Environment & Energy Insights

December 2025 Edition

Welcome to the December edition of Nutter's *Environment & Energy Insights*, a periodic update of current trends in environment and energy law. This month we cover:

- **The Massachusetts Water Resources Authority's contemplated attempt to reclassify the Charles River**
- **The Ninth Circuit's recent decision rendering a Clean Water Act citizen suit moot**

The MWRA Contemplates Requesting Reclassification of Charles River to Permit Permanent Combined Sewer Overflows, but Faces Community Pushback

The Massachusetts Water Resources Authority ("MWRA") is beginning to face headwinds in its efforts to permanently allow for untreated sewage discharges into the Charles River.

Multiple municipalities near the Charles River, including Boston, Cambridge, and Somerville, have combined sewer systems. This means that each municipality has sanitary sewers and rainwater drainage systems that are combined into a single network. During significant rainfall events, the combined flow in such a system is so high that the sewage-rainwater mixture must be discharged into a receiving waterbody prior to receiving treatment. A combined sewer overflow ("CSO") is the infrastructure used to discharge untreated or minimally treated sewage under such circumstances.

The MWRA has attempted for decades to eliminate CSOs. It, along with the Boston Water and Sewer Commission and the City of Cambridge, has reduced CSO discharges to the Charles River by 98 percent since 1988. Still, the Charles River is the receiving water to multiple CSOs, despite its current classification as a Class B waterway under Massachusetts' surface water quality standards (314 CMR 4.00). This classification means that the Charles River is authorized for swimming, recreation, and other such activities, and CSO discharges are typically not allowed. Previously, state regulators gave temporary authorization allowing 13 million gallons of CSO discharges annually, giving the MWRA time to improve its infrastructure and remove the remaining Charles River CSOs.

But now, the MWRA seeks to reclassify the Charles River under Massachusetts Department of Environmental Protection (MassDEP) regulations (314 CMR 4.00) from a Class B waterway to a Class B (CSO) waterway. This would permanently allow for CSO discharges of up to 30 million gallons annually.[1] Class B (CSO) waterways, under the regulations, are "occasionally subject to short-term impairment or other recreational uses due to untreated CSO discharges in a typical year." This means that the continued operation of CSOs on the Charles River would no longer be a matter of special, temporary permission by state regulators, but rather a matter of right under Massachusetts water quality standards. The MWRA cites the prohibitive costs of total CSO elimination on the Charles River as the driving consideration behind the reclassification.

This reclassification may be on hold, though, due to pushback from MassDEP, concerned citizens, and even legal challenges. Kathleen Baskin, a MassDEP official, sent a letter on November 17 urging the MWRA to reconsider the reclassification request, citing concerns that the plan would insufficiently address the underlying problems associated with CSOs. Letters from concerned citizens groups to the MWRA and MassDEP also urged against reclassification, such as those from A Better City and the Charles River Watershed Association ("CRWA") together with the Mystic River Watershed Association ("MyRWA"). The CRWA and MyRWA went a step further by filing a motion to intervene in the ongoing federal lawsuit that initiated the cleanup of Boston Harbor, alleging that the MWRA's reclassification plans would run afoul of its obligations under that suit.

The MWRA was set to vote on whether to request the reclassification on November 19, but tabled that vote amid these mounting concerns. It is unclear now whether the MWRA will continue in its reclassification efforts or if it will instead seek alternative options to deal with the remaining CSOs in its system. Ultimately, MassDEP will need to approve any reclassification request.

[1] This proposal was made at an October 29 Board of Directors meeting, the minutes of which are linked here.

The Ninth Circuit Doubles Down on Circuit Split By Rendering Citizens' Clean Water Act Complaint Moot

A citizen suit under the Clean Water Act by the Coastal Environmental Rights Foundation ("CERF") against a California restaurant owner has produced a second appellate decision that doubles down on an ongoing circuit split.

Originally filed in 2021, CERF's suit alleged that Naples Restaurant Group, LLC ("Naples") violated the Clean Water Act by discharging fireworks into Alamitos Bay in Los Angeles without first receiving a National Pollution Discharge Eliminations Systems ("NPDES") permit. CERF initially lost at a 2023 bench trial because they failed to prove that there were "continuous and ongoing violations" necessary to establish its claims. Shortly thereafter, Naples received a NPDES permit for future fireworks in Alamitos Bay, which led the Ninth Circuit on CERF's first appeal to rule that the case was moot. The Ninth Circuit remanded the case, however, due to a factual dispute as to whether Naples failed to pay the annual fee for its NPDES permit. The district court again ruled in favor of Naples and CERF again appealed.

Applying Supreme Court precedent, the Ninth Circuit held in its November 5, 2025 decision that the NPDES permit had rendered moot any of CERF's claims for injunctive relief. But CERF also had claims for civil penalties, whose mootness had not yet been decided. The Ninth Circuit thus also addressed "whether a request for civil penalties under the Clean Water Act becomes moot when a defendant obtains a NPDES permit that moots injunctive relief." Different circuit courts have reached different answers to this question. The Ninth Circuit noted that the Second, Third, Fourth, Seventh, and Eleventh Circuits have all held that the mootness of injunctive relief does not automatically make a citizen suit for civil penalties moot. Prior to the present decision, the Eighth Circuit was the only circuit to hold otherwise, by applying the same mootness analysis to both injunctive relief and civil penalties.

The Ninth Circuit joined the Eighth Circuit in its minority position. The Ninth Circuit did so in part because of similarities between the facts of the present case and those underlying the Eighth Circuit's decision. But perhaps more importantly, the Ninth Circuit pointed out that only the Eighth Circuit's decision post-dated the Supreme Court's landmark mootness decision in *Friends of the Earth, Inc. v. Laidlaw Env't Servs., (TOC), Inc. ("Laidlaw")*.[2] The Eighth Circuit had reasoned that, although not explicit, the Court's decision in *Laidlaw* overturned each of the circuit decisions which held that the mootness analysis for injunctive relief is separate from that for civil penalties. The Ninth Circuit agreed, holding that *Laidlaw* established the principle that "even when a defendant's compliance moots injunctive relief, civil penalties remain available to deter future violations unless it's absolutely clear that the alleged violation could not reasonably be expected to recur." Applying this rule to the present case, the Ninth Circuit ruled that it was "absolutely clear" that Naples would not discharge fireworks again without a NPDES permit, because it had acquired and maintained that permit. Thus, the Ninth Circuit held that CERF's suit for civil penalties was moot.

The circuit split remains unresolved and could be an issue the Supreme Court resolves in the coming years.

[2] 528 U.S. 167 (2000).

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