

## Alert | Environmental



December 2019

### Congress Takes Initial Steps to Address PFAS in the National Defense Authorization Act Conference Report

*For a refresher on what per- and polyfluoroalkyl substances (PFAS) are and what Congressional action could mean for stakeholders, see this [May 2019 Greenberg Traurig E2 Law blog entry](#), “[Congress Is Gearing Up to Address PFAS.](#)”*

On Dec. 11, the House of Representatives passed [S. 1790](#), the National Defense Authorization Act (NDAA) conference report. The Senate followed suit on Dec. 17, bringing an end to protracted negotiations on this annual must-pass legislation. In one of their final acts, conferees agreed to provisions addressing per- and polyfluoroalkyl substances (PFAS). Two major provisions – designation of PFAS as Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) hazardous substances and requirements to promulgate PFAS drinking water standards – were left out of the bill.<sup>1</sup> Their absence, and the controversy they engendered, have diverted attention from the many significant PFAS provisions that did make it into the final NDAA package. The NDAA represents Congress’ first major response to public concern about [these “forever” chemicals](#), and the NDAA provisions signal that much more is to come from Congress on the subject of PFAS.

<sup>1</sup> [H.R. 535](#) (Dingell, D-MI), which would designate all PFAS as CERCLA hazardous substances, was reported out of the House Energy and Commerce Committee in November, and likely will see floor action early in 2020. Prospects are uncertain for [S. 638](#) (Carper, D-DE), its Senate counterpart.

The NDAA PFAS provisions are focused for the most part on the Department of Defense (DOD). They require DOD to stop using PFAS in firefighting foam and other applications, and to cooperate with affected communities and begin cleaning up resources contaminated by military PFAS uses. However, two provisions have much broader application. For the first time, manufacturers and users of dozens of PFAS will be required to report to EPA's Toxics Release Inventory releases to the environment. And public water systems will be required to monitor for over two dozen PFAS. These provisions will create significant amounts of new information about where PFAS are manufactured, stored, and used, and where they are impacting drinking water. Those data will inform future legislative and regulatory efforts to address PFAS.

### **The Context**

Republicans and Democrats have introduced dozens of PFAS bills in the 116th Congress, reflecting a growing bipartisan policy consensus that EPA, DOD, and other federal agencies are not moving quickly enough to set standards for PFAS pollution or clean up PFAS contamination. The Senate passed its version of the NDAA in June, with PFAS language earlier approved by the Senate Environment and Public Works Committee. Notably, the Senate version would have required EPA to develop a drinking water standard for PFOA and PFOS – the first two PFAS – and the most studied of the 5000+ PFAS currently in commerce. The House bill, passed soon after, also included PFAS provisions, notably designating all PFAS as hazardous substances under CERCLA. These two issues became stumbling blocks in conference talks, and were ultimately jettisoned. What remains are significant measures that require the government – especially DOD – (1) to move more aggressively to clean up PFAS contamination; (2) to prioritize research and regulation of PFAS; and (3) to gather and publish information about where PFAS are manufactured, used, and released into the environment.

### **What's In the NDAA?**

#### **DOD Provisions**

The legislation contains extensive measures requiring DOD to stop using PFAS and to begin cleaning up PFAS contamination caused by its activities. DOD must phase out PFAS in firefighting foam by Oct. 1, 2024 (ships would be exempt), subject to limited waivers of one year (Sec. 322). Use of PFAS-containing firefighting foams in training exercises is prohibited immediately (Sec. 323). By next year, DOD will be required to provide blood testing to each military firefighter to determine potential exposure to PFAS (Sec. 707). After Oct. 1, 2021, packaging for military Meals Ready to Eat (MRE) may not contain PFAS (Sec. 329). DOD-generated PFAS-containing wastes must be stored in areas that meet the standards of the Resource Conservation and Recovery Act (RCRA)(Sec. 330). If such wastes are incinerated, that must occur at a RCRA-permitted hazardous waste facility (Sec. 330).

DOD is directed to enter into information-sharing agreements with communities and public water systems near military installations to exchange PFAS contamination data (Sec. 331). DOD must establish and maintain a website clearinghouse to make information publicly available about exposure to PFAS of soldiers, their families, and their communities (Sec. 331). Finally, DOD is required, upon request of a state governor, to negotiate a cooperative agreement (1) allowing for testing, monitoring, and cleanup of PFAS contamination from DOD activities, and (2) providing funding for such activities (Sec. 332). The legislation also authorizes grants to and other cooperative efforts with local water authorities to address PFAS contamination in drinking water supplies (Sec. 332).

## EPA Provisions

One of the NDAA's most significant (and underdiscussed) PFAS provisions will require – beginning in 2020 – that releases into the environment of PFAS be reported to the EPA Toxics Release Inventory (TRI)(Sec. 7321). TRI is an annual disclosure program intended to generate publicly available information about where toxic chemicals are manufactured, used, stored, and released into the environment. EPA uses TRI data to identify regulatory gaps, potential enforcement targets, and areas for future regulation. Initially, manufacturers and users will have to report releases of PFOS, PFOA, Gen X, PFNA, PFHxS, and dozens of PFAS subject to the Toxic Substances Control Act (TSCA) significant new use reporting (see 40 C.F.R. §§ 721.9582, 721.10536). Within two years, EPA will be required to consider adding more PFAS to the TRI reporting program (Sec. 7321).

Public water systems must monitor for all PFAS for which EPA has validated a monitoring method, and EPA has to cover the cost of monitoring for smaller water systems (those serving 10,000 persons or fewer) (Sec. 7311). The NDAA authorizes funding for Safe Drinking Water Act grants to public water systems to address “emerging contaminants,” including PFAS (Sec. 7312). Within a year, EPA must publish interim guidance on disposal and destruction of PFAS materials, and update it every three years (Sec. 7361). EPA also must continue research into health and environmental effects of PFAS and monitoring and remediation technologies, prioritizing these efforts based on potential for human exposure, toxicity, and available information (Sec. 7362).

Finally, the legislation amends the TSCA to require PFAS manufacturers to submit information to EPA about their products, including chemistry, existing and proposed uses, amounts manufactured, byproducts, data about health and occupational exposure, environmental effects, and waste management (Sec. 7351). It also requires EPA to complete a long-stalled TSCA rulemaking on long-chain PFAS in seven months (Sec. 7352).

## What's Next for PFAS?

The omission from the final NDAA of the CERCLA hazardous substance designation and Safe Drinking Water Act (SDWA) standards have their supporters looking for other legislative vehicles. There were extensive last-minute efforts to include PFAS drinking water standards in the FY 2020 Interior/Environment Appropriations bill, though they did not make the final cut. Members continue to look for opportunities to designate PFAS as CERCLA hazardous substances. Meanwhile, EPA has several PFAS-focused rules under development, including: (1) a recently published [Advance Notice of Proposed Rulemaking](#) asking for comment on whether EPA should add some PFAS to the TRI reporting program (essentially mooted by the TRI provisions in the NDAA); (2) a determination about whether to promulgate drinking water standards for PFOS and PFOA (now under interagency review at OMB); and (3) a rule proposing to add PFOA, PFOS, and possibly some other PFAS to the CERCLA list of hazardous substances (still under policy review by EPA senior management).

## Authors

This GT Alert was prepared by **Steven G. Barringer, Keith E. Smith, and Katie P. Reed**<sup>†</sup>. Questions about this information can be directed to:

- **Steven G. Barringer** | +1 202.331.3108 | [barrings@gtlaw.com](mailto:barrings@gtlaw.com)
- **Keith E. Smith** | +1 215.988.7843 | [smithkei@gtlaw.com](mailto:smithkei@gtlaw.com)

- Katie P. Reed<sup>~</sup> | +1 202.530.8564 | [reedkatie@gtlaw.com](mailto:reedkatie@gtlaw.com)
- Or your Greenberg Traurig attorney

<sup>~</sup> Not admitted to the practice of law.

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.<sup>~</sup> Houston. Las Vegas. London.<sup>\*</sup> Los Angeles. Mexico City.<sup>+</sup> Miami. Milan.<sup>\*</sup> Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.<sup>∞</sup> Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.<sup>^</sup> Tokyo.<sup>\*</sup> Warsaw.<sup>~</sup> Washington, D.C.<sup>.</sup> West Palm Beach. Westchester County.

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