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PFAS Solution Moving Through Congress on Must-Pass Defense Bill

PFAS (perfluoroalkyl and polyfluoroalkyl substances) have been under scrutiny on both sides of the Capitol in recent months, and the Senate made significant headway in late June in reaching consensus on PFAS legislation. Following two hearings in the Senate Environment and Public Works (EPW) Committee this spring, a package was unveiled and quickly considered in Committee on June 19. Championed by EPW Chairman John Barrasso (R-WY), Ranking Member Tom Carper (D-DE), and Senator Shelley Moore Capito (R-WV), S. 1507, the PFAS Release Disclosure Act, was considered in Committee and simultaneously filed as an amendment to S. 1790, the must-pass National Defense Authorization Act (NDAA) that was headed to the Senate floor the following week.

Senate Action

The Senate PFAS package would require a wide variety of actions by various federal agencies to:

- require reporting of PFAS releases as part of the Toxics Release Inventory (TRI) reporting program,
- address existing PFAS contamination, especially in drinking water,
- end most uses of PFAS by the military in firefighting foam,

- require promulgation of federally enforceable drinking water standards for PFAS under the Safe Drinking Water Act (SDWA), beginning with PFOA and PFOS (the most studied of PFAS, and voluntarily phased out of production in the United States),
- using Toxic Substance Control Act (TSCA) authorities, collect information about all PFAS manufactured in the United States since 2006, and complete pending TSCA rulemakings regarding long-chain PFAS (see 80 Fed. Reg. 2,885),
- prioritize further federal efforts to understand and respond to threats posed by PFAS, and
- provide cooperation and assistance to states, local governments, and public water systems to address PFAS contamination.

The package does not address other pending legislative proposals – including the listing of PFAS as Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) hazardous substances – but such proposals remain under consideration, as legislators grapple with the ubiquity of PFAS in commerce and in the environment, and limited data and research on their health and environmental effects.

The NDAA had over 500 amendments filed, but with significant bipartisan support and the inclusion of defense-related language, the PFAS amendment was ruled germane and included in the overall package on the Senate floor. S. 1790, including the PFAS language, passed by a vote of 86-8 on June 27.

House Movement

H.R. 2500, the House version of the NDAA, passed the House on Friday, July 12, 2019. Representatives filed over 600 amendments to H.R. 2500, including numerous amendments addressing PFAS issues. The final bill as passed by the House contains PFAS provisions similar to those in the Senate bill, but with some significant differences. The House bill mandates Clean Water Act (CWA) discharge limits for PFAS, but does not include the Senate's requirement to promulgate drinking water standards. Most importantly, the House approved an amendment, offered by Reps. Debbie Dingell (D-MI) and Dan Kildee (D-MI), requiring EPA to list *all* PFAS as hazardous substances under CERCLA. As noted above, the Senate bill does not include this provision, despite a strong push from Senate Environment and Public Works Committee Ranking Member Tom Carper (D-DE).

The hazardous substance issue is important and controversial because of its liability implications. If PFAS are listed as hazardous substances, they become subject to CERCLA's broad liability scheme, which makes past and present owners and operators, transporters, and arrangers jointly and severally liable for the cost of cleanup. EPA already has CERCLA authority to clean up PFAS releases (as pollutants or contaminants), but presently cannot hold parties liable under CERCLA for such cleanup. The House provision – by making PFAS hazardous substances – would expand EPA's ability to recover CERCLA response costs, and also would empower private parties to recover CERCLA response costs for PFAS cleanups. The competing bills now head to a House/Senate conference committee, where these (and many other differences) must be resolved.

Veto Threat

Meanwhile, the White House has threatened to veto the NDAA for various reasons, including if it contains House-passed provisions (more stringent than similar Senate-passed language) that would require DOD to phase out PFAS-containing firefighting foams for all purposes.

PFAS Will Stay on the Congressional Agenda

As we have written previously, dozens of bills addressing PFAS have been introduced in the 116th Congress, and congressional interest in PFAS will not end with enactment of the NDAA. The NDAA provisions – mostly bipartisan – reflect a growing sense of congressional unease about PFAS, and the pace at which EPA and other federal agencies are addressing them. The Senate amendment included legislative proposals from Members of both parties, and was uncontroversial. Similarly, the numerous House PFAS amendments were approved by voice vote, evidencing the lack of partisan difference on PFAS issues. Together, these are omens that PFAS legislation is likely to be among the most important environmental accomplishments of the 116th Congress.

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