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Environmental Liability at Health Care Facilities

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With reports of news stories related to “superbug” infections emerging in hospitals across the country, health care facilities are redoubling their efforts to ensure that proper sanitization procedures are instituted. In undertaking these procedures, such facilities need to be similarly mindful of the many environmental requirements that apply to health care facilities to avoid unwanted scrutiny and enforcement from environmental regulators. In an era of ever-increasing hospital mergers, acquisitions and related transactions, resolving environmental concerns best positions facilities in a transactional context.

The U.S. Environmental Protection Agency indicates on its website that hospitals “pose a major environmental and public health concern.” All too often, such facilities fail to establish compliance protocols for the full breadth of environmental requirements pertaining to their operations, including air emissions, waste handling, wastewater discharges and emergency planning. The failure to comply with such regulations can result in substantial environmental enforcement actions, fines and related liabilities.

With respect to air emissions, hospitals that operate sterilizing equipment are generally required by the EPA to implement specific management practices and comply with air emission standards, including the need to route emissions from such equipment to an air-pollution control device. Other common air-related violations at health care facilities include the failure to close lids on parts washers when not in use, improper use of medical-waste incinerators and excessive emissions from outdated



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or improperly functioning boilers used to generate steam for heating, hot water, sterilization and power.

Waste management represents a particular environmental challenge for health care facilities. Nearly every major health care facility generates hazardous and infectious waste at on-site laboratories, X-ray units, pharmacies, operating rooms and laundry facilities. Waste violations can arise due to improper labeling of waste containers, open containers of hazardous waste, poor disposal practices and failure to inspect and document inspections of hazardous waste storage accumulation areas.

Managing pharmaceutical waste can be especially challenging for health care facilities. A growing consensus has emerged that the introduction of pharmaceuticals into waterways can harm fish and aquatic life. The EPA announced it would undertake a notice of proposed rulemaking in 2015 to specifically address pharmaceutical waste management pursuant to the Resource Conservation

and Recovery Act. A similar effort was undertaken in 2008 that would have generally managed pharmaceutical waste pursuant to the RCRA’s Universal Waste Rule, but such rulemaking was abandoned following adverse public comments. Few details have been made available concerning the new RCRA rulemaking which was anticipated to be published in the Federal Register in June but has yet to be published as of the date of this article.

Regarding compliance with water regulations, violations frequently arise from unpermitted wastewater discharges, improper floor drain disposal, and failure to maintain and implement spill prevention control and countermeasure, or SPCC, plans. Typical records that an EPA inspector may ask to review include industrial user permits for discharges to the local municipality or publicly owned treatment works, copies of the facility SPCC plan, Phase II stormwater permits, NPDES construction stormwater permits and permits for direct discharges to a water body.

Another area ripe for environmental missteps for health care facilities pertains to mandatory emergency planning and risk management requirements pursuant to the Emergency Planning and Community Right-to-Know Act, or EPCRA. For example, the EPCRA requires health care facilities that possess any chemical listed on the EPCRA “extremely hazardous substances list” at or above its planning threshold quantity to: (1) notify the State Emergency Response Commission and Local Emergency Planning Committee within 60 days of receiving the shipment of the listed substance or producing the substance on site; (2) designate a facility representative who will participate in the emergency planning process; and (3)

provide requested information to enable local authorities to implement an EPCRA-compliant emergency plan. Penalties for EPCRA noncompliance are substantial. Violations can result in civil penalties ranging from \$10,000 to \$75,000 per day per violation and, when circumstances warrant, criminal penalties. The EPCRA also contains a citizen suit provision allowing citizens to directly sue facilities for EPCRA-related violations.

Construction activities related to hospital expansions and renovations pose a distinct set of environmental concerns and potential liabilities. Driven largely by increased patient demand related to the Affordable Care Act, a recent analysis by Dodge Data & Analytics determined health care construction spending increased 3 percent in 2014 to \$22.8 billion, and is predicted to rise 6 percent in 2015 to \$24.3 billion. Another survey found that 67 percent of U.S. hospitals were undergoing renovations or additional construction activities. Such renovations and expansions are often undertaken quickly to meet market conditions, but ignorance of environmental requirements pertaining to such work can trigger significant liabilities. Construction or demolition work on structures built in the 1980s or before generally requires the preparation of a formal asbestos survey, notification of federal, state and local regulatory agencies, and the use of properly trained and accredited asbestos abatement personnel to manage, handle, remove and dispose of any asbestos debris. Occupational Safety and Health Act requirements pertaining to lead disturbance must be addressed. The presence of legionella bacteria and mold at aging health care facilities can be exposed or exacerbated during renovation activities, and must be carefully approached to avoid bacterial releases that can rapidly spread through HVAC systems and adversely impact sensitive hospital patient populations.

In its "Guidelines for Environmental Infection Control in Health Care Facilities," the U.S. Centers for Disease Control and Prevention explicitly recognizes the potential risks for infection transmission during construction, demolition, renovation and repair at health care facilities. Accordingly, the CDC recommends the implementation of an infection-control risk

assessment "before the start of these or any other activities expected to generate dust or water aerosol." This confluence of increasing health care construction activity coupled with a redoubled focus on infection prevention and control could result in heightened regulatory scrutiny.

Whether the objective is to avoid the imposition of fines and liability stemming from government inspections or to better position assets for sale or acquisition, there are a number of mechanisms available to owners and operators of health care facilities to proactively address instances of potential or suspected environmental noncompliance. Voluntary environmental compliance audits, conducted pursuant to the EPA's "Incentives for Self-Policing," commonly referred to as the audit policy, provide a particularly attractive path for resolution of environmental liabilities for health care facilities. The audit policy provides incentives to regulated entities to voluntarily detect, disclose and correct violations of applicable federal environmental laws (states, including Pennsylvania have similar environmental audit programs to resolve state environmental law violations). Provided that the conditions of the audit policy are satisfied, the EPA can waive all or most gravity-based penalties and generally will not recommend criminal prosecution.

While the long-term viability of the audit policy had been questioned in recent years due to a lack of resources, in June the agency breathed new life into it through its announcement of a pending rollout of a new Web-based portal, eDisclosure, that will provide for efficient Web-based disclosures, resulting in the EPA's generation of either: (1) an instantaneous "electronic notice of determination" (primarily in the context of resolving certain EPCRA-related violations); or (2) an electronic acknowledgement letter confirming the EPA's receipt of the disclosure and indicating that the EPA will make a determination concerning penalty mitigation "if and when it considers taking an enforcement action for environmental violations."

Environmental audits should be carefully conducted under the supervision of environmental counsel to maintain privileges and to avoid inaccurate conclusions of law regarding disclosure

rights and obligations by nonlegal personnel who may otherwise be participating in the environmental audit process. Part and parcel to the environmental audit process, health care facilities should design and implement internal environmental compliance and audit policies and ensure that facility managers are appropriately trained and well versed in such policies.

Environmental insurance products specifically tailored for health care facilities provide another potential path to reduce environmental risk. Since claims relating to pollution conditions are typically excluded under a facility's general liability or property policies, the insurance market has stepped in to fill the void with pollution legal liability policies that offer coverage for cleanup costs and third-party tort claims related to both on-site and off-site pollution conditions. Such policies can be individually negotiated and manuscripted to address facility-specific concerns subject to carrier underwriting. The policies are generally assignable to subsequent owners, making them a particularly attractive vehicle for facilitating transactions involving health care facilities.

Finally, and particularly in the context of facility renovation and construction projects, it is imperative to ensure that all outside contractors are appropriately identified on any required environmental permits or disclosure forms and that any contractors working at or for health care facilities maintain insurance naming the appropriate facility ownership and operation entities as named insureds.

At a time when our nation is witnessing an unprecedented rise in health care spending and industry growth and consolidation, now more than ever health care facility owners and operators should work proactively to ensure careful adherence to federal, state and local environmental requirements. In so doing, costly environmental liabilities can be avoided and health care facilities can be rightfully viewed by regulators and the public alike as safe places of healing and restoration.