

## Insights

# PFAS CHEMICALS WILL BE ADDED TO THE TOXIC RELEASE INVENTORY AND ADDITIONAL CHEMICALS MAY BE COMING

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In furtherance of the PFAS Action Plan of 2019,<sup>1</sup> the Environmental Protection Agency (“EPA”) is adding certain per- and polyfluoroalkyl substances (“PFAS”) to the list of toxic chemicals subject to reporting under the Toxic Release Inventory (“TRI”) of the Emergency Planning and Community Right-to-Know Act (“EPCRA”).

As discussed below, the TRI reporting began on January 1, 2020 with the first annual report due on July 1, 2021. In addition to other requirements, your company is now responsible for submitting a “Form R” report required by the TRI for certain PFAS materials.

## What are the specific actions?

The National Defense Authorization Act (“NDAA”) recently added 160 PFAS substances to the TRI. This list of PFAS appears at the following link.<sup>2</sup> It should be specifically noted that both perfluorooctanoic acid and its salts (“PFOA”) and perfluorooctane sulfonic acid and its salts (“PFOS”) are listed, two of the most regulated PFAS substances to date.

Additionally, EPA has issued an Advanced Notice of a Proposed Rulemaking (“Advanced Notice”) to initiate potentially more PFAS substances to be reported on the TRI.<sup>3</sup> For any PFAS that meet the criteria, EPA is also considering whether to add these compounds to the list of chemicals of special concern and establishing lower reporting thresholds. The Advanced Notice discusses, among other things, the listing actions being considered and the entities potentially affected (*e.g.*, those that manufacture, process or otherwise use PFAS in amounts above certain thresholds).

## What is the TRI?

According to EPA, “TRI tracks the management of certain toxic chemicals that may pose a threat to human health and the environment. U.S. facilities in different industry sectors must report annually how much of each chemical is released to the environment and/or managed through recycling, energy recovery and treatment. (A ‘release’ of a chemical means that it is emitted to the air or water,

or placed in some type of land disposal.)”<sup>4</sup> These facilities must also report pollution prevention and recycling data for such chemicals.

The TRI database is public and maintained by EPA. Until the NDAA was enacted on December 20, 2019, no PFAS chemicals, which total nearly 5,000 compounds, were covered by the TRI program.

### **What is the status of these actions?**

With respect to the NDAA, the 160 PFAS additions are already effective as of January 1, 2020.

Reporting will be due to EPA by July 1, 2021 for calendar year 2020.<sup>5</sup> Presently, companies are required to report if they manufacture, process or otherwise use 100 pounds or more of any listed PFAS.

With respect to the Advanced Notice, comments must be received on or before February 3, 2020. If you or your company is interested in submitting a comment, specific submission requirements are found at the following website.<sup>6</sup> If EPA chooses to include PFAS substances in the TRI, the agency will publish a proposed rule and request public comment at that time.

### **What information is EPA gathering in the Advanced Notice?**

EPA is seeking comments on the following:

- Information regarding the approximately 600 PFAS substances that are currently active in commerce in the United States;
- Whether there is data available to designate PFAS as a single category, as multiple listings, or as a combination of individual and multiple categories;
- The reporting thresholds (measured in pounds) for PFAS under the TRI; and
- Additional information on human health and environmental toxicity, persistence, and bioaccumulation of PFAS to determine if the TRI designation is appropriate.

Importantly, even though the NDAA added certain PFAS substances to the TRI, there may be additional PFAS chemicals listed in the near future.<sup>7</sup>

### **Who Does This Action Apply To?**

It will be vital to understand if your facilities processed, manufactured, or used PFAS in any products. As noted above, EPA has expressly stated that it may elect to make PFAS reporting thresholds lower than those for typical chemicals. Ultimately, if you process, manufacture or use PFAS in any way, you should conduct a thorough inventory of your PFAS-containing materials. You may even import, use, and/or process PFAS materials and not even be aware that they are present.

EPA has the authority to investigate cases of non-compliance with TRI requirements and may issue civil penalties, including monetary fines and corrective action.<sup>8</sup> Therefore, pretending PFAS will merely “go away” is not advisable.

## **Conclusion**

If your company has not already done so, it would be prudent to begin assembling information regarding the use of PFAS substances at your facilities. Significantly, there are now mandated reporting requirements that are legally binding.

1. [https://www.epa.gov/sites/production/files/2019-02/documents/pfas\\_action\\_plan\\_021319\\_508compliant\\_1.pdf](https://www.epa.gov/sites/production/files/2019-02/documents/pfas_action_plan_021319_508compliant_1.pdf)
2. [https://www.epa.gov/sites/production/files/2020-01/documents/tri\\_non-cbi\\_pfas\\_list\\_1\\_16\\_2020-6.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/tri_non-cbi_pfas_list_1_16_2020-6.pdf). Some more common PFAS compounds listed are also listed: hexafluoropropylene oxide dimer acid (GenX), perfluorononanoic acid (PFNA), and perfluorohexanesulfonic acid (PFHxS).
3. <https://www.govinfo.gov/content/pkg/FR-2019-12-04/pdf/2019-26034.pdf>
4. <https://www.epa.gov/toxics-release-inventory-tri-program/what-toxics-release-inventory>
5. <https://www.epa.gov/toxics-release-inventory-tri-program/addition-certain-pfas-tri-national-defense-authorization-act>
6. <https://www.regulations.gov/docket?D=EPA-HQ-TRI-2019-0375>
7. <https://www.epa.gov/toxics-release-inventory-tri-program/addition-certain-pfas-tri-national-defense-authorization-act>
8. <https://www.epa.gov/toxics-release-inventory-tri-program/tri-compliance-and-enforcement>

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## MEET THE TEAM



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