

## EPA Takes First PFAS Plan Regulatory Step

EPA on November 25, 2019, announced and signed an Advanced Notice of Proposed Rulemaking (ANPR) to explore a possible promulgation of a rule that would add PFAS compounds to the Toxic Release Inventory (TRI) and require release reporting pursuant to the Emergency Planning and Community Right to Know Act from the 1986 Superfund amendments and the 1990 Pollution Prevention Act. With this very preliminary step involving only one statutory approach, EPA has initiated regulatory steps to implement its “PFAS Plan.”

This ANPR is in some ways notable for what it does not address: it is not a path to declaration of hazardous substance status under Superfund nor would it lead to promulgation of enforceable drinking water standards. And while this step in advance of a specific proposal is likely years away from implementation, it does in fact have significant potential to add a broad range of businesses, federal facilities, and other entities to the TRI regulatory requirements. In turn, this would involve the creation and reporting of a great deal of newly available information on the location, use, and releases of covered PFAS compounds.

Perhaps more important, this ANPR highlights some key issues relating to how the agency approaches the full range of PFAS compounds. While this Request for Comment mentions the two best known compounds, PFOS and PFOA, it notes that these are not generally currently manufactured, imported, or used in the United States while some 600 other PFAS compounds are manufactured or imported. Similarly, the agency points the commenter beyond these initial two compounds to the universe of as many as 30 currently subject to some sort of toxicity study and analysis.

### Who would be affected by addition of PFAS to the TRI reporting and related Release Reporting?

The TRI requirements apply to facilities that handle above the set threshold amount of the listed substance so long as they are in certain NAICS (nee SIC) codes and employ more than 10 FTE employees. Typical NAICS codes include mining, utilities, manufacturing, merchant wholesalers, and publishing.

The current TRI list requires reporting on 595 chemicals and 33 chemical categories, so it is not clear how many new reporters would be added by the addition of PFAS compounds.

As noted above, a wide range of interested persons would have access to information about PFAS handling and releases.

### What are the major broad PFAS issues where the agency is taking comment?

The agency invites comment on key PFAS regulatory issues that will also be key to decision making in any other regulatory action, like listing under Superfund or setting drinking water Maximum Contaminant Levels (MCLs). These include which PFAS compounds (of the potential commercially active 600 or so) to list and how (in clusters, by combining to trigger threshold, etc.). The agency also focuses attention on toxicity information, noting that the main criterion for TRI listing is toxicity (not risk considering exposure). In that regard, it asks which compounds have an adequate database for evaluation, which merit greater scrutiny, and how to consider combinations of PFAS. In the context of exploring whether to set a significantly lower threshold amount for reporting, the agency goes to considerable length to compare PFAS with the PBT (persistent, bioaccumulative, and toxic) compounds, where the much lower threshold amount currently applies.



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- Environmental Regulatory & Due Diligence

## Does this tell us anything about other potential regulatory actions by the agency?

While this step does not have any direct link to other actions, it does highlight some key issues that will be in play for other regulatory approaches. It is quite telling that EPA issued a press release on November 26 which mentions this ANPR but attempts to address EPA's work on the entire "PFAS Action Plan." In it, EPA promises to "announce guidance on how to clean up the chemicals when high levels are found in groundwater," which would finalize a recent proposal. On the subject of the Safe Drinking Water Act, the agency says only that it will "take the next step to update the amount of chemicals that is considered safe in drinking water," perhaps signaling some update to the current health advisory for PFOS and PFOA. As to listing PFOS and PFOA under Superfund, "the EPA is still working on that step and consulting with other Agencies," including notably the Department of Defense, of course.

## Who should care about this ANPR?

While there is much process to go before any final rule requiring TRI reporting of PFAS compounds, many PFAS stakeholders will likely be affected by these early EPA regulatory deliberations, especially as it relates to the agency's approach to its expanding consideration of additional compounds and rapidly developing data on many of them. This is also an early opportunity for entities who might be newly subject to regulation to evaluate the significance of current handling and releases of PFAS compounds and of opportunities to manage those compounds differently.

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### References:

<https://www.epa.gov/toxics-release-inventory-tri-program/advance-notice-proposed-rulemaking-adding-certain-pfas-tri>