



# Insights & Updates

Fall 2010

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## Development and NIMBYs: Has the Landscape changed?

**M**arket forces undoubtedly slowed the progress of development over the past few years. The number of submissions to the Massachusetts Environmental Policy Act (MEPA) Office declined and applications for environmental permits were also lower than usual. When the economy recovers, will the permitting landscape have changed or will things return to the way they were? Some changes to MassDEP's permitting regulations and several recent court decisions suggest that challenges to permitting decisions may have a harder time succeeding. Nonetheless, the permitting and appeals process for developments will continue to be difficult when there is opposition to a project. Here are a few examples of the results and lessons from recent cases that involved challenges to various developments permits.

In July the Supreme Judicial Court ended a citizen group's seven-year effort to preclude New England Wind, LLC and its predecessor from obtaining a permit under the Wetlands Protection Act to build two gravel access roads for the construction of wind turbines on Bakke Mountain in Florida, Massachusetts. The road would cross 12 intermittent streams. The citizen group challenged the project from the beginning, ultimately appealing the DEP Commissioner's decision approving the project, and the case made its way to the SJC. Consistent with years of established case law, the Court gave deference to DEP's interpretation of its regulations. It also found that DEP's decision approving the project was supported by substantial evidence.

Although the citizen group did not prevail in the litigation, it did succeed in delaying the project for seven years. The case prompted changes to DEP's wetland permitting and appeal processes, which now impose strict short timelines and require an appellant to state the basis for its claim early in the process. An opponent must provide technical reasons for a challenge to a project permit, supported by expert opinion.



The Supreme Judicial Court examined another controversial project involving a proposed mixed-use development known as Westwood Station. The Town of Canton challenged the MEPA certificate for the project (i.e., the determination that the Environmental Impact Report (EIR) was adequate) citing traffic concerns. The Town filed its lawsuit within 30 days of the Massachusetts Highway Department's Section 61 findings; however, a sewer connection permit had already been issued for the project more than 30 days before. Because the MEPA statute requires an action to be commenced no later than 30 days following the "first issuance of a permit," the Town's lawsuit was not timely.

The Town of Canton argued that the "first permit" should be construed as the first permit that pertains to a party's specific concern - here, the highway permit. The Court rejected that argument, saying essentially "first means first." As a result of this decision, it is even more imperative that project opponents (or others with interest) pay attention to the list of permits a project needs, as described in an EIR, and inquire about the status of the permit applications. A person may write to a DEP bureau, for example, and ask to be notified of the issuance of a particular permit.

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# Firm Activities

## IN THE NEWS

**Mackie Shea O'Brien, PC** has received a first-tier ranking in the inaugural edition of the U.S. News - Best Lawyers "Best Law Firms" publication. The firm was ranked for Environmental Law in the Boston metropolitan area. Tom Mackie, John Shea, and Michelle O'Brien have been listed in *Best Lawyers* for expertise in environmental law for the past three years, and were selected for inclusion in the 2011 edition.

**Michelle O'Brien** has been elected to the Lesley University Board of Trustees to serve a three-year term as Alumni Trustee. She is also serving a concurrent term on the Alumni Council. Michelle previously served on the University's Board of Corporators from 1998 to 2009, as President of the Alumni Association from 1998 to 2002, and as co-chair of the University's Centennial Steering Committee in 2009.

**Tom Mackie** co-chaired a three-session Waste to Energy Series for the Environmental Business Council. He also lectured on renewable energy at a Law Seminars International event.

**MSO** celebrated the firm's 25th Anniversary at an Open House attended by 150 clients, colleagues, friends and families with music provided by Hank VanLaarhoven, Philip Goddard and Katie Saltanovitz.



*Tom Mackie, John Shea and Michelle O'Brien celebrate the firm's 25th Anniversary.*

**John Shea** has been appointed to the Legislative Committee of the Massachusetts Water Works Association.

## Development and NIMBYs: *(continued from page 1)*

Opponents of projects who appeal special permits or other decisions issued by local zoning boards continue to bear the burden of demonstrating their "aggrievement." Massachusetts trial and appellate courts have decided a number of cases lately on the basis of a party's legal standing. Only persons aggrieved by a zoning decision can file an appeal under the Zoning Act. Abutters enjoy a rebuttable presumption that they are persons aggrieved who have legal standing to appeal a decision. If a town or project proponent challenges a person's standing, however, the person must produce evidence that he is aggrieved by the decision. The evidence must be more than unsubstantiated claims or speculative personal opinions. The determination of whether a person has standing is fact-specific

and typically is not decided until after the person's allegations are fleshed out in the discovery process. Many superior court and land court judges have dismissed cases in the last few years on the basis of a lack of legal standing. The appellate courts have also continued to address what is sufficient to confer standing to appeal a zoning decision. For example, the Appeals Court has stated that generally, concerns about the visual impact of a structure do not suffice to confer standing. Although abutters are likely to continue appealing zoning decisions, they must be prepared to withstand challenges to their legal standing and produce evidence of actual aggrievement.



# Renewables Corner

## DOER Regulations on Biomass

Stimulated by the Manomet Center's Biomass Sustainability and Carbon Policy Study and a compromise on an initiative petition that would have restricted renewable energy credits ("RECs") for biomass, in September the Massachusetts Department of Energy Resources proposed modifications to the Renewable Energy Portfolio Standard Class I regulations regarding eligible biomass. To receive a full REC per MWh, biomass plants will need to use only sustainably harvested clean wood (or other eligible biomass fuels), achieve a 50 percent reduction in lifecycle greenhouse gas emissions compared to natural gas plants, and demonstrate at least 60 percent efficiency. Biomass units that achieve at least 40 percent efficiency will receive one-half REC per MWh. The efficiency standards are considered achievable for small combined heat and power plants but unattainable for utility scale biomass. The proposal would phase out RECs for existing qualified facilities that do not meet the fuel eligibility requirements after 2012. Those biomass plants that use eligible fuel but do not meet the efficiency or GHG requirements will lose their RECs in 2015.

## Larger Solar Projects Eligible for Incentives

The so-called Solar Carve-Out Program established by the Green Communities Act in 2008 requires all retail electricity suppliers selling electricity to end-use customers in Massachusetts to obtain a certain percentage of electricity from eligible solar renewable generation sources. As part of the Economic Development Act signed into law in early August, the cap for eligibility to participate in the Solar Renewable Energy Certifications (SRECs) program was increased from 2 to 6 MW, per single contiguous parcel of land. DOER has proposed conforming amendments to the REC regulations.

## Firm Successes

**Michelle O'Brien** and **Gail Magenau Hire** obtained a verdict in favor of K.G.M. Custom Homes, Inc. after a six-day trial in Fall River Superior Court. K.G.M. sought to enforce a purchase and sale agreement to buy and develop land in Norton for a residential development under Chapter 40B.

**John Shea** was recognized for his key role at the groundbreaking for the \$10 million expansion of the South Shore Baptist Church in Hingham and spoke at a ceremony to commemorate the conveyance to the Town of a Conservation Easement on six acres of white pine forest adjacent to a Town well field.

## EPA Rule to Affect Disposal of Commercial and Industrial Secondary Materials

Proposed EPA regulations will remove a long standing "energy recovery" exemption for energy recovery plants that burn wastes as fuel. The proposed changes, which under court order are required to be final by mid-January 2011, will significantly change disposal options for a wide variety of commercial and industrial materials and effectively override state issued fuel beneficial use determinations ("BUDs"). EPA proposes a new definition of "non-hazardous secondary materials that are solid waste when used as fuel." It will no longer suffice that a waste is combusted in a facility with energy recovery and is covered by a state BUD. To remain a fuel, a secondary material must be processed, managed as a commodity, have a meaningful heating value, be combusted to recover energy, and have contaminant levels comparable to or lower than traditional fuels. EPA has stated that materials such as whole tires and painted wood in construction and demolition debris will not satisfy the proposed fuel criteria. Unless exempted by law, any facility that burns non-compliant secondary material will be considered an "incinerator." EPA also proposes to tighten up the emissions limitations for these commercial and industrial solid waste incinerators, making it economically infeasible to build a new facility and likely too expensive to continue to accept certain waste derived fuels at many existing facilities. While plants that are already regulated as incinerators may have as long as three to five years to come into compliance, the EPA has still not issued guidance on how currently exempt facilities can come into compliance when the rules come into effect in January. It is possible that in order to avoid being reclassified as incinerators, existing boilers will stop accepting wastes as fuel unless the wastes can be demonstrated to meet the EPA's new criteria.



*John Shea and David Parks, SSBC Building Committee at South Shore Baptist Church Groundbreaking Ceremony.*

# Environmental Law Update

## CHANGES TO SOLID WASTE SITING LAW ENACTED

The Solid Waste Disposal Act, G.L. c. 111, §150A, was quietly amended as part of the Fiscal Year 2011 state budget, effectuating two significant changes in the way solid waste facilities are permitted and presumably saving MassDEP money. First, the MassDEP will no longer be issuing site suitability reports for solid waste projects. The change will shorten the site assignment application process by up to 30 days and eliminate MassDEP's pre-hearing role. In addition, local boards of health (not the MassDEP) will now be responsible for issuing construction and operating permits for refuse transfer stations handling less than 50 tons per day.

## DEVELOPMENT PERMITS GET AUTOMATIC TWO-YEAR EXTENSION

Legislation signed by Governor Patrick on August 5 automatically extended state and local permits for the use or development of real property for two years. The permit extension is part of a significant economic development bill intended to promote job growth and long-term economic recovery. For approvals in effect or existence in the period beginning August 15, 2008 and continuing through August 15, 2010, two years shall be added to the lawful term of the approval. "Approvals" include any permit, license, variance, waiver, or other approval from any municipal, regional or state governmental entity that concerns the use or development of real property. The legislation specifically excludes a Comprehensive Permit issued under G.L. c. 40B.



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