

# Legislation Pushes EPA And Cos. To Reckon With PFAS

*By Heather Palmer, Justin Savage, Andrew Stewart and Aaron Flyer*

Law360 (February 4, 2020, 6:25 PM EST) -- On Dec. 20, 2019, President Donald Trump signed into law the National Defense Authorization Act for fiscal year 2020. The NDAA includes a number of provisions that increase reporting and monitoring obligations for per- and polyfluoroalkyl substances, or PFAS.

By including these PFAS requirements in the NDAA, Congress has forced the [U.S. Environmental Protection Agency](#) to accelerate the pace of actions already under consideration in the agency's 2019 PFAS action plan. And while most of the PFAS requirements in the NDAA focus on testing and monitoring rather than imposing affirmative cleanup obligations, the House of Representatives picked up where the NDAA left off with passage of H.R. 535, the PFAS Action Act, on Jan. 10.

H.R. 535 includes a number of significant requirements, most notably addition of two of the most scrutinized PFAS compounds, perfluorooctanoic acid, or PFOA, and perfluorooctane sulfonic acid, or PFOS, as hazardous substances under the federal Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA, also known as Superfund.

A brief review of the provisions enacted in the NDAA and proposed in H.R. 535 follows.

## **New Requirements in the NDAA**

In brief, the most significant obligations set forth in the NDAA will require monitoring under the Safe Drinking Water Act; reporting requirements under the Emergency Planning and



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Community Right-to-Know Act Toxics Release Inventory, or TRI; disclosures under the Toxic Substances Control Act; and increased PFAS sampling by the U.S. Geological Survey.

Furthermore, the [U.S. Department of Defense](#) must phase out use of aqueous film-forming foam for firefighting on DOD installations by 2024. Exposure to this foam is the subject of a number of personal injury and natural resource damages lawsuits throughout the country. The DOD must also undertake blood sampling of firefighters exposed to the foam, and provide Congress with a remediation plan for contamination surrounding military installations.

The detailed PFAS requirements are set forth in Title LXXIII of the NDAA, which adds PFAS to the list of unregulated contaminants that must be monitored by public water systems under the Safe Drinking Water Act's Unregulated Contaminant Monitoring Rule. The specific PFAS chemicals included will not be identified until the EPA promulgates the fifth iteration of the rule, which the agency expects to publish by December 2021.

On the release disclosure side, the EPA must add a number of PFAS compounds to the TRI for reporting of inventories greater than 100 pounds, to include:

- PFOA and associated salts;
- PFOS and associated salts;
- Hexafluoropropylene oxide dimer acid (GenX — a substance widely seen as a safer replacement for PFOA);
- Perfluorononanoic acid (PFNA);
- Perfluorohexanesulfonic acid (PFHxS); and
- Other PFAS compounds already listed as active chemical substances under the Toxic Substances Control Act.

The EPA must revisit this list and consider additional compounds in two years.

Related to the Toxics Release Inventory requirements, the EPA must take action by 2023 under Section 8(a) of the TSCA to require individuals to report all PFAS manufacturing activities as far back as 2011.

Finally, by June of this year, the EPA must finalize its proposed Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances Significant New Use Rule from 2015, which, if finalized as proposed, would remove a reporting exception for individuals importing PFAS for use in carpet manufacturing.

While these requirements do not create any affirmative cleanup or remediation obligations, they do impose a number of obligations related to PFAS manufacturing and use.

### **Proposed Requirements in H.R. 535**

Building on the provisions that were proposed, but never passed, in the NDAA, H.R. 535 would establish affirmative cleanup obligations and requirements for PFOA and PFAS, and require the EPA to consider additional requirements for other PFAS compounds in the future.

Beyond the addition of PFOA and PFAS as hazardous substances under CERCLA within one year of enactment, the EPA must also consider designating all other PFAS compounds as hazardous substances within five years.

Furthermore, the agency must promulgate national primary drinking water standards for PFOA and PFAS within two years. Currently, the EPA's 70 parts per trillion water health advisory for PFOA and PFOS, established in 2016, does not impose any affirmative regulatory requirements, and is higher than many state standards.

H.R. 535 would also require the agency to designate PFAS as hazardous air pollutants under the Clean Air Act; establish effluent and pretreatment standards for PFAS under Section 307(a) of the Clean Water Act; and impose a five-year moratorium on approval of any new PFAS compounds for use under the Toxic Substances Control Act.

### **What's Next?**

With passage of the NDAA, companies will need to take an immediate look at their chemical

inventories to understand if they manufacture, process or otherwise use any substances that must now be reported under the TRI.

TRI reporting, along with additional sampling by USGS, will serve to further draw attention to PFAS, creating more potential defendants or alleged contamination sites to fuel the increasing stream of toxic tort and natural resource damages complaints being filed by private litigants and state attorneys general.

Currently, many of these cases alleging PFAS-related contamination rely on tort theories, such as nuisance, negligence, trespass and products liability. However, even without federal cleanup obligations, several states, including California, New Jersey, New York and Michigan, continue to regulate PFAS aggressively, including development of drinking water contaminant limits above and beyond that required under federal law.

These state provisions may be used to support statutory-based state law claims related to alleged PFAS contamination above and beyond tort liability. For example, the state of Michigan recently filed a suit in state court alleging a number of claims related to alleged PFAS contamination across the state, including a claim under Part 201 of Michigan's Natural Resources and Environmental Protection Act, the state's CERCLA analog.

Though PFOA and PFOS are not currently listed as hazardous substances under CERCLA, Michigan promulgated PFOA and PFOS drinking water standards in 2018, and the state claims that these standards establish that the substances "pose an unacceptable risk to the public health, safety, or welfare, or the environment," which is required in order for alleged contamination to become subject to the requirements of Part 201.

Conversely, on Jan. 15, the [U.S. District Court for the Eastern District of Pennsylvania](#) dismissed a lawsuit against the [U.S. Navy](#) for alleged PFAS contamination under Pennsylvania's Hazardous Site Cleanup Act, because PFAS was not designated as hazardous under Pennsylvania law.[1]

Even without H.R. 535, the lower courts have split over whether PFAS qualify as hazardous substances under CERCLA, or relatedly as hazardous waste under the Resource Conservation and Recovery Act, or RCRA.

In *City of Lake Elmo v. 3M Co.*, 3M sought to dismiss Lake Elmo's claim under CERCLA to

recover costs expended in response to alleged PFAS contamination of the city's water supply by arguing that Lake Elmo could not establish an injury under CERCLA, because the PFAS contamination did not exceed any federally-mandated maximum contamination level.

However, the court was not persuaded, and denied the motion, ruling that CERCLA liability does not depend on the existence of a threshold quantity of a hazardous substance.[2]

In another case, *Tennessee Riverkeeper Inc. v. 3M Co.*, Tennessee Riverkeeper filed a citizen suit under RCRA, seeking declaratory and injunctive relief in response to alleged ongoing PFAS contamination. In their motion to dismiss, the defendants argued that the alleged PFAS discharges were excluded from RCRA's definition of "solid waste" because they were industrial discharges from a point source subject to Clean Water Act discharge permit.

However, the complaint survived the motion, with the court finding a genuine issue of material fact as to whether the alleged PFAS-contaminated groundwater and leachate discharges fit within RCRA's exception to the definition of solid waste.[3] In contrast, in the aforementioned case from the Eastern District of Pennsylvania, *Giovanni*, the court declined to apply RCRA's definition of hazardous waste to the state law claim, and recognized that PFAS did not meet the definition of hazardous substances under CERCLA.[4]


Even more PFAS regulation may be coming at the state and federal level (including via the EPA's PFAS action plan), and these regulations, along with increased disclosures surrounding PFAS inventories and legacy contamination, may find their way into the litigation.


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*as legal advice.*

[1] [Giovanni et al. v. Department of the Navy](#) , Nos. 16-04873, 17-00765, slip op. at 16 (E.D. Pa. Jan.15, 2020).

[2] See [City of Lake Elmo v. 3M Co.](#) , No. 16-2557, slip op. at 6 (D. Minn. Feb. 15, 2017). This case subsequently settled before trial.

[3] [Tennessee Riverkeeper Inc. v. 3M Co.](#) , 234 F. Supp. 3d 1153, 1163 (N.D. Ala. 2017). The case subsequently settled before trial.

[4] Giovanni, Nos. 16-04873, 17-00765, slip op. at 11, 13.