



Insights & Updates

Spring 2007

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BRIGHT FUTURES

Convergence is defined as a "tendency or movement towards union or uniformity." We are experiencing a national and local convergence between public opinion and traditional environmental values on a new scale, driven ironically by hard bitten national security and economic forces, not by a softer whole earth mentality. Some of the contributing factors are:

- Increased public frustration with the war in Iraq;
- Widely held perception that the decision to go to war was driven by protection of US oil interests in the Middle East;
- Oil insecurity in Venezuela, Nigeria, Russia, the Middle East, the Gulf Coast and Alaska from politics, insurgencies, hurricanes and aging infrastructure;
- Oil prices hitting new highs;
- High electric rates in the Northeast;
- Need for additional generating capacity and diversity in the Northeast;
- US Supreme Court rejection of EPA's contention that it did not have authority to regulate greenhouse emissions from cars;
- Near unanimous recognition that climate change is attributable to human activities, primarily burning of fossil fuels;
- Governor Deval Patrick's election on a renewable energy platform;
- Massachusetts finally joining the Regional Greenhouse Gas Initiative;
- Consolidation of the Massachusetts Executive Office of Environmental Affairs with Energy into the new EOEEA.

Couple this with a nearly evangelistic realization by public officials that environment and energy are inextricably linked and you get significant movement on the Massachusetts development front, to wit:

- Approval of the ZeGen C&D waste gasification pilot project in record time;
- Endorsement of the Cape Wind Project and its Environmental Impact Report;
- Open discussion of a coal gasification plant along the Massachusetts coast;



- Consideration of lifting the moratorium on new waste to energy plants;
- Introduction of multiple renewable energy bills in the legislature;
- Multiple legislative and regulatory proposals for fast track permitting.

While the Governor's early ride has not been exactly Cadillac smooth, we expect that his emphasis on renewable and alternative energy resources will last long after the new paint in his office has dried.

Mackie Shea O'Brien is perfectly poised to participate in this proliferation of prospects. Our longstanding relationships with industry and regulators allow us to bridge the gap between environment and energy. For example, we represent the developer of a biomass renewable energy plant who intends to use C&D wood as fuel. Knowing the C&D marketplace put us in a unique position to source project partners and future fuel suppliers. Our understanding of C&D processing operations has been instrumental in helping design fuel protocols that will match the

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Firm Activities

IN THE NEWS

Thomas Mackie and Michelle O'Brien are listed in the 2007 edition of *The Best Lawyers in America* for environmental law.

Michelle O'Brien has been selected for inclusion in *America's Registry of Outstanding Professionals* for 2006-2007.

The firm sponsored the First Annual Construction and Demolition Debris Summit, hosted by the Environmental Business Council and attended by more than 100 people. The summit focused on opportunities and challenges in handling this waste stream and featured presentations on recent successful projects.

Denise Green, MSO's Administrator, served on the planning committee for the Association of Legal Administrators' Boston Chapter One Day Educational Conference held at the Hynes Convention Center. Keynote speaker of this event was former Red Sox player and current color analyst for NESN, Jerry Remy.



MSO Firm Administrator Denise Green with Red Sox announcer and former second baseman, Jerry Remy

Gail Magenau was named - for the second year in a row - as a Massachusetts Super Lawyers Rising Star in Environmental Law, an honor bestowed upon top young lawyers in the Commonwealth.

Gail married Stephen F. Hire on May 19. She will be known professionally as Gail E. Magenau Hire.

PROFESSORS AT LAW

Thomas Mackie gave a presentation at the Spring meeting of the Solid Waste Association of North America - Massachusetts Chapter on Renewable Energy Credit for Organic Refuse Derived Fuels.

Michelle O'Brien provided the private bar perspective on environmental enforcement at the American Bar Association seminar on Key Environmental Issues in U.S. EPA Region I held in Boston.

Gail E. Magenau was a panel member at a Boston Bar Association solo and small firm practitioner's seminar for Boston College Law School students.

SPORTS AUTHORITY

Coach Emeritus John Shea watched his son, Carson, play hoops for Stoughton High and coached one of two junior high teams sponsored by the firm. The boys' squad made it to the semis and girls' team won the senior league championship.

BRIGHT FUTURES *continued from page 1*

emerging reality of the C&D processing industry. And our long history in siting controversial projects enables us to anticipate and head off or manage the strident NIMBYism that can slow or stop projects of this magnitude. A paradigm shift is also occurring in the real estate development marketplace. Developers are greening their projects by embracing "LEED" and "LID" principles. Even the most hide bound developers are using "green marketing" to improve project perceptions. "Low impact development" is not new to Mackie Shea O'Brien. We have been using these tools for years to overcome permitting obstacles. It has just taken a bit longer for the marketing folks to catch onto the fact that environmental amenities can be used as a marketing tool for new developments. We are very optimistic about the future for the environment and economy in Massachusetts. If you are interested in philosophizing about any of these topics, please contact Tom Mackie.

EOEEA Reorganization

On April 11, 2007, the Massachusetts Executive Office of Environmental Affairs took on a new name and role. The new secretariat - the Executive Office of Energy and Environmental Affairs - brings the Division of Energy Resources and the energy-related functions of the former Department of Telecommunications and Energy under Secretary Ian Bowles. The Departments of Environmental Protection, Conservation and Recreation, Agricultural Resources, and Fish and Game remain in this executive office.

Ann G. Berwick serves as Undersecretary for Energy. Ms. Berwick, an attorney with a distinguished career in the public and private sectors, was Chief of the Environmental Protection Division under Attorney General Scott Harshbarger (when Michelle O'Brien worked there).

Philip Griffiths is the Undersecretary for Environmental Affairs. He previously worked in the commissioner's office at the Department of Environmental Protection.

Greg Watson has joined the secretariat as Assistant Secretary for Clean Energy Technology, to work specifically on renewable energy products. He was previously the Vice President for Sustainable Development and Renewable Energy at the Massachusetts Technology Collaborative, which oversees the Renewable Energy Trust.



LAND AND SEA: BUILDING IN THE NEW MILLENNIUM III

MSO recently completed three projects of which we are especially proud: Tom Mackie's work on a construction and demolition debris recycling facility and solid waste transfer station and John Shea's work on two marinas.

TBI Redux

After nearly ten years of hearings and litigation, including a trip to the highest court in the state, the firm's client, TBI, Inc., has succeeded in obtaining a site assignment for its proposed construction and demolition debris processing, recycling and transfer facility in North Andover. Tom Mackie and Gail Magenau presented TBI's case over the several nights of Board of Health hearings, in which more than 1,000 individuals intervened, with the able assistance of a cadre of expert witnesses, including Alan Kirschner of Brown & Caldwell, Dale Raczynski of Epsilon Associates, and Bill Scully of MS Transportation. Congratulations and thanks go out to the Thomson family for staying the course through this arduous process.

The Pier at Cordage

From 2003 through 2006, a tenant boat retailer and the landowner sought and obtained all necessary permits and approvals to install and operate a 54 slip, seasonal floating dock system and boat launching ramp within the water sheet of existing licensed structures at Cordage Park in Plymouth. No dredging was proposed. It is intended to be a temporary facility until a larger marina is permitted as part of an overall

redevelopment of the waterfront at the former Plymouth Cordage Company rope manufacturing property. We obtained an Order of Conditions, a MassDEP Chapter 91 License and Water Quality Certification, a CZM Consistency Statement, and an Army Corps Section 10/404 permit. The MEPA review was especially tricky: A 2001 Certificate on the ENF required a Special Review Procedure for the marina component of the redevelopment of the ropeworks, which included a 300 slip marina, a marine supply store, office and café, a harbor master's office, a terminal for ferry or excursion boats, and dredging of many acres of tideland. The EOEA Secretary in review of our Notice of Project Change for a much smaller project affirmed the need for a full EIR for the future landside and marina components, but allowed the completion of permitting for the temporary marina. The owner agreed to an extensive mitigation package: a shellfish enhancement program, a public access "pocket park," a historical maritime educational display, and a museum on the maritime industrial history of Cordage.

Marshfield Yacht Club

In 2003, this "working man's boat club" proposed an additional 60 floating boat slips, a pile supported access pier and ramps, and 9,500 cubic yards of dredging in the South River. MYC obtained an Order of Conditions and a Special Permit from the Town. Based upon a MEPA consultation with MassDEP, CZM and the Division of Marine Fisheries, MYC filed an Expanded ENF for a 40 slip project with 4,752 cubic yards of

dredging. The EOEA Secretary found no further MEPA review was warranted and any remaining issues could be resolved during the permitting processes. Discussions with MassDEP, CZM, and the Conservation Commission resulted in a Water Quality Certification, a CZM Consistency Statement, and a significant mitigation package: payment into escrow accounts for a new tide gate for Marshfield's Green Harbor polder and for the Town's vessel pump out program; installation of a tight tank at the municipal boat ramp; and planting of a salt marsh. The Chapter 91 license provided a public access pathway through the beach to the water. The Army Corps permit was delayed by extensive consultations with the National Marine Fisheries Service, which invoked a seldom used elevation procedure to extract a reduction in the project to 32 slips, a single pile-supported fixed pier, and 3,000 cubic yards of dredging, plus a clam replenishment project. Dredging finally began in December 2006.

Marina projects, especially those with dredging, require proponents to have the stamina for three to five years of planning and permitting (longer if appeals); hundreds of thousands of dollars for science, engineering and legal work; the patience to negotiate with agencies and environmental groups who don't want any more boats, piers, docks, or dredging in coastal waters; and the willingness and ability to reduce the scope of the project and to fund expensive mitigation measures. If boating is an expensive hobby, developing a marina requires gold balls.

Permitting Update

Permit streamlining is another example of the new environmental paradigm in Massachusetts. Governor Deval Patrick is touting a goal of "regulation at the speed of business." Gregory P. Bialecki, the state permitting ombudsman, has taken on the challenge of "one-stop shopping" for businesses seeking to operate in Massachusetts and reducing permit and approval time to six months.

The Patrick administration promises to make MassDEP permit decisions 20 percent faster, issue 90 percent of all permit decisions within 180 days (according to a MassDEP source last fall, 80 percent of decisions were being issued within 180 days), and concentrate its reviewing efforts on significant economic development and energy projects. The Governor has convened a task force to suggest reforms to improve the protracted and costly adjudicatory hearing process for wetlands appeals, an issue that has been tackled numerous times before.

Past reforms have been relatively modest. Last summer the Massachusetts Legislature overhauled the Expedited Permitting program in Chapter 43D, formed the Massachusetts permit regulatory office, and created the position of state permitting ombudsman.

The legislation also established a special Land Court session to focus on permit appeals, increased Division of Administrative Law Appeals funding by \$1 million, required that five of ten persons appealing a Chapter 91 (tidelands) permit must be local residents, provided that zoning special permittees may proceed (at their own risk) if their permit is appealed, and adopted other narrowly targeted reforms.



MSO Shareholder and Co-Chair of the BBA Environmental Law Section Michelle O'Brien with her Co-Chair, Eugene Benson, and Greg Bialecki; State Permitting Ombudsman

We have already employed several of these reforms for clients, including expedited permitting and resolution of wetland appeals. For further information, please call Gail E. Magenau Hire.

Environmental Law Update

PROPOSED CHANGES TO CHAPTER 21E

In 1998 the legislature amended Chapter 21E to provide liability exemptions for "eligible persons" such as certain purchasers of contaminated property. Apparently believing that the protections do not go far enough to promote the development of brownfields, the development community has proposed legislation this year to expand the exemptions. Among other things, "An Act Relative to Brownfields," Senate No. 134, would make the liability exemptions effective automatically for eligible persons, instead of when the cleanup is completed. The legislation would also remove authority to collect from eligible persons MassDEP's unpaid response costs at a site. Discussion of the proposed changes is expected to continue throughout the spring and summer.

ASBESTOS IN SOIL/MERCURY



MSO's Kay Coughlin and friends at the EBC Young Environmental Professionals Esplanade Clean Up.

After many year of discussion, MassDEP has finally released its regulations for handling asbestos in soil. The proposal makes changes to the Massachusetts Contingency Plan, the regulations governing cleanups of contaminated sites, as well as to the solid waste regulations. Likewise, MassDEP just issued draft mercury regulations for comment.

PERMIT STREAMLINING PART II

With a goal of "achieving environmental regulation at the speed of business," Governor Patrick is pushing MassDEP to make changes in the way it issues permits. MassDEP has established work groups that will make recommendations for regulatory changes to the permitting processes and time lines for air quality, groundwater discharge, and chapter 91 permits. Another task force is looking at reforms to the wetlands appeal process. Although some wetland appeals are resolved or dismissed at a screening stage, appeals that proceed to the Division of Administrative Law Appeals continue to take months or years to complete.

LANDFILL CLOSURES

MassDEP has issued an addendum to its "Revised Guidelines for Determining Closure Activities at Inactive Unlined Landfill Sites, July 6, 2001" to address concerns about the use of construction and demolition debris fines or residuals as grading and shaping material. C&D fines have the potential for generating hydrogen sulfide gas. MassDEP will now require landfill closure projects proposing to use C&D fines to have a plan for separating gypsum/wallboard from the debris before crushing or grinding, to the greatest extent feasible. The C&D fines must also be mixed with soils. These and other requirements of the addendum suggest that using C&D fines as grading and shaping material for landfill closures will continue to be challenging.



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