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Congress continues to grapple with how it should legislate in response to human health and environmental concerns related to per- and polyfluoroalkyl substances ([PFAS](#)). Of the [dozens of bills proposed](#) in 2019 to address PFAS, only the National Defense Authorization Act (NDAA) passed both chambers, becoming law when the president signed the act on Dec. 20, 2019.

Believing the NDAA was only a first step towards comprehensive PFAS legislation, the House of Representatives has continued to push forward. It passed the PFAS Action Act ([H.R. 535](#)) on Jan. 10, 2020. The PFAS Action Act would require, among other things, that the Environmental Protection Agency (EPA) promulgate a national primary drinking water regulation for certain PFAS and a health advisory for other PFAS not subject to a national primary drinking water regulation. The Senate has yet to take action on this bill, and some predict there is little likelihood of any further Senate action. Nevertheless, the NDAA will keep EPA and other affected agencies busy implementing PFAS regulations mandated by the NDAA.

Most significantly, the NDAA requires regulated parties to initiate PFAS-related reporting pursuant to the Emergency Planning and Community Right-to-Know Act Toxics Release Inventory (TRI), increases monitoring under the Safe Drinking Water Act Unregulated Contaminants Monitoring Rule, enhances certain reporting and disclosures required by the Toxic Substances Control Act, and requires the U.S. Geological Survey to expand

nationwide PFAS monitoring and sampling of our waterways. Additionally, the NDAA bans the Department of Defense from using PFAS firefighting foam (AFFF) in land-based applications effective Oct. 1, 2024.

TRI Listing Requirements

Section 7321 of the NDAA added a significant number of PFAS compounds to the TRI list of reportable chemicals. As a result, 160 additional PFAS will now be subject to immediate inclusion on the TRI/Form R reports due July 1, 2021. The NDAA explicitly listed five PFAS for immediate inclusion:

- Perfluorooctanoic acid (PFOA)
- Perfluorooctane sulfonic acid (PFOS)
- Hexafluoropropylene oxide dimer acid (GenX)
- Perfluorononanoic acid (PFNA)
- Perfluorohexanesulfonic acid (PFHxS)

In addition to those explicitly listed, the NDAA required reporting for any PFAS compounds that meet the following two criteria: (1) chemicals subject to a significant new use rule at either [40 CFR 721.9582](#) or [721.10536](#) on or before December 20, 2019, and (2) chemicals identified as active in commerce on the Toxic Substances Control Act Inventory that was published in February 2019.

EPA then must revisit this list of PFAS in two years. For all of the PFAS addressed by the NDAA, the use threshold for reporting is 100 pounds.

Recently, EPA published a list of the [160 PFAS that meet the NDAA mandates](#) and must be added for immediate inclusion on the TRI beginning Jan. 1, 2020 (with reports due in 2021). This congressional action truncates the [TRI Advanced Notice of Proposed Rulemaking](#) EPA published at the beginning of December 2019, with a public comment period that closed on Feb. 3, 2020.

The NDAA's TRI mandates will have significant effects on industries subject to TRI reporting (mainly the manufacturing sector of the economy). Companies that manufacture, process, or otherwise use the newly listed PFAS compounds in quantities of 100 pounds or more per year must now annually report their releases. In practice, this means that all covered facilities must report applicable PFAS for the calendar year 2020 by July 1, 2021. Companies may have questions regarding how to develop PFAS-related TRI reports, and absent more precise guidance from EPA, regulated entities may elect to initiate such efforts under guidance and protections of legal counsel.

There is little doubt that the NDAA represents a bold expansion of TRI reporting by Congress. The purpose of the TRI reporting is set forth in 40 C.F.R. §372.1, which states:

“The information collected under this part is intended to inform the general public and the communities surrounding covered facilities about releases of toxic chemicals, to assist research, to aid in the development of regulations, guidelines, and standards, and for other purposes. This part also sets forth requirements for suppliers to notify persons to whom they distribute mixtures or trade name products containing toxic chemicals that they contain such

chemicals.”

Past history with the TRI reporting has shown that these data may be used to establish new policies or mandates not only at the facilities subject to TRI, but also at wastewater treatment plants, disposal sites, or other facilities where potentially PFAS-containing waste from covered manufacturing operations is sent. Reporting determinations must be considered carefully and guidance from EPA must be sought as complicated reporting issues get identified in this first year of reporting on these compounds.

Safe Drinking Water Act PFAS Monitoring

Section 7311 of the NDAA also requires monitoring of public water supply systems for PFAS under the Safe Drinking Water Act. Notably, the NDAA does not include any mandate for the EPA to set a maximum contaminant level for any PFAS under the Safe Drinking Water Act. However, in February 2019, the EPA released an [“Action Plan”](#) to address the threats of PFAS and indicated that it would begin PFOA and PFOS drinking water rulemaking, and in December 2019 EPA sent a regulatory determination to the Office of Management and Budget.

Other Key Provisions

There are other key provisions in the NDAA that will have long-term impacts on how PFAS remediation activities are addressed. For example, for Department of Defense (DOD) sites, the NDAA requires that cooperative agreements with states include that the DOD “shall meet or exceed the most stringent . . . standards for PFAS in any environmental media,” including an enforceable drinking water standard. There are many states that have been haggling with the DOD regarding drinking water and surface water impacts associated with military sites, while DOD resists such actions because there are no enforceable federal drinking water requirements. Moving forward, the NDAA will essentially make drinking water standards promulgated by individual states applicable as relevant and appropriate requirements for those federal facilities being cleaned up under Superfund.

The NDAA also mandated that the U.S. EPA, not later than one year after enactment, “publish interim guidance on the destruction and disposal of perfluoroalkyl and polyfluoroalkyl substances and materials containing perfluoroalkyl and polyfluoroalkyl substances.” This is important to address remediation holistically – from sampling to analysis to treatment to ultimately how to destroy these compounds and remove them from the environment.

What’s Next?

Although the NDAA drastically increased regulation and monitoring of PFAS, many provisions advocated by the House were dropped from the final law. The House had included provisions in its initial NDAA legislation that required that PFAS be designated as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Additionally, the House had mandated that PFAS be regulated under Section 307(a) of the Clean Water Act. These requirements were dropped in the House and Senate Conference Committee in the final NDAA but were resurrected in the PFAS Action Act that recently passed the House. There is little hope that the Senate Committee on Environment and Public

Works will act quickly or at all on the House-passed PFAS Action Act.

Despite low prospects in the Senate, several states have decided to regulate PFAS more aggressively in the absence of additional PFAS legislation beyond the NDAA. We will be monitoring these state actions as they develop.