

# Insights & Updates

Spring 2003

MOEHRKE, MACKIE & SHEA, P.C.

## **TWENTY YEARS OLD AND STILL GOING STRONG**

*We are proud to celebrate our 20th Anniversary with this issue of Insights and Updates. Thanks to our loyal clients and friends for 20 years of success.*



State House

### **TWENTY YEARS IN THE TRENCHES; A RETROSPECTIVE**

To mark the firm's 20th Anniversary, we asked some of our more "seasoned" attorneys for a retrospective on key environmental policy developments over the last twenty years. While not all of our attorneys have twenty years to draw from, we have several grizzled veterans who bear the campaign ribbons.

In 1983, the year our firm opened, Tony Moehrke was Special Counsel advising the Legislature on passage of the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, known as chapter 21E. Tom Mackie was Chairman of the Steering Committee of the Gold Coast Oil superfund site in the Miami area as an environmental lawyer for Piper Aircraft Corp. John Shea had just left his position as Chief of Environmental Law and Military Justice at Hanscom Air Force Base to handle litigation over the proposed siting of hazardous waste facilities in Warren and Haverhill. Michelle O'Brien was in the public records division of the Office of the Secretary of

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### **OPEN LETTER TO MITT**

Change is brewing at DEP and the Commissioner's chair will apparently sit vacant while it does. The DEP is crying out for key program reform and we have yet to hear a cogent reply. The question became: "why not us?"

#### **WETLANDS**

Massachusetts has an acute shortage of affordable housing, due in part to tough environmental laws. Among them is the toughest wetland law and regulations in the country and an appellate procedure that allows NIMBYs to delay projects for years for short money without regard to protection of wetland values. Rarely do DEP appeals and adjudicatory hearings result in project changes that significantly improve wetland protection.

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Moehrke, Mackie & Shea, P.C.

137 Newbury Street

Boston, Massachusetts 02116

(617) 266-5700

www.lawmms.com

**INSIDE**

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## Firm Activities

### Sports Authority

Coach John Shea's Stoughton Seventh Grade Travel Basketball Team posted an impressive 19-3 record in 2003. The team won the Western Division Championship of the Suburban West League with an 11-0 record. During March Madness the talented squad won three exciting playoff games, but came up short in the Championship game to the Medfield Renegades. Coach Shea is already planning his summer training program.

### Professor at Law

Michelle O'Brien is on the speaking circuit this spring. On February 27<sup>th</sup> she co-chaired a seminar on Renewable Energy sponsored by the Boston Bar Association (see related article). Michelle also served on the faculty of the Environmental Law Basics seminar put on by the Massachusetts Bar Association where she discussed Chapter 21E and Brownfields. Finally, in July Michelle will be speaking on environmental regulations at a Land Use Law Update seminar sponsored by the National Business Institute.

### Rosie's Place

On March 27, a number of firm employees once again volunteered to prepare and serve dinner at Rosie's Place, a Boston shelter and support facility for battered and homeless women and their children.

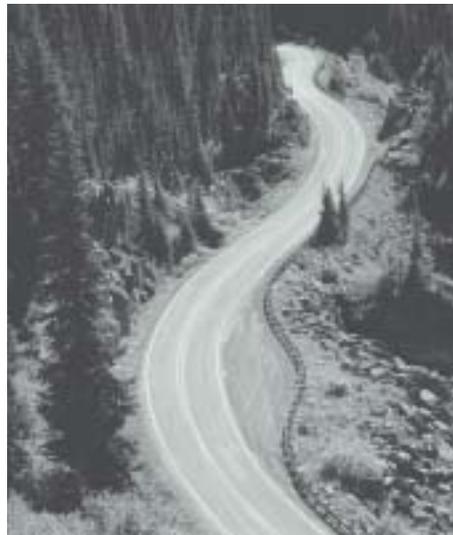


## Twenty Years in the Trenches; A Retrospective *continued from page 1*

the Commonwealth, where she was introduced to her future boss, Rep. Steven Angelo, Chairman of the Natural Resources Committee.

From our perspective as former government and private sector environmental attorneys we identified the following key developments in environmental law and policy in Massachusetts:

- The rise and fall of hazardous waste as a prime driver of environmental law and engineering services caused by a shift from over-aggressive enforcement of a fundamentally unfair hazardous waste liability scheme to risk-based cleanup standards, privatization, modest liability relief and brownfield development incentives.
- Slashed hazardous waste generation rates and a dramatic fallout in the hazardous waste business caused by industry's embrace of pollution prevention.
- Use of standardized superfund consent decrees, presumptive remedies, and generally accepted allocation scenarios instead of excessively costly and wasteful litigation and the large steering committee approach to sites.
- The lack of any meaningful toxic tort successes discouraged plaintiffs' attorneys from representing the "little guy" suffering environmental harm.
- Real estate and corporate transactions now regularly include environmentally driven due diligence, transaction structuring,



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indemnification, insurance and accelerated clean-up of site problems.

- The nation's highest solid waste disposal prices due to restrictions on disposal capacity and bans on disposal of large portions of the waste stream in an attempt to foster reduction and recycling.
- A huge drop-off in litigation by the Attorney General in small cases due to the DEP's use of administrative penalties and Administrative Consent Orders.
- The increased use of mediation for environmental dispute resolution, in part facilitated by the mandatory dispute resolution provisions under chapter 21E.
- The increased sophistication of the judiciary such that the EPA and DEP can no longer avoid burdens of proof and persuasion simply by claiming to advocate for the environment.
- Enthusiastic promotion of pollution coverage after years of insurance company lawsuits over denials of environmental coverage.
- Risk assessment solved the "how clean is clean" question.
- Massive strides in clean-up technology that have reduced costs by a factor of three or four.
- A limited shift in regulatory focus from end of pipe, command and control schemes to environmental results, self-certification and privatization.

# ENVIRONMENTAL LAW UPDATE

## Beacon Hill News

The proposed reorganization of state government by Governor Mitt Romney has created quite a stir in the Commonwealth, including within the environmental and business communities. Romney has taken several controversial steps in his first few months in office.

Although many of Romney's plans involve consolidation and elimination, one of his first acts was to create a new "super Cabinet level" position - Chief of Commonwealth Development. Romney appointed Doug Foy, former head of the Conservation Law Foundation, to that post. Foy previously was known as a leading environmental activist. In his new role, he is overseeing state transportation, housing, energy and environmental agencies. Coordination among these sectors can be a positive thing; however, some business leaders fear that Foy's environmental background is driving Romney's agenda more toward environmental activism than to economic recovery.

Governor Romney has also appointed a new Secretary of Environmental Affairs, Ellen Roy Herzfelder. In the mid-1980s she joined in a family business that formed Intercontinental Energy Corp., whose electric generating plant supplied nearly ten percent of the Boston area's

power. The Roys sold the company to Florida Power & Light Co. in 1998. Ms. Roy Herzfelder also was a venture capitalist for a brief time. Her official biography on the Commonwealth's web site describes her as an environmentalist and a manager as well as an outdoors enthusiast.

The Department of Environmental Protection is expected to have a new leader, after months of speculation about the status of Lauren Liss. Ms. Liss resigned as of February 14, 2003, but no permanent appointment to the commissioner's job has been made as of yet. We are pleased that Ed Kunce will again serve as Acting Commissioner. He brings a wealth of years and experience in DEP to the job, with a grounded approach to environmental regulation.

## C&D Waste Disposal Bin

Mass. DEP plans to ban disposal and incineration of most construction and demolition ("C&D") wastes, effective December 31, 2003. The new rules, which DEP may release for public comment in the Spring, will ban asphalt paving, concrete, brick, wood and metal from landfills and incinerators and bar transfer stations from handling such wastes intended for disposal.

The bans aim to boost C&D recycling to 88% by 2010 in accordance with the state's

Solid Waste Master Plan. Currently, Massachusetts recycles some 78% of the 4,480,000 tons of C&D wastes generated annually. The new rules will not ban gypsum, asphalt shingles, plaster, or linoleum, but DEP intends to broaden the C&D waste bans in the future.

DEP will also regulate C&D Processing Facilities, a new class of waste management facilities, with rules similar to those for transfer stations. The rules will require facility operators to inspect all mixed loads of trash and C&D wastes greater than five cubic yards. Operators must reject mixed loads that contain greater than 20% C&D wastes, which may spur increased source separation by construction and demolition firms. The Associated General Contractors of Massachusetts lists the C&D ban as one of its top three priorities for this year.



## OPEN LETTER TO MITT *continued from page 1*

Instead, views are preserved, setbacks are increased, buildings are downsized, needed housing stocks are delayed and reduced, and the body of ALJ decisions that have little precedential value swells. Modest regulatory reforms can reduce bogus appeals and delays:

- Eliminate automatic standing for abutters and any 10 residents.
- Increase filing fees and earmark the funds for quicker processing of appeals.
- Limit issues to those raised at the local hearing.
- Establish presumptive mitigation measures (e.g., cookbook wetland replacement protocols).
- Set and enforce a time limit for decisions on appeals.

### SOLID WASTE

The Commonwealth has the highest disposal fees in the nation and most of the disposal capacity is controlled by one entity. The DEP last overhauled solid waste siting in 1986. It has a Solid Waste Master Plan premised on assumptions about new facility development that simply cannot be implemented under the present regulatory scheme. Subjective fears based on speculative what-ifs trump sound engineering every time. No new landfills have come on line. In fact, when the Commonwealth recently announced that a major new facility was required, not a single proponent stepped forward. Very few transfer stations have been sited when locally opposed. Even recycling and composting facilities, the darlings of the Master Plan, face insurmountable siting obstacles.

Core changes are essential to bring much-needed disposal and processing capacity on line. Reform should focus on process, which has become fear driven, without proper regard to science and engineering.

- The DEP should have oversight over local site assignment proceedings.
- Appeals from local board decisions should go to DEP, before the superior court.
- DEP should use technical experts paid out of permit fees to review applications and appeals.
- DEP decisions should be presumed correct.
- Limit issues to those raised early in the process at the DEP site suitability stage.
- Local board hearings should be legislative, not mini-trials.
- The DEP should render its decisions within 45 days.

## **Renewable Energy Seminar Inspires A New Look At Landfills**

One wouldn't ordinarily think of landfills among solar panels, windmills, and other renewable energy sources. However, landfill gas is a major renewable energy source in the Commonwealth, and could potentially generate even more power in years to come.

A growing percentage of energy sold in Massachusetts – beginning with one percent in 2003 – must be “renewable energy.” Landfill gas qualifies as a renewable energy source, as do wind, solar, biomass, and fuel cells. By 2009 four percent of energy sales must be from renewable sources.

The Massachusetts Division of Energy Resources has already approved 10 landfill gas projects as renewable energy generators, out of a total of 15 approved renewable energy generators in New England. Others are sure to fall in place.

Renewable energy reduces the effects of global warming, minimizes health effects of fossil fuel emissions, such as smog and partic-

ulates, and creates new economic opportunities. Federal and state governments offer a variety of tax and other incentives to developers of renewable energy sources such as the \$150 million Massachusetts Renewable Energy Trust. Recently, Governor Romney formed a new \$15 million Green Energy Fund to provide equity capital, loans and management assistance to Massachusetts-based renewable energy businesses.

Although there are challenges to developing renewable energy in Massachusetts, there is a growing need and desire to do so. Our firm has been at the forefront of renewable energy, having negotiated landfill gas contracts for clients throughout the U.S. and educated our colleagues. Michelle O'Brien recently co-chaired the Boston Bar Association's seminar titled “Renewable Energy: Where are we? Where are we headed?” Please contact Michelle O'Brien for more information.



*Michelle O'Brien with fellow program co-chair Carl Dierker, Regional Counsel, EPA New England (bottom left) and members of the panel on "Perspectives on the State of Renewable Energy Today and the Challenges that Lie Ahead." Panel members are David O'Connor, Commissioner, Massachusetts Division of Energy Resources (bottom right), and in the back row from left to right, Dr. Robert Dixon, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, Seth Kaplan, Esq., Conservation Law Foundation, and George Dean, Esq., Foley Hoag LLP.*

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