

Insights & Updates

Fall 2005

MOEHRKE, MACKIE & SHEA, P.C.



Massachusetts Solid Waste Developments in 2005

Unlike prior years, 2005 has been a banner year for developments in Massachusetts solid waste law. As the number of new projects mired in local permitting disputes has increased, some facility proponents have attempted to wire around local regulation while others continue to try to build relationships. From the Commonwealth's active opposition to federally exempt rail transfer facilities to the Land Court's preemption ruling in the *Wheelabrator v. Town of Saugus* case, 2005 marks another watershed year in solid waste developments.

While it is difficult to gauge whether or not the developments of 2005 will ultimately lead to the siting of significant new solid waste processing and disposal capacity, there is reason to be optimistic. Although early in the year the Mass. DEP was considering abandonment of its policy to eliminate net export and import of waste by 2006, its draft 2005 Solid Waste Master Plan Revision continues to articulate the development of adequate in-state disposal capacity as a "goal", but without any target date. Even

though the DEP has not taken any meaningful regulatory steps to make siting a new disposal facility any easier, it is considering issuing a Request for Proposals to the organics processing industry to use state land for the development of a processing facility. In another long anticipated move, the DEP has finally promulgated its revisions to the Solid Waste Management Facility Regulations at 310 CMR 19.0000 *et seq.* including a revamped beneficial use determination process, a requirement for double liners on all landfills, and a ban on disposal of certain components of the C&D waste stream after July 1, 2006. From one perspective the C&D disposal ban is no big deal since, according to the DEP, most of these materials are already diverted from disposal. However, the C&D processing industry and those hoping to use C&D wood for a variety of applications

continued on page 2

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INSIDE

Firm Activities

Firm Successes

Recycling in MA

Environmental Law Update

Firm Activities

PROFESSOR AT LAW

Michelle O'Brien gave a presentation on Enforcement Under Chapter 21E at the annual meeting of the Licensed Site Professionals Association.

Tom Mackie and John Shea authored updates to their chapters on Solid Waste Law and Hazardous Waste Law in the MCLE Massachusetts Environmental Law treatise.

Tom Mackie co-chaired the Environmental Business Council's seminar on Biomass: Recovering Renewable Energy from Construction and Demolition Debris Wood. He also was a panelist at MCLE's Environmental Permitting seminar and made a presentation on Host Community Agreements at the Solid Waste Association of North America Massachusetts Chapter Annual Meeting.

DOING GOOD

Gail Magenau planned the first volunteer day for EBC's new Young Environmental Professionals Committee, which took place at

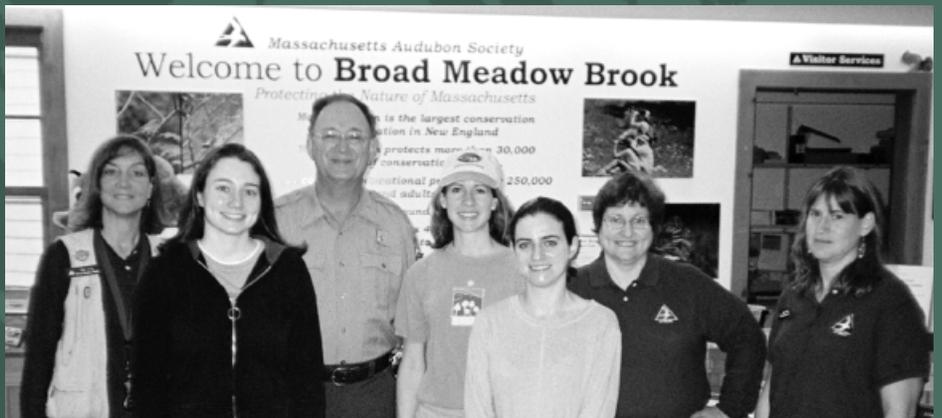
Broad Meadow Brook Wildlife Sanctuary in Worcester. Despite the rainy weather, volunteers enjoyed a tour of Mass. Audubon's impressive grounds and helped the Sanctuary staff prepare for its fall activities.

SPORTS AUTHORITY

The firm also sponsored Jenny Koningisor's high school senior project, a 3,200 mile Bike

Ride Across America to raise money for breast cancer research. She was accompanied on her amazing Spring trek by her dad, our friend and colleague, Jim Koningisor.

John Shea came out of retirement to help coach the Stoughton JV team in the Abington Summer League. The squad of sophomores went 10-3 and beat Norwell for the Championship.



Massachusetts Solid Waste Developments in 2005 continued from page 1

ranging from mulch to fuel for power plants, are encouraged by the ban on wood disposal.

The courtroom appears to have been the place where the most meaningful developments took place in 2005. In *Goldberg v. Board of Health of Granby*, the Supreme Judicial Court upheld DEP and Granby Board of Health decisions to site a vertical expansion despite the fact that the expansion did not meet the site assignment criterion establishing a 1000-foot setback from residences. Notwithstanding citizen protests, the Court ruled that the DEP had properly exercised its authority to determine which siting criteria to apply to a landfill expansion. The Court gave "substantial deference" to the DEP's expertise and interpretation of the statute over which it had "primary responsibility for administering." *Goldberg* will no doubt be cited by facility proponents seeking to advance DEP interpretations of the site assignment regulations before hostile citizens and boards of health.

In another victory for facility owners at the trial court level, in *Wheelabrator v. Town of Saugus*, the Land Court held that the Town of Saugus's passage of a zoning by-law limiting landfill height was invalid on several grounds. The Land Court found the by-law violated the prohibition contained in G.L. c. 40A, § 9 against

new by-laws restricting expansions of solid waste facilities in industrial zones. Most importantly the Land Court found that the Town's

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attempt to limit the height of the landfill was preempted because it "impermissibly interferes with the operation of G.L. c. 111, § 150A." Perhaps the holy grail of state preemption of local regulation of solid waste facilities will become a reality in Massachusetts, an outcome

heretofore only hoped for by industry proponents and feared by industry opponents.

Given the difficulty of siting new solid waste facilities, proponents are becoming increasingly creative. The proponent of a project that would involve transferring waste onto rail cars at a rail siding in Wilmington, Massachusetts, has claimed exemption from all pre-construction permit and approval processes under the preemption provided to rail transportation under the Interstate Commerce Commission Termination Act of 1995, ("ICCTA"). The ICCTA vests the Surface Transportation Board ("STB") with "exclusive" jurisdiction over "transportation by rail carriers ... and facilities of such carriers." Initial opposition by the Town of Wilmington grew to include the Mass. DEP, the Solid Waste Association of North America, and the National Solid Waste Management Association. These industry organizations opposed preemption for the project because it would create an uneven playing field where rail transfer projects would skip the entire state and local permitting process. Ultimately, the STB dodged this issue by dismissing the application (without prejudice) on the ground that the project that had been originally reviewed had been so changed that it required another review.

Innovative European Recycling Project Coming to Massachusetts



Over the past six months Tom Mackie and Eric DiVincenzo have worked with a Danish Company, Gypsum Recycling International (GRI), to establish a groundbreaking recycling operation in the United States known as Gypsum Recycling America, LLC (GRA).

GRI is the worldwide leader for gypsum wallboard recycling. The company was started in 2001 in Denmark, where more than 60 percent of all gypsum and plasterboard waste is now being recycled. Under the direction of CEO Henrik Lund-Nielsen, GRI has expanded its operations in Europe to Sweden, Norway, Holland, Ireland, and the United Kingdom, and is now targeting the United States.

Henrik Lund-Nielsen first became involved in the Massachusetts solid waste scene when he started attending DEP gypsum working group meetings in early 2004. Hydrogen sulfide odors from decaying gypsum wallboard waste in landfills prompted the DEP and gypsum wallboard manufacturers to explore alternatives to landfill disposal. In an ambitious move, late last year GRI and two major gypsum wallboard manufacturers (United States Gypsum and National Gypsum) together pledged to start gypsum wallboard recycling operations in Massachusetts in the fall of 2005. GRA's first gypsum wallboard recycling plant using GRI's technology is scheduled to go on line in Massachusetts this year.

Our firm assembled the team of engineers and other professionals to identify, lease and permit a suitable Massachusetts facility location, establish the U.S. company, and advise on

the environmental and international law implications of doing business in America.

GRA will employ a unique collection and processing management system to make the recycling of gypsum wallboard a competitive business enterprise. By controlling transporta-

As a result of
our innovative
technology,
gypsum
wallboard is
100% recyclable.

tion and fixed infrastructure costs and having a guaranteed outlet for its product, problems that have plagued recycling operations in Massachusetts to date, GRA will be able to offer pricing competitive to disposal contractors. The lynchpin of the system's success is an innovative European-designed mobile patented processing unit developed by GRI that turns waste

gypsum wallboard into a pure gypsum powder. The powder goes directly into the manufacture of new gypsum wallboard. Another key feature of the GRA system is the mobile processing unit, which can be shuttled between several warehouses throughout the region (and even down the eastern seaboard).

The Mobile Recycling Unit

"As a result of our innovative technology, gypsum wallboard is 100% recyclable" boasts Mr. Lund-Nielsen. The recycling of gypsum wallboard will further the Commonwealth's Beyond 2000 Solid Waste Master Plan target of 88 percent diversion of construction and demolition debris materials from the waste stream. This process helps avoid the unnecessary disposal of recyclable materials in landfills.

For more information on the firm's solid waste and recycling facility development services, please contact Tom Mackie or Eric DiVincenzo at (617) 266-5700.

Firm Successes



Michelle O'Brien

Trial Victory

Michelle O'Brien obtained one of the top verdicts of 2005 in the state, after a two-week trial in Fall River Superior Court. Michelle, assisted

by Eric DiVincenzo, and with co-counsel Thomas P. Crotty of New Bedford, obtained a \$3.2 million judgment against a town that unlawfully shut down a coal ash structural landfilling project. The town subsequently agreed to pay \$2,250,000 to settle the matter and avoid cross-appeals.

Coastal Appeal

After years of contentious litigation, Michelle O'Brien obtained a victory in the Massachusetts Appeals Court in a case involving coastal wetland resources and snarly issues of administrative law.

ENVIRONMENTAL LAW UPDATE

DEP Website

DEP has unveiled its new website at www.mass.gov/dep. It is billed as “your portal to information about the work Mass DEP does... [and] about environmental matters in your community” and is the place to conduct on-line business with DEP through its Service Center. The website is now organized primarily around media (air, water, etc.) and has an improved search function designed to respond to specific user needs. DEP is also improving complex applications, such as DEP forms, maps and geographic tools. Favorite links and pages may have new locations. The “old” website will be maintained in parallel for several months.

Endangered Species

The Division of Fisheries and Wildlife has issued new regulations, effective July 1, 2005, under the Massachusetts Endangered Species Act (“MESA”). The regulations establish a more



formal process under the Natural Heritage and Endangered Species Program (“NHESP”) for mapping of rare species, determining whether

a “take” of rare species will occur, and issuing a Conservation and Management Permit (“CMP”) for a project with a “take.” The changes promote early consultations with NHESP to determine whether a project will impact priority habitat. There are now criteria and CMP performance standards, deadlines for decisions, and administrative appeals for denials. The new rules allow a landowner to request a list of species on the property, undertake a voluntary assessment, and request a guarantee from the Division that for three years no new records of species of special concern will need to be addressed in any MESA or MEPA review of the property. A Division determination that no “take” will result from a project is effective for three years, and can be extended up to three years. Projects also may be protected from new reports of species by certain “permit shields” such as a final Order of Conditions, any permit that required a noticed public hearing, and 15 days after issuance of a building permit.

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