



# Insights & Updates

Spring 2011

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## Navigating the MESA Maze

For developers, “lions and tigers and bears” morphs to “box turtles and moths and hawks” when their property is mapped as Priority Habitat under the Massachusetts Endangered Species Act (MESA). Yet, recent amendments to the MESA regulations provide developers with meaningful opportunities to design and permit projects that protect endangered species and their habitats. Endangered species protection need not become a “turtles versus housing” pitched battle. Although they may not be in Kansas anymore, developers with brains, hearts and courage can navigate this Land of Oz.

### The Legal Regime

MESA was enacted in 1990. It protects both plant and animal species and their habitats by prohibiting the “take” of any endangered, threatened or special concern species native to Massachusetts. MESA is administered by the Natural Heritage and Endangered Species Program (NHESP) in the Division of Fisheries & Wildlife at the Department of Fish and Game (Fisheries and Wildlife).

Under MESA, the Director of Fisheries and Wildlife is required to determine whether any species is endangered, threatened or of special concern, and reviews the list of species at least every five years. There are 213 endangered, 105 threatened, and 117 special concern species on the list.

In 1992, Fisheries and Wildlife promulgated implementing regulations, which were amended in 1996 to add criteria for issuing a Conservation and Management Permit (CMP) when a “take” is unavoidable. In 2005, the regulations were revised to formalize a process for interacting with NHESP on the mapping of Priority Habitat, requests for information, environmental reviews, and applications for MESA Review including a CMP. There are procedures and criteria for decision-making on whether a “take” will occur from proposed activities, review timelines, and an appeal process.



In 2010, Fisheries and Wildlife amended its regulations to provide general areal mitigation standards for achieving the “long-term Net-Benefit” performance standard. These standards require a replacement of habitat in the following ratios: endangered 3:1; threatened 2:1; special concern 1.5:1. Developers must commence work under a “no take” determination within five years, and Fisheries and Wildlife can set an extended time for work to commence or be completed under a CMP. There is a new conservation planning and streamlined permitting process for Species of Special Concern.

### NHESP Regulatory Review

Developers must file with NHESP if a project falls within Priority Habitat mapped in the *Atlas* and does not qualify for one of 18 exemptions. Since the maps do not identify what species triggered the mapping, the proponent typically submits a Request for Information for the list of state-listed species associated with the mapped site to facilitate project planning and design. A project can be designed to avoid a “take” under the regulatory performance standards for obtaining a No Take Determination for certain small projects with a total disturbance limit of less than 10,000

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# Firm Activities

## IN THE NEWS

We are pleased to welcome Trevor Anderson Hire, born to MSO associate **Gail Magenau Hire** and her husband, Steve, on March 23, 2011.

**Tom Mackie** chaired the Fifth Annual EBC Construction and Demolition Materials Summit.

**Michelle O'Brien** has been appointed to the MassDEP Regulatory Reform Working Group, the purpose of which is to develop reform proposals to enable MassDEP to effectively perform its environmental protection mission in the face of significant staff reductions resulting from budget cuts.

**John Shea** presented a lecture at New England School of Law, "Administrative Law Practice: Challenges and Opportunities."

For 10 years, the firm has participated in the New England Shelter for Homeless Veterans' Adopt-A-Vet Program, the last three years under the leadership of **Noreen Ruggiero**.



**Peter F. Durning** has joined the firm as an associate. Peter is a 2003 graduate of Boston College Law School. He was previously associated with two Boston law firms where he gained significant experience in environmental law and litigation.

## Navigating the MESA Maze: (continued from page 1)

square feet. In Fiscal Year 2009, NHESP issued approximately 595 "no take" decisions, 174 "conditional no take" decisions, and 23 "take" decisions. If a project will result in a "take," it may qualify for a CMP. In certain cases, it is useful to conduct a rare species Survey or Habitat Assessment pursuant to NHESP protocols and guidelines under a Scientific Collection Permit in order to design a project for a CMP. A CMP application must assess project impacts and alternatives to both temporary and permanent impacts, include on-site and/or off-site mitigation plans, and a project design that avoids, minimizes, and mitigates impacts to the greatest extent practicable. A CMP may be issued if: (1) an insignificant portion of the local population will be impacted or no viable alternative exists; (2) there will be a long-term Net-Benefit to the conservation of the local population of the impacted species; and (3) there is adequate funding for the CMP plan. The CMP plan may include on- and off-site

permanent habitat protection, usually under a Conservation Restriction; on- and off-site habitat restoration or management; research to enhance conservation efforts and rare species recovery; and contributions toward development or implementation of an off-site conservation recovery and protection plan for the impacted species. In Fiscal Year 2009, NHESP issued 15 CMPs covering 10 turtle species, 12 invertebrates, six plants and five birds.

### Creative Solutions

Our clients have secured NHESP approvals for significant projects that incorporated measures to protect or mitigate impacts to endangered turtles, birds and plants. Six native turtle species pose unique challenges because of their particular life history characteristics (e.g., annual egg production, death rates for young and old species), and shrinking and fragmented habitats. The Eastern Box Turtle is sporadically distributed on the Cape and in



## Navigating the MESA Maze: (continued from page 2)

Plymouth, Bristol and Hampden Counties. This species is terrestrial, inhabiting woodlands and fields at low elevations with well-drained sandy soils. Individuals can inhabit a small home range, while others may regularly move several miles. They can live for 100 years, so population stability requires very high annual survival. Road deaths of females can doom a local population. NHESP's general "rule of thumb" requires 70% habitat protection and 30% development of a site. Developers are eager to protect wetlands and build in uplands, but the Eastern Box Turtle is an upland species that spends little of its life cycle in wetlands. Instead of merely accepting the ratio, a turtle study may document different habitat needs and range. For a Chapter 40B project in Marshfield, a client conducted a Turtle Survey and a Habitat Suitability Study, with multi-year radio telemetry tracking. That work confirmed the 70/30 split, but allowed a sensitive design with turtle protection measures. The "take" was approved under a CMP that required a conservation restriction on 23 acres of the 31 acre site; creation of nesting, breeding and movement habitats; funded restoration and perpetual maintenance of nesting habitat; temporary and permanent turtle-exclusion fencing; and \$70,000 to fund studies, research and conservation planning to improve the understanding of turtle preservation methods.

In a Nantucket case, family members inherited 45 acres that were in the family for four generations. Unfortunately, they faced claims for multi-million dollar unpaid inheritance and property taxes, and did not have sufficient money to satisfy these obligations and keep the

property. They became reluctant developers in order to subdivide the property, sell lots to pay the taxes and development costs, and keep the family house. Despite discovering that the property was mapped for the Northern Harrier Hawk and two plants, with the assistance of a seasoned wildlife biologist, an engineer, and our firm, they designed and permitted a six-lot subdivision. Although the family could not avoid the "take" of the plants and the feeding, breeding, sheltering and movements behavior of the hawk, after negotiations with NHESP, we secured a CMP that allows eight acres of development footprint for homes while it protects 28 acres in perpetuity as open space habitat under a conservation restriction (fortunately, the hawk needs wetlands); provides a 830 foot flyway for the hawk; protects 2.7 acres under a Declaration of Restriction; provides \$20,000 for long-term, on-site habitat management and monitoring, and \$30,000 for off-site mitigation; and imposes timing restrictions and other measures to protect the species during construction. The result is a viable project that achieves the family's goal of preserving the estate property and its natural beauty by generating income to pay taxes, to construct minimum infrastructure, and to provide for the beneficiaries, under a development plan that meets the performance standards for a CMP.

Although these species and their habitats have the potential to be "project killers," an expert team can guide clients in planning, designing and permitting projects to be profitable and protective of endangered species. For more information, contact John F. Shea, Esq.

## Firm Successes

**Mackie Shea O'Brien, PC**, and Tom, John and Michelle are again recognized for skills in environmental and land use law by *The Best Lawyers in America*, *Chambers USA America's Leading Lawyers for Business*, and *Massachusetts SuperLawyers* for 2011.

**John Shea** secured the final wetlands permits for construction of a high-end home on upper Mystic Lake in Winchester, after almost ten years of litigation in DEP, Superior Court and Land Court. John also spearheaded the permitting team and obtained wetland approvals for a coir envelope, sand fence, beach nourishment and planting project designed to restore the beach and slow severe erosion of a coastal bank, which is threatening to topple our clients' homes into Cape Cod Bay in Truro.

**Tom Mackie** and his team mates on the Moroccan Moles placed eighth in the First Annual Wachusett Mountain Up Down and Around run, bike, climb and ski event.



From left: David Crowley, Amy Grove, Julie Crowley and Tom Mackie.

**Michelle O'Brien** has been selected for the inaugural edition of the *Bar Register of Preeminent Women Lawyers*, compiled by Martindale Hubbell.



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# Insights & Updates

## Environmental Law Update

Governor Deval Patrick appointed Richard K. Sullivan, Secretary of the Executive Office of Energy and Environmental Affairs (EEA), and Kenneth L. Kimmell, Commissioner of the MassDEP. Secretary Sullivan was formerly Commissioner of the Department of Conservation and Recreation and Commissioner Kimmell was formerly General Counsel of the EEA.

On December 29, 2010 EEA issued the Massachusetts Clean Energy & Climate Plan. The Plan, established pursuant to the Global Warming Solutions Act, sets the state's 2020 goal for reductions in greenhouse gas (GHG) emissions at 25%, the maximum under the law. It sets forth the broad initiatives that the EEA will take to reduce GHG from various major sectors.

The state's proposed FY 2012 budget includes a significant further decrease in MassDEP funding. Commissioner Kimmell and others are lobbying for more funding as the 2012 budget process unfolds. These cuts are not good for those seeking permits or compliance assistance from MassDEP or for the many initiatives that are currently underway.

If an outside rider to the FY 2012 Massachusetts Budget is passed, changes the Legislature made in 2010 to solid waste site suitability requirements and to permitting of small (less than 50 tpd) transfer stations will be completely reversed.

The MassDEP has issued pre-publication proposed amendments to its solid waste site assignment regulations to streamline and clarify the procedures for permitting anaerobic digestion and other source separated organics processing facilities.

In March 2011, the EPA promulgated a new solid waste regulation defining whether secondary materials used as a fuel will be considered "wastes." The definition is critical in determining whether a facility combusting secondary material meets the EPA definition of an "incinerator" under EPA's air program and would be required to comply with maximum available control technology (MACT) standards. These new regulations are not affected by the EPA's May 2011 indefinite suspension of the effective date of the new MACT standards pending completion of judicial review and EPA reevaluation.

The USEPA postponed for three years proposed greenhouse gas regulations that would have applied to biomass combustion facilities in order to study the matter further. The proposed amendments would have required biomass facilities to achieve best available control technology (BACT) to limit emissions of green house gases, such as carbon dioxide.