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## **WASCA Advocates for Its Members as the Department of Health Targets ASFs in Certificate of Need Rulemaking**

On July 10, 2015, the Department of Health announced its intent to undertake rulemaking regarding the expansion of ambulatory surgery facilities (ASFs), specifically considering whether the addition of operating rooms (ORs) requires an already certificate of need (CN) approved ASF to obtain a new CN. The Department is holding a workgroup meeting on August 17, 2015 for stakeholders to discuss the rulemaking.

Because ASFs are more cost-effective than other outpatient surgical settings, an increase in CN requirements for ASFs has the potential to adversely affect patients and the cost of health care in Washington.

WASCA will strongly oppose any increased CN requirements for ASFs. The association has a longstanding policy opposing CN requirements for ASFs and specifically opposing the expansion of the review process to include the addition of ORs to an existing, already CN-approved ASF.

### *History of Washington’s Certificate of Need Law Related to ASF Expansions*

Washington’s CN law expressly subjects eight specific activities to CN review by the Department’s Certificate of Need Program. Among those activities, the CN law requires review in connection with the “establishment of a new health care facility . . . .” Since the CN law was enacted in 1979, the Department has interpreted and implemented this provision as the legislature wrote it, subjecting only the establishment of a new ASF to review. The Department has consistently held that an increase in the number of ORs at an existing, CN-approved ASF does not result in the establishment of a new health care facility and therefore is not subject to CN review.

However, nearly 35 years after the CN law took effect, the Department reversed its longstanding interpretation of the CN law in 2014 and unilaterally determined that CN review is required where an existing, CN-approved ASF seeks – not to open a new facility – but only to increase the number of ORs at the existing facility. Importantly, hospital outpatient departments are not subject to review in the same circumstance.

### *WASCA’s Participation as Amicus Curiae in *The Polyclinic, et al. v. Department of Health of the State of Washington**

On October 31, 2014, in a declaratory action captioned *The Polyclinic, et al. v. Department of Health of the State of Washington*, the Thurston County Superior Court entered an Order invalidating the Department’s new requirement that an existing, CN-approved ASF obtain a new CN before increasing the number of ORs at its facility.<sup>1</sup> WASCA participated as *amicus curiae* in the action, filing multiple briefs addressing the adverse impact of the Department’s new requirement on the ambulatory surgery

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<sup>1</sup> The Polyclinic, an active member of WASCA, is an independent, physician-owned organization that operates an ASF in the Seattle area.

industry – a requirement that would increase the cost of regulation for ASFs while at the same time paving the way for hospital competition. In addition, WASCA argued that, by failing to follow required rulemaking procedures set forth in the Administrative Procedure Act, the Department through its new requirement would cause real and substantial injury to ASF owners and operators who have invested resources in the planning and construction of additional ORs in reliance on the longstanding Department position that those expansions are not subject to CN review.

The court found that the Department failed to follow required rulemaking procedures set forth in the Administrative Procedure Act before adopting the requirement. Although the Department appealed the decision, its appeal was dismissed on May 5, 2015.

### *Conclusion*

In light of the dismissal of the Department’s appeal, its requirement that an existing, CN-approved ASF obtain a new CN before increasing the number of ORs at its facility remains invalid pursuant to the Thurston County Superior Court’s October 10, 2014 Order. Therefore, existing, CN-approved ASFs are currently permitted to increase the number of ORs at their facilities without obtaining a new CN.

However, the Department’s announcement of new rulemaking targeting ASFs indicates that it now intends to adopt a rule specifically requiring that such expansions are subject to CN review.

WASCA will continue its efforts to oppose this increased CN requirement for ASFs. For more information, please contact Ms. Studebaker at [estudebaker@gsblaw.com](mailto:estudebaker@gsblaw.com) or (206) 816-1417.