

# Insights & Updates

Fall 2003

MOEHRKE, MACKIE & SHEA, P.C.



*DEP Commissioner Robert Golledge and John Shea*

## **AN INTERVIEW WITH NEW DEP COMMISSIONER GOLLEDGE**

Robert W. Golledge, Jr., the new Commissioner of the Massachusetts Department of Environmental Protection (“DEP”), may be one of the few constants in a sea of change at Massachusetts’ environmental agencies. After a stint in the private sector as Director of Environmental Sciences at Vanesse Hangen Brustlin Inc. (VHB), Bob has returned to the DEP where he spent 13 years in a variety of positions, including Director of the DEP’s Central Regional Office in Worcester and Chief of Staff and Director of the Division of Wetlands and Waterways in Boston.

Bob brings extensive DEP experience to the Commissioner’s position. The last three Commissioners were all from outside the Department. Both environmental and industry organizations have lauded Bob’s appointment primarily due to his reputation as a fair and reasonable regulator. Secretary of Environmental Affairs Ellen Roy Herzfelder calls him a “champion of sensible reform.”

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## **TURNING DIRT INTO DOLLARS**

The Central Artery/Tunnel (CA/T) Big Dig project excavates thousands of tons of Boston dirt daily, much of it slightly contaminated. With the help of Moehrke, Mackie & Shea and the engineering firm of Camp Dresser and McKee, the Town of Saugus has been successfully using Big Dig dirt to grade and shape the Town’s old landfill in preparation for capping. In the process, the Town is receiving hundreds of thousands of dollars in tipping fee revenue for landfill closure related costs.

Just about a year ago the Town, like many others today, faced potential penalties for failure to close its landfill. The Town lacked both the material to bring the landfill

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# An Interview with New DEP Commissioner Golledge *continued from page 1*

Bob's appointment may signal that the Romney administration does not want to rock the boat at the DEP any more. After the surprise appointments of Douglas Foy from the Conservation Law Foundation as Chief of the new Commonwealth Development agency and Ellen Roy Herzfelder as Secretary of the Executive Office of Environmental Affairs, the Administration's plan for its environmental agencies was very unclear. The Administration's appointment of Bob Golledge, while not predicted, was a smart move to restore stability in difficult times.

In early October, Commissioner Golledge generously gave MM&S partner John Shea an exclusive look into his plans for the DEP. Here is a condensed version of the Commissioner's interview with John.

**JS:** How has your life changed in the last three months? What is it like to be the top dog?

**BG:** As you know, coming in on the whole explosion of the vehicle inspection and

maintenance program has been a huge undertaking for both me personally and the entire agency. I would say that I'm probably working two to three times harder than I've ever worked in my life; but at the same time, there are exciting issues and it's a great opportunity to steer the Department in the right direction.

**JS:** You have been on a whirlwind speaking tour. What are your themes? How has your message been received?

**BG:** With the budget constraints and all the layoffs and early retirements, DEP is down 250 people, which has a huge impact not only on the ability to appropriately staff our many programs, but we also lose institutional knowledge.

My themes are: (1) compliance and enforcement; (2) continuing to be a national leader; (3) information management and decision making; and (4) program improvements.

**JS:** The DEP has scored big on two recent enforcement actions: the Waters case with a \$5.9 million penalty and the Sunoco case with a \$968,000 penalty. Are you looking for big dollar cases?

**BG:** DEP is going to spend a lot more time on compliance and enforcement. That doesn't necessarily mean the million dollar penalty case, but we need to have the right presence out in the field and some targeted initiatives to send the right message to people out of compliance; we're going to come after them strong. DEP will be seeking a balance of incentives and disincentives for those who are in the permitting process and for those outside the process. We should have tough standards and the permitting process should be a little bit simpler so as not to create disincentives to comply. We want to eliminate the 10 percent who claim permitting is too difficult and just go ahead with a "catch me if you can" attitude. It is not fair to companies that are being good stewards. I think we'll see swifter actions and appropriate penalties. DEP is not going to negotiate consent orders for nine months. We'll either reach agreement quickly or DEP will issue unilateral orders. Especially with our staffing reductions, we are going to use our time more efficiently and act decisively.

**JS:** DEP has been a national leader with the 21E privatized cleanup program. How will DEP have a national presence during your tenure?

**BG:** DEP must continue to play a huge role on national air issues that are critical to

## Firm Activities

### Sports Authority

Coach John Shea's Stoughton Eighth Grade Travel Basketball Team is finishing up its summer training program and preparing for its first tournament. In 2001, the team posted a 21-5 record, won the Championship, and lost the East Division Championship game in OT. In 2002, the team was 19-3 overall, won the West Division Championship, and again fell short in the Championship game. With high school competition next for his players, this will be Coach Shea's last season at the helm of the travel team.

### Professors at Law

John F. Shea spoke at CLE International's Connecticut Land Use Law Conference in Hartford – "When the Going Gets Tough . . . Strategies for Contentious Land Use Disputes". He shared with the audience of lawyers, regulators, consultants and developers his "Ten Commandments of Permitting", and illustrated successful strategies with "Town Meeting Lynch Mob," "Bulldozers and the Infirm" and "Swans versus the Godfather". Michelle O'Brien was a speaker at the Land Use Law Update in Massachusetts seminar sponsored by the National Business Institute. Her presentation on "Complying with Environmental and Special Use Regulations" included a discussion of wetlands, contaminated property, and Brownfields initiatives. Michelle also served as a panelist for the Massachusetts Bar Association's "Environmental Law Basics" seminar, a MCLE seminar on "Handling Environmental Issues in Residential Real Estate," and the annual MCLE "Environmental Law Basics" seminar where she discussed government enforcement activities.

## Onward and Upward



Gail Magenau

The faces of MM&S are changing, as our attorneys move onward and upward.

In March Michelle O'Brien became a shareholder of the firm. While continuing to handle most of our litigation and enforcement matters, Michelle now shares in the management of the firm. On July 1st Anton Moehrke became "of counsel" to the firm, as he began his journey toward retirement. Tony continues to work actively on a few matters and provides support and guidance in others.

Gail Magenau has joined us as an associate. Gail holds a Master of Environmental Engineering degree as well as a law degree. Her experience as an environmental consultant for several major companies adds to our expertise in this challenging field. Gail also has experience in corporate law.

Tom Mackie has been elected to the Board of the Environment Business Council and continues as co-chair of its Solid Waste Committee.

## TURNING DIRT INTO DOLLARS *continued from page 1*

to closure grades and the funds for landfill closure. The Town Manager realized that the Big Dig dirt presented a unique opportunity to obtain the grading material and to provide funds for the closure. However, he needed to overcome local skepticism, work his way through challenging procurement issues, negotiate an interagency agreement with the CA/T Project and obtain approval from the Department of Environmental Protection, including a modification to the Administrative Consent Order for landfill closure. Enter MM&S shareholder Michelle O'Brien and Camp Dresser & McKee (CDM) as the Town's lawyer and engineering consultant for the project.

Michelle is no stranger to Saugus politics. She had served on the Town Planning Board for several years and has successfully represented the Town in litigation. Thus, Michelle was well equipped to guide a team of public officials and engineers through the numerous meetings and negotiations with local officials, members of the public, DEP, and the CA/T staff. Familiar with the benefits of demonstrative evidence, Michelle helped arrange a bus tour for local officials to view the Big Dig operations at the Subaru pier, where some of the dirt is stockpiled, and to see a completed landfill closure in West Roxbury now containing several soccer fields, a walking trail, and terrific views of Boston and the

Charles River, known as Millennium Park.

Ultimately, the Town agreed to accept 200,000 cubic yards, equivalent to 330,000 tons, of "historic fill" with an option to increase the quantity. So far approximately 200,000 tons of fill have been received at the Saugus landfill.

"The Town and the DEP have required a rigorous testing procedure before the dirt

can be spread on the landfill. In addition, the Town constructed storm water detention basins and relocated certain town public works functions, including the yard waste composting area. The project has been going so well that the Town recently decided to take additional material so that the landfill closure can be completed at no cost to the Town."

"The success of these projects is in the planning," said Chris Barnett, materials manager for the CA/T project. "The Town put a good team together and we tried to anticipate issues and potential problems. The project has been a success for all parties because of the time and effort put into the planning process."



*Michelle O'Brien and Rick Spieler at the Saugus Landfill*

Once the grading and shaping of the landfill are complete, the Town will install a permanent cap. At the end of the project, in the summer of 2005, the Town expects to have a flat grassy area for recreational fields and a walking trail at the site, as well as a new-and-improved yard waste drop-off and compost area.

This project would not have occurred without Michelle's steady influence and knowledge of both solid waste law and the state system. We are proud of the savings she helped the Town achieve.

For more information on the landfill closure project, contact Michelle O'Brien.

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continuing to have to ratchet down on all our industries to comply with the Clean Air Act, and two upwind states with the same industrial sectors do not require the same level of air pollution control technologies because they are in attainment. In addition to the Attorney General's lawsuits, in the last three months I've submitted comments on separate proposed rules at EPA that relate to what the Administration is calling the Clear Skies Initiative. DEP will have a strong voice on the Ozone Transport Commission, which is all the Northeast states banding together against allowing upwind industries to gain an advantage and causing us to suffer economically, environmentally, and health-wise.

**JS:** How does information management relate to DEP decision making?

**BG:** This one is probably controversial for many: I don't view consensus to be a prerequisite for DEP decision making. That does

not mean I am not for consensus, but I think we're often too conservative and don't make a decision until we've reached consensus. Because of the diverse participants and interest groups that DEP invites to the table when we develop policies and regulations, it's an unrealistic goal to secure consensus. If we can reach consensus in a short period of time, I'm all for it, but DEP cannot afford the time and effort over a protracted period to reach consensus for two reasons: all sorts of lost opportunities that DEP would be getting to, but more importantly, we are setting the environmental bar too low by reaching consensus. We should strive for a higher bar. I still want thoughtful, spirited debate, both internally and externally; however, in the future we will set a firm deadline by which decisions will be made. Consensus will be reached sooner, the debate will be narrowed, and DEP will make a timely decision.

We are making a huge undertaking we call "e-DEP." The goal is to have within three years all permit transactions on-line. We expect to have all waste site cleanup transactions to be on-line by the end of this calendar year. We have an aggressive schedule for additional programs to be fully on-line by the end of the fiscal year. DEP will use this information to focus and speed up its decisions.

**JS:** Can you preview some likely program improvements?

**BG:** The Bureau of Waste Prevention will unveil soon its Strategic Targeting, Assessment & Response (STAR) Program, which will take a more formal, systematic and information-driven approach to oversight of pollution sources.

It is time to revisit the Solid Waste Master Plan because its themes and goals may be unrealistic under current conditions. For example, the no net export goal clashes with landfill closures and a lack of newly permitted

landfill capacity. We need to think about the proper role of DEP, how much we should let the free market find its place, how to site new facilities given Massachusetts' strong Home Rule, and the ban on incineration. DEP will issue some proposed C&D regulations soon and also some siting criteria.

In the wetlands program, by the end of 2003 we expect to release for public comment draft regulations that contemplate a general permit for work 50 feet away from the wetland. If there is a "no touch" zone and a deed restriction, a permit would not be needed. Once the wetland boundary is delineated and the proponent stays 50 feet away, there would not be an appealable permit. This will reduce the backlog of appeals, and free DEP for enforcement for wetland impacts from project construction.

Within the next few weeks we'll propose new mercury rules for power plants, setting tough standards with some flexibility.

**JS:** What do you want your legacy as Commissioner to be?

**BG:** It may sound corny, but I want to leave the institution stronger three years from now in how it makes decisions, sets tough environmental standards, and is a national leader. When I was considering the position, you and several people advised that anybody can lead in good times, but in tough times it will take a person who can embrace risk and instill confidence. In turbulent times,

morale is a huge issue: keeping people focused and committed to long-range goals. I am confident DEP's talented and dedicated people will meet the challenges ahead. Our people will focus on the most important challenges, will become comfortable with less than a "bullet proof" permit, and will achieve greater incremental environmental protection with a strong enforcement presence.



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