STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Petition of OWEN H. JOHNSON for a Declaratory Ruling pursuant to Section 204 of the State Administrative Procedure Act and Part 619 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York	Declaratory Ruling DEC 27-29

INTRODUCTION

Petitioner, Senator Owen H. Johnson, Chairman of the Senate Environmental Conservation Committee, State of New York, requests a Declaratory Ruling pursuant to Section 204 of the State Administrative Procedure Act (SAPA) and 6 NYCRR §619 on the applicability and interpretation of §27-0101(5) of the Environmental Conservation Law (ECL), which requires a consumer purchasing a new lead-acid battery to pay the retailer of such a battery a return incentive payment of five dollars if the consumer does not return a used lead-acid battery to the retailer. Specifically, Petitioner requests a Ruling as to whether this statute prohibits a retailer from charging a consumer purchasing a new lead-acid battery a return incentive payment which is either less than or in excess of five dollars when the consumer does not return a used lead-acid battery to the retailer. A Declaratory Ruling is warranted to clarify the amount of a return incentive payment which may be charged.

DISCUSSION

ECL §27-1701(5) provides:

> (a) Any consumer purchasing a new lead-acid battery who does not return a used lead-acid battery to the retailer at the time of such purchase shall pay such retailer a return incentive payment of five dollars per lead acid battery sold.
>
> (b) A retailer shall refund to a consumer the five dollar return incentive payment collected pursuant to this subdivision if, within thirty days of the date of the purchase of a new lead-acid battery, the consumer returns to such retailer a used lead-acid battery. Any return incentive payment not refunded to the consumer pursuant to this subdivision shall be retained by the retailer.

To properly respond to Petitioner's inquiry, a determination must be made whether the statutory language "shall pay . . . five dollars" allows for return incentive payments in any amount other than five dollars.

Words of ordinary import used in a statute are to be given their usual and commonly understood meaning, unless it is plain from the statute that a different meaning is intended. McKinney's Statutes §232. The word "shall" is ordinarily "used in laws, regulations, or directives to express what is mandatory." Webster's New Collegiate Dictionary 1056 (1980). Likewise, Black's Law Dictionary 1233 (5th ed. 1979) defines "shall":

> As used in statutes . . . this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given compulsory meaning; as denoting obligation. It has a preemptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears.
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> But it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intent and in cases where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense. (Citations omitted).

It is fundamental that the words used should be given the meaning intended by the lawmakers. McKinney's Statutes §230. Whether a given provision in a statute is mandatory or discretionary is to be determined primarily from the legislative intent gathered from the entire statute, keeping in mind the public policy to be promoted and the results that would follow one or the other interpretation. McKinney's Statutes §171.

ECL §27-1701(5) was enacted into law as part of Chapter 152 of the Laws of 1990 ("Chapter 152"). The purpose of Chapter 152 is set forth in ECL §270-1701(1):

> Legislative findings. The legislature hereby finds that the improper disposal of lead-acid batteries is a direct threat to the health and safety of the citizens of this state. Further, the

> legislature finds that the disposal of these batteries constitutes a waste of recyclable materials. Therefore, the legislature finds and declares it to be in the public interest to facilitate the collection and recycling of lead-acid batteries in this state by prohibiting the improper disposal of lead-acid batteries, establishing a financial incentive for the return of used batteries, and requiring lead-acid batter retailers and distributors to accept used batteries free of charge from the public.

To accomplish these objectives the legislation establishes requirements for the collection and recycling or proper disposal of used lead-acid batteries. Thus, retailers of lead-acid batteries may dispose of lead-acid batteries only be delivery to a distributor, collector, recycling facility or, as a method of last resort, an authorized hazardous waste facility. ECL 2127-1701(3)(b). Distributors may dispose of used lead-acid batteries only by delivery to a collector, recycling facility or, as a method of last resort, an authorized hazardous waste facility. ECL §27-1701(3)(c). Collectors may dispose of lead-acid batteries only by delivery to a recycling facility, another collector or, as a method of last resort, an authorized hazardous waste facility. ECL §27-1701(3)(d). Recycling facilities and hazardous waste facilities are required to store, recycle or dispose of lead-acid batteries only in accordance with regulations promulgated pursuant to Chapter 152. ECL §27-1701(3)(e).

The legislation also prohibits any person from disposing of lead-acid batteries in mixed municipal solid waste. ECL §27-1701(3)(a). Retailers are required to accept up to two used lead-acid batteries per calendar month from any individual at no charge to such individual. ECL §27-1701(4)(a). Distributors are required to accept up to two used lead-acid batteries per month from any individual at no charge to the individual and must accept lead-acid batteries from any retailer to which the distributor sells lead-acid batteries at no charge to the retailer.

The requirements for lead-acid battery recycling and disposal will result in such recycling and disposal only if used lead-acid batteries are returned by consumers to retailers in the first instance. To encourage such returns, the legislation requires that a five-dollar fee, called a return incentive payment, be added to the retail sale of a new lead-acid battery when a consumer does not return a used lead-acid battery to the retailer. ECL §27-0701(5).

As used in ECL §27-1701(5)(a), the word "shall" was clearly intended by the Legislature to be mandatory in nature. To construe the word as being discretionary would frustrate the accomplishment of the legislative objectives of the statute. On the one hand, if the statute were to allow no return incentive payment fees to be charged or were to allow a return incentive fees in an amount less than five dollars to be charged, then insufficient financial incentives would be present to encourage consumers to return used lead-acid batteries to retailers. On the other hand, if the statute were to allow the charging of a retur

incentive payment in excess of five dollars, then retailers charging such payments would obtain windfall profits in those situations where consumers have no used lead-acid batteries to return.

Had the Legislature intended to authorize a retailer to charge a return incentive payment of some amount other than five dollars, then the Legislature would have drafted the statute to allow discretion in the amount of the payment. Thus, retailers who do not charge any return incentive payment at all and retailers who charge a return incentive fee which is less than the five dollar return incentive fee mandated by statute are in violation of the statute. Similarly, those who charge a return incentive payment in excess of five dollars are in violation of the statute.

Although the statute requires that a return incentive fee of five dollars be charged by retailers, the statute neither prohibits retailers from charging fees other than return incentive fees when selling new lead-acid batteries nor from refunding additional amounts. However, retailers charging fees such as "installation fees", "handling fees" or "service fees" and retailers offering incremental refunds may not mislead consumers into believing that such fees or refunds are in any way mandated by State law as part of the return incentive fee. Any such additional fees or refunds must be individually itemized on sales invoices to ensure that consumers understand that such fees are imposed or such refunds are offered at the discretion of the retailer rather than by operation of ECL §27-1701. See General Business Law §§349 and 350.

DATED: Albany, New York
May 17, 1994

Deputy Commissioner and
General Counsel