



Insights & Updates

Fall 2007

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Wither Wood?

Construction and demolition debris processors throughout Massachusetts are looking to the MassDEP and other state agencies for continued leadership in developing markets for materials removed from the construction and demolition debris waste stream. The Commonwealth should not shy away from its leadership role, but should continue to take bold moves towards an economically viable and environmentally sound management system for these materials.

In its Beyond 2000 Solid Waste Master Plan, the MassDEP announced that it would be banning disposal of construction and demolition debris. Effective July 1, 2006 MassDEP banned the disposal or transfer for disposal of wood, asphalt, brick, concrete and metal. Construction and demolition debris processors responded to these regulatory mandates by investing tens of millions of dollars in facilities specifically designed to process and recycle construction and demolition debris.

The construction and demolition debris processing industry spawned from this regulatory scheme is facing serious financial uncertainty on a number of fronts. Due to environmental concerns about the materials they recover, processors are disposing of more material and at higher costs than anticipated. In order to defray processing facility capital and operating costs, operators need to be able to maximize recovery of reusable materials and minimize the amount of material they dispose of by traditional landfilling or incineration. Otherwise, the processing costs coupled with disposal costs render such operations unprofitable and unable to compete with cheaper out-of-state disposal options.

The first problem processors encountered was nuisance odors from hydrogen sulfide gas attributed to the gypsum wallboard in construction and demolition debris fines and residuals that have been used as daily cover or as grading and shaping material at landfills.



MassDEP has taken enforcement actions against several landfills that have experienced nuisance odor conditions. Consequently, landfill operators have curtailed their acceptance of residuals and fines, closed or radically changed their operating practices which has resulted in less capacity and increased costs for use of fines and residuals. Recently, the MassDEP issued an updated Use of Construction and Demolition Fines and Residuals Guideline and a final Control of Odorous Gas Policy which largely codifies the DEP's previous responses to nuisance odor conditions. Thus, it seems unlikely that the new Policy and Guidance will loosen up the market sufficiently to restore capacity and pricing to preexisting levels.

Unfortunately, as if the fines and residuals problem was not bad enough, processors are experiencing difficulty finding outlets for the wood that is now banned from disposal. According to most estimates, wood comprises approximately 40 percent of the C&D waste stream. Prior to the wood disposal ban, processors had several options for wood: (i) landfilling, (ii) grinding and reusing as part

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Firm Activities

IN THE NEWS

Mackie Shea O' Brien received the first annual "Best Place to Work" Award from the Environmental Business Council of New England. The firm also tied with another company for the award for Most Environmentally Conscious Company.



Mackie Shea O'Brien attorneys and staff accept EBC Best Place To Work Award

Tom Mackie presented a talk on Renewable Energy Credits for Organic Refuse Derived Fuel at the Fall meeting of the Solid Waste Association of North America - Massachusetts Chapter.

Noreen Ruggiero, in collaboration with the Association of Legal Administrators, spearheaded a group of MSO employees and family, including her daughter Caitlin, in a day of service at the Home for Little Wanderers.

Michelle O'Brien received the Member Award at the annual meeting of the LSP Association in October. This organization of hazardous waste site cleanup professionals honored Michelle for her leadership and commitment to the LSPA organization and membership.



WITHER WOOD? *continued from page 1*

of the residuals employed for landfill cover or grading and shaping material; or (iii) shipping wood to Maine for use as fuel in power plants. Now, however, disposal in landfills is banned, the Revised Guideline requires the maximum feasible separation of clean wood from residuals and, effective August 1, 2007, two key Maine power plants ceased accepting C&D wood fuel.

Thus, the processing industry (which was built in direct response to MassDEP policy initiatives) has been hit with a "triple whammy" of environmental policy objections to their end product resulting in a "Perfect Storm" of economic troubles.

The MassDEP cannot be blamed for the gypsum problem or the resultant shortage of capacity for fines and residuals. Nevertheless, the MassDEP owes the processors the duty to proactively find alternatives, such as a ban on disposal of gypsum wallboard or mandatory source separation of wallboard, that are environmentally sound and economically sensible. Likewise, the MassDEP should actively oppose further measures that will needlessly constrain the market for wood. The MassDEP should actively support environmentally sound and economically feasible alternatives for the use of C&D wood in Massachusetts and surrounding states. While helpful, it is not sufficient for the MassDEP to merely identify wood markets in Canada and Europe which may be beyond the practical reach of Massachusetts processors.

It is also incumbent upon the MassDEP to actively discourage policy initiatives, such as the rumored potential disqualification of C&D wood from the definition of "eligible biomass" eligible for valuable Massachusetts renewable energy credits by the Massachusetts Division of Energy Resources. Similarly, MassDEP should oppose any further measures by neighboring states such as Connecticut's disqualification of C&D wood from Class I Connecticut Renewable Energy Credits and New Hampshire's ban on use of C&D wood as a fuel for energy recovery.

Public policy overwhelmingly favors renewable energy. Wood, a universally accepted form of "biomass," is a renewable energy resource. As a biogenic source of carbon, wood is carbon neutral. Use of C&D wood for energy recovery is the only feasible alternative to landfilling. Several studies have demonstrated that C&D wood fuel in a BACT-equipped power plant will not cause unacceptable emissions and that C&D wood can be consistently and reliably produced and monitored for quality.

MassDEP should use the bully pulpit to proclaim the dual benefit of recovering energy from C&D wood. Doing so will sustain the economic and environmental contribution provided by C&D processors and send a signal to investors and other key stakeholders that the Commonwealth will stand behind recycling and alternative energy in Massachusetts.

NEW MASSDEP COMMISSIONER TAKES COMMAND

On September 4, 2007, Laurie Burt assumed the position of Commissioner of the Massachusetts Department of Environmental Protection. Burt, an environmental attorney, has immersed herself in MassDEP's permit streamlining efforts and has said she hopes to set a new standard for both environmental protection and regulatory efficiency.



Michelle O'Brien, co-chair of the Boston Bar Association's Environmental Law Section, with co-chair Ben Ericson and Commissioner Burt.

Environmental Law Update

MASSDEP STORMWATER MANAGEMENT STANDARDS

MassDEP has proposed new Stormwater Management Standards. The standards include increased stormwater recharge (in order to approximate the annual recharge from predevelopment conditions), use of Low Impact Development Best Management Practices, removal of illicit discharges to stormwater systems, and improved stormwater management system Operation and Maintenance. Currently MassDEP regulates stormwater discharges under the MassDEP Stormwater Management Policy.

MASSDEP WETLANDS APPEALS

In March 2007, Governor Patrick directed MassDEP to shorten the time for appeals of wetland permits, which have often delayed projects for years. In response, MassDEP adopted revisions to the Wetlands Protection Regulations and the Adjudicatory Hearing Regulations, effective October 31, 2007. The new regulations establish a six-month timeline for resolving appeals of "reviewable decisions," defined to mean regional decisions such as superseding orders of conditions. MassDEP will continue to prescreen appeals to evaluate whether they are amenable to settlement, mediation, or dismissal. If they are not, the issues for adjudication will be established and the clock starts running. An appealing party must provide the factual and legal basis for its appeal within 45 days of the prescreening conference. The regulations now impose an obligation on a project applicant to provide the Notice of Intent and site plan to any person who states his intent to appeal a decision. In addition, an applicant and property owner must provide a person who files an appeal an opportunity to visit the site upon request. For the most part MassDEP will hear the appeals itself, but may transfer cases to administrative magistrates at the Division of Administrative Law Appeals.

FEDERAL WETLANDS JURISDICTION

In June 2006, the U.S. Supreme Court issued a decision which, despite hopes, failed to provide a bright line rule for Section 404 federal wetlands permitting and enforcement cases. On July 5, 2007, the Army Corps and EPA responded

with an immediately effective guidance Memorandum Regarding "Clean Water Act Jurisdiction Following Rapanos," which requires application of two new standards and a greater level of documentation to support a Corps Jurisdictional Determination. The agencies will now assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent (e.g., flow year-round or have continuous flow at least seasonally) and wetlands that abut these tributaries. They will also assert jurisdiction over every water body that is determined to have a *significant nexus* with traditional navigable water, such as non-navigable tributaries that do not flow year-round or at least seasonally, and wetlands adjacent to, but not directly abutting the relatively non-navigable tributary. Hydrologic and ecological criteria determine if a nexus is "significant." The Corps also has issued a Jurisdictional Determination Form Instructional Guidebook to help developers and defendants conduct case-by-case evaluations of specific wetlands. The agencies are providing six months for public comment on the guidance. Within nine months, the agencies intend to reissue, revise or suspend the guidance.

UPDATE ON TRANSRAIL

The solid waste industry and regulators have challenged a proposal by New England Transrail to build a railroad solid waste transfer station on the Olin Chemical superfund site in Wilmington, Massachusetts, without first obtaining local and state solid waste permits. New England Transrail asserts that its activities are exempt from permitting because they involve rail transportation subject to the exclusive jurisdiction of the Surface Transportation Board (STB) under the Interstate Commerce Commission Termination Act. On July 10, 2007 the STB ruled that, except for shedding of C&D debris, NET's activities would involve rail transportation thereby preempting state and local regulation. The Massachusetts Attorney General has appealed the STB decision. A U.S. House of Representatives subcommittee met on October 16 to hear testimony on the proposed Clean Railroads Act of 2007 (H.R. 1248) that would remove solid waste disposal from the jurisdiction of the Board and subject such facilities to local and state permitting requirements.

Firm Successes

BEACON OCEAN SHORE AFFORDABLE HOUSING

John Shea and Gail Magenau Hire represented Beacon Communities' 90 unit residential development in Marshfield in adjudicatory proceedings before MassDEP and DALA, culminating in MassDEP approval. They prevailed by using a series of carefully planned motions to dismiss, for summary decision, and for directed decision. With their guidance and team of engineers and wetland and wildlife scientists Beacon developed a host of mitigation measures to protect the Eastern Box Turtle and wetlands interests and achieve MassDEP approval for the project.

WETLANDS AND MORE

After years of litigation and complex negotiations, Michelle O'Brien and Gail Magenau Hire completed a settlement of a multi-faceted appeal of wetland permits allowing our client to build a residential home along a riverfront. We defended the permits successfully in superior court and in an administrative appeal, but the abutter persisted in her opposition. The settlement involves the abutter's acquisition and subdivision of another riverfront parcel, a land swap, perpetual conservation restrictions and an amended permit allowing construction on the newly-acquired lot.

VERIDIAN VILLAGE

John Shea advised Hampshire College and Beacon Communities, developers of a collaborative residential project to create a "Lifelong Learning Community" known as "Veridian Village." He helped Veridian Village to successfully navigate wetlands and endangered species issues for about 130 townhomes and flats, community buildings, parking, loop roadway, gardens, trails and open space that incorporate significant Low Impact Development standards and HAHB Green Design Guidelines.

THOMSON BROTHERS INDUSTRIES, INC. MASS DEVELOPMENT FINANCING

Tom Mackie successfully negotiated and closed a 7.35 million dollar tax free Massachusetts Development Finance Agency financing of Thomson Brothers Industries' recycling facility and transfer station in North Andover. MassDevelopment issued a tax free solid waste handling facility revenue bond to Citizens Bank which provided the construction loan for the TBI facility. With the assistance of the firm and TBI's engineers at Brown & Caldwell, TBI has obtained a solid waste site assignment, zoning special permit and wetlands order of conditions for the facility. TBI expects to begin construction of its 500 ton per day recycling and transfer facility as soon as it receives its MassDEP authorization to construct.



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