



MACKIE
SHEA
O'BRIEN[®]

Insights & Updates

Fall 2012

Inside

Firm Activities

Environmental Law Update

Firm Successes



The Phelon Compound, Polpis Harbor, Nantucket

Photo by Ron Lynch

Our Coastal Zone: Threatened Resource

The Massachusetts shoreline, vantage point to the sea, is the Commonwealth's premier place to live and work. Almost five million people live along Massachusetts' 1519 mile tidal coast. They have built exquisite homes and mansions perched majestically atop the granite headlands and nestled defiantly on the sandy plains of the Cape and Islands, many with breathtaking views of the sea. They fight for access to the water for passive recreational pursuits, and for docks and piers for power boats and yachts. Condominiums, marinas, vacation resorts, tourist attractions, restaurants and retail jostle for space on the waterfront. Port communities are attempting to recapture the glory of their seafaring history with the promise of future commercial cargo, ferry, cruise and pleasure craft; terminal operations; and the fishing industries. Submerged lands provide habitat for fisheries and aquaculture, routes for pipelines and cables, and very soon platforms for wind and tidal turbines. Yet, the Commonwealth's coastal waters are under

continuous assault from our garbage, agricultural runoff, oil spills and discharges of wastewater and stormwater. The shoreline itself appears to be under assault from sea level rise associated with climate change. What does the future hold for the population living and working on the coast?

About 10,000 years ago, the landscape of Cape Cod, Nantucket and Martha's Vineyard was created by the retreat of glacial ice, the slow rise of the sea, and attack of the waves. The 30-mile bent arm of the Cape once reached eastward another two miles, and the Islands another two miles southward. Once an island, George's Bank is now a submerged fishery. In 1987 and 2007, nor'easters breached the barrier beach in Chatham and destroyed scores of homes and cottages. Just this October, Massachusetts' coastal residents breathed a sigh of relief as they watched TV images of the devastating effects of storm surge flooding, pounding waves, high winds and intense rain of Hurricane Sandy on New Jersey and New York. Coastal dwellers and governments must eventually deal with the reality of climate change: the melting of polar ice sheets, sea level rise, more frequent and extreme storms, loss of coastal wetlands, and erosion of sandy coasts. Some scientists predict Provincetown and Wellfleet may be islands someday, and commuter boats might dock in Copley Square.

MACKIE SHEA O'BRIEN, PC

420 Boylston Street

Boston, Massachusetts 02116

617 266 5700

www.lawmso.com

(continued on page 2)

Firm Activities

IN THE NEWS

Peter Durning has been named Co-Chair of the Boston Bar Association Environmental Litigation Committee.

Michelle O' Brien has been appointed vice-chair of the Campus Planning and Property Management Committee of the Lesley University Board of Trustees.

Tom Mackie chaired an Environmental Business Council of New England Program on MSE Berms in Landfill Closure and Construction in Massachusetts, presented on Siting a Source Separated Organics Facility in Massachusetts to the 9th Annual SWANA Recycling and Solid Waste Conference, and Chaired a Panel on Anaerobic Digestion at the EBC-NE Solid Waste Water Resources and Renewable Energy.

Michelle O' Brien completed a three-year term on the Boston Bar Association Council, the governing body of the BBA, where she served on the executive committee and two workgroups. She also co-chaired the BBA's Environmental Sustainability Task Force, which released its "Greening the Profession" report in September.



Michelle O'Brien with outgoing BBA President Lisa C. Goodheart.

Our Coastal Zone: Threatened Resources (continued from page 1)

LIGHTHOUSE

In *The Ocean of Life: The Fate of Man and the Sea* (Viking, 2012), Callum Roberts exhaustively treats the accelerated demise of our oceans and coastal zone. He argues we are at the beginning of a sixth planetary extinction, and compares us to the Permian mass extinction 251 million years ago caused by runaway global warming. Somehow life survived and rose again to live on the shore. He believes we can change to avert near-term catastrophe because there are enough reasons to terrify us into action. He urges us to prepare for the worst, change course and "live alongside wild nature [because] the alternative is self destruction."

As stewards, we should act boldly to buy time for future generations to adapt to global warming and geologic evolution. We need to embrace sustainable lifestyles as survivor skills. We must stop ocean dumping and protect the marine environment from plastic debris, oil spills and deep-drilling disasters. We must harness American off-shore wind and relentless wave and tidal energy. We must harden our vulnerable, aging infrastructure and build dikes and floodgates to hold back the rising sea. We are destined by our DNA to fight for our home on the ever-changing shore. We will adapt and survive the indomitable power of Mother Nature to live, play and work in the coastal zone.

PROTECTING THE RESOURCE

We are proud that our firm has been asked to participate in the crafting of solutions to some of these seemingly intractable problems. Recently, for example, John Shea helped the Town of Falmouth address the emergent issue of nutrient loading on Cape Cod. Like many other Cape

towns, in Falmouth, increases in population and ineffective control of nitrogen and phosphorus primarily from conventional septic systems have caused nutrient loading of sensitive ponds and estuaries resulting in overproduction of algae, reduced oxygen levels, and adversely impacted water quality and marine resources. At the same time, the EPA recently adopted stringent Total Maximum Daily Loads (TMDLs) for nutrients which cannot be achieved in the short-term. Falmouth has 68 miles of shoreline and more estuaries and TMDLs than any other town. John helped Falmouth negotiate an innovative settlement with MassDEP and the Buzzards Bay Coalition over the groundwater discharge permit for its municipal wastewater treatment plant that leads the way to find solutions with an adaptive management approach to improving water quality, implementing a Comprehensive Wastewater Management Plan, and taking specific measures to restore water quality in West Falmouth Harbor.

Likewise, we have been proud to assist landowners, communities, and interest groups in their efforts to responsibly prevent or slow the damage and destruction from storms and relentless erosion. The dynamic coastal environment is reflected in a myriad of changing laws, regulations and government policies governing coastline protection and development with which MSO and its clients regularly deal. Shoreline projects must run a gauntlet of local, state and federal permitting processes whether to restore a beach, protect against erosion, manage wastewater, or to build a home, business, or other

(continued on page 3)

Our Coastal Zone: Threatened Resources (continued from page 2)

water dependent use. We are typically on a team of extraordinary professionals: renowned architects, engineers, scientists and builders. Over the past few years we have been privileged to help five clients obtain approvals for major efforts to restore the beach and slow the erosion of coastal bank, which threatens to topple their homes into Cape Cod Bay in Truro. We spearheaded the permitting team and obtained approvals for coir envelopes, sand fences, beach nourishment and planting. These "soft" measures are maintained and monitored, and prayers are offered with each coastal storm. Along the way, some of our clients have had to challenge incorrect agency decisions, and defend hard-won approvals against costly and dilatory appeals by neighbors and advocacy groups. The stakes are always high and the battles can be rough.

Along with these more prosaic coastal projects, we have also had the utmost pleasure of working on some truly incredible coastal home projects. In addition to helping to permit homes and improvements in such spectacular settings as Pine Island in Osterville and Nonquitt in South Dartmouth we have had the privilege of working on several projects in beautiful Nantucket Island, one of which is the 70-acre estate featured on the front page of this newsletter. After all, the ocean is there not only to be respected, but also to be enjoyed.



Eroding coastal bank pre-coir envelopes (2011)

Photo by LEC Environmental

Environmental Law Update

As part of an economic development law enacted this summer, the legislature expanded and extended the **Permit Extension Act** of 2010. Permits or approvals in effect or existence in the period from August 15, 2008 through August 15, 2012 (rather than 2010) are automatically extended. In addition, the length of the automatic extension has doubled from two to four years. Therefore, a permit in effect or existence at any time between August 15, 2008 and August 15, 2012 is valid for four years beyond the expiration date of the permit. Even if a permit expired, it can be revived and extended under this law. The Act applies to virtually all state and local development permits.

The Secretary of Energy and Environmental Affairs is proposing changes to the **Massachusetts Environmental Policy Act (MEPA)** regulations that would include a new MEPA threshold for a mandatory Environmental Impact Report for projects with greenhouse gas (GHG) emissions of more than 100,000 tons per year CO₂ equivalent. Also, GHG emissions would be considered part of the environmental review of all projects requiring a state permit or financial assistance, regardless of media. Finally, there are proposed provisions where agencies will be required to give notice of agency action to persons who have given MEPA notice of intent to sue.

The **Supreme Judicial Court** upheld as a lawful fee a monetary charge imposed by the Town of Saugus on commercial and residential developers for access to the town's sewer system. Four developers had challenged the so-called I/I reduction contribution as an unlawful tax. The town was under an Administrative Consent Order with MassDEP to identify and eliminate sources of inflow and infiltration into the town's sewer system. As part of the mechanism for addressing the sewer system problems, the town imposed a fee for new connections to the system. The SJC's decision reversed the trial court and the appeals court, both of which had found the fee to be an unlawful tax.

The MassDEP has issued final **Regulations for Solid Waste Management Facility Site Assignment and Recycling, Composting and Conversion Permits** designed to streamline and clarify the siting and permitting of source separated organics facilities. MassDEP has also issued corresponding changes to the **Solid Waste Management and Operation, Maintenance and Pretreatment Standards for Wastewater Treatment Works**. Under the new regulations, stand-alone facilities and publicly owned wastewater treatment plants that handle source separated organics will be exempt from obtaining a solid waste site assignment. The degree of MassDEP permitting will depend upon the size and nature of the operation.



COUNSELORS AT LAW
420 Boylston Street
Boston, MA 02116
617 266 5700
www.lawmso.com

US Postage
PAID
Permit #4
Rutland, VT 05701
First Class Presorted

Insights & Updates

Firm Successes

John Shea has been named the 2013 Boston Environmental Law "Lawyer of the Year" by *Best Lawyers*. **Tom Mackie** and **Michelle O' Brien** were also selected by their peers for inclusion in *The Best Lawyers in America*® 2013. In addition, the firm received a first-tier ranking in the third edition of the U.S. News - Best Lawyers "Best Law Firms" publication. The firm was ranked Tier 1 for both Environmental Law and Environmental Litigation in the Boston metropolitan area for 2013.

Tom Mackie and **Peter Durning** obtained a Final Decision of the Commissioner of the MassDEP upholding a Comprehensive Air Plan Approval for a 35 MW biomass power facility proposed for Springfield, Massachusetts.

John Shea negotiated an innovative settlement among our municipal client on Cape Cod, the MassDEP, and a regional environmental organization, which resolved an adjudicatory appeal of the town's wastewater treatment facility groundwater discharge permit.

