



MACKIE
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Insights & Updates

Fall 2008

Change is in the wind.

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The Commonwealth has set a goal of providing fifteen percent of all electricity from renewable resources by 2020, while reducing carbon emissions by ten percent. This summer's Green Communities Act, Biofuels Act and the Global Warming Solutions Act have broken new legal ground and would completely overhaul the energy business. While these acts contain significant incentives and directives to achieve these goals, they do not solve the fundamental problem of siting new renewable energy facilities. Literally breaking ground and actually building renewable projects will require legislative reform.

Many projects are bogged down in the siting process and others have never left the drawing board based upon siting difficulties. For example, the Department of Public Utilities recently denied Russell Biomass' petition for exemption from local zoning special permit restrictions that the developer claims make the project untenable. Hoosac Wind nearly lost its wetlands permit when the state Division of Administrative Law Appeals found that, among other things, the proponents had not sufficiently evaluated wildlife habitat; the DEP Commissioner overruled DALA and reissued the permit. Likewise, Cape Wind has been stalled in a multi-year permitting process, with the required permits and review agencies a seemingly moving target.

Change is in the wind.

Several recent Acts contain provisions intended to address siting:

- The Green Communities Act creates:
 - ▶ a legislative commission to study the siting issue.
 - ▶ "Green communities," which must provide as-of-right siting of renewable or alternative energy-generating, R&D, or manufacturing facilities in designated locations and adopt expedited applications and permitting to site such facilities within one year of initial application.
- The "Green Jobs" Act creates:
 - ▶ the Massachusetts Clean Energy Technology Center, which is empowered "to review and recommend changes in laws, rules, programs and policies of the Commonwealth and its



agencies and subdivisions to further the enhancement of clean energy financing, infrastructure, siting, manufacturing and development within the Commonwealth."

- ▶ a study on clean energy, to be completed by February 1, 2009, and a subsequent statewide plan (100 days later) for the installation and operation of renewable energy-generating facilities on state-owned property.
- The Clean Energy Biofuels Act creates:
 - ▶ a commission that will "study the feasibility and effectiveness of various forms of incentives to promote the development and use of advanced biofuels in the Commonwealth including, but not limited to" the production and harvesting of woody biomass or woody residue, and also consider strategies to increase biofuels use, including financing mechanisms for distribution infrastructure.

Mackie Shea O'Brien has a long history of siting difficult projects. For example, we are currently working on an affordable 40B apartment project, several solid waste facilities and a recycled C&D

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Firm Activities

IN THE NEWS

Gail Magenau Hire, who recently celebrated her fifth year with the firm, was appointed co-chair of the Hazardous and Solid Waste Committee of the Boston Bar Association's Environmental Law Section. Gail is also an active member of the Boston Groundwater Emergency Task Force, which has proposed legislation to regulate and mitigate the adverse effects of groundwater drawdown by construction activities in Boston.



Michelle O'Brien and Gail Magenau Hire at the BBA Leadership Reception

Noreen Ruggiero, in collaboration with the Association of Legal Administrators, again led a group of MSO employees and family, in a day of service at The Home for Little Wanderers.

For the second year in a row, **Mackie Shea O'Brien, PC** has won the Environmental Business Council's award for the "Most Environmentally Conscious" company. As part of the firm's participation in the unrelated Massachusetts Bar Association's Eco-Challenge, the MSO Eco-Team has undertaken initiatives in all areas of the firm, from office products to kitchen supplies to promoting and teaching "green" habits in reducing, reusing and recycling, and it's making a difference. As we all know, it's not easy being green!

Michelle O'Brien has been appointed to MassDEP's Waste Site Cleanup Advisory Committee as a representative from the private party attorneys sector. The Committee provides input to the Bureau of Waste Site Cleanup on evolving policy issues and program operations.

Tom Mackie, John Shea and Michelle O'Brien were chosen again as Leaders in Environmental Law by **Chambers and Partners: USA Guide to America's Leading Lawyers for Business 2008**.

Mackie Shea O'Brien participated in the Boston Bar Association's Summer Jobs Program and benefited from the hard work of Danielle Booker, a student at Tech Boston Academy.

PROFESSORS AT LAW

John Shea lectured on "Environmental Laws and Regulations Impacting Land Development and Construction" at the **Massachusetts Land Law for Civil Engineers and Land Surveyors** seminar.

Michelle O'Brien co-chaired the Boston Bar Association program entitled "Chapter 21E: Celebrating Its 25th Anniversary With a Discussion Of Its Latest Developments." In addition to looking back at significant events in the history of the cleanup statute and regulations, the program provided an update on recent case law and MassDEP Chapter 21E priorities. Michelle was also a faculty member of the MCLE Environmental Law Basics program on "Enforcement."

Tom Mackie spoke on "Renewable Energy From Waste" at the Fall meeting of the Solid Waste Association of North America, Massachusetts Chapter and at the BBA Hazardous and Solid Waste Committee.



EBC Executive Director Dan Moon presents award to Tom Mackie and Denise Green



Danielle Booker and Michelle O'Brien at the BBA Graduation Ceremony on August 21, 2008



Renewables Corner

In the Energy Improvements Extension Act of 2008, signed by President Bush on October 3, Congress extended and enhanced investment and production tax credits for various forms of renewable energy.

The Massachusetts Department of Energy Resources is preparing draft regulations for the revised Class I and Class II renewable portfolio standards and new alternative portfolio standards which are due to be in place by January 1, 2009.

Palmer Renewable Energy, LLC, an MSO client, was successful in obtaining a Secretary's Certificate that no EIR is required for its 38 MW renewable energy biomass facility to be located at 1000 Page Boulevard in Springfield, Massachusetts. This facility will be the first in the Commonwealth to use recycled wood from construction and demolition debris to produce renewable energy.

The City of Taunton has issued Addendum No. 2 to its RFQP for a regional solid waste management facility listing 16 firms that have expressed their intention to submit a proposal. The deadline for proposals is February 2, 2009.

wood fueled biomass renewable energy power plant. Each of these projects involves a legislative and regulatory framework intended to minimize local permitting hurdles by limiting the authority of municipalities in key areas such as zoning or wetlands regulation. For example, the Solid Waste Act of 1987 provides site-assigned solid waste facilities protection from exclusionary local zoning if they are located in an industrial zone. G.L. c. 40A, § 9. Likewise, Chapter 40B provides a zoning override and one stop local permitting under the Comprehensive Permit process.

Renewable energy facility developers can benefit from similar tools under existing energy laws and regulations. For example, by granting a Certificate of Environmental Impact and Public Interest, the Energy Facility Siting Board can override a state or local ordinance, permit requirement, license, or other "burdensome condition or limitation" that would unduly delay or prevent construction of a Board-approved energy facility. G.L. c. 164 §§ 69K-69O ½. A developer may also apply for a Certificate if there are inconsistencies among resource use permits issued by state or local agencies. Likewise, the Department of Public Utilities can exempt energy facilities from local zoning to advance the public interest. However, these tools are limited. For example, Siting Board jurisdiction is limited to large energy facilities, exceeding 100 megawatts. Renewable energy projects tend to be smaller and will not qualify for this benefit.

Siting relief in the Commonwealth now consists of a patchwork of legislative exemptions from local regulation, primarily zoning. Consistent with this, renewable energy legislation to date has established at least two separate bodies to promote or study facility siting. Ongoing reform efforts are epitomized by a confusing array of independent initiatives that read like an alphabet soup of task forces, boards and offices:

- Executive Office of Housing and Economic Development: EOHED is leading a Planning and Zoning Reform Task Force

of officials, legislators, and stakeholders to find consensus on reforms that will modernize the Commonwealth's planning, subdivision, and zoning statutes to be consistent with smart growth.

- Interagency Permitting Board: Chaired by the Commonwealth's Permitting Ombudsman, the IPB reviews priority development site (PDS) proposals from Massachusetts municipalities and then, through grants and technical assistance, helps them modify permitting processes for approved sites to provide efficient decisions on development proposals.
- The Massachusetts Permit Regulatory Office: In partnership with municipalities, the MPRO will identify appropriate locations for significant new growth, whether commercial, industrial, or mixed-use. In these locations the Administration will work with community officials and property owners to make the district truly "development ready" with respect to local and state permitting, site preparation, infrastructure improvements, and marketing.
- The Massachusetts Environmental Policy Act (MEPA) Unit of the Executive Office of Energy and Environmental Affairs: MEPA issued a final Integrated MEPA/Permitting Review Policy this summer. It provides a voluntary, inter-agency permitting process for eligible projects, including those that would generate renewable energy or make significant reductions in greenhouse gas emissions. Under this process, state permit applications would be filed at the same time as a Final Environmental Impact Report.

History shows that the legislature will likely mirror the piecemeal reform approach it has taken in the past. For that reason, renewable energy advocates will need to keep track of multiple legislative initiatives. Eventually, developers will need to tailor their projects to match the specific criteria of whatever program the legislature passes. Mackie Shea O'Brien is monitoring developments in facility siting and will employ new tools for its clients as they become available.

Firm Successes

TOLL BROTHERS SUBDIVISION

John Shea, assisted by Raymond Johnson of Tetra Tech Rizzo, won an adjudicatory appeal of Toll Brothers' wetlands Superseding Determination of Applicability before DALA by demonstrating that Scott's Brook (shown as a perennial stream on a USGS map) was actually an intermittent stream without an associated riverfront area due to documented no-flow conditions in a non-draught period, which were "not significantly affected by drawdown from withdrawals of water supply wells, direct withdrawals, impoundments or other man-made flow reductions or diversions" at an upstream golf course.

LANDFILL DEVELOPMENT APPEAL

Michelle O'Brien and Tom Mackie successfully defended a superior court challenge to MassDEP's Authorization to Construct a new landfill cell at the Greater New Bedford Regional Refuse Management District's Crapo Hill Landfill. The court concluded that the appealing party, a company

located adjacent to the landfill, had no legal standing to challenge the permit.

LANDFILL ZONING COMPLIANCE

Tom Mackie successfully defended the City of Northampton DPW before the Northampton Zoning Board of Appeals against a zoning enforcement request by neighbors seeking to shut down the City landfill for alleged lack of proper zoning permits. The ZBA concluded that the landfill was a lawful non-conforming use.

CHAPTER 21E COST RECOVERY

The Supreme Judicial Court adopted the position argued by Michelle O'Brien in an *amicus* (i.e., friend of the court) brief submitted on behalf of the LSP Association in the case of **Bank v. Thermo Elemental, Inc.** The case involved the standard for private party cost recovery under G.L. c. 21E. Michelle's article about the decision appeared in the August edition of the LSPA newsletter (www.lspa.org/resources).

Environmental Law Update

OCEAN MANAGEMENT

On May 28, 2008, Governor Patrick signed the Oceans Act of 2008, legislation that will require Massachusetts to develop - by December 31, 2009 - a first-in-the-nation comprehensive science-based plan to manage development in state waters. The plan must balance natural resource preservation with traditional and new uses of ocean resources, including renewable energy. One significant provision of the Oceans Act amends section 15 of the Ocean Sanctuaries Act to allow for the siting of "appropriate scale" offshore renewable energy facilities in state waters except for the Cape Cod Ocean Sanctuary (offshore from the Cape Cod National Seashore on the Outer Cape) provided that the facility is consistent with the ocean plan. A 17-member ocean advisory commission was recently appointed to begin the work required by the legislation. A series of "listening sessions" has been scheduled for this fall to solicit input on the goals for the ocean plan.

SOLID WASTE MASTER PLAN

MassDEP is embarking on a revision to its solid waste master plan that shifts the thinking from waste management to materials management. Being dubbed by some as the "landfills last" approach, the goals of this plan are to maximize efficiency and sustainable materials use, minimize

waste disposal, and use a wide array of waste diversion options such as composting and anaerobic digestion. The agency is developing a proposal, which it will make available for public comments before the master plan is revised.

ENERGY LEGISLATION

Massachusetts enacted significant changes in energy law and policy in the formal legislative session that concluded on July 31, 2008. The most significant piece is the Green Communities Act, signed by Governor Patrick on July 2, 2008, which promises to stimulate development of new renewable energy facilities in the Commonwealth. Among other things, the Act increases incentives for renewables, expands the definition of qualifying facilities, and creates legislative commissions to study the controversial areas of facility siting and use of construction and demolition debris for renewable fuel.

The Governor also signed the Global Warming Solutions Act, which requires Massachusetts to cap greenhouse gas emissions across the economy by up to a nation-leading 25 percent by 2020, ultimately reducing them by 80 percent by 2050. In addition to cleaning up the environment, the law will stimulate the development of clean energy technologies and jobs.



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