

Congress Passes Federal PFAS Legislation in Defense Authorization Act

On December 17, 2019, Congress finally passed legislation to speed investigations and cleanups of military facilities contaminated with per- and poly-fluorinated compounds (PFAS compounds). The legislation — the 2020 Defense Authorization Act — awaits execution by President Trump. While the legislation falls well short of expectations that Congress would declare PFAS compounds to be hazardous substances under Superfund and regulated drinking water contaminants under the Safe Drinking Water Act Maximum Contaminant Levels (MCLs) program, the new law will speed cleanups at military installations and greatly expand public knowledge of PFAS sources. The far-reaching provisions found in early versions were stripped in the last few days of reconciliation, as House and Senate conferees negotiated the terms of the final bill.

DOD Use and Clean Up of PFAS

The new requirements impose a significant set of PFAS obligations and limitations on DOD, including a phase out of all use of Aqueous Fire Fighting Foam (AFFF) by 2024, termination of training with AFFF, and elimination of PFAS in meals ready to eat food packaging. Military firefighters also will receive blood monitoring.

While the military is still not subject to the provisions of Superfund that could make it clearly liable to third parties, this legislation requires the military to remediate and provide alternate water supplies to contaminated nearby farms, to clean up “pollutants and contaminants” (includes PFAS) on federal facilities, and to enter into cooperative agreements with communities for testing, monitoring, and cleanup of sites involving PFAS contamination from military operations. DOD must also share data with communities. These cleanup provisions have the potential to speed the pace and broaden the reach of military related PFAS cleanups.

Expansion of EPA and USGS Programs

The legislation also adds several PFAS to the Toxic Release Inventory and sets the threshold for reporting at 100 lbs., jumping several steps beyond EPA’s recent Advanced Notice of Proposed Rulemaking to add PFAS compounds to the TRI. The impact will be early, expansive, and produce publicly available information on the location, use, and releases of PFAS compounds at thousands of locations across the United States. In turn, we expect this will also lead many handlers of PFAS in the covered business lines to acquire new obligations under the TRI regulatory system.

The EPA is also required to add all the PFAS compounds with a drinking water detection method to the upcoming fifth round of national unregulated contaminant monitoring rule (UCMR) under the SDWA. The combination of substantial new sampling and the addition of more than a dozen new compounds could well shift the overall national sense of the scope and nature of the problem.

The EPA is also tasked with a major research initiative and improvements in technical assistance to states and localities.

Finally, in what could be a game changer, the U.S. Geological Survey (USGS) is required to add PFAS to its national monitoring programs, which cover surface water and ground water, soils, and wells.

More Legislation Imminent?

The press coverage of the eleventh hour negotiations on the Defense Authorization Act is full of lawmakers bemoaning the failure of the earlier bipartisan agreement and promising “stand alone” legislation. It isn’t obvious from any of the coverage that both houses of the current Congress



Peter J. Fontaine

**Chair,
Environmental**

pfontaine@cozen.com
Phone: (215) 665-2723
Fax: (856) 910-5075

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working with the current administration are likely to turn these provisions into law, but it certainly appears that the subject is of keen interest in both houses. It is clear that the impact of this actual new legislation is imminent and that it could be very significant.

Conclusion

Notwithstanding the scale-back in the legislation, there clearly remains continuing broad bipartisan concern about PFAS and their impact on human health and the environment. And while the provisions are not as far-reaching as public health advocates had hoped, the new law likely will speed cleanups, create an explosion of new monitoring and sampling, accelerate and expand the number of PFAS compounds required to be monitored in response actions, and significantly affect the commercial market for some products containing PFAS compounds.
