

ALERT

Bipartisan Amendment to the National Defense Authorization Act Would Enact Sweeping Changes to EPA's Regulation of PFAS Chemistry

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Earlier this week, Congresswoman Debbie Dingell (D-MI) filed an amendment to the Fiscal Year 2021 National Defense Authorization Act (NDAA) that would transform the U.S. Environmental Protection Agency's (EPA's or Agency's) regulation of perfluoroalkyl and polyfluoroalkyl substances (PFAS) under the Toxic Substances Control Act (TSCA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. The amendment is a part of a broader bipartisan effort to better understand and reduce the risks of PFAS chemicals, which exhibit longevity in the environment and the human body. Potentially affected companies should closely monitor the status of this amendment and engage their representatives in anticipation of the eventual conference between the U.S. House of Representatives and the U.S. Senate over the final NDAA.

The NDAA, which authorizes program funding for the U.S. Department of Defense, already included several PFAS-related provisions in response to PFAS contamination found at or near drinking water at a number of military sites. Rep. Dingell's amendment, which is currently cosponsored by Reps. Bill Posey (R-FL), Ann McLane Kuster (D-NH), Fred Upton (R-MI), Lisa Blunt Rochester (D-DE), Brian Mast (R-FL), and Mike Gallagher (R-WI), seeks to strengthen the PFAS provisions of the existing bill to address the production, use, and disposal of PFAS chemicals and facilitate the clean-up of PFAS chemicals across the country. Specifically, the amendment would prohibit EPA's ability to approve new PFAS chemicals and new uses of PFAS chemicals under

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TSCA and would require EPA to engage in extensive new testing of PFAS chemicals. The amendment would also direct EPA to develop regulatory requirements addressing PFAS under other environmental statutes—including CERCLA, the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act.

The Amendment's Implications for TSCA

If enacted, the amendment would impose a five-year ban on EPA's ability to approve new PFAS chemicals or new uses of PFAS chemicals under TSCA. This prohibition is specifically directed at TSCA section 5, which requires EPA to review submitters' section 5 premanufacture notices and make affirmative findings on the risks of new chemical substances or significant new uses of chemicals before they can proceed to the marketplace. The amendment would also require EPA to write a broad new test rule for PFAS under TSCA section 4 that would direct companies to conduct comprehensive toxicity testing on all perfluoroalkyl or polyfluoroalkyl substances. Additionally, the bill would place a permanent prohibition on EPA's ability to use the low-volume exemption for PFAS chemicals. The low-volume exemption generally allows businesses to produce chemicals without undergoing full premanufacture notice (PMN) testing and providing complete human exposure and environmental release data under section 5 of TSCA, unless the chemical is produced over a certain volume, usually 10,000 kg/year or less.

The Amendment's Implications for CERCLA

As written, the amendment would *require* the EPA to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) chemicals as "hazardous substances" under CERCLA within one year of enactment of the legislation. The Agency would then have to determine whether to designate all other PFAS chemicals as "hazardous substances" within five years of enactment of the legislation.

Such a designation would have sweeping implications. CERCLA authorizes EPA to clean up sites contaminated with "hazardous substances." To ensure that contaminated sites are remediated, CERCLA forces the parties responsible for the contamination to either perform cleanups or pay for the costs incurred in the cleanup of sites contaminated with chemicals designated as "hazardous substances" under CERCLA. In cases where there is no viable responsible party, CERCLA gives EPA the funds and authority to clean up contaminated sites on its own. Designating PFAS chemicals as "hazardous substances" would trigger cleanups of contaminated groundwater under CERCLA and direct federal resources to remediate contaminated sites and limit their spread.

Next Steps in the Legislative Process

An independent version of the Dingell amendment, H.R. 535, passed the House in a 247-159 vote in January 2020. The Senate, however, has not considered the measure. The current amendment, filed on July 13, 2020, seeks to add H.R. 535 to the NDAA (H.R. 6395). Sponsors of the amendment added the legislation to the NDAA with the expectation that the regular defense funding bill would be a surefire vehicle to get the legislation approved by the House and before the Senate. In addition to the Dingell amendment, lawmakers have requested that debate be allowed on a number of other PFAS-related amendments, including proposals

from both Republican and Democrat lawmakers from around the country. The full House is expected to vote on the NDAA and its proposed amendments on Monday, July 20, 2020. If successful, the vote on the amendment appears likely to force the Senate to consider the issue in a conference committee with the House.