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Business, Sustainability, & Environmental Protection

THE CUBICAL

September 25, 2025

Environmental Permits, Licenses, and Authorizations: *Don't Forget About Certificates of Occupancy*

Recently, authorities in Southern California executed a search warrant on a medical device sterilization facility, and then subsequently announced that they had filed felony charges against the facility. The charges appear to stem from allegations that the facility has been exposing its workers to harmful levels of ethylene oxide, a known human carcinogen, and attempting to conceal the extent of such exposures.

Based on the reports so far, this criminal enforcement action does not appear to be part of a larger focus on medical device sterilization facilities. Nonetheless, I was still reminded of how the emissions of ethylene oxide from medical device sterilization facilities were front and center in my home state of Georgia six years ago. (To see what I wrote on this topic at the time, you can read *Comply First, Challenge Later: The Sterigenics Affair and Facility Shutdown Orders,* which can be accessed by clicking here.) At the time, two separate facilities in the metro Atlanta area were the focus of intense regulatory enforcement activity by a suite of state and local regulators.

A particularly interesting issue that arose with respect to one of those facilities - Sterigenics, located in suburban Cobb County - centered on the content of a certificate of occupancy for the facility. Certificates of occupancy (or similar authorizations) are issued by local code enforcement authorities to verify a particular building's compliance with applicable building codes. The Sterigenics facility was ordered to shut down after the Fire Marshal (who has jurisdiction over building code enforcement matters for the county) claimed to have noticed that the facility's occupancy status was outdated. From there, the details start to get more complicated, and these claims ultimately ended up in litigation. (As a postscript, relief finally started to come for these facilities when it

became apparent how essential they were in the campaign against the COVID-19 virus.)

Certificates of occupancy typically contain requirements and conditions that relate to the operation's impact on public health and the environment. As such, questions surrounding the content of these certificates can emerge as a new front for a facility that is facing allegations of noncompliance with environmental requirements from multiple regulatory agencies at the same time. Facilities should treat certificates of occupancy in the same way that they would treat any other environmental permit, license, or approval. Care should be taken in collecting and curating the information that is incorporated into applications for certificates of occupancy. Compliance with such certificates should be periodically reviewed by facility EHS functions. In certain circumstances, facilities may even want to consider incorporating the compliance status of such certificates into their respective EHS audit programs.

There is a transactional component that should also be kept in mind. In the operative agreements for mergers, asset purchases, and similar transactions, sellers are typically required to disclose and schedule all environmental permits that are necessary to operate the business. In these agreements, the term "permit" is typically defined broadly enough to cover just about any type of environmental approval. Given this fact, certificates of occupancy should be on the checklist of environmental approvals that may need to be disclosed and/or scheduled pursuant to these operative agreements. On the flip side, buyers should consider whether building occupancy noncompliance is a sufficiently significant risk to warrant closer scrutiny of certificates of occupancy, at least with respect to certain operations.

Startups, Shutdowns & Malfunctions Redux: *Are Two Tracks Merging?*

In the October 2024 edition of The Cubical, I focused on the issue of whether and how to sanction noncompliance with air pollution control requirements resulting from startups, shutdowns, and malfunctions. In particular, I opined that two developments during 2024 may point to a dual track system when it comes to the issue of whether noncompliance resulting from a malfunction may either be excused or at least be grounds for an affirmative defense to allegations of noncompliance. One track seemed to be restricting or eliminating the availability of a malfunction exemption or defense in the case of noncompliance with federal new source or hazardous pollutant standards. A second track, however, seemed to be opening up for the availability of a malfunction exemption or defense for standards arising out of State Implementation Plans (SIPs). (See *Startups, Shutdowns & Malfunctions* in the October 25, 2024 edition of The Cubical, which can be accessed by clicking here.)

There have been two more recent developments on this topic within the last several months - one regulatory and the other judicial. At first glance, these developments appear to reinforce the idea of such a dual track approach emerging. However, a closer inspection of the judicial development suggests the possibility of the two tracks merging into a single more permissive track.

The regulatory development was EPA's promulgation of a final rule removing a malfunction-based affirmative defense in the National Emission Standards for Hazardous Air Pollutants for the Polyether Polyols Production Industry (the "PPP NESHAP") on September 2nd. In the preamble to the final rule, EPA noted that as the

result of several judicial opinions from the U.S. Court of Appeals for the D.C. Circuit over the last two decades, EPA has been removing such affirmative defense provisions from NESHAPs and New Source Performance Standards ("NSPS'). According to these opinions, previous regulatory affirmative defense provisions were contrary to statutory provisions in the Clean Air Act requiring emissions standards to be continuous in nature.

Several days after the promulgation of this final rule, in*SSM Litigation Group v. EPA,* No. 23-1267 (D.C. Cir., Sept. 5, 2025), the D.C. Circuit reversed EPA's rescission of a malfunction-based affirmative defense provision in its Title V operating permitting regulations. This ruling addressed a malfunction-based affirmative defense provision in a set of general permitting regulations, rather than in a specific set of performance standards. Intuitively, it may not be a surprise that this decision would line up with previous judicial decisions pertaining to such affirmative defenses in the context of SIPs. Nonetheless, in its opinion, the D.C. Circuit addressed the emissions limitation continuity issue head on, holding that "a complete affirmative defense to liability does not render an emission limitation non-continuous under 42 U.S.C. § 7602(k)."

For the immediate future, the malfunction-based affirmative defense issue is likely to continue to proceed on two separate tracks. However, the D.C. Circuit's opinion *SSM Litigation Group* raises the question as to whether the door has been cracked open for a more permissive approach with respect to noncompliance with NESHAP and NSPS as well. At the very least, EPA's current leadership may try to see how much further it can open this door.

EPA Proposes to Rescind Its Greenhouse Gas Reporting Rule

On September 12th, EPA announced its intent to rescind its Greenhouse Gas Reporting Rule (the "GHG Reporting Rule"). The GHG Reporting Rule, which has been in effect for about 15 years, requires most facilities emitting more than 25,000 metric tons of carbon dioxide per year, and certain suppliers of fuels and industrial gases to collect, calculate, and report their emissions of GHGs to EPA on an annual basis. According to the Agency, the GHG Reporting Rule has been imposing a substantial compliance burden, while at the same time failing to deliver any real environmental benefits.

It is anticipated that EPA will receive extensive comments on its proposal - both pro and con. Because of the amount of time that will likely be needed to respond to such comments, it may be quite a while before a final rule is promulgated. In addition, environmental organizations and state Attorneys General offices, among others, are expected to challenge any final rule to rescind the existing GHG reporting requirements. This could leave the status of any such final rule in limbo for that much longer.

It is quite likely that many - if not most - of the business covered by this rule currently report such information under other voluntary (or not so voluntary) reporting regimes. Given such voluntary reporting activities, and the amount of time it may take for this proposal to wind its way through the rulemaking process, these businesses should keep their existing reporting infrastructure in place for now. Adjustments should only be made as significant developments may warrant.

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