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ENVIRONMENT & ENERGY INSIGHTS

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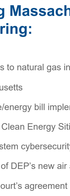


Matthew Snell

Welcome to Nutter's *Environment & Energy Insights Newsletter*, a monthly update of current trends in environment and energy law affecting Massachusetts. This month we are covering:

- Legal challenges to natural gas infrastructure bans, including a possible suit in Massachusetts
- Possible climate/energy bill implementing the recommendations from the Commission on Clean Energy Siting and Permitting
- EPA's Water System cybersecurity concerns
- Implementation of DEP's new air amendments
- The Supreme Court's agreement to hear San Francisco's challenge to its NPDES permit

More challenges to natural gas infrastructure bans. Is Massachusetts next?
Several cities and towns across the country have attempted to limit or prohibit the construction of new natural gas piping and appliances in an effort to limit fossil fuel use. Massachusetts is among them, having created a pilot program allowing 10 cities and towns to ban installation of fossil fuel infrastructure in new buildings.

The future of such programs is in doubt in light of the Ninth Circuit's decision in *California Restaurant Ass'n. v. City of Berkeley*, holding that the federal Energy Policy and Conservation Act (EPCA) preempted *Berkeley*'s California's building code ordinance prohibiting new natural gas infrastructure. The court held that EPCA preempts building codes that regulate the quantity of natural gas consumed by consumer appliances. Thus, *Berkeley's* ban was preempted because the ordinance had the practical effect of regulating the "quantity of energy consumed by [natural gas appliances] at point of use."

Following the *Berkeley* case, similar lawsuits have already been filed in other jurisdictions, including Washington state and New York City and New York state, which banned the use of natural gas in new construction last year. According to a recent article in the ***Boston Globe***, Massachusetts could be next, as a trade association is considering a similar challenge to the state's pilot program. If the bans are overturned, municipalities will either need to look to Congress to amend EPCA or tailor their ordinances to meet one of EPCA's few exemptions.

The Massachusetts Commission on Clean Energy Siting and Permitting made its recommendations. Will the Legislature act on them?
In September 2023, Governor Healey established the Commission on Energy Infrastructure Siting and Permitting "to identify the barriers to clean energy development and develop recommendations . . . to address these challenges" to help achieve Massachusetts' ambitious climate goals. The Commission published its **report** in late March 2024, proposing several reforms to the state's process for siting and permitting clean energy infrastructure. Among the recommendations are: (1) Consolidating state, regional, and local permits for large clean energy projects into a single permit from the Energy Facilities Siting Board that must be decided on within fifteen months of application; (2) Implementing a single, consolidated, municipality-issued permit for smaller projects that must be decided on within twelve months of application; and (3) Giving the Siting Board jurisdiction to approve large battery storage projects (>100 MW).

The chairs of the Legislature's joint energy committee say **there will be a climate and energy bill this session**, and the Healey Administration **says it is working on a bill** with the committee that will follow the Commission's framework. But time is quickly running out before formal sessions end in July. It is currently unclear which of the Commission's recommendations the Legislature might adopt, if a bill is finalized in time.

EPA urges action to enhance Water System cybersecurity.
Last fall, the EPA **rescinded a memorandum** that would have required states to incorporate cybersecurity evaluations into public water system audits. Water system cybersecurity remains of critical importance, however, as highlighted by EPA Administrator Michael Regan and National Security Advisor Jake Sullivan's March 2024 **joint letter** issued to all U.S. Governors, addressing the urgent need to safeguard water sector critical infrastructure against **cyber espionage** by adversarial state actors.

Even routine cybersecurity measures can make a difference, as illustrated by a recent **incident** in which operational technology at water facilities were disabled in a cyberattack exploiting unchanged default manufacturer passwords. The Department of Homeland Security's Cybersecurity and Infrastructure Security Agency provided a **list of actions** that water systems can take to reduce their risk and improve protections against malicious cyber activity. These actions include conducting regular cybersecurity assessments, changing default passwords, creating isolated backups of critical systems data, training employees in cybersecurity basics, and developing a cybersecurity incident response and recovery plan. Additional tools and resources are available **here**.

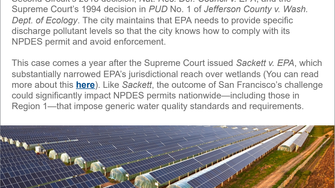
DEP's Cumulative Impact air amendments begin July 1, 2024.
The DEP recently **amended** air pollution control regulations (310 CMR 7.00) to require a cumulative impact analysis (CIA) for certain comprehensive plan applications (CPA) submitted on or after July 1, 2024 where the facility is located near an environmental justice community. The first in the nation regulations will require a CIA for any CPA required for (1) new facilities; or (2) modifications to existing facilities where the modification would increase facility-wide potential emissions by one ton per year or more. The scope of the CIA will be governed by whether the facility is a major source (potential emissions of fifty tons of nitrogen oxides or volatile organic compounds, a hundred tons of any other criteria pollutant, twenty-five tons of combined hazardous air pollutants or ten tons of any individual hazardous air pollutant) or a non-major source, and its proximity to environmental justice communities. For facilities that are not a major source (most facilities in Massachusetts), a CIA is required where the facility is within one mile of an environmental community. Major sources must conduct the CIA if the facility is within five miles of an environmental justice community.

Under the amended regulations, comprehensive permit applicants for proposals requiring CIA are subject to additional notice and community input requirements prior to submitting a CPA. Once the CPA is submitted, applicants are required to conduct a comprehensive assessment of existing conditions within the community, to include scientific analyses of air quality and narrative incorporating public comments. Applicants must conduct air quality dispersion modeling and risk characterization of air pollutants. Applicants must use these materials to produce the CIA (**technical guidance available here**), evaluating potential public health impacts of the proposed project and detailing mitigation measures. Applicants must then submit the CIA to the DEP, which will issue a proposed decision on the CPA and allow for additional public comment before issuing a final decision.

This is a notable development in environmental law, as Massachusetts is the **first state** to require analysis of cumulative impacts for air quality permits near historically disadvantaged communities. This regulation may serve as a model for future DEP environmental justice initiatives, and a similar approach may be applied to other DEP programs in the future.

A new San Francisco treat: The Supreme Court will decide another challenge to EPA's Clean Water Act authority.
In May 2024, the Supreme Court agreed to hear San Francisco's challenge to its National Pollution Discharge Elimination System (NPDES) permit issued by the EPA under the Clean Water Act (CWA). San Francisco **alleges** that its NPDES permit contains overly vague requirements that do not inform the city how to comply with the permit. The city argues that the CWA prohibits generic prohibitions against discharging "in a manner that causes or contributes to an exceedance of" water quality standards in receiving waterbodies, citing the Second Circuit's 2015 decision, *Nat. Res. Def. Council v. EPA*, and the Supreme Court's 1994 decision in *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*. The city maintains that EPA needs to provide specific discharge pollutant levels so that the city knows how to comply with its NPDES permit and avoid enforcement.

This case comes a year after the Supreme Court issued *Sackett v. EPA*, which substantially narrowed EPA's jurisdictional reach over wetlands (You can read more about this **here**). Like *Sackett*, the outcome of San Francisco's challenge could significantly impact NPDES permits nationwide—including those in Region 1—that impose generic water quality standards and requirements.



This advisory was prepared by **Matthew Connolly**, **Matthew Snell**, and **Joseph Jannetty** in Nutter's **Environmental** and **Energy** practice group. If you would like additional information, please contact any member of our practice group or your Nutter attorney at 617.439.2000.

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