

PUBLICATION

Expect More Environmental Enforcement Activity

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Historically, health care facilities have not been a focus of environmental compliance and enforcement efforts by either the United States Environmental Protection Agency (EPA) or state environmental agencies. However, since 2004 the EPA has placed a higher emphasis on environmental compliance and enforcement in the health sector through its regional offices. This heightened attention includes components that encompass all of EPA's available compliance and enforcement tools, including compliance assistance, compliance incentives, compliance monitoring, and civil and criminal enforcement. The initiative has focused on all major environmental laws including air, water, pesticides, underground storage tanks, solid and hazardous wastes, hazardous substances and chemicals, environmental response, emergency planning, community right-to-know requirements and toxic substances control.

While EPA's focus so far has been on general medical hospitals, the same environmental laws and regulations apply to a range of facilities, including but not limited to psychiatric and substance abuse hospitals, specialty hospitals, physicians' offices, dentists' offices, outpatient care centers, medical and diagnostic laboratories, nursing care and assisted living facilities, residential mental retardation/health and substance abuse facilities, community care facilities for the elderly, and licensed veterinary practitioners primarily in the practice of veterinary medicine, dentistry, or surgery for animals.

Given the progression of this focus in other regions, health care facilities in Region 4 (which covers Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee) should expect increased environmental enforcement activity in the months and years ahead. To reduce the risk of civil or criminal penalties, facilities should carefully evaluate their existing compliance status by conducting environmental audits and correcting any violations discovered. Health care facilities should also consider taking advantage of compliance incentives such as the Audit Policy. Use of these incentives has greatly reduced the penalties assessed against health care facilities; for instance, in other EPA regions, the average waiver of penalties through use of these incentives has been \$200,000. Longer term, health care facilities are encouraged to develop and implement environmental management systems (EMSs) as a way of ensuring the facilities have procedures in place to maintain compliance.

This client alert relates only to EPA Region 4. Other EPA regions may have similar initiatives but Baker, Donelson, Bearman, Caldwell & Berkowitz, PC makes no representations regarding other regions.

Areas of EPA Focus

Compliance Assistance: Region 4 kicked off its focused efforts in 2005 by beginning its Hospital and Healthcare Compliance Assistance Initiative to assist health care facilities in complying with applicable environmental laws and regulations. The initiative included EPA-led compliance workshops in each of the states and the development and dissemination of extensive resources aimed at educating the health care industry.

Compliance Incentives: The most significant compliance incentive that EPA has encouraged for this sector is its "Audit Policy," *Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations*. Through its Audit Policy, EPA seeks to encourage and reward voluntary discovery, self-disclosure, and prompt

correction by offering three types of incentives: reduced civil penalties, no recommendation for criminal prosecution, and no routine requests for audit reports. For health care facilities that are also small businesses with 100 or fewer employees, EPA's Small Business Compliance Policy may also provide incentives.

Compliance Monitoring: Compliance monitoring activities include EPA and state agencies conducting compliance inspections and investigations, record reviews, and responding to citizen complaints. Over the past year, Region 4 has begun conducting such multi-media inspections and record reviews at health care facilities in the region in coordination with the respective state environmental agencies.

Enforcement: EPA's enforcement and compliance program utilizes several types of enforcement actions to correct and deter noncompliance. Civil enforcement includes administrative actions resulting in consent decrees, settlements, or penalties as well as judicial actions. EPA may also use criminal enforcement actions in situations where violations are knowingly and willfully committed. Several health care facilities, including large hospitals across the nation, have been assessed six-figure fines as a result of these initiatives. EPA has also required extensive and expensive corrective actions for violations discovered.

The experienced attorneys in Baker Donelson's Health Care Regulatory and Environmental, Health & Safety Practice groups have worked with multiple facilities to assess their environmental compliance status and can provide a big-picture perspective on how this increased enforcement activity may impact health care facilities. For more information about the steps you should take to protect your facility from enforcement actions, please contact your Baker Donelson attorney.