

Mark Your Calendar!

The New York State Association for Solid Waste Management announces its Fall Conference, Sept. 25-27 2005. The conference will feature a regulatory review of Part 360, tire disposal regulations, a session on planning for disasters, managing your solid waste fleet, composting operations and electronics disposal. For more information on the conference visit the website at <http://www.newyorkwaste.org>.

WASTECON 2005 will take place Sept.27-29 in Austin, Texas. There will be 11 SWANA training courses, 45 Technical sessions and onsite demonstrations. Guest speakers at this year's conference will be Bruce Jenner speaking on "Finding the Champion Within" and Jeff Cooper speaking on "Producer Responsibility in Europe".

The 16th Annual New York State Recycling Conference will take place on Nov. 15 & 16, 2005 in Rochester. The conference is sponsored by the New York State Association for Reduction, Reuse and Recycling, Inc. and The New York Department of Environmental Conservation. For more information or a registration form contact Linda Ochs at lsochs@localnet.com or 315-539-5607.



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Federation Conference Concludes with Plenary Speaker Dr. Rathje

In a Plenary session for an audience of 250, Headliner Dr. William Rathje showed what it takes to read a landfill. Rathje is a professor emeritus at the University of Arizona and currently holds a teaching position at the University of Stanford in Palo Alto, CA.

In an interesting slide show of a dig at the Fresh Kills Landfill, Garbologist William Rathje showed the method of getting old garbage out for quantification. The latest numbers indicate (using both residential and commercial waste) that people in the New York City area create seven pounds of trash per person. The national rate is 4.3 lbs/person/day. Recycling is about 0.86 lbs./person/day.

Nationally, two million tons of residential MSW was generated in 2003. Rathje referred the audience to USEPA as a source of waste quantification. With many

repeat studies, it is easy to compare growth and the impact of thinwalling on commercial products.

Both Rathje and Christine O'Connell of SUNY Stonybrook's Waste Reduction and Management Institute noted that consumer spending correlates with the increase in trash.

Rathje also reminded the audience that personal surveys do not always give an accurate picture of what is in the trash. One of his current projects is to determine how much fiber people eat. Individuals are asked that question; then Rathje's team goes through the survey participant's garbage can and finds if the trash supports the answers given in the survey. The preliminary findings indicate that there is a discrepancy between the answer and the actual evidence.

Highlights of the 2005 Federation Conference Held at the Sagamore



Monday's Survey Says! session focused on litter. Litter is the most expensive form of solid waste management. The cost to pick up each item is \$0.025. In states with bottle bills, the cost to pick up a beverage container jumps to \$4.25/container. Steven Stein of GBB, Fairfax, VA reported on the survey which he directed and analyzed for New Jersey's Clean Communities Council. The survey is available at www.njclean.org.

In GBB's New Jersey litter survey, packaging made up the greatest part of litter at 21%. Beer and soft drink containers totaled 6.1%, compared to the average of 6.4% for the previous 15 surveys. Other beverage containers, including wine, liquor, new age beverages, tea and water, totaled 4.1%, compared to the average of 1.3%, a sign of the growing consumption of these beverages.

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President's Letter



Dear Members:

As we head into the summer, we are fresh from another very successful Solid Waste and Recycling Conference and Trade Show at the Sagamore Hotel in May, sandwiched in between two heavily attended one-day seminars sponsored by NYSWANA. Our November seminar, focusing on collection practices and equipment, drew approximately 60 attendees to the Town of Hempstead's Merrick Transfer Station complex. On June 1, our Chapter's seminar on rail transportation drew over 100 attendees to the Crowne Plaza Hotel adjacent to LaGuardia Airport. Our thanks to Peter Kuniholm for organizing the seminars and lining up the speakers. Our goal as a SWANA chapter and as members of the New York Federation of Solid Waste Associations is to deliver useful information to solid waste professionals. Based upon attendance, everyone involved in organizing the Federation Conference and our Chapter seminars seems to be doing a great job in meeting the needs of our membership.

As was the case last year, I come away from these events, and others such as Long Island Sanitation Officials (LISOA) luncheons and the North American Waste-To-Energy Conference (NAWTEC), with a sense that solid waste management in New York State and elsewhere is coming out of the Carbone-era doldrums and moving into a period of renewed initiative. These new initiatives appear to include a surge in new truck to rail transfer stations in the Long Island-New York City and Buffalo regions, new trash composting operations, modernizations of MRFs and maybe some WTE expansions. Time will tell.

Through it all, the New York SWANA Chapter will continue its efforts to "Educate, Communicate, Innovate". As you may have noticed, the conferences and seminars provide Continuing Education Units (CEUs) for all SWANA members and Professional Engineering Contact Hour Credits for attending P.E.'s. As this newsletter goes to print, we hope to be getting our website up and running at WWW.SWANANYS.ORG. Take a look at our website and let us know what you think!

Have a great summer!

Ted Pytlar
Chapter President

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Highlights of the 2005 Federation Conference Held at the Sagamore

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Lawless began his presentation noting that however much government may have a goal to operate as a business, it cannot do so when it comes to purchasing. First, law regulates how government procures services and products – both as to procedure of buying and buying only what is authorized by law. “New York State has numerous laws at all levels of government pertaining to purchasing.” Purchasing regulations are also controlled by past opinions of the Attorney General’s Office. In sum, Lawless stated, “New York’s purchasing laws are more restrictive than any in the nation.”

In pursuing a goal to ensure public trust, it is important for a Commissioner of Purchasing to guard against extravagance and favoritism. Other basic principles are to protect the tax payer and choose the lowest possible price under submitted bids. Equity and fairness in procurement are required. However, even though it sometimes adds costs, government may use procurement to support social goals, i.e. recycled content, products made by handicapped, minority-owned businesses or in the State’s prison system.

Any purchase over \$10,000 requires formal bids and following a formal bidding process. Purchases under \$10,000 require written quotes.

A RFP or Request for Proposal is useful in complicated building projects and in purchasing services such as a public education program. Section 120W of the Solid Waste Law provides a bidding exemption for construction of solid waste facilities. It allows a “design build” RFP where building and engineering expertise is more easily brought to the table.

During the Next Generation of Waste-to-Energy contracts session an overview of the Waste-to-Energy (WTE) field was given. In the 1970’s and 80’s 180 of these facilities came on line. In the 1990’s challenges to the plants included a change in tax laws, the defeat of flow control, and cheap landfill tip fees. Currently, 91 plants operate in 21 states and handle 14% of U.S. trash. The original 20 year term contracts are now expiring and owners and operators are in negotiations

Rick Sapir of Hawkins, Delafield, & Wood, LLP provided lawyer’s perspective on the topic. WTE projects have large scopes of work all in one contract and are generally full service. The contracts provide long term performance “warranties” and predictable and stable long term costs. For operations performance there are electric production guarantees and environmental guarantees. Some contracts included put-or-pay clauses for garbage delivery.

Sapir’s recommendations are when developing a new contract, consider what was learned from past experiences and from other owners, and anticipate future changes and requirements. Include enforcement and incentives in the contract to accomplish your objectives. Other items/clauses to include are:

- Financial security mechanisms
- As-is risk issue – operator to inspect and accept facility
- Enhanced standards – more stringent than regulations
- Damages for failure to meet environmental guarantee beyond fines and payable to owner
- Inflation multiplier of <1.0 % encourages the control of costs
- Identify events which expressly will not constitute uncontrollable circumstances
- Focus on maintenance obligations and end of term condition (many operators will stop maintenance at the end of a project – cost/benefit for them)
- End of term transition responsibilities (i.e. hiring their employees)
- End of life or term decommissioning (like If closure fund)
- Anticipated changes in laws

Sapir ended his talk with the advice that self sufficiency is important for project planning and environmental planning.

An Earth Friendly Building System



lightweight material with 85% of its volume being recycled postconsumer polystyrene waste. Some of the attractive characteristics of Rastra are it is a high rated

It is now possible that the Styrofoam cup you threw away today could have been part of someone's house in the future. A building material called Rastra is gaining in popularity. It is a concrete form made of a

insulator, has a four hour fire rating, can withstand winds up to 200 mile per hour, has pest and rodent resistance, uses a step-saving building process which requires less time and requires virtually no maintenance. The production of the material uses minimal energy.

To produce ten square feet of material about 1kWh of electricity is consumed and no heating is involved in the process. Any scraps generated from production are put back into the process. During the construction process the builder fills the hollow channels with rebar and structural concrete. The building is stuccoed on the outside and plastered on the inside. Rastra has been used all around the world successfully in several different climates.

“New York Recycles” Plate

Approximately a year ago the New York State Association for Reduction, Reuse and Recycling spearheaded the development of the “New York Recycles” license plate. The license plate features the green chasing arrow symbol with “New York Recycles” under it and “Reduce, Reuse, Recycle” along the bottom of the plate. The plates currently cost \$43 and can be renewed for an annual fee of \$25. New York is currently the only state that offers a recycling themed plate.



It has been proposed the funds generated from the license plates go to the state's Environmental Protection Fund. A current bill introduced by Assemblyman William Colton supports the action. Similar legislation was introduced to the Senate by Sen. Carl Marcellino who is the chairman of the Environmental Conservation Committee. The legislation proposes to have all the annual fee or part of it placed specifically in the solid waste account of the Environmental Protection Fund to help fund municipal programs such as recycling and hazardous waste.

Bigger Better Bottle Bill

The Bigger Better Bottle Bill made it past the Assembly this year only to come to a road block in the Senate. On June 24 the Senate recessed without voting on the measure. Historically the Bottle Bill has not been discussed in the Senate. This year's passage by the Assembly was a momentous triumph and environmental groups are prepared to focus efforts on the Senate. The legislation will come back in January when the legislature resumes.

The Bigger Better Bottle Bill would have expanded the five cent deposit to noncarbonated beverages such as ice tea, sports drinks and water. The bill would have also required unclaimed deposits go to the Environmental Protection Fund. The bill has been faced with strong industry opposition.

Suzanne Lalonde Recognized by Federation

Suzanne D. Lalonde, a longtime SWANA member, active in both the Chapter and on the Board, was honored recently by the Federation of New York Solid Waste Associations for her many years of “outstanding service and dedication” to the Federation. SWANA is one of three association members of the Federation. The other two associations are the NYS Association for Reduction, Reuse & Recycling and the NYS Association for Solid Waste Management.

Ms. Lalonde was the primary architect of the educational sessions at the Federation's annual conference for many years. Her recent illness, however, forced her to reduce her workload. “We thought it was a great time to recognize a great person,” commented Meg Morris, Federation Chairman, “Suzanne has been contributing to the success of the Federation and its conference since our inception.” Morris credited Lalonde with developing innovative methods for presentations, as well as enticing outside presenters to come to New York.

Prior to her retirement, Ms. Lalonde worked with Onondaga County Resource Recovery Agency and was active in recycling and solid waste management. She has been a member of SWANA-NYS Chapter and the New York State Association for Reduction, Reuse & Recycling for many years.

Board Member Nominations

During the Annual Meeting held May 5th at the Sagamore Hotel the following nominations were made:

- President - Scott Menrath P.E., NYS Department of Environmental Conservation
- Vice President - Peter Kuniholm P.E., SCS Engineers
- Secretary - Jay T. Pisco, HDR Engineering, Inc.
- Treasurer - Charles Weidner, P.E., Dunn Engineering
- Past President - Ted Pytlar, Dvirka & Bartulucci

During the July 6, 2005 meeting, a motion to elect the Board was passed unanimously. The Board will serve for a two year term.

Welcome New Members:

- ♦ Michael Bemis, Director of Operations, Ulster County Resources Recovery Agency
- ♦ Jeffrey Bouchard, Director, Fulton County Dept. of Solid Waste
- ♦ Joe Broome, Plant Supervisor, Onondaga County RR Agency
- ♦ Michael Cahill, Germano & Cahill, P.C.
- ♦ John Crews, Executive Director
- ♦ Michael Gianchetta, Vice President, GIANCO Environmental Services
- ♦ Andrew Goldstein, Erie County Recycling Coordinator
- ♦ Matthew Gorecki, Jr., Sanitation Supervisor, Town of Smithtown
- ♦ Joshua Kenyon, Business Development Manager, Severn Trent Pipeline Services
- ♦ Ray Kvedaras, General Manager, Cooper Tank & Welding Corp.
- ♦ John Liszewski, Commissioner of Public Works
- ♦ Gary Ritchie, Superintendent of Landfill, Westchester County
- ♦ David Robinson, Commissioner of Public Works
- ♦ Paul Roth, Town of Brookhaven
- ♦ Ted Siegler, President, DSM Environmental Services Inc.
- ♦ Steven Suher, Forest Fibers Inc.
- ♦ David Tonjes, Research Scientist, Waste Reduction and Management Institute
- ♦ Rosemary Weisner, Town of Brookhaven
- ♦ Irene Williams, Administrative Assistant, Chemung Co. Solid Waste

Rail Haul Seminar Sparks Interest

The Rail Haul Seminar was extremely well attended (over 110 registrants) with lots of interest from a variety of public and private solid waste management interests and parties. Attendees that I spoke with expressed their appreciation for the seminar as a timely and relevant topic of interest, and gave the speakers high marks. In particular, the Federal Preemption Rule, which under the Interstate Commerce Act of 1995 delegates exclusive permitting authority for solid waste transfer facilities operated by railroads to the Federal Surface Transportation Board in lieu of local and state agencies, has engendered significant controversy and some opposition among the private sector and in some states, particularly in New Jersey.

The seminar speakers discussed a variety of engineering, economic and regulatory issues associated with transport of MSW and C & D wastes by rail, including the recognition that rail transport offers the potential to eliminate or reduce some of the traffic associated with truck transport.

Waste Management of New York hosted a tour of their Harlem Yard rail transfer facility in the Bronx, which provided an opportunity for attendees to see a large rail transfer station in operation. It is apparent that as more of the landfills in the northeast fill to capacity, and in consideration of the difficulty of siting new landfills and the relatively high tip fees in the area, that rail transport to more remote sites will become increasingly attractive as an option to be considered in the future.

The NY SWANA Chapter appreciates the interest expressed in this and other topics and invites your comments and suggestions for future seminars of this kind or on other topics. Please contact Peter Kuniholm at 845-353-5727 or pkuniholm@scsengineers.com with comments or suggestions.

Re-solicitation - 2005 Scholarship/Financial Assistance Grant Program

As announced at the Annual Conference in May 2005, due to the lack of applicants responding to the original solicitation, the Board of Directors unanimously decided to re-solicit applicants for the remaining grant funding of \$3,300. Applications will be accepted until September 1, 2005, and award(s) determined by October 1, 2005. Candidates selected for awards will be contacted directly by the Scholarship Committee, and the award(s) will be announced in a future SWANA newsletter.

Applications are reviewed by the SWANA New York Chapter Scholarship Committee. Awards are based on the overall achievements of the individual candidate, and not solely on academic performance. A detailed description of award categories and an application form is inserted in this newsletter.



Highlights of the 2005 Federation Conference Held at the Sagamore

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In counting litter, it is important to be consistent with other surveys' methodology, which provides a database for comparing surveys. Counting the number of items is the most commonly used and most statistically accurate method.

Sue Smith of Keep America Beautiful spoke of her organization's 40-year effort to prevent littering. Ad samples are at www.preventlitter.org. Researchers have identified littering as the first forerunner of crime and neighborhood decline. Look for the book "Fixing Broken Windows" and at the work of Fenton Earls, Prof. of Human Behavior.

What you can learn from a Waste Quantification & Characterization was discussed during the Status of Trash session. New York City is in the middle of conducting a four season Waste Quantification and Characterization. NYCDOS's Samantha MacBride reported on some interesting initial findings in her talk, "Composition Drives Diversion." Below are some points.

- The city has four million tons of residential waste/year. The current diversion rate is 20%.
- The most realistic to hope for is a 25% diversion rate in the city, under the current recycling program, due to the fact that only 35% of the combined (refuse + recycling) residential waste stream consists of paper, metal, glass or plastic presently designated for recycling; and a 70% capture rate is the most that can be realistically hoped for in New York city's dense, heterogeneous environment. Boosting diversion beyond 25% would require diverting additional materials under new programs.
- Trash and recycling were sorted into 91 different material categories, that can be grouped into nine major classes: paper, metal, glass, plastic, organics, C&D, appliances/electronics, HHW, and "other".
- The highest item was recyclable paper at 24%. Surprisingly, films and plastic bags totaled 7%.
- Compostables, including grades of paper not suitable for recycling, as well as wood C&D, totals nearly 50% depending on the season.
- NYC reuses from 1-3,000 tons of non-residential, agency-generated C&D per day.

During the session the progress on waste tire stockpile abatement was also discussed. New York State is tackling its waste tire piles thanks to a \$2.50/tire charge that is providing funding to clean up such sites. NYSDEC's David Vitale explained the goal of the law, which expires in 2010, is to abate the tire piles and to promote market development.

Ten sites have been initially targeted as a priority for clean-up because of the size of the tire pile or because of its location near population centers or environmentally sensitive areas. There are currently 95 know sites across the State. Five sites have more than one million tires for a total of 24.7 million tires. There are 43 sites in the state with less than 10,000 tires. Still tire piles are a problem throughout the state as most counties have at least one tire pile.

The Granddaddy of all the sites is the Fortino site in Oswego County where an estimated ten million tires are stored 20 - 30 feet high covering approximately 20 acres of land. The second largest is the Mohawk Tire site in Saratoga County with an estimated eight million tires.

Vitale reports many of the tires in such piles are very dirty and old, making them poor candidates for tire derived products or even for fuel. The State's program will be converting the vast majority of these tires into tire derived aggregate for use in road construction by the Department of Transportation (DOT). One other possible end market for those tires that cannot be converted to material useful to the DOT is use in landfill construction.

Donald Lawless, Onondaga County Commissioner of Purchasing and a manager who developed the Onondaga County Solid Waste Management Plan in the 1980's led a workshop on RFP's and Bids at the Federation Conference. It was entitled: "Tips, Tricks and Traps in the Bidding Process."

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Litigation Affecting the Management of Municipal Solid Waste

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validity of the fee under the Commerce Clause. They insist the fee is really a tax and is thus subject to a stringent four-part test. Michigan authorities argue that the charge is a bona fide regulatory fee used to support the state’s regulatory duties over intrastate truckers. The Michigan state courts have upheld the fee by applying the same balancing test courts use to assess flow control measures. In January, the U.S. Supreme Court agreed to hear the case.

A line of Supreme Court cases recognize a distinction between taxes used to raise revenue and fees that recover the costs of regulatory supervision. The outcome will depend on whether the court finds the Michigan fee is a bona fide regulatory fee or just a tax.

Local governments assess fees and charges on many different types of vehicles, including solid waste packer trucks and transfer trailers. Some of these vehicles travel exclusively intrastate, some both intrastate and interstate, and a few exclusively interstate. Devoted readers of the Quarterly Summary will recall a Texas appeals court decision reported last year. [Qtr.Lit.Rpt, Apr. 2004, p. 1] The city of Houston imposed permit and registration fees on drivers and vehicles involved in non-hazardous waste transportation. The fees were found to be a tax that was unconstitutional because the charges were not apportioned based on how much activity the haulers conducted within the city. *Shannon v. State*, 129 S.W.3d 670 (2004).

The questions presented in the Supreme Court case are whether the fee on vehicles conducting intrastate operations violates the Commerce Clause and whether the fee on vehicles operating solely in interstate commerce is preempted by federal statute.

Besides the principal briefs, the State and Local Legal Center is supporting Michigan with an *amicus* brief it filed on behalf of the National Conference of State Legislatures, Council of State Governments, National Association of Counties, National League of Cities, U.S. Conference of Mayors, and International Municipal Lawyers Association.

Other *amicus* briefs have been filed by the United States, U.S. Chamber of Commerce, and National Private Truck Council.

The case is scheduled to be argued on April 26. The court has allotted one hour for oral argument by the parties, including 10 minutes for the Acting Solicitor General of the U.S.

American Trucking Associations Inc. v. Michigan Public Service Commission, Docket No. 03-1230.

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Senate Passes Energy Bill

The Senate passed a federal energy bill (S.10) with a vote of 85-12. The legislation would allow companies to claim up to 15 percent of the cost for equipment used in processing recyclable materials under the General Business Credit. An amendment to the legislation also includes equipment used in the process of recycling cathode ray tubes, flat panel screens and video displays larger than four inches diagonally. Also included is a three-year “placed in service” extension for the renewable production tax credit.

The House also has a version of the bill. The Senate and House will meet in a conference committee to integrate the two bills. President Bush has requested an agreement be made and the bill to be placed on his desk by August 1.



Legislative and Regulatory Issues Affecting the Management of Municipal Solid Waste

April 2005

Edited for NY SWANA Newsletter

I. Federal Tax Credits for Energy Produced from Landfill Gas (LFG) and MSW Combustion

The Renewable Energy Production Incentive Reform and Reauthorization Act (H.R. 1127) introduced by Congressman Lee Terry (NE-R) seeks to reauthorize the renewable energy production incentive (REPI) program and remove the assigned priority list in the current program and allocation of appropriated funds on the basis of the energy source. Under this proposed reform the Department of Energy would be responsible for administering the REPI program for electric energy generated from solar, wind, and geothermal energy; the Department of Agriculture would be responsible for administering the REPI program for electric energy generated from biomass; and The Environmental Protection Agency would be responsible for administering the REPI program for electric energy generated from and heat derived from landfill gases. The Authorization of Appropriations for the REPI program would go as follows: \$25,000,000 to DOE; \$5,000,000 to the DOA; and \$5,000,000 to the EPA.

On March 7, 2005 Senator Byron Dorgan introduced S. 542. This bill would flatly extend the placed in service window for renewable energy facilities from January 1, 2006 to January 1, 2011.

II. Resource Conservation and Recovery Act

SWANA Files Amicus Brief in Environmental Group Appeal of EPA RD&D Rule

GrassRoots Recycling Network (“GRRN”), has filed a court challenge to an EPA final rule giving states regulatory discretion to stimulate new technologies and

alternative operating standards for the disposal of municipal solid waste. [69 Fed. Reg. 13,242, March 22, 2004]

SWANA and the National Solid Wastes Management Association (NSWMA) have filed a joint amicus (friend of the Court) brief to defend the United States Environmental Protection Agency’s (EPA) Final Rule on the RD&D Permits for MSW Landfills. That brief was filed March 30, 2005.

GRRN, along with the Natural Resources Defense Council and Friends of the Earth, condemned the proposed rule, arguing that the program would violate the Resource Conservation and Recovery Act and the National Environmental Policy Act by unlawfully delegating authority to set standards.

New Electronic Waste Bills Introduced in Congress

Two electronic waste bills have been introduced early in the 109th Congress.

The first bill was introduced by Congressman Mike Thompson (D-CA). The National Computer Recycling Act (H.R. 425) would require the Environmental Protection Agency (EPA) to submit a study to Congress on electronic waste materials that may be hazardous to human health or the environment along with related management recommendations. The recommendation would include a fee assessment on the sale to an end-user of any computer, monitor, or other designated electronic devices. Nonprofit organizations would be exempt from the fee requirement. The fees would be

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Legislative and Regulatory Issues Affecting the Management of Municipal Solid Waste

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used to administer this Act and for making grants available.

The second bill was introduced on March 3, 2005 by Senator Ron Wyden (D-OR). The Electronic Waste Recycling Promotion and Consumer Protection Act (S. 510) would establish a tax credit of \$8 per unit (whole computers) of qualified electronic waste that is collected from consumers and recycled. Individuals or companies in states with a mandatory electronic recycling program could not take advantage of this tax credit. Consumers would be eligible for \$15 per unit tax credit for one or more units taken to a recycling facility.

If the EPA determines households have sufficient access to a recycling service, then 3 years after the date of enactment it will be unlawful for the operator of a landfill, incinerator, or any other facility for the transfer, disposal, or storage of municipal solid waste to knowingly receive from a consumer a display screen or system unit for disposal.

EPA Hosts National Electronics Recycling Meeting
Environmental Protection Agency (EPA) called upon the electronics manufacturers, retailers, e-waste recyclers, advocacy organizations, and other stakeholders to voice opinions and discuss ideas for a national system for recycling electronic waste. SWANA was invited and participated in this meeting.



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The discussions included how to increase the number of collaborative pilot projects, electronic waste recycler certification, improving data collection, and increasing consumer awareness on disposal options.

Some participants stated a desire to develop a plan for defining a data model for an electronic waste information clearinghouse.

EPA stated that its role in this meeting is strictly as a facilitator and would not provide any leadership. It was also unclear at the end of this meeting if future meetings would be scheduled.

IV. Clean Water Act/ Wetlands

House Democratic Committee Leaders Legislation introduced to Define Scope of Wetlands Regulation
Legislation intended to bolster Clean Water Act (CWA) protections for wetlands was introduced March 17, 2005 by Rep. James Oberstar (D-Minn.) and Rep. John Dingell (D-Mich.). The legislation would simply remove the term “navigable waters” throughout the CWA and replace it with “waters of the United States.”

Proponents of this legislation argue that clarification is needed because of uncertainty caused by a 2001 Supreme Court decision stating that the presence of migratory birds could not be used as an interstate commerce test to extend protections to isolated bodies of water (Solid Waste Agency of Northern Cook County v. Corps of Engineers, 531 U.S. 159, 51 ERC 1833 (2001); 7 DEN AA-1, 1/10/01). This decision has been commonly referred to as the SWANCC decision or case. Both land users and environmental advocates contend that since the SWANCC decision, there have been inconsistencies regarding how the Army Corps of Engineers has been determining wetlands permits and how the corps asserts its jurisdiction.



Litigation Affecting the Management of Municipal Solid Waste

April 2005

Edited for NY SWANA Newsletter

Federal Court Validates Flow Control to Public Facilities

In 1995, waste haulers in central New York State and their trade group filed suit in federal district court against Oneida and Herkimer counties and a state-created waste authority. The counties had passed a law requiring the haulers to bring all locally collected waste to designated publicly owned facilities. The plaintiffs argued that the laws discriminated against interstate commerce by restricting their access to other waste processing locations where the fees were lower.

Relying on *C&A Carbone Inc v. Town of Clarkstown*, 511 U.S. 363 (1994), the district court ruled against the defendants and declared the laws to be unconstitutionally discriminatory. On appeal, the U.S. Court of Appeals for the Second Circuit reversed the lower court decision. The appellate panel ruled that the lower court was wrong in relying on the *Carbone* case because the Clarkstown law, which the Supreme Court found to be discriminatory, favored local private interests over out-of-state private interests. The Second Circuit, on the other hand, saw no discrimination in the county laws: private businesses, regardless of location, are equally affected. The court remanded the case to the lower court for a hearing on the issue of whether the laws’ burden on commerce outweighed any local benefits from them. [*United Haulers Association Inc. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001)]

After reviewing the evidence and legal arguments, the magistrate found no burdens whatsoever on interstate commerce and, thus, nothing to weigh and compare to

the benefits of the legislation. He recommended that the district court dismiss the lawsuit. The district judge agreed with the magistrate’s findings, and ruled in favor of the defendants.

United Haulers Association Inc. v. Oneida-Herkimer Solid Waste Management Authority, No. 5:95-CV-516, N.D.N.Y., March 24, 2005

Updates on Previously Reported Flow Control Decisions (See Jan. 2005 Qtr Lit Rpt)

- *NSWMA v. Pine Belt Regional Solid Waste Management Authority*.

On April 5, NSWMA filed a petition with the U.S. Supreme Court asking for review of the 5th Circuit decision. The petition presents two questions: (1) whether the appeals court was correct in finding that the waste hauling firms lacked standing to challenge the discriminatory nature of the flow control ordinances because the companies did not transport across state lines any waste that originated within the authority’s boundaries; (2) whether the appeals court misapplied the legal test for balancing the local benefits of regulation with its impacts on interstate commerce.

Supreme Court Considers State and Local Fees on Intrastate Truckers

Michigan imposes a flat-rate regulatory fee on vehicles that are used in intrastate commerce. A trucking association and a trucking firm have challenged the

(continued on page 8)