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Insights & Updates

Spring 2013

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Moment of Silence at Boston Marathon bombing memorial outside of MSO offices.

Our hearts go out to the families and victims of the Boston Marathon bombings and MIT shootings. Thank you to the first responders, law enforcement and the many others who helped to save lives and bring our City back to life. Thanks go out also to our clients and colleagues who checked on us; we appreciate your concern. Although several MSO employees were in the City on the day of the Marathon, all are safe.

Agency Guidance: The Tyranny of Small Decisions

In our firm's 30 years of environmental law practice we have been asked many times about the enforceability of guidance and policy documents issued by administrative agencies such as the MassDEP and the US EPA. Both agencies have published a myriad of documents that either interpret or supplement the laws and regulations they administer. We offer here our views on this challenging question.

The difficulty and importance of the question is exemplified by the recent Eighth Circuit Court of Appeals decision in *Iowa League of Cities v. EPA*, No. 11-3412, (8th Cir., March 25, 2013): "[i]dentifying where a contested rule lies in the sometimes murky spectrum between legislative rules and interpretive rules can be a difficult task, but it is not just an exercise in hair-splitting formalism. As agencies expand on the often broad language of their enabling statutes by issuing layer upon layer of guidance documents and interpretive memoranda, formerly flexible strata may ossify into rule-like rigidity. An agency potentially can avoid judicial review through the tyranny of small decisions."

According to the Massachusetts Supreme Judicial Court, "it is no use trying to frame an airtight definition of such [interpretive] pronouncements which would serve to distinguish them from regulations; on the other hand, it may be possible to point to factors of differentiation in light of the functions or purposes that are furthered by notice and hearing in the given context." *Massachusetts General Hospital v. Rate Setting Comm'n.*, 371 Mass. 705, 707 (1977).

To better navigate this "murky spectrum" where "airtight definitions" do not exist, it is useful to understand some basics. Agencies act in three fundamental ways: through regulations, adjudicatory proceedings, and guidance. Agency regulations are particularly important where an agency must interpret legislative policy that is only broadly set out in governing statutes. While the Massachusetts Supreme Judicial Court has expressed a clear preference that an agency develop policy through rule making, as opposed to through individual adjudicatory proceedings, it is a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rule making. The choice between proceeding by general rule or by individual *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency. The agency's choice is not always limited to adjudication or rulemaking. Agencies intending to fill in the

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Firm Activities

IN THE NEWS

On January 31st the firm again sponsored, and **Tom Mackie** chaired, the Environmental Business Council and MassDEP's Seventh Annual Construction and Demolition Materials Summit. More than 150 people attended the summit, which featured MassDEP Commissioner Ken Kimmell and covered topics such as C&D to energy and modular gasification.

Michelle O' Brien co-taught "Environmental Law for the LSP," a four-hour course for licensed site professionals and other consultants.

Tom Mackie authored *Keeping the "Mass" in Biomass: the Permitting Saga of Palmer Renewable Energy* in the May issue of EM magazine, the national periodical of the Air and Waste Management Association.

On May 1st **Peter Durning** and **Michelle O' Brien** participated in Law Day in the Schools. Through the Boston Bar Association and participating Boston public schools, this program introduces youth to lawyers and legal concepts. Peter and Michelle each taught a lesson about equality to a fifth grade class.

John Shea presented "Defending Citizen Suit Stormwater Enforcement Actions" at the April 19, 2013 Law Seminars International program *Stormwater Management in New England*.

Tom Mackie was on the plenary panel on Zero Waste in Massachusetts at MassRecycle's R3 Conference on April 1, following the keynote presentation by MassDEP Commissioner Ken Kimmell.

Agency Guidance: The Tyranny of Small Decisions (continued from page 1)

details or clear up ambiguities of an established policy may issue interpretative or informational pronouncements without going through the procedures required for the promulgation of a regulation.

The problem arises when an agency issues a guidance document or takes a policy stance that is treated as binding and enforceable, without going through the formal rule making process of notice and comment or an adjudicatory proceeding. Guidance is not supposed to be either binding or enforceable, but there are plenty of examples of agency guidance documents that set forth new standards. The hallmark of an interpretative rule or policy statement is that it cannot be independently legally enforced. It is the underlying legislative rules that drive compliance, and thus when an agency applies a newly announced interpretative rule or policy statement, there must be some external legal basis supporting its implementation.

The courts recognize this critical distinction: "[a] legislative rule, i.e. regulation promulgated by an agency under legislative power validly delegated to it, is as binding upon a court as a statute, if it is within the granted power, issued pursuant to proper procedure, and reasonable, however, an interpretative rule is not binding on the courts." *Niles v. Boston Rent Control Adm'r.*, 6 Mass. App. Ct. 135 (1978).

In part due to the binding and enforceable nature of a regulation, an agency must publish notice and solicit comments before promulgating any new regulation. Failure to follow the formal rule making procedures exposes the rule to invalidation. But the same does not hold true for mere guidance. Indeed, it is the lack of any procedure for review and comment on agency guidance masquerading

as binding regulation that draws so much criticism and challenge.

The state and federal courts approach the question somewhat differently. Under federal law as explained in the *Iowa League* case:

Whether [a] Guidance Document is a legislative rule is largely a legal, not a factual, question, turning . . . primarily upon the text of the Document. The critical distinction between legislative and interpretative rules is that, whereas interpretative rules "simply state what the administrative agency thinks the statute means, and only 'remind' affected parties of existing duties," a legislative rule "imposes new rights or duties." When an agency creates a new "legal norm based on the agency's *own authority*" to engage in supplementary lawmaking, as delegated from Congress, the agency creates a legislative rule. Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules. It follows from this distinction that interpretative rules do not have "the force of law." Whether or not a binding pronouncement is in effect a legislative rule that should have been subjected to notice and comment procedures thus depends on whether it substantively amends or adds to, versus simply interpreting the contours of, a preexisting rule. (citations omitted)

Massachusetts state courts appear to follow a slightly different analysis. As noted in the *Massachusetts General*

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case, the state court focuses on the “functions or purposes that are furthered by notice and hearing in the given context. To the degree that the agency puts forward a proposition that is ‘complex,’ or of ‘broad or pervasive coverage,’ notice and comment of formal rule making would be more useful so that the proposition would be considered a regulation.” Likewise, ‘a proposition that is seen to involve difficulties of compliance,’ (i.e., if not followed would be considered to be a violation), would benefit from the notice and comment process required for new regulations.

Despite this state law precedent, the regulated community in Massachusetts has rarely challenged the MassDEP’s authority to regulate through guidance. A review of recent cases reveals only *Water Department of Fairhaven v. Massachusetts Department of Environmental Protection*, 455 Mass. 740 (2010). In that case, fourteen Massachusetts cities and towns and their water departments challenged the MassDEP’s authority to impose new conditions on the renewal of their water withdrawal registrations and to create an adjudicatory

hearing process to resolve grievances regarding those conditions. Although the case did not, strictly speaking, involve a guidance document, it did involve a successful challenge to the change in MassDEP policy that had not been adopted through regulation. The SJC approached the case as “a question of statutory construction” without any meaningful discussion of the regulation/guidance dichotomy, perhaps because such an analysis is so fraught with “murky definitions” where “airtight distinctions” are not to be found. From a practitioner’s perspective, the lesson is that it is probably better to challenge the agency based upon the lack of authority under the words of the governing statute, rather than get bogged down in arguments over more arcane questions of enforceability. Nevertheless, until challenged, as the *Iowa Cities* court stated, “agenc[ies] potentially can avoid judicial review through the tyranny of small decisions.”

(Note: For ease of reading, some quotation marks and case citations have been omitted from this article. For more information, contact Tom Mackie.)

Environmental Law Update

Brownfields Tax Credit Program

Unless the Massachusetts Legislature acts this year, the Brownfields Tax Credit will expire. The current law provides a tax credit of 25 or 50 percent of the costs of cleaning up contaminated property in economically distressed areas. It applies to sites that have achieved a permanent solution or remedy operation status by January 1, 2014. Legislative proposals to extend the credit are pending before the Joint Committee on Revenue.

Wind Turbine Sound Studies

As a result of concerns about the effects of wind turbine sound, MassDEP and the Mass. Clean Energy Center are overseeing several studies of turbine acoustics and sound. MassDEP is conducting a sound study in Fairhaven and has engaged a contractor to conduct a sound study of the town’s turbine in Kingston. The operators of wind turbines in Scituate and Florida/Monroe are performing studies that MassDEP will review. MassCEC has retained a contractor to perform detailed acoustic, wind, and turbine operational monitoring of existing Massachusetts wind energy facilities. The results of the studies may lead MassDEP to modify its noise policy and perhaps to revise or adopt new standards and measurement procedures for wind turbines.

Environment and Energy Funding

On March 15th, Governor Patrick announced the filing of a \$911 million energy and environmental bond bill. The bond bill includes \$124 million for land and park programs (\$40-50 million of which is for land conservation), \$312 million for energy programs, \$120 million for coastal infrastructure, and \$10 million for the Sustainable Water Management Initiative and helping cities and towns meet mitigation requirements through grants. The bill, H3332, is under review by the Committee on Environment, Natural Resources and Agriculture.

Regulatory Reform

The MassDEP expects to issue final regulatory reform packages this fall including the following major areas:

- Massachusetts Contingency Plan (“MCP”) (draft regulations issued 3/1/13): eliminating Tier 1 permitting; simplifying the site classification system; eliminating Activity and Use Limitation Opinions by LSPs; allowing for closure of sites with an operating subslab depressurization system; changing the names of site closure documents; revising nonaqueous phase liquid (NAPL) requirements; updating MCP Method 1 numerical cleanup standards and Reportable Concentrations based on new toxicity information.
- Wetlands/Waterways/Water Quality Certification (“WQC”)/Wastewater (draft regulations issued 3/1/13): coordinating MassDEP and MEPA review of certain major waterways license applications; consolidating various permit applications for coastal/dredging projects; creating a general wetlands permit and limited project provisions for ecological restoration projects (dam removals); creating a general license for certain small-scale docks; incorporating stream crossing standards into the wetlands and WQC regulations; creating wetlands limited project status for access roads for the development of renewable energy projects; eliminating the variance requirement for certain public dredging projects; clarifying that post-1986 stormwater management systems do not create jurisdictional wetland resource areas or buffer zones.
- Solid Waste (draft regulations issued 12/14/12): streamlining transfer station permitting; adding presumptive approvals for certain landfill post-closure uses and for special wastes; requiring more third party inspections of solid waste facilities; streamlining asbestos abatement requirements.
- Water Management (draft regulations not yet issued): implementing a Sustainable Water Management Initiative (SWMI) for water withdrawals.



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Insights & Updates

Firm Successes

Michelle O' Brien completed a settlement of the third and final appeal associated with two zoning special permits for our client's wind energy facility in Plymouth. As a result, Future Generation Wind, LLC is moving forward with its four-turbine project. Michelle is also defending an appeal of a single turbine project in another part of Plymouth.

Peter Durning assisted a Boston-area cold storage facility with a resolution of an EPA enforcement action under the Clean Air Act.

Michelle O' Brien obtained a solid waste site assignment for a new construction and demolition materials transfer station on Nantucket Island.

The Massachusetts Department of Conservation and Recreation has selected MSO and **John Shea** along with engineering firm TRC to provide permitting services to its Waterways Division, and the Town of Concord has selected MSO and **John Shea** along with Environmental Partners Group to prepare a comprehensive long-term plan for the Nagog Pond surface water supply.

John Shea led the successful permitting, without appeals, of ocean-front docks and piers for clients in Gloucester and Hingham with novel mitigation including conservation moorings and eelgrass mitigation and monitoring. **John** also assisted a well-known national home builder to obtain a MassDEP groundwater discharge permit for a 42 home wastewater treatment system in Cohasset, Massachusetts.