MACKIE SHEA O'BRIEN PC

Insights & Updates

Summer 2006

Inside

MACKIE SHEA O'BRIEN, PC

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MACKIE SHEA O'BRIEN, PC: BRANCHING OUT

Mackie Shea O'Brien, PC is headed in an exciting direction. We continue to be at the forefront of the environmental law field, helping clients achieve the best business and environmental results. We believe that the environmental market is also headed in a good direction. The bad old days of command and control, end of the pipe environmental regulation are nearly gone. Regulators and the public have a more sophisticated understanding of business and the environment which provides opportunities to meld these two concepts where few existed before. As a consequence, our clients are increasingly asking us to help legally integrate sustainability concepts into profitable business models. We achieve this goal through creative and personalized lawyering. Our new credo – legal solutions for today's businesses and tomorrow's environment – sums up our philosophy.

From green buildings to first of their kind recycling projects, we are enthusiastic about the opportunities presented in today's market. Our recycling clients continue to invest heavily in the state's growing recycling infrastructure. They look to us to help guide them through the tangled permitting process. For our foreign and out-of-state clients, we provide introductions to existing industry players and key government regulators. Developers of wood fueled renewable energy projects use us to understand the regulatory and market dynamics that will make their projects feasible. Our solid waste industry clients are transforming themselves into resource managers through the development and use of landfill gas as a renewable energy source for innovative applications such as hydroponic greenhouses. They are also becoming partners with their host communities in the truest sense, by providing long term economic and environmental benefits achieved through open and transparent legal arrangements. Tom Mackie adds special value to these areas through his familiarity with local permitting and depth of experience in the recycling and solid waste industries.

Our real estate development clients are building "smart growth" developments that incorporate the New England Village concept to reduce project impacts and improve quality of life. Smart growth and the related concept of transit-oriented development have been key concepts in the Romney administration, and state funding is available for eligible projects. We have had the opportunity to team with engineers and scientists at the earliest project stage to help optimize permitting by incorporating sustainability and open space opportunities. John Shea is using these smart growth concepts to successfully navigate the minefields

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Firm Activities

IN THE NEWS

Michelle O'Brien has been named Co-Chair of the Boston Bar Association Environmental Law Section. She previously held the position of Co-Chair of the Hazardous and Solid Waste Committee.

Thomas Mackie and Michelle O'Brien have been listed in the 2006 edition of *The Best Lawyers in America* for environmental law.

John Shea, Tom Mackie and the firm have been listed in Chambers USA *America's Leading Lawyers for Business 2006* for environmental law.

Eric DiVincenzo and Gail Magenau have been selected as 2006 Massachusetts SuperLawyers Rising Stars.

PROFESSORS AT LAW

John Shea co-chaired an MCLE seminar, Development Near Wetlands and Rare Species Habitats, and made a presentation entitled "The Legal Regime of Endangered Species Protection in Massachusetts." Copies of his article can be obtained by calling or e-mailing the firm. Thomas Mackie presented "Smart Contracting for Composters" at the MassDEP Third Annual Organics Summit.

PUBLIC PARTICIPATION

Gail Magenau is working with the Citywide Groundwater Emergency Task Force to achieve solutions to groundwater depletion in the City of Boston. Insufficient groundwater levels threaten the stability of structures built on "made land" because wooden piles (on which the structures rest) decay when the water table falls and the piles are exposed to air. Gail participated with the Task Force to encourage the City of Boston to amend its Zoning Code in February to formally recognize this silent plague on Boston area neighborhoods. Gail is now working with the Task Force on legislation addressing groundwater depletion.

FOND FAREWELL

On June 30 the firm bid a fond farewell to legal assistant Jeanne M. Collins, who retired. In addition to her nine years of stellar secretarial work, Jeanne also coordinated many of the firm's volunteer activities such as the Jimmy Fund Walk and Rosie's Place dinners. We wish her well.

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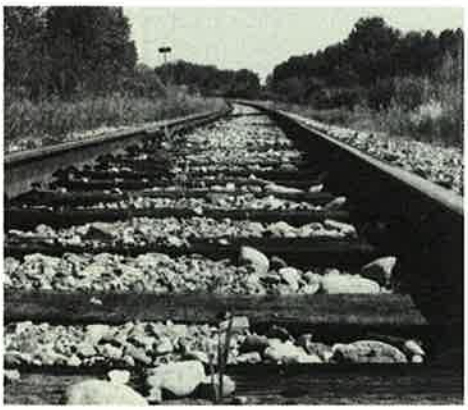
of wetlands, wildlife and zoning permitting and avoid the blockades of administrative and court appeals that would otherwise bog down our clients' affordable housing, marina and mixed use projects. Gail Magenau has become an authority on conservation easements and restrictions, a valuable resource to our entire clientele.

Historically, the firm's litigation practice consisted primarily of defending clients against environmental enforcement and clean up claims. Michelle O'Brien has taken the firm down new paths, however, by obtaining the state's highest judgment against a municipality for terminating a client's coal ash disposal project and by winning several appeals on other cutting-edge environmental issues. Michelle will continue to spearhead the firm's involvement with the environmental bar as Co-Chair of the Environmental Law Section of the Boston Bar Association (where she formerly served as Co-Chair of the Hazardous and Solid Waste Committee).

Lest we leave the impression that we have departed from our historical roots, be assured that we still handle many traditional matters. We continue to negotiate or litigate enforcement defense cases with state and federal regulators, clean up cost claims, permit appeals and other environmental cases. We also continue to represent leaders in the hazardous waste industry by providing environmental due diligence for facility acquisition and business and compliance advice regarding hazardous waste services. As before, we still handle a heavy caseload of land use, zoning, subdivision, wetlands, waterways, coastal zone and MEPA matters.

The firm has always been in the vanguard of Massachusetts environmental law firms. Founders Frank Wright and Tony Moehrke were instrumental in the development of key environmental programs and leaders in the environmental law bar. More importantly, they set the high standard for client service and legal performance that has carried our firm to its current pre-eminent standing. Even though the nature of our work has changed, we still value these two pillars of practice above all else.



LITIGATION POINTERS FOR ELECTRONIC DATA

Each of us has a computer and uses email frequently for highly confidential business communications. We all have gotten into the habit of sending an email instead of a quick telephone call to convey our latest idea. We also regularly review and comment on draft contracts and documents for major business transactions, sometimes using the "comments" feature to express reservations about passages in these documents. This incredibly convenient technology has a dark side. By using it, we are creating an indelible electronic record of our most confidential business thoughts and impressions. These thoughts and impressions can and will be used against us in a court of law. It is just a matter of time. So, what can you do about it? You can do plenty.

Electronic (or "e") discovery requests are now standard in litigation. Plaintiffs are no longer settling for that box of documents your secretary pulled out of the dusty closet. Emails are only the tip of the iceberg. Requests for computer hard-drive back-up tapes and even voicemail messages are fair game. The cost of responding to e-discovery requests can be astronomical. Most importantly, courts are imposing severe sanctions on those who fail to comply adequately. You must prepare now - before litigation. Here is a simple roadmap to prepare you for the inevitable e-discovery request and how to efficiently manage a response.

Electronic evidence: why it's different. The sheer volume of information subject to e-discovery defies measurement. Information is considered "electronic" if it exists in a medium that can only be read through the use of a computer or other electronic device. One DVD can store more than 50 boxes of documents; computer hard-drive back-up tapes - nearly 3,000. Electronic information doesn't go away. Pressing the delete button does not send that company email into cyberspace never to return. A record of the revisions you made to a draft agreement may remain in the document's "metadata" eternally. An entire industry of "data mining companies" has emerged whose sole purpose is to recover data from your computer that you never knew existed.

Prepare now. When hearing this grim news, your first instinct is to hope your company never receives such a request. Unrealistic. Instead, a company-wide document retention policy should be established. Many companies delete emails every thirty days and recycle back-up tapes every few months. Most importantly, companies should require all employees to adhere to the policy and then police compliance.

Anticipating a lawsuit. If you do suspect that a lawsuit is coming, do NOT start deleting files. Federal courts have imposed a duty on companies to preserve material evidence both during litigation and before litigation when a party "reasonably should have known" that certain information might be relevant. All key employees and sources of discoverable information should be identified. A litigation hold letter should be circulated to, at a minimum, instruct key employees to stop deleting records. I.T. personnel should be instructed to suspend automatic document deletion protocols for individuals involved in the anticipated litigation. Counsel must take affirmative steps to monitor compliance with the hold, including conducting periodic employee interviews.

Consequences of poor planning. Court sanctions are becoming routine for companies who fail to properly preserve electronic evidence in anticipation of litigation. In the much discussed Zubulake case (2004), a federal jury returned a $29 million verdict ($20 million in punitive damages) against a company as a result of improper document destruction during litigation. Emails were deleted and back-up tapes were lost after a litigation hold was circulated. Company attorneys failed to identify all key employees and/or monitor compliance with the hold. Court orders for back-up tape restoration, awarding discovery costs to complainants and even judge-issued "spoliation" instructions, where a jury is ordered to assume that lost or destroyed information is adverse to the company's case, are now common.

Lessons learned. Communication internally and with your lawyers is crucial. There is no substitute for early planning. Establish a company-wide document and data retention policy and adhere to it. By asserting some measure of control over your company's document retention pre-litigation, you will be in better position later to appropriately limit e-discovery scope, avoid unnecessary costs and increase credibility in court during a dispute. For more information on the firm's litigation services, please call Michelle N. O'Brien at (617) 266-5700.

Environmental Law Update

New DEP Wetlands Guidance for Wildlife Habitat
MassDEP has issued a Massachusetts Wildlife Habitat Protection Guidance for Inland Wetlands. The Guidance provides simplified evaluations of small scale alterations and detailed evaluations for larger projects. Rare or endangered species continue to be separately regulated by the Natural Heritage and Endangered Species Program under the Massachusetts Endangered Species Act.

Proposed DEP Standard for Perchlorate
MassDEP has proposed the first drinking water and waste site cleanup standard for perchlorate, a chemical found in blasting agents, fireworks, munitions, manufacturing processes and, amazingly, in existing water treatment processes. Cleanup and drinking water levels cannot exceed 2 parts per billion (ppb).

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Environmental Law Update

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New Federal Wetlands Decision

In *U.S. v. Johnson (February 2006)*, the U.S. First Circuit Court of Appeals affirmed the authority of the EPA to regulate activities in certain cranberry bogs under Section 404 of the Clean Water Act (CWA). Johnson, a cranberry farmer in Carver, Mass., discharged dredged and fill material at his properties in order to construct, expand and maintain his commercial cranberry bogs. The government argued that Johnson should have obtained a Section 404 Permit from the Army Corps of Engineers. The Court concurred with the EPA's interpretation of the term "waters of the United States" to allow for the regulation of wetlands found to be hydrologically connected to a non-navigable tributary or tributary system which eventually flows into a navigable water. Undisputed evidence demonstrated that the bogs were located adjacent to a system of non-navigable water tributaries which eventually flowed into the navigable Weweantic River and ultimately the Atlantic Ocean.

New EPA "Brownfields" Regulation

Under the Brownfields Amendments passed in 2002, a property purchaser can be exempt from superfund liability if he or she complies with specific provisions outlined in the statute, including conducting "all appropriate inquiries" into present and past uses of the property and the potential presence of environmental contamination on the property. The new EPA regulation specifies tasks and timelines for a prospective purchaser's all appropriate inquiry. The rule will become effective on November 1, 2006.

New EPA Particulate Matter Rules

In January, EPA proposed revisions to the particulate matter air quality standards. The proposed revisions would strengthen the PM2.5 standard by lowering the 24-hour standard from 65 micrograms per cubic meter to 35 µg/m3 (the annual PM2.5 standard would remain at 15 µg/m3). The revisions would also use a new measure called PM 10-2.5 to refocus the coarse particle standards on those particles that are associated with public health concerns, taking into consideration whether the PM was generated from paved roads, construction or industrial sources (regulated) versus rural, agricultural or mining (not regulated) sources. The old PM-10 standards would be eliminated. The projected timeline calls for promulgation of the new PM2.5 and PM 10-2.5 standards by December 2006, followed by PM2.5 attainment designations and implementation plans by 2009 and 2013, respectively, and PM 10-2.5 designations and implementation plans by 2013 and 2016.

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