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Insights & Updates

Spring 2012

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Clean Energy Results? Getting There.

A few years ago the Patrick Administration set lofty goals for expanding the Commonwealth's clean energy production. Around the same time the Massachusetts legislature passed several game-changing pieces of legislation, such as the Green Communities Act and the Global Warming Solutions Act. Initially, the constituent agencies of the reconfigured Executive Office of Energy and Environmental Affairs (EOEEA) were very busy writing regulations and policies to effectuate the new laws, but more recently they have been more focused on implementation. Consequently, many projects are in the pipeline and some such as solar panels and a handful of wind turbines are actually constructed. Despite all of this activity, development of renewable energy facilities still faces significant challenges, including permitting struggles and financing, that have not yet been fully addressed.

The Commonwealth remains committed to being a national leader in clean energy. To that end, in November of 2011 two EOEEA agencies, the Department of Environmental Protection (DEP) and the Department of Energy Resources (DOER), launched their Clean Energy Results

Program. According to its brochure, the Program will "further strengthen the environment-energy connection in Massachusetts by bolstering DEP and DOER's efforts to reduce regulatory and other barriers to clean and energy efficient development across the state." The identified barriers to the construction of clean energy and energy efficiency projects are complex environmental permitting, limited information for communities on environmental requirements and best practices, and difficulty in finding appropriate sites for new projects.

The Administration established short-term (within one year) and long-term goals for the Clean Energy Results Program. Among the short-term Program activities is DEP's establishment of "clean energy support teams" consisting of specialists in environmental permitting and standards to provide hands-on assistance to local communities. Each of DEP's four regional offices has a point person and DEP has a Clean Energy Director in Catherine Finneran. Catherine was DEP's brownfields coordinator for many years and she has significant experience working with support teams from multiple agencies.

DEP completed one of the short-terms goals of the Clean Energy Results Program with the publication in January of the *Wind Turbine Health Study: Report of Independent Expert Panel*. In conjunction with the Massachusetts Department of Public Health, DEP convened a panel of seven independent experts whose charge was to identify any documented or potential health impacts of risks that may be associated with exposure to wind turbines. The panel members' backgrounds are in public health, epidemiology, toxicology, neurology and sleep medicine, neuroscience, and mechanical engineering. Through this study DEP sought to advance public discussion on the health effects of wind turbines based on sound science. The panel conducted an extensive literature review of scientific literature as well as other reports, popular media, and public comments solicited and received by DEP.

The expert panel presented its findings relative to three areas associated with the operation of wind turbines: noise and vibration, shadow flicker, and ice throw. Its report essentially

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Firm Activities

IN THE NEWS

John Shea has joined ProVisors®, a national and regional community of professionals who serve as senior-level trusted advisors and share the highest standards of integrity, performance and accountability.

Tom Mackie chaired the Environmental Business Council of New England and MassDEP Sixth Annual Construction and Demolition Materials Regional Summit in January and moderated a panel on Organics at MassRecycle's 2012 Recycling and Organics Conference in March

Sam Mackie's first place finish at the Massachusetts Division 1 boy's state swimming championship in the 100-yard breaststroke earned him All American consideration and All-Scholastic selection by the *Boston Globe* and the *Boston Herald*. In December, Sam finished seventh at the Junior National Championships in the 100-yard breaststroke. Sam will study and swim at Bucknell University in the fall.



A group of Boston Bar Association members including **Michelle O' Brien**, her co-chair of the BBA's Environmental Sustainability Task Force, Ben Ericson, and BBA President Lisa Goodheart assisted the City of Boston's Urban Wilds Program by performing a trailhead renovation project at the Roslindale Wetlands in honor of Earth Day.



Boston Bar Association Environmental Sustainability Task Force Co-Chairs Michelle O' Brien and Ben Ericson flank BBA President Lisa Goodheart at the Roslindale Wetlands.

Carson Shea will graduate from Stonehill College as a member of the Lamda Epsilon Sigma honor society, and attend Northeastern University School of Law this fall.

Noreen Ruggiero again led the firm's participation in the New England Shelter for Homeless Veterans' Holiday Adopt-A-Vet Program and the Jimmy Fund's Rally Against Cancer on the Red Sox's home Opening Day.

Clean Energy Results? Getting There. (continued from page 1)

concludes that there is little or no evidence that wind turbines cause health effects. The report states that there is no evidence for a set of health effects from exposure to wind turbines that could be characterized as a "Wind Turbine Syndrome." The panel concluded that the weight of the evidence suggests no association between noise from wind turbines and measures of psychological distress or mental health problems. Similarly, scientific evidence suggests that shadow flicker does not pose a risk for eliciting seizures. Not surprisingly, the panel noted that falling ice is physically harmful and measures should be taken to ensure that the public is not likely to encounter ice thrown from a wind turbine blade. The report acknowledges the fact that there is limited scientific evidence on the actual effects of wind turbines on human health. Most epidemiologic literature on human response to wind turbines relates to self-reported annoyance. The expert panel concluded that effective public participation in and direct benefits from wind energy projects (such as receiving electricity from the neighboring wind turbines) have been

shown to result in less annoyance in general and better public acceptance overall. Developers of wind energy projects should take this information to heart.

One of the long-term Program goals that is eliciting significant interest is to ensure that at least three anaerobic digestion/Combined Heat and Power (CHP) projects are operating by 2014. The Commonwealth hopes to divert 350,000 tons per year of organic material from landfills and incinerators by 2020, by boosting use of anaerobic digestion, CHP, recycling, and composting facilities. In support of these goals, DEP has proposed changes to the siting regulations governing anaerobic digestion facilities in an effort to ease the permitting burden. Our firm and a number of industry representatives have participated in the regulatory process and are anxiously awaiting DEP's final word on the changes.

Sometimes progress on achieving goals has to be measured in small increments. In the case of clean energy results, so far that seems to be the only way to measure.

Renewables Corner

Newly proposed greenhouse gas emission standards for fossil fuel fired power plants will contribute to the continued decline of coal and should help indirectly to prop up competing renewable power. On March 27, the EPA published for comment a new source performance standard for carbon emissions from new fossil fuel fired electric generating plants. The standard would require facilities greater than 25 MW to meet an output-based standard of 1000 pounds of CO₂ per MW. Although it is anticipated that natural gas combined cycle power plants will be able to meet this standard, coal plants will not be able to achieve the standard without carbon capture and sequestration, not currently available. The rule is available for review on EPA's website at <http://epa.gov/carbonpollutionstandard/pdfs/20120327proposal.pdf>.

In an agreement filed with the Massachusetts DPU on March 31st, NStar agreed to purchase 27.5% of Cape Wind's power output at a price starting at 18.7 cents per KW/h. This is the same price that National Grid agreed in 2010 to pay for 50% of Cape Wind's output. In late December, 2011, the Massachusetts Supreme Judicial Court overruled challenges to the National Grid deal. Although both the National Grid and NStar contracts have been harshly criticized by opponents as too costly, the approval of those contracts will facilitate the financing and development of the largest renewable energy resource proposed for Massachusetts.

MassDEP's "Clean Energy Results Program" includes incentives for the development of anaerobic digestion ("AD") and other forms of organics recycling to reduce disposal of organics and generate clean energy. Among MassDEP's goals is the development of three AD facilities by 2014 and the diversion of an additional 350,000 tons per year of organics from disposal and generation of 50 MW of power from AD by 2020. The MassDEP intends to phase in a ban on the disposal of food waste from commercial and institutional

generators beginning in 2014. As part of this overall initiative, MassDEP Commissioner Kenneth Kimmell has announced that by this summer the MassDEP will promulgate new regulations streamlining the permitting of AD facilities. The draft regulations can be accessed at <http://www.mass.gov/dep/service/regulations/newregs.htm#organics>.

In support of Governor Patrick's goal of 250 MW of solar power installed by 2017, the Commonwealth recently selected 17 communities to participate in the 2012 Solarize Massachusetts Program. Solarize Mass is a program that encourages the adoption of small scale solar photovoltaic (PV) technology by deploying a coordinated education, marketing and outreach effort, combined with a tiered pricing structure that provides increased savings as more people in the community go solar.

In early April the Massachusetts Senate unanimously passed a bill that aims to curb rising energy costs and expand renewable energy development. Senate Bill 2214 would change existing requirements and incentives under the Green Communities Act and other energy laws. One amendment would require electric distribution companies to obtain a greater percentage of their electricity supply from long-term power purchase agreements for renewable energy. Another change would extend net metering eligibility to anaerobic digestion facilities. The bill also proposes to change how certain energy generation facilities are treated for tax purposes.

On April 28, the Massachusetts Department of Energy Resources issued proposed final regulations and guidelines updating the renewable energy portfolio standard, two years after it took public comment on an earlier controversial draft. Among many other refinements, the proposal increases the required efficiency standard from 40% to 50% for biomass power projects to receive one-half of a renewable energy credit per Mwh of renewable energy generated. The DOER will accept comments through June 18.

Environmental Law Update

In February 2012, the Attorney General of Massachusetts, along with counterparts from eleven other states, sent notice to EPA indicating their intention to sue the agency over its failure to finalize **new standards for fine particulate matter** (PM 2.5) within the five year timeline for revising those standards under the Clean Air Act.

In a rare unanimous decision, in March 2012, the US Supreme Court ruled that EPA enforcement orders under the federal **Clean Water Act** are subject to pre-enforcement judicial review and rejecting the EPA's long standing position that the Clean Water Act precluded pre-enforcement judicial review of the EPA's enforcement orders. *Sackett v. EPA*, No. 10-1062.

On February 16, 2012, the EPA approved the new federal Construction General Permit ("CGP") under the **National Pollutant Discharge Elimination System**. The CGP replaced the 2008 version of the regulation and includes restrictions on erosion, sediment control, pollution prevention, and stabilization. Massachusetts is among several states authorized to issue the new CGP.

On March 5, 2012, the MassDEP issued its **Final Action Plan of regulatory reform initiatives** including plans to: (a) consolidate Wetlands, Chapter 91 and 401 Water Quality Certification permits; (b) expedite permitting for ecological restoration projects; (c) create categorical standards for renewable energy projects in wetlands; (d) streamline permitting for transfer station and special facilities; and (e) simplify Activity and Use Limitations forms and procedures. Commissioner Kimmell has set a goal of finalizing the changes in July and August.

MassDEP has instituted new training and certification requirements for owners and operators of **Underground Storage Tank ("UST") systems**. The new regulations at 301 CMR 80.01 and 80.02 went into effect on February 3, 2012 and require facilities with UST systems to have a certified operator on staff by August 8, 2012. The requirements apply to all UST systems, not just to petroleum systems.



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Insights & Updates

Firm Successes

Michelle O' Brien and **Peter Durning** obtained a dismissal of the City of New Bedford's claims against our client, Steelcase Architectural Walls Inc., related to contamination at the New Bedford High School and surrounding area.

Tom Mackie submitted a "friend of the court" amicus curiae brief to the Supreme Judicial Court on behalf of the National Solid Wastes Management Association Massachusetts Chapter in the matter of *Town of Sturbridge Board of Health, et al. v. Town of Southbridge Board of Health, et al.* The NSWMA argued that under the Massachusetts solid waste siting law ten citizen groups do not have special rights to appeal a site assignment decision. The SJC agreed.

Michelle O' Brien secured a settlement of an appeal of a zoning special permit for our client's wind energy facility in Plymouth. As a result of this and a prior settlement of another appeal, Future Generation Wind, LLC can move forward with its three-turbine project.



Town of Ipswich wind turbine. GE 1.6 MW model generating enough electricity to power approximately 300 homes.