Environmental Update

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Potential RCRA Liability for Health Care Facilities

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Hospitals accustomed to a world of acronyms such as PPO, PHO, DRG, HMO, CMS, should make sure they include another to the already lengthy list: **RCRA**. Facilities that do not learn about and comply with RCRA could find themselves on the wrong end of an EPA inspection, facing the very real prospect of a six-figure fine. The list of hospitals that have already paid such fines is sobering: to name a few, North Shore University Hospital ($57,749), Atlantic Health Systems/Mountainside Hospital ($64,349), Memorial Sloan Kettering ($214,423), and Nassau Health Care Corporation/Nassau University Hospital ($279,900). With well-publicized increases in EPA hiring of enforcement personnel, now is the time for hospitals to take RCRA seriously.

"RCRA," which stands for the Resource Conservation and Recovery Act, was enacted in 1976, during an unprecedented five-year period that saw the enactment of some of today's fundamental environmental laws such as the Clean Water Act (CWA), the Endangered Species Act (ESA), and the Toxic Substances Control Act (TSCA). Among other things, RCRA was designed to control hazardous waste from the "cradle-to-grave," including generation, transportation, treatment, storage, and disposal. Within an already complex regulatory universe, RCRA is among the most complex. It is also among the most punitive, with violations leading easily to fines of many thousand dollars and, in worst cases, to potentially significant prison sentences (a conviction for knowing endangerment carries a maximum 15-year prison sentence). RCRA is not, in other words, a statute to be taken lightly.

Under RCRA, the threshold question is whether a particular waste meets the definition of a "hazardous waste." Within the RCRA universe, there are two basic types of hazardous waste: "characteristic wastes" and "listed wastes." A characteristic waste is a waste that exhibits one of four "characteristics": ignitability, corrosivity, reactivity, and toxicity. EPA assigns each of these characteristic wastes a Hazardous Waste Number: ignitability (D001), corrosivity (D002), reactivity (D003), and toxicity (D004 - D043). The second type of hazardous wastes are "listed wastes," meaning they are specifically identified by the EPA as hazardous. These wastes have Hazardous Waste Numbers beginning with F, K, P, or U. Additionally, EPA has classified certain wastes as "universal wastes" (e.g., batteries, pesticides, mercury-containing equipment and certain light bulbs). Universal wastes are subject to specific regulations.

Typical hazardous wastes found at hospitals include: Epinephrine (P042), Arsenic trioxide (P012), Lindane (U129), Chloral Hydrate (U034), and Nicotine (P075). Additionally, Acetone is often found at the pathology lab, Methanol at the histology lab, Xylene at the morgue, and Chloroform in anesthetic used by the hospital.

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There are three basic categories of RCRA regulated entities: generators, transporters, and TSD (treatment, storage, and disposal) facilities. Most hospitals will be RCRA generators, which means any person or site whose processes and actions create hazardous waste. As RCRA generators, hospitals are subject to a wide range of RCRA requirements, affecting how waste is stored, how employees are trained, and even the hospital's policies and procedures. Failure to meet these requirements is what led to the penalties described earlier in this article.

The EPA has identified hospitals as potential RCRA violators and has pursued an initiative involving hospital inspections. According to a 2007 EPA presentation, EPA Region 2 (New York, New Jersey, Puerto Rico, the U.S. Virgin Islands, and seven Tribel Nations) has conducted 49 hospital inspections. Those inspections resulted in 36 enforcement actions, 11 formal enforcement actions and 9 settlements.

With results like these, there is no reason to believe that EPA will discontinue the initiative. Moreover, although there is no evidence that all the EPA Regions have initiated wide-spread surprise inspections, a recent increase in general enforcement activity around the country suggests that hospitals should be prepared for increased activity in this area as well.

When the EPA conducts a hospital RCRA inspection, it will seek to answer two questions: (1) what is the facility's generator status (in other words: is it a hazardous waste generator?), and (2) is the facility in compliance with RCRA? An integral component of the EPA's analysis will be a visual inspection of the entire facility. An EPA RCRA inspector has offered the following list of hospital areas to be inspected and specific issues to be investigated in those areas:

Area	Issues
Clinical Labs	Spent solvents – distillation
Research Labs	Spent solvents, corrosives, off-spec chemicals, unwanted chemicals
Facilities-Maintenance, Painting, Grounds	Spent solvents, waste paints, used oil, parts washer solvents, rags, waste pesticides, batteries, mercury wastes, fluorescent lamps, aerosols
Pharmacies	Off-spec drugs, investigatives
Operating Rooms	Breathing machine spent media
Housekeeping	Autoclave indicator tape
Printing	Spent solvents, waste inks
Biomedical	Batteries, soldering wastes
IT	Batteries, soldering wastes, solvent rags
Radiology	Lead aprons, film developing wastes
Chemical Storage Areas	Off-spec and unwanted chemicals

Important questions include: (1) is waste correctly classified, (2) are satellite accumulation containers properly labeled and closed, (3) are hazardous waste storage areas properly inspected, (4) are hospital employees properly trained, (5) does the hospital have an appropriate contingency plan, and (6) does the hospital have copies of manifests for hazardous

waste that has been sent for off-site disposal? The inspection will be thorough and, for an unprepared hospital, can be traumatic.

What can a hospital do before the EPA arrives? First and foremost, the hospital should form a committee—including senior management, counsel, and facilities personnel—tasked with hazardous waste issues. This committee should identify applicable RCRA regulations and move aggressively to ensure compliance with those regulations. The committee should put forth a clear and unequivocal message that RCRA compliance is important and senior management should fully endorse and support this message. It should be made clear that personnel who do not comply with RCRA regulations will face real consequences. If hospital personnel do not have the necessary knowledge to conduct an internal RCRA audit, the hospital should consider retaining an experienced outside consultant to provide compliance assistance. The hospital should also consider having outside counsel retain the consultant so that it can, to the extent possible, assert that the consultant's work product is privileged. Finally, the hospital should develop an EPA inspection response plan.

If you have questions concerning how RCRA applies to your facility, please contact any of the lawyers in our Environmental & Toxic Tort Practice group.

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