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Insights & Updates



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Fall 2011

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Change is in the Wind

In a recent *Boston Globe* editorial, John Sununu claims that Wall Street is telling us “that everything we have been told about energy is wrong” citing increasing investment in shale gas (and related infrastructure like pipelines) and decreasing investment in renewable resources. Leaving aside its awkward timing during the “occupation” of Wall Street, Sununu's editorial was striking in its silence about climate change. The same thing happened in the recent Republican candidates' debate hosted by Dartmouth College -- nary a word on global warming. Similarly, during a recent presentation to the Environmental Business Council on his current priorities, MassDEP Commissioner Ken Kimmell was also silent on the issue.

Why has climate change become the veritable third rail of polite political discourse? Answer: in Jim Carville's inimitable words, “it's the economy, stupid.” We don't need to look any further than Pennsylvania to see climate concerns overshadowed by excitement over newly available shale gas resources and the job growth that industry may stimulate.

Something subtle is happening to the environmental lexicon at the same time. Suddenly, “climate change” has lost its currency. The folks opposed to hydraulic fracking in New York State, for example, hardly mention the fact that shale gas is a “fossil fuel” that will increase the carbon load in the atmosphere. Instead, they focus on more traditional environmental questions about groundwater and air quality.

Does it seem a long time ago that the Commonwealth proposed to reduce the renewable energy incentives available to biomass projects based on claims that biomass is “worse than coal” as a contributor to climate change? Will the eventual passage of those regulatory changes feel like an after thought now that climate change has flown off the radar screen? Climate change seems so yesterday. By the time we get up to speed, the conversation has already moved on leaving us to pick up the pieces. Although change is inevitable, perhaps we would all be better off if we let it happen just a bit more slowly.

Firm Successes

Mackie Shea O'Brien, PC attorneys have since Spring 2011 succeeded in the following notable matters, among others:

- defeated a regional environmental organization's request to intervene in a Land Court case involving our client's special permit for a biomass energy project;
- resolved an appeal of a zoning special permit for our client's wind energy facility in Plymouth;
- obtained a MassDEP air plan approval for a 35 MW biomass energy plant;
- obtained wetland approvals and public access permits for three more coir envelope and beach nourishment projects in Truro; and
- obtained a Final Decision, after adjudicatory hearing, upholding MassDEP's Amended Superseding Order of Conditions allowing changes to our clients' home, infinity pool, curvature of retaining walls and drainage on the Dartmouth coast.

Michelle O'Brien has been listed as one of the Top Women Lawyers in the Northeast for environmental law.

U.S. News and Best Lawyers® ranked **Mackie Shea O'Brien, PC** in Tier 1 for both Environmental Law and Environmental Litigation in the Boston metropolitan area in the 2011-2012 “Best Law Firms” publication. The firm also ranked in the first tier nationally for Environmental Litigation. Thanks to our clients who helped us achieve this top-tier ranking.



Mackie Shea O'Brien, PC and Tom, John and Michelle each received the 2011 AV Pre-eminent Rating for Legal Ability and Ethical Standards by Martindale-Hubbell.



From left to right: *Carson Shea, Peter Durning and John Shea celebrating victory in the Reichenbach case with the Stanley Cup.*

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Firm Activities

IN THE NEWS

Michelle O'Brien has been tapped by Boston Bar Association President Lisa Goodheart to serve as co-chair of the BBA's Environmental Sustainability Task Force. The Task Force will promote environmental sustainability in law practices, organize public service events focused on environmental sustainability, and identify pro bono opportunities for lawyers interested in organizations that promote sustainable practices.

Michelle O'Brien served on the planning committee and moderated a panel discussion on enforcement for the American Bar Association Section of Environment, Energy, and Resources' recent conference on *Key Environmental Issues in U.S. Environmental Protection Agency Region 1*. At the conference, **John Shea** submitted a paper and delivered a presentation on defending against citizen enforcement and appeals.

Noreen Ruggiero, Susan Lee and John and Carson Shea participated in the Massachusetts Military Heros Fund's September 11 Remembrance Project, putting together care packages and writing letters to American troops overseas.

Tom Mackie has been tapped by the Environmental Business Council of New England for a repeat performance as chair of its Solid Waste Committee.

Mackie Shea O'Brien co-sponsored the Environmental Business Council's evening reception with Kenneth Kimmell, Commissioner of the Department of Environmental Protection, and Alicia McDevitt, Deputy Commissioner for Policy and Planning.



From left to right: Tom Mackie; Kenneth Kimmell, Commissioner of the MassDEP; Alicia McDevitt, Deputy Commissioner for Policy and Planning, MassDEP; Peggy Briggs, Managing Principal, Epsilon Associates, at EBC Reception.

Environmental Enforcement Update

The United States and the Commonwealth of Massachusetts have had recent success in major environmental enforcement cases.

In a criminal enforcement matter, a federal jury convicted a former gas company of storing mercury in violation of the Resource Conservation and Recovery Act at a Pawtucket, Rhode Island facility. The government presented evidence that gas company technicians stored loose liquid mercury at an unstaffed, frequently vandalized building in an environmental justice community. In September of 2004, youths broke into the storage building and took containers of liquid mercury to a nearby apartment complex, where residents exposed to the liquid mercury were displaced from their homes for months. The court ordered the company to pay a \$6 million fine (in addition to cleanup costs) and pay \$12 million in community service payments. The First Circuit Court of Appeals upheld the decision. The company filed a petition for certiorari with the U.S. Supreme Court, which is currently pending.

The Massachusetts Attorney General's Office recently prevailed in criminal prosecutions for failure to report a fuel release and for procurement fraud in the delivery of waste disposal services. In one case, four related companies were fined a total of \$500,000 and ordered to provide environmental training for every employee of the company as a result of a 900 gallon fuel release that was not reported to MassDEP for 17 hours. The Massachusetts Appeals Court upheld the government's use of corporate collective knowledge to prove the crime of failure to notify, which requires knowledge of the fuel release. The Attorney General's Office also obtained criminal sentences involving a \$100,000 fine, confinement to the House of Corrections, probation, and community service against three individuals for violating environmental laws and the false claims act in the course of performing a government contract. The individuals' company had contracts to dispose of municipal street sweepings at a permitted landfill but sent the material elsewhere. The company submitted false weight slips for payment.



Rendering of the Expanded South Shore Baptist Church, Hingham by Vcevoid O. Strekalovsky

John Shea and Noreen Ruggiero were acknowledged at a Recognition Service by the South Shore Baptist Church in Hingham for their contributions to the church expansion project. Our Firm handled the permitting for the project.

Environmental Law Update

The requirement for MassDEP to issue a site suitability report for a solid waste facility site assignment is back in the **Solid Waste Disposal Act**. In the Fiscal Year 2012 state budget, the Legislature restored DEP responsibility for such reports. Similarly, responsibility for issuing permits for small refuse transfer stations (50 tons per day or less) is statutorily back at MassDEP, reversing a previous shift of that responsibility to local boards of health.

The budget also changed the audit requirements in Chapter 21E, the **Oil and Hazardous Material Release Prevention and Response Act**. MassDEP must now audit a "statistically significant number" of sites to ensure compliance with Chapter 21E and the Massachusetts Contingency Plan rather than 20 percent previously required. The requirement for MassDEP to audit all sites with an Activity and Use Limitation has also been eliminated from the statute.

In another section of the state budget, the **Chapter 91** program was changed to allow MassDEP to issue a general license authorizing non-commercial, small-scale docks and piers that are accessory to residential use in tidelands, Great Ponds, rivers and streams.

MassDEP released for public comment proposed amendments to **310 CMR 7.71**, Reporting of Greenhouse Gas Emissions. Among other proposed changes, these revisions will allow reporters to quantify emissions in accordance with The Climate Registry's then current General Reporting Protocol.

EPA recently promulgated the **Area Source Boiler MACT Rule** to reduce emissions of toxic air pollutants from existing and new industrial, commercial and institutional boilers located at area source facilities. Existing sources were required to submit initial notification to EPA by September 17, 2011, to demonstrate compliance with work practice standards by March 21, 2012 and comply with emission limits by March 21, 2014.

In *Ten Persons of the Commonwealth v. Fellsway Development LLC*, 460 Mass. 366 (2011), the Supreme Judicial Court confirmed again that project opponents cannot directly challenge the Secretary of Energy and Environmental Affairs' discretionary decisions under the **Massachusetts Environmental Policy Act (MEPA)**. Consistent with past decisions, the SJC confirmed that no jurisdiction existed for a claim under G.L. c. 214, § 7A against the Secretary because the Secretary is not the person causing or about to cause environmental damage but remanded the case for further proceedings against the developer and the permitting agency.

On October 24, 2011, MassDEP Commissioner Ken Kimmell released for public comment a **Draft Action Plan for Regulatory Reform**. The plan is the result of a six-month comprehensive effort by MassDEP staff and outside stakeholders to identify and implement regulatory reforms that will improve the agency's operations while maintaining, and in some cases improving, environmental outcomes. There are 21 specific changes identified in the plan, but suggestions for additional reforms are requested. The goal is to finalize the Action Plan and begin implementation by July 1, 2012.