

Publications

Client Alert: USEPA Clarifies New PFAS Reporting Requirements Under the Toxics Release Inventory

Related Attorneys

Mark A. Norman

Kristin L. Watt

Anthony J. Giuliani

David M. Edelstein

Related Services

Environmental

CLIENT ALERT | 10.6.2020

On December 20, 2019, President Trump signed the National Defense Authorization Act for Fiscal Year 2020 (NDAA) into law. Section 7321 of the NDAA added per- and polyfluoroalkyl substances (PFAS) to the catalog of chemicals covered under the Toxics Release Inventory (TRI). This summer, the USEPA issued a final rule, which clarified reporting requirements for entities that use or have used certain PFAS. "Implementing Statutory Addition of Certain Per- and Polyfluoroalkyl Substances to the TRI Chemical List." 85 CFR 37354 (June 22, 2020). Facilities that use PFAS or other chemicals listed in the TRI should be aware of these developments.

The law and new rule are noteworthy for three reasons:

1. 172 PFAS are first subject to TRI reporting in 2020 and must be included on reports starting July 1, 2021;
2. The TRI threshold for PFAS has been set at 100 pounds for each individual listed PFAS; and
3. The *de minimis* level is 1% for all listed PFAS, except perfluorooctanoic acid (PFOA) (CASRN: 335-67-1), which has a *de minimis* level of 0.1%.

Relevant Background

Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) launched the TRI, which established annual reporting requirements for certain facilities based on a relevant threshold chemical quantity. This report is commonly known as the Form R. On the Form R, facilities must report how much of each reportable chemical is used, how waste for that chemical is managed, how much of the chemical enters the environment, and how the facility is preventing waste of that chemical. For 2020, this list now includes 172 different PFAS.

PFAS Reporting Requirements

After passage of the NDAA, certain PFAS must now be included in a business's Form R. USEPA has identified 172 different PFAS that meet the reporting standards in the NDAA. This currently includes fourteen PFAS identified by name or CAS number, and the remaining 158 are categories of PFAS. Importantly, USEPA has an explicit responsibility under the law to continue to update the list of PFAS, so the number might exceed 172 in future reporting years.

For the current 172 PFAS, USEPA has established a reporting threshold of 100 pounds. This is lower than the reporting threshold for many other listed chemicals, which typically range from 10,000 to 25,000 pounds. Facilities will need to look at safety data sheets, speak with chemical suppliers, and gather additional information to determine the quantity, if any, of the newly-listed PFAS used at the facility.

Reporting obligations for these 172 PFAS began on January 1, 2020 and must be included in the Form R for 2020, which needs to be filed by July 1, 2021. Therefore, any entity using these chemicals should be appropriately documenting its PFAS use.

PFAS Exemptions

For those facilities, which do trigger reporting requirements for PFAS under the TRI, all typical exemptions are available. One particular exemption might be especially useful for PFAS: the *de minimis* exemption. Under 40 CFR 372.38(a), PFAS present in mixtures, where the PFAS concentration is below 1%, can be excluded from the 100-pound threshold determination. The one current exception to this 1% *de minimis* level is that the USEPA has set a *de minimis* level of 0.1% for PFOA.

Next Steps

Facilities should take affirmative steps to ensure compliance with these new rules. The combination of highly publicized concerns related to PFAS in the public sphere—including a recent feature film, *Dark Waters*; the rapidly evolving, scientific understanding of the types and impacts of different PFAS; and the newly implemented regulations engenders an uncertain regulatory atmosphere. This creates risk for regulated facilities.

If you have questions about these new rules or how they might apply to your business, please reach out to Mark Norman, Kristin Watt, Anthony Giuliani, or David Edelstein.