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THE CUBICAL

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Separating the H From the EC: SCDHEC to Be Split into Two Separate Agencies

On May 25, 2023, South Carolina Governor Henry McMaster signed a bill that will result in the Department of Health and Environmental Control ("DHEC") being split into two separate agencies: the Department of Public Health and the Department of Enviornmental Services. As the name certainly applies, the Department of Environmental Services will inherit most of the responsibilities of DHEC's Environmental Affairs directorate. These responsibilities encompass the typical responsibilities of a state environmental agency, such as air permitting, wastewater permitting, and hazardous waste management. Full implementation of the split is expected to take some time as new boards are constructed and new directors are appointed. Entities regulated by Environmental Affairs are unlikely to see very many changes, other than perhaps a few delays here and there while a myriad of administrative and bureaucratic details are being sorted out.

South Carolina is one of the few states where a single governmental agency is responsible for both environmental protection and public health services. (Kansas and Colorado are two other notable examples.) The protection of the environment and the protection and promotion of the health and well-being of a state's citizens are closely linked. However, the actual day-to-day functions of a state public health agency and a state environmental protection agency differ considerably. Organizational, structural, and leadership needs differ considerably as well. Splitting the two functions into separate agencies will allow each agency to focus on its core competencies without being burdened with the bureaucratic and administrative weight of the other.

At the same time, there will still be opportunities for collaboration and cooperation among these administrative functions. As an example, the epidemiological and chemical exposure functions of a number of state public health agencies have been instrumental in response to the challenges associated with the threat posed by emerging contaminants such as PFAS and 1,4-dioxane. (The Minnesota Department of Health and the Florida Department of Public Health have been notable examples on this front.) Personnel with South Carolina's new public health and environmental protection agencies will already have some degree of familiarity with each other. Whether this familiarity can be leveraged to improve the delivery of services to their citizens by cooperating and collaborating where it makes sense to do so remains to be seen.

What Happens After a Court Rules Against EPA?

In the August edition of The Cubical, I reported on a recent opinion from the U.S. Court of Appeals for the Third Circuit that struck down a long-held EPA policy requiring major air pollution sources to re-enter the Prevention of Significant Deterioration ("PSD") permitting process prior to restarting previously shuttered operations. I noted that the Third Circuit's opinion would be limited in its geographical scope to only those states and territories that fall within the jurisdictional boundaries of the Third Circuit. As it turns out, this isn't the first time that the pages of The Cubical have touched upon the jurisdictional limitations of a federal appellate court decision striking down EPA action. I made note of such limitations in an article on another Third Circuit decision in the July 2021 edition of The Cubical. That article dealt with the "federally permitted release" exemption to CERCLA's release notification and reporting requirements.

What's going on here? If a federal appellate court concludes that EPA has acted arbitrarily or beyond the scope of its legal authority in pursuing a particular policy or course of action, why would the binding effect of such a decision be limited to a particular geographical area, rather than the entire country? To answer this question, it is important to remember that a federal appellate court decision is binding only in the geographical area covered by the federal circuit court of appeal in question. So, a decision from the U.S. Court of Appeals for the Third Circuit would be binding only in New Jersey, Pennsylvania, Delaware, and the Virgin Islands. Absent any statutory or regulatory authority to the contrary, there is nothing that would require EPA to comply with a federal circuit court of appeals opinion in states or territories that fall outside the jurisdictional boundaries of the deciding court.

The opinion discussed in the August 2023 edition of this newsletter involved the Clean Air Act (the "CAA"). As it turns out, under the CAA and its implementing regulations, EPA's authority to limit the geographical scope of an adverse court decision may be limited in certain circumstances. The RCR, which was originally promulgated by EPA in 1980 pursuant to Section 301(a)(2) of the CAA, establishes a policy goal of national uniformity and consistency in the application of the statute and its implementing regulations. Amendments to the RCR that were promulgated in 2016. permit EPA to depart from this policy of national uniformity and consistency when limiting the geographical scope of an adverse federal court decision regarding a "locally or regionally applicable" action. In practice, what this means is that in most instances, EPA would probably be obligated to give nationwide effect to adverse decisions from the D.C. Circuit, but it would likely retain the ability to limit the geographical scope of adverse decisions coming out of the other circuits.

Happy Holidays!!
And Best Wishes for a Wonderful New Year!!

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