



Insights & Updates

Fall 2009

Inside

Firm Activities

MEPA Greenhouse Gas Policy

MSO on the Move

Firm Successes

Environmental Law Update

Carbon: The New "Plastics"?

In *The Graduate*, Mr. McGuire whispered "one word" of career advice - "plastics" - to young Benjamin Braddock, played by Dustin Hoffman. Fast forward and "carbon" has replaced plastics as the future career track.

A "carbon rush" has already started. The *Boston Globe* recently reported that Al Gore may be our first "carbon billionaire." The carbon economy hasn't hit most of our clients yet, but it will. When it does, will it be a fizzle, like the millennium bug, or will it be a game changer, like Superfund?

Practically, what is the carbon economy all about and how does it affect us today? Carbon dioxide is the primary greenhouse gas (GHG) to which climate change is attributed. Our economy derives most of its energy by combusting carbon based coal, oil, and natural gas to produce electricity. Fossil fuels dominate our energy production because they are abundant, efficient, reliable and safe. Reducing carbon dioxide emissions essentially requires that we stop combusting carbon based fossil fuels or capture (sequester) their carbon dioxide waste. Since there are no feasible sequestration technologies, cutting back on fossil fuel consumption is the only means of reducing carbon emissions. The problem is that aside from nuclear, we really don't know how to generate sufficient reliable energy from other sources to replace fossil fuels.

The Commonwealth and the federal government are beginning to take concrete steps to force reductions in carbon dioxide and other GHG emissions. For example, here in Massachusetts, we each pay a small amount in our electric bills to utilities for their purchase of carbon allowances from the state in periodic Regional Greenhouse Gas Initiative (RGGI) auctions. Massachusetts utilities have paid \$69 million so far, mostly attributable to carbon emissions in 2009. Since the first RGGI auction, the utilities in the ten participating states have paid a total of \$432.7 million for permits to emit carbon dioxide. This is part of the carbon economy as it exists in Massachusetts today.



The relatively modest \$69 million cost of carbon emissions in Massachusetts is not reflective of future costs. Currently utilities are only paying to emit carbon on a "business as usual" basis, without having to reduce emissions. In addition, the recession has significantly reduced electricity demand, which in turn reduces demand for carbon allowances. Beginning in 2014, utilities will need to reduce their carbon emissions 2.5 percent annually. At that time, the cost of carbon allowances is expected to rise, all other things being equal. If so, the impact on consumers will rise as well. It should be noted, however, that the state predicts that increases in energy efficiency funded by the RGGI auction proceeds will offset these cost increases.

As the companion article on the MEPA Greenhouse Gas Policy illustrates, GHG emissions have now taken on a regulatory component beyond just the electric utility sector. Most of our clients involved in significant development projects in Massachusetts are being required to evaluate and mitigate their projects' greenhouse gas emissions under changes to the environmental impact review process under the Massachusetts Environmental Policy Act (MEPA). This sort of consulting and advising work is also part of the "carbon economy."

MACKIE SHEA O'BRIEN, PC

420 Boylston Street

Boston, Massachusetts 02116

617 266 5700

www.lawmso.com

continued on page 2

Firm Activities

IN THE NEWS

Michelle O'Brien has been elected to a three-year term on the Boston Bar Association Council. The Council is the governing body of the 10,000 member organization. Michelle previously served as co-chair of the Environmental Law Section.



Michelle O'Brien with BBA President Jack Regan and Treasurer Peter Zupcowska

John Shea and Tom Mackie each has authored a chapter on Hazardous Waste and Solid Waste law, respectively, for MCLE's Massachusetts Environmental Law 2009 update, considered the authoritative treatise on the subject.

The Firm was recognized on September 18, 2009 by the Environmental Business Council of New England with awards for The Best Place to Work in the entrepreneurial company category for a second year, and for the Most Environmentally Conscious Company for a third year.

John Shea participated in the 11th annual cleanup outing sponsored by Toll Brothers, Inc. to prepare the Seeds of Peace International Camp for 350 teenage ambassadors from Israel, Palestine, Pakistan and Afghanistan who undergo conflict resolution training in the pristine woods of Maine.

Tom Mackie presented a talk on Renewable Energy Credits at the SWANA 7th Annual Recycling and Solid Waste Fall Conference.

Gail Magenau Hire published "Wetland Permit Appeals - Building a Record for Survival" in the Fall 2009 Real Estate Bar Association for Massachusetts newsletter.

Tom Mackie, John Shea, and Michelle O'Brien were selected for inclusion in the 2010 edition of **The Best Lawyers in America®** for environmental law. Selection to **Best Lawyers** is based on an exhaustive and rigorous peer-review survey comprising more than 2.8 million confidential evaluations by the top attorneys in the country. The MSO partners have been included in **Best Lawyers®** for several years in a row.

Carbon: The New "Plastics"? (continued from page 1)

Much more is yet to come. According to the Supreme Court's 2007 ruling in Massachusetts v. EPA, the federal agency has the authority under the Clean Air Act to regulate carbon dioxide as a pollutant. The Court found that EPA's refusal to regulate CO₂ has led to "actual" and "imminent" harm to the state of Massachusetts, mainly in the form of rising sea levels along the state's coast. The ruling also noted that "the harms associated with climate change are serious and well recognized." After President Obama took office and appointed Lisa Jackson as Administrator, in April the EPA formally proposed to find that atmospheric concentrations of greenhouse gases endanger public health and welfare within the meaning of Section 202(a) of the Clean Air Act. On December 7, 2009 EPA finalized this finding which will lead to new standards for vehicle emissions of GHGs. Also, in September the EPA issued final regulations requiring comprehensive greenhouse gas emissions reporting, commencing in January 2010. Whether you own or operate a solid waste landfill or a power plant, you will be required to measure and report your greenhouse gas emissions to the EPA annually. The EPA also proposed the "tailoring rule" which would mandate Best Available Control Technology (BACT) for GHG emissions. These three actions are widely recognized as just the first steps towards a comprehensive regulatory scheme where carbon emissions will be limited.

Massachusetts is way ahead of the EPA on the issue of carbon emission reduction. After all, it was the Massachusetts Attorney General who spearheaded the lawsuit against the

EPA forcing it to recognize carbon dioxide as a pollutant. Once Governor Deval Patrick took office, the Commonwealth joined the RGGI, the regulatory scheme that compels the above mentioned utilities to pay to emit carbon in Massachusetts. In August 2008 the Massachusetts legislature passed the Global Warming Solutions Act, which requires the MassDEP to adopt a much more sweeping GHG program. That Act gave the MassDEP authority to "regulate emissions of greenhouse gases with the goal of reducing those emissions." It requires the MassDEP to adopt a 2020 statewide GHG emissions limit and plan to achieve that limit. By 2050, under the Act statewide emissions are supposed to be 80 percent below 1990 levels. More specifically, the Secretary of Energy and Environmental Affairs is authorized in the Act to implement "direct emissions reductions measures from other sectors of the economy" beyond the utilities covered by RGGI.

Understanding the carbon economy is a must for anyone providing advice on environmental issues. For Mackie Shea O'Brien, this means advising clients such as those who are selling carbon offsets from landfill gas to energy projects, developing GHG reducing renewable biomass electric generating facilities, or developing new facilities that need to comply with the MEPA Greenhouse Gas Policy. And, from time to time, as we attend graduation parties we whisper "carbon" in the ears of our friends' children.

MEPA Greenhouse Gas Policy

In 2007, the Executive Office of Energy and Environmental Affairs (EOEEA) determined that "damage to the environment" in the Massachusetts Environmental Policy Act (MEPA) should include greenhouse gas emissions (GHG) caused by projects under MEPA review. A Technical Advisory Committee developed a standardized protocol for analysis of GHG emissions, which resulted in a GHG Policy. Section 7 of the Global Warming Solutions Act of 2008 required strict GHG emissions reductions targets and amended MEPA to require permitting agencies to consider "reasonably foreseeable climate change impacts" including GHG emissions. Under the revised GHG Policy and Protocol (February 3, 2009), all projects that require an Environmental Impact Report (EIR) must comply with the GHG policy. Project proponents must now quantify the GHG emissions and identify all feasible means and measures to avoid, minimize or mitigate the emissions.

The EOEEA Secretary's Certificate on the scope for an EIR will require quantifying the potential annual GHG emissions in tons per year (tpy) according to the Protocol. In the EIR the project proponent must evaluate and agree to adopt mitigation measures based on calculated emissions reductions and energy savings. Carbon dioxide (CO₂) is the GHG of primary concern, but methane from landfills and wastewater treatment plants, and for other projects certain fluorocarbons must be quantified and analyzed. The analysis must examine direct GHG emissions (stacks) and indirect emissions (vehicles and electricity attributable to the project). Baseline emissions from energy and transportation must be calculated and energy uses modeled. EOEEA encourages on-site measures to mitigate emissions, but off-site offsets will be considered. Commitments on GHG emission measures are to be enforced through MEPA Section 61 Findings incorporated into state permits.

The GHG Policy and Protocol have significantly increased the cost of MEPA review and permitting. There are a handful of qualified experts who can conduct the complex modeling, assessment and analysis of GHG emissions of the several project alternatives. The increased construction costs to incorporate mitigation measures are substantial. For example, Toll Brothers proposes a 240-unit, age-restricted residential community on a 73-acre site in Methuen (EEA No. 14167). The calculated base case CO₂ emissions related to energy use and transportation is 6,155 tpy. Mitigation measures that will reduce total CO₂ emissions to 4,809 tpy include roof and wall insulation with high R-values, furnace and HVAC systems with certain Energy Efficiency Ratings, U-value energy efficient windows, programmable thermostats, compact fluorescent lighting, Energy Star dishwashers and refrigerators with the lowest energy rating, high albedo roofing materials and 1.28 gallon/flush toilets. The proponent also committed to a Transportation Demand Management Program to reduce transportation GHG emissions.

MSO On the Move

In October, the firm relocated its offices to The Berkeley Building at 420 Boylston Street in Boston.

Known as the "Crowned Jewel of the Back Bay," the building has received landmark designation and numerous preservation and architecture awards. It was designed by Constant Desire Despradelle, the Dean of the MIT School of Architecture, and built in 1906.



THE BERKELEY

"The Crowned Jewel of Back Bay"

Firm Successes

John Shea continued his representation of the **South Shore Baptist Church** in Hingham on its \$10 million renovation and expansion project, obtaining a Planning Board Site Plan Approval, a Historic District Commission Certificate of Appropriateness, and a Hingham Historic Commission approval to relocate a building for preservation of a 1727 house. Construction is slated for Spring 2010.

Michelle O'Brien successfully obtained for the **Nantucket Historical Association** 100 percent reimbursement of costs it incurred responding to an oil spill at the Nantucket Whaling Museum.

Tom Mackie represented **United Waste Systems, Inc.** in obtaining a solid waste site assignment, City Council special permit and host agreement for a new solid waste transfer station in Holyoke, Massachusetts.

Gail Magenau Hire negotiated two Conservation Restrictions with the Division of Conservation Services at the EOEEA: one to protect spotted salamander and vernal pool habitat for a **Clear Channel** radio antenna project in Newton, and another to protect open space and historic and archaeological resources for a **Toll Brothers** subdivision in Walpole.

John Shea assisted **Creative Homes, Inc.** in obtaining an Order of Conditions approving an affordable housing Local Initiative Project in Easton.

Michelle O'Brien settled the liability of **Tewksbury State Hospital** for the Sutton Brook Superfund Site.

Environmental Law Update

SUSTAINABLE REMEDIATION

For cleanup sites it operates, MassDEP is evaluating how to make remediation more sustainable, such as using solar panels to generate electricity to pump leachate at a landfill. In the coming months, MassDEP's Bureau of Waste Site Cleanup will unveil a clearinghouse for sustainability on its web site. Optimizing the remediation process means finding ways to save energy, water, land and staffing resources and minimize greenhouse gas emissions.

WASTE SITE DATA AVAILABLE ON-LINE

Information about Massachusetts sites affected by releases of oil or hazardous materials can now be obtained electronically, via MassDEP's Waste Site/ Reportable Release File Viewer (http://public.dep.state.ma.us/wsc_viewer). Beginning in January of 2008, submissions made to MassDEP's waste site cleanup program have been made electronically, providing immediate access to the information. MassDEP is scanning and uploading paper files for older submissions so that eventually all reports and forms for all waste sites will be available on the web site.

CHAPTER 21E ENFORCEMENT

The Appeals Court recently affirmed a \$600,000 penalty against an owner of several suburban gasoline stations for failures to meet clean up deadlines under the Massachusetts Contingency Plan. MassDEP and the Attorney General's Office continue to take action against parties strictly liable for addressing contaminated properties who have failed to meet their obligations.

INDUSTRIAL WASTEWATER AND STORMWATER ENFORCEMENT

The U.S. EPA and MassDEP are looking closely at violations of the federal Clean Water Act and the state Clean Waters Act, particularly at commercial and industrial properties that have process water as a component of their operations. For several years EPA has targeted the sand and gravel and ready-mix concrete industries for enforcement, asserting that several companies discharged process water and stormwater without valid permits. Process water discharges include concrete truck washout, stone washing, and steam cleaning wastewater. Having a permit and a Stormwater Pollution Prevention Plan are required but are not enough: operators must routinely inspect and monitor discharges and ensure that applicable effluent limits are met.



COUNSELORS AT LAW
420 Boylston Street
Boston, MA 02116
617 266 5700
www.lawmso.com

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