Alert

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Some Businesses Using PFAS Compounds Now Subject to TRI Reporting and Likely Greater Scrutiny

By this time next year, a wide range of businesses, governments and citizens will know a lot more about per- and poly-fluoroalkyl substances (PFOS and PFOA) in their communities. PFOS and PFOA compounds are a family of emerging contaminants, commonly referred to as PFAS. By July 1, 2021, businesses that in 2020 manufactured, processed, or otherwise used threshold quantities (i.e. 100 pounds or more) of any of 172 listed PFAS compounds must file Toxic Release Inventory (TRI) reports with the U.S. Environmental Protection Agency (EPA). Shortly thereafter, the EPA will begin publishing information on PFAS TRI reporters, a move that likely will lead to greater public scrutiny of businesses that manufacture, process, or use PFAS. The list of the 172 PFAS compounds that now have to be reported is found here. The new PFAS reporting requirement was imposed by the National Defense Reauthorization Act for 2020.

Most of the focus on PFAS to date has been on drinking water contamination, which is the subject of a plethora of state and federal regulatory actions, civil lawsuits, and increasing national investment in sampling and treatment of PFAS in drinking water. Responsibility for PFAS contamination in soil and groundwater is the subject of a wave of litigation. Releases of PFAS to air and the potential for such releases to contribute to localized soil and groundwater contamination is the subject of increasing scrutiny by the EPA, states, and litigants. TRI reports will provide the public with new information about PFAS air releases that could lead to greater scrutiny of PFAS air releases as potential contributors to local soil and groundwater contamination. Click here for the latest on EPA-involved federal actions. To follow developments in states and the private sector, click here.

With the new TRI reporting requirements, businesses that manufacture, process, or otherwise use 100 lbs. or more of any of the listed PFAS compounds should be developing their 2020 data for reporting to the EPA. They also should be planning for a likely surge in local community interest and greater scrutiny by regulators, citizen groups, and potentially responsible parties at PFAS groundwater contamination sites, who are looking to share cleanup liability with other contributing sources of PFAS contamination. The detailed TRI reports to be filed by July 1, 2021, will focus on sources and nature of involvement with each PFAS, as well as details about all releases to the environment, including transmittal in waste to onsite and offsite locations. Those who supply PFAS compounds to such facilities or receive PFAS waste streams from any such facilities also will be identified in the TRI reports and therefore should expect greater scrutiny from regulators and local communities.

Who Must Report PFAS Manufactured, Processed or Otherwise Used?

TRI reporters include all facilities in many specified NAICS codes who employ more than 10 full-time equivalent employees (FTE) and cover more than 21,000 facilities in such sectors as mining, certain utilities, manufacturing for food and beverages, textiles and apparel, wood, paper, printing, chemicals, metals, electronics, furniture, certain wholesale merchants, publishing, hazardous waste management, and all federal facilities. Complete reports covering the 2020 year are due to the EPA on July 1, 2021 and facility-level preliminary reports are made public by the EPA by the end of July. Complete data sets are published by the EPA in October and analyses of the data are published in January of the following year. Data must be submitted to the appropriate state or Indian Tribe at the same time as supplied to the EPA.

The FTE threshold is for all employees, including administrative staff. A facility is all buildings, structures, and operations on a single site or on contiguous or adjacent sites with common ownership or operations. There is a complex formula for "multiple establishments" with a mix of covered NAICS codes and other enterprises.

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Related Practice Areas

- Environmental Litigation & Enforcement
- Environmental Regulatory & Due Diligence

The EPA provides detailed annual guidance on reporting and the required forms will cover all activities and uses of each covered PFAS, the maximum amount on-site during the year, the quantity entering each environmental medium on-site, and all transfers of any sort off-site, along with extensive information about waste reduction, recycling, source reduction, and pollution prevention generally. Guidance is available here.

What Challenges Face Reporters in Filing the Initial Year's PFAS Reports?

As we are almost through the first reporting year, TRI reporters should be well underway in developing the information, tracking and measurement, and methodologies for the extensive reporting that is required. Important aspects of report preparation may depend on information about, for example, the timing of highest volume of PFAS. Reporters should, at a minimum, determine whether and which PFAS they manufacture, process, or otherwise use above the thresholds and identify, for covered compounds, what kind of information will need to be developed in order to file complete and accurate reports.

In this first year for PFAS reporting, many manufacturers will face challenges identifying the nature and volume for each of these 172 compounds. Some, like those PFAS widely used in fire suppressant foams, may be relatively easy to identify. Some may be clearly below the 100 lb. threshold applicable to each category (manufacture, process, or otherwise use) and some will be present in less than the *de minimis* concentration (1.0 percent for most PFAS, .1 percent for PFOA).

All reporters should receive supplier notifications from required manufacturers and importers pursuant to 40 CFR § 372.45 covering the PFAS content and Safety Data Sheet for each supplied PFAS above the *de minimis* concentration.

The identification of all PFAS involved in manufacturing will include substances produced or imported, and reporting will include information on amounts on-site, amounts involved in sale and production, and information on impurities. Manufacturing activities may be for on-site use, for sale, or as a byproduct of impurity. PFAS "processed" includes formulation, article components, repackaging, recycling, reaction chemistry, and impurities.

"Otherwise used" PFAS compounds include those used as catalysts, in waste processing, as fuel, in construction materials, and as flame suppression or retardants, with narrow exemptions for certain cleaning and vehicle maintenance activities. Many facilities maintain supplies of flame suppressants containing PFAS, for example. While mere storage of flame suppression chemicals without some kind of manipulation would not constitute "otherwise use," it is clear that training and fire suppression use do qualify.

After identifying the nature and source of PFAS at a facility, the TRI reporter must supply details about all releases of the compounds from the facility, including fugitive and nonpoint air releases, stack or point source releases, discharges to waters, transfers to off-site waste disposal, and on-site waste treatment and disposal, including on-site land application and injection wells. Discharges to publicly owned treatment works (POTWs) are specifically covered.

The EPA allows a range of methods to estimate the values required for these reports, ranging from monitoring results, mass-balance calculations, use of published emissions factors, development of site specific emissions factors, and other justified methods. Information may include additional specifics from suppliers. In many instances, PFAS estimates may be particularly difficult given the limited availability of analytical methods.

While the final reports are not due until July 1, 2021, the entire 2020 year provides the content and basis for the report.

What Public Information Will Be Found in the Reports?

Beginning with the initial EPA publication of preliminary TRI data, all members of the public can access the complete reporting forms for all submitters received by the EPA. These forms are searchable by facility name, zip code, SIC/NAICS code, and chemical name. With the exception of certain information protected as confidential business information, all of the details about quantities, uses and activities, disposal, releases to the environment, and efforts at pollution

prevention and reduction are included in the publicly available forms.

What Are the Implications for TRI Reporters, Suppliers, Waste Handlers, and Exposed Populations?

TRI reporters should know long before next July whether they will be reporting PFAS handling and releases and in what quantities and media. Nevertheless, the publication of that information may bring them into contact with a vast range of interested parties with whom they have not been accustomed to engaging. During 2020 and early 2021, reporters should consider engaging suppliers, wastewater treatment facilities, POTWs, and waste disposal operations in discussions about the upcoming content of their reports and about PFAS released to those entities. Some companies may also wish to reduce the amounts of PFAS manufactured, processed, or otherwise used and take steps to respond to any releases documented in their TRI reports.

Among the first and most prominent entities affected by the TRI PFAS publication will be those expressly identified in the reports — the recipients of off-site wastes and perhaps suppliers of PFAS-containing materials. While these kinds of entities may be accustomed to public data on other TRI reported chemicals, the first-time reporting of chemicals that are the subject of much public and regulatory concern could nevertheless be quite dramatic for these entities.

While entities that are facing newly published information about their handling or receipt of possibly multiple sources of PFAS are at the forefront of the potential reactions to the information, they are far from the only entities potentially affected. Communities, potential litigants, land and water users, and residents generally keenly attuned to the disclosure of PFAS contamination. At a minimum, demand for further information and sampling is likely.

In short, the new TRI reporting requirement will lead to a vast increase in public information about PFAS handling and releases that likely will lead to further changes in the regulatory landscape and greater potential liability for facilities reporting PFAS manufacturing, processing, and use, as well as their PFAS suppliers and waste disposal providers.