

Environmental Law Update

ENVIRONMENTAL CASES ON SJC DOCKET

The Massachusetts Supreme Judicial Court has been busy with environmental cases. Last year, in *Moot v. Department of Environmental Protection*, the Court ruled that MassDEP did not have authority to exempt landlocked tidelands from the licensing requirements of G.L. c. 91. The legislature later amended the statute to validate the exemption for landlocked tidelands.

In a case involving the proposed Biosafety Level 4 laboratory being constructed in Boston's South End, *Allen v. Boston Redevelopment Authority*, the SJC ruled that the certification by the Secretary of Environmental Affairs that the final environmental impact report impact report adequately and properly complied with the Massachusetts Environmental Policy Act was arbitrary and capricious. The project proponent, University Associates, failed to evaluate alternative locations for the Biolab despite the Secretary having directed it to respond to comments by a local environmental group that included requesting an analysis of alternative sites. The Court decided that because the EIR did not include the alternatives analysis, the EIR did not adequately and properly comply with MEPA, contrary to the Secretary's certification.

The SJC also heard two cases involving Chapter 21E. In March the Court issued its decision in *Scott v. NG US 1, Inc.*, which raised interesting questions of successor liability for contaminated sites. A landowner whose property contained

coal tar, presumably from the operations of a gas works by Salem Gas Light Company in the late 1800s, attempted to hold Boston Gas Company and NG US 1, Inc., also known as National Grid USA, liable for the contamination as a result of various corporate transactions over the decades. The Court declined to expand the law on "operator liability" or "piercing the corporate veil" and concluded that neither entity was liable because each lacked any interest in, and did not control, the subsidiary or its facility at the time of the contaminating acts. A decision is expected soon in the case of *Bank v. Thermo Elemental, Inc.*, another Chapter 21E case of import. At issue is whether a party must comply strictly with the Massachusetts Contingency Plan in order to seek reimbursement from another party for response costs incurred at a contaminated site. The case also raised issues about when attorneys' fees may be recovered under G.L. c. 21E.

"WHITE KNIGHTS" GET LIABILITY RELIEF

MassDEP promulgated revisions to the Massachusetts Contingency Plan (MCP) effective February 14, 2008, that seek to encourage new owners of contaminated property to take on response actions at sites that have been out of compliance with the MCP. Generally, the so-called "white knight" provisions allow new owners to tier classify the site and establish new response action deadlines under the MCP without penalty for the past missed deadlines.



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Spring 2008

The Blue Revolution: A Water Ethic

We are in the midst of a "blue revolution" to prevent but perhaps only forestall Samuel Taylor Coleridge's nightmare lament, "Water, water, everywhere, nor any drop to drink." In Massachusetts, a new water ethic is emerging. We are beginning to treat water as a scarce resource, respect the local water cycle, and embrace the sustainable use of water.

"Water, water, everywhere."

Carl Sagan's 1990 *Voyager 1* "pale blue dot" photo of sunlight reflecting off a cerulean liquid ocean in the darkness of space epitomizes our water world. Water covers nearly 80% of Earth's surface (a volume of about 326 million cubic miles). This water was deposited on our molten infant world almost 4.2 billion years ago by icy asteroids and comets. Tectonic upheavals and solar energy released buried CO₂ and H₂O and triggered a global "greenhouse effect" and a multi-millennia rainstorm, flooding the planet. The resulting water supply is 97.5% salty ocean and 2.5% freshwater of which 69% is unavailable in glacier ice, snow, and permafrost, 30% is in deep aquifers, and 0.4% is in surface and atmospheric water. There are only 2.3 trillion gallons of freshwater for 6 billion people. Absent another cometary deluge (which will likely exterminate us), the water that we have is all we'll ever get.

"Nor any drop to drink."

Our uses of water are wasteful: 4.8 billion gallons a day to water U.S. golf courses, 2,900 gallons to produce a quarter-pound hamburger, and 37 gallons for a cup of coffee. Brushing teeth with the faucet running uses two gallons of water and watering lawns with a hose uses 10 gallons a minute. Stormwater and wastewater are rarely returned to the local water cycle. We are pumping dry millions of years of stored groundwater and exhausting our freshwater supplies. Recent television images of stranded boats and the red clay shoreline at Lake Lanier, the main reservoir for Atlanta, are but one example.



Economists estimate that by 2025, over 5.3 billion people will suffer from water shortages. Political and social scientists see water as "the new oil" and predict water wars over control of rapidly diminishing supplies of clean water. Conflicts in the Middle East are fueled in part by access to and control of regional water resources. Water wars are waged in U.S. courtrooms, such as the 20 year legal battle among Georgia, Alabama and Florida jostling for water from Lake Lanier and the Chattahoochee River; and the recent MassDEP adjudication of water withdrawals that cause the Ipswich river to dry up in the summer. As Mark Twain wryly observed, "Whiskey is for drinking, water is for fighting over."

In the aftermath of 9/11, we see how susceptible our public water supplies are to terrorist attacks. A bomb can destroy water system components, causing flooding and reduced water pressure, the disruption of automated water quality detection equipment and computer delivery systems, and the release of chlorine and hazardous chemicals used for water treatment. The release of biotoxins into water supplies is more than a Hollywood storyline.

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IN THE NEWS

Denise Miller Green has been promoted to "Executive Director" of Mackie Shea O'Brien in recognition of her many years of superior service to the firm.

Tom Mackie received special recognition for his pro-bono legal work from the Greenwood Memorial United Methodist Church located in Dorchester.

Michelle O'Brien filed an *amicus* brief with the Supreme Judicial Court on behalf of the LSP Association in *Bank v. Thermo Elemental, Inc. et. al.*, supporting that association's position on recovery of cleanup costs under the Massachusetts Contingency Plan.

Tom Mackie, John Shea and Michelle O'Brien Each has been listed in the 2008 edition of *The Best Lawyers in America* for environmental law.

Michelle O'Brien has been appointed co-chair of the Lesley University Centennial Committee.

Michelle gave a presentation on Legal Considerations for Buyers and Sellers of Contaminated Properties to the New England Chapter of Certified Commercial Investment Members (CCIM).

PROFESSORS AT LAW

Tom Mackie chaired a panel of speakers on Massachusetts energy policy and legislation at the EBC's Breakfast with Phil Guidice, Commissioner of the Division of Energy Resources. He also presented on Renewable Energy Credits at the Second Annual MassDEP/EBC C&D Summit and on Initiatives to Address the Climate Change Market at the EBC seminar on Solutions to Climate Change in New England.



Catherine Finneran, MassDEP, David MacDonald, LSP, Woodard & Curran, Lawrence Feldman, Ph.D., LSP, GZA GeoEnvironmental, Shyla Matthews, MassDevelopment, and Michelle O'Brien at CCIM seminar

CHAPTER 21E TURNS TWENTY-FIVE

This year marks several significant milestones in the history of the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, General Laws Chapter 21E. The law was enacted 25 years ago as a mechanism for the state to clean up sites affected by releases of oil and hazardous materials and recover the costs from responsible parties. The law also allowed private parties to perform the cleanups, with oversight by the Department of Environmental Protection (known then as the Department of Environmental Quality Engineering). A complex set of regulations - the Massachusetts Contingency Plan - was developed to guide parties through the process of assessing, remediating, and monitoring sites.

After ten years of the program, numerous sites remained unaddressed and the real estate community demanded changes. In 1992 the state legislature enacted significant revisions to Chapter 21E that created a first-of-its-kind "privatized" program for addressing contaminated sites. The legislature created a new category of environmental professional - the Licensed Site Professional - to oversee responses to releases of oil or hazardous materials and to render "waste site cleanup activity opinions" about the actions taken. Changes to the MCP followed in 1993 to reflect the statutory changes.

The so-called Brownfields Amendments to Chapter 21E were enacted in 1998 to provide liability relief and

incentives for the reuse of contaminated sites. The attorney general's office and MassDEP have staff committed to the Brownfields program.

In 2003, ten years after the program became privatized and 20 years since Chapter 21E's enactment, more than 18,000 sites had been closed out. In all of those cases risks to public health, safety, welfare, or the environment posed by oil or hazardous material contamination were evaluated and, where necessary, reduced or eliminated. Many contaminated sites were put back into productive use.

Now, with several anniversaries to celebrate, Chapter 21E is alive and well. Private parties are performing the vast majority of response actions, and sites are being addressed and used without as much fear of the contamination. Legal and technical expertise in this field have continued to grow. Our firm has assisted many commercial, industrial, and residential property owners in addressing contaminated sites. We have also negotiated numerous access agreements, settlements, and other arrangements for dealing with contamination, when our client owns the contaminated property, is contemplating purchasing contaminated property, or has been affected by someone else's contamination.

For more information about this area of practice, contact Michelle O'Brien.

THE BLUE REVOLUTION: A WATER ETHIC *continued from page 1*

Our water supplies also face an insidious threat from antiquated infrastructure. According to the Massachusetts Infrastructure Investment Coalition, \$8.5 billion is needed to replace aging water mains, to upgrade well fields, treatment plants and water storage facilities, and to develop new water sources. The loss of drinking water will have devastating public health and safety, environmental and economic consequences.

Blueprint for Sustainability

In Massachusetts, we are leading a blue revolution in our thinking about water and how to protect it, balance competing uses, and encourage sustainable uses. Our water policies, programs, laws and regulations are focused on ensuring sufficient water quantity and quality to meet our needs and to sustain our environmental and economic systems. The Water Resources Commission (WRC) in its 2004 Water Policy Report has developed a blueprint of integrated strategies, innovative measures, and best available science to address water supply issues from a watershed perspective and to encourage Smart Growth consistent with sustainable water resource management. The resulting regulatory programs keep water local (in the watershed/river basin), increase water use efficiency (conservation and lower energy costs), and balance consumptive and in-stream uses (reasonable in-stream flows and safe yield withdrawals).

Cutting-edge expressions of our evolving water ethic are found in the following recent developments.

- Water Conservation Standards (July 2006). EOEEA and the WRC's statewide goals for water conservation and water use efficiency, providing guidance on state-of-the-art conservation measures. This 59 page document describes achievable and practical measures for water suppliers, water users, and state agencies to use in planning and issuing permits and approvals.
- Water Management Guidance for Permit, Permit Amendment Applications and 5-Year Reviews (1/18/06). MassDEP issued this revised guidance for the 2004 Water Policy to set water use performance standards, including caps on residential gallons per capita per day (RGPCD) (no more than 65 gallons per capita for high and medium stress basins and 80 gallons per capita for low stress basins); limits on Unaccounted for Water (UAW) (10% for high and medium stress and 15% for low stress basins); summer limits on withdrawals; streamflow thresholds that trigger mandatory limits on nonessential outdoor water use; and streamflow monitoring.
- Revisions to the Wetlands Protection Act and Water Quality Certification Regulations (1/2/08). MassDEP has incorporated revised standards into its regulations which promote

increased recharge, use low impact development (LID) techniques, and improve best management practices for operation and maintenance of stormwater management systems. Stormwater management systems designed and constructed with LIDs do not create additional buffer zones or wetland resource areas.

- MassDEP Registration Renewals and Appeals. Water registration of "grandfathered" withdrawals under the Water Management Act and MassDEP regulations expired on December 31, 2007. MassDEP imposed conditions on renewals similar to those in withdrawal permits: RGPCD and UAW numerical standards, deadlines for compliance, and Seasonal Demand Management Plans. About 50 municipal water suppliers and golf courses have filed requests for adjudicatory hearing challenging the conditional renewal registrations.
- Desalination Policy and Siting and Monitoring Protocols for Desalination Plants (2007). The emergence of desalination as a source of water supply by the Town of Swansea and by Aquaria (for Brockton) prompted EOEEA to develop policies and protocols for new projects. Even though desalination technology is improving and is more cost-effective, the policy reluctantly endorses desalination only after proponents (1) demonstrate efficient use and conservation of existing water supplies, wastewater reuse, stormwater recharge, and removal of inflow and infiltration, and (2) minimize environmental impacts from intakes, discharges and energy consumption.

Our clients and consultants can join in the blue revolution by adopting the new water ethic in project planning and design, and more fundamentally in our personal lives through conservation measures and support of efforts to provide clean, fresh water for every human being on the planet. Walt Kelly's *Pogo* wisely observed: "We have met the enemy and he is us."

Our law firm works with seasoned water supply professionals to permit new supplies, protect watersheds and sources, fairly allocate water volumes, and achieve compliance in enforcement actions. For more information, contact John F. Shea.

