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ENVIRONMENTAL COMPLIANCE DURING COVID-19 RESPONSE

A variety of governmental orders in response to the COVID-19 pandemic have caused nearly all industry sectors to evaluate how and to what extent compliance with environmental statutory, regulatory and permit requirements will be achieved. For non-essential businesses that have been required to cease operations, the regulated community is faced with whether otherwise applicable environmental requirements remain in full force and effect. For essential businesses that are continuing to operate, with only essential personnel reporting to the workplace, are these businesses still subject to environmental requirements? Some states, like **Oregon**, addressed these questions early on by issuing enforcement discretion guidance during these uncertain times. Last week, on March 26, 2020, the U.S. Environmental Protection Agency ("EPA") published its own policy memorandum addressing these concerns: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (the "**COVID-19 Memo**").

The COVID-19 Memo is effective retroactively from March 13, 2020 and remains in effect until EPA terminates the policy. While the COVID-19 Memo does not rescind or stay otherwise applicable environmental requirements during the COVID-19 crisis, EPA has determined that, when environmental compliance

is not reasonably practical due to the pandemic, the Agency will exercise enforcement discretion if regulated entities satisfy the COVID-19 Memo conditions. This enforcement discretion includes waiving civil penalties that may be defined in EPA's program-specific enforcement policies. EPA explains that eligible violations include routine compliance monitoring and reporting (including activities required under administrative settlement agreements) and certain operational compliance issues, including, among others, violations relating to hazardous waste accumulation that might transition a hazardous waste generator into an unpermitted treatment, storage and disposal facility.

The COVID-19 Memo also sets forth the limits of EPA's enforcement discretion, explaining that the COVID-19 Memo does not apply to State or Tribal enforcement decisions, consent decrees or court orders, Superfund or Resource Conservation and Recovery Act corrective action activities, chemical imports (particularly products that are imported and subject to the Federal Insecticide, Fungicide and Rodenticide Act and claimed to address COVID-19), or criminal violations.

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

And with respect to accidental releases, the COVID-19 Memo does not relieve regulated entities from properly preventing, responding to, and reporting the same.

To satisfy the conditions of the COVID-19 Memo and ensure eligibility of EPA's enforcement discretion, regulated entities must:

- (a) Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
- (b) Identify the specific nature and dates of the noncompliance;
- (c) Identify how COVID-19 was the cause of the noncompliance, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity;
- (d) Return to compliance as soon as possible; and
- (e) Document the information, action, or condition specified in (a) through (d).

We understand that environmental compliance is complex and oftentimes business- and location-specific. It is possible that efforts to document compliance with the COVID-19 Memo may vary by location for businesses with a variety of operations and geographic locations. Should you have questions about the COVID-19 Memo or environmental compliance matters in general, please reach out to **Michael Miller**.