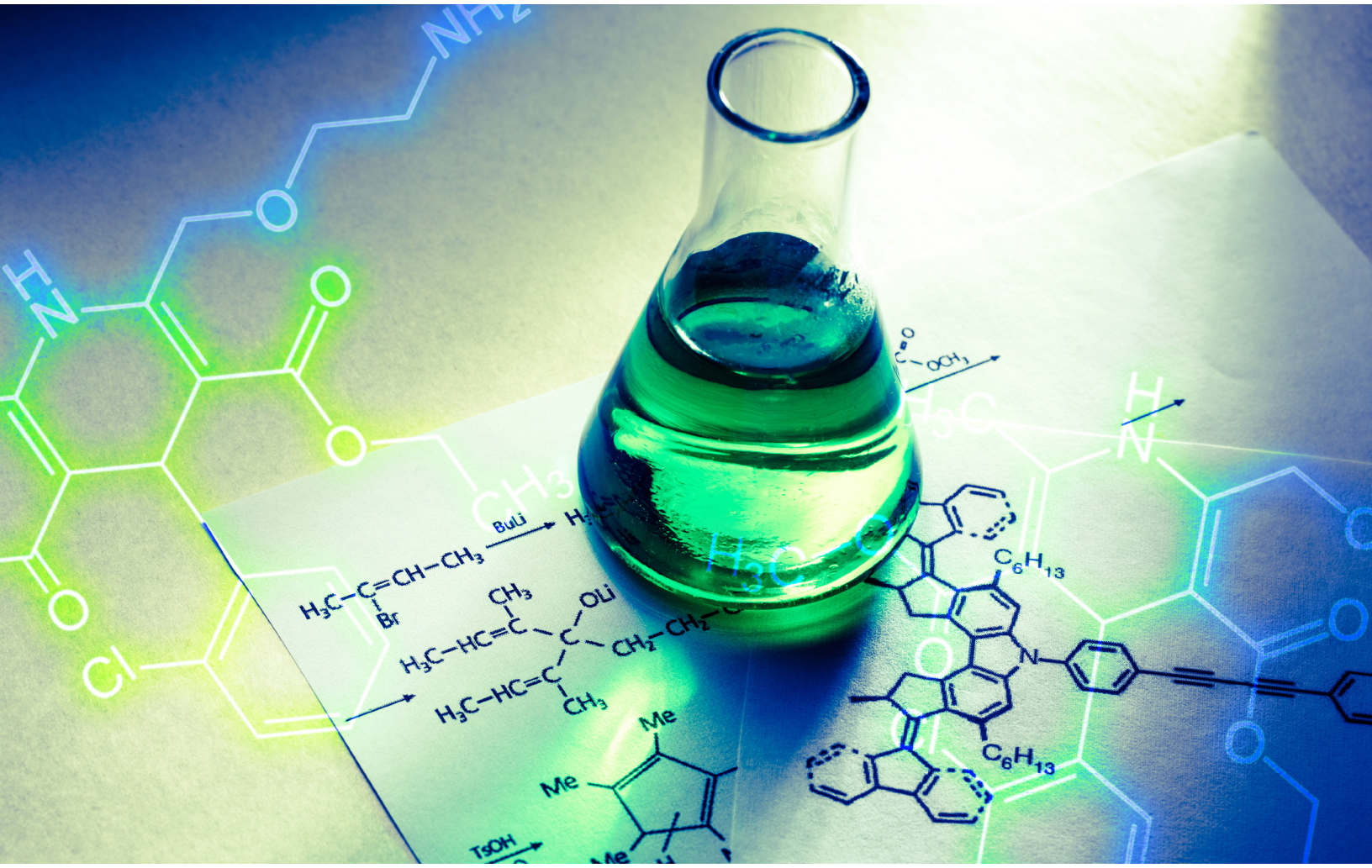
CLIENT ALERT:

December 18, 2023

Major Changes to PFAS Reporting Requirements under the Toxic Release Inventory Program to Impact Industries across the US



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Starting with Reporting Year 2024, Per- and Polyfluoroalkyl Substances (PFAS) will be regulated as "Chemicals of Special Concern," thus removing the de minimis exemption and changing who must report PFAS releases under the Toxic Release Inventory (TRI) Reporting Program.

Now ALL concentrations of regulated PFAS in mixtures, no matter how small, must be considered in TRI threshold applicability assessments. With this change, many companies that previously fell below the 100-pound TRI reporting thresholds for PFAS using the de minimis exemption will now be required to report.

The Final Rule also makes a significant change to the Emergency Planning and Community Right to Know Act (EPCRA) Supplier Notification requirements. Under this rule change, effective 30 November 2023, regulated suppliers are now required to disclose TRI-regulated PFAS and existing persistent, bioaccumulative, and toxic (PBT) chemicals on the "Chemicals of Special Concern" list at ANY concentration in their products. A company has 30 days to provide/correct their EPCRA Supplier Notifications once they learn of the presence of a TRI-regulated chemical in a product previously sold to a TRI-regulated customer. Collectively, this change involves hundreds of chemicals that will now have to be disclosed at any known concentration in products.

Companies need to understand the presence and quantity of PFAS in their operations and collect the required data for supplier notifications and annual TRI reporting. Companies must also consider how the reported PFAS data, in public domain, may impact community and stakeholder perceptions. Failure to strategically approach PFAS data collection and management may result in significant reputational, business, and compliance risks.

Read on for specific details regarding the EPCRA TRI rule changes, its projected impacts, and recommendations for how businesses can respond in a pragmatic and strategic way.

Background

PFAS were added to the TRI Program in December 2019 by the United States Congress under the PFAS Act of 2019 under The Fiscal Year 2020 National Defense Authorization Act. Subtitle B of the PFAS Act established TRI 'manufacture,' 'process,' and 'otherwise use' reporting thresholds of only 100 pounds per regulated PFAS and went into effect immediately on 1 January 2020. This legislative action was unprecedented and outside the established regulatory

process The United States Environmental Protection Agency (USEPA) must follow for adding chemicals to the TRI Program.

The PFAS Act of 2019 identified 14 specific PFAS as reportable under TRI and established set criteria for the USEPA to follow to automatically add PFAS to the TRI Program. USEPA's initial review resulted in the regulation of 172 individual PFAS for Reporting Year 2020 and there are currently 189 TRI-regulated PFAS listed for Reporting Year 2023.

TRI Reporting Impacts for PFAS

TRI report submittals have and will provide a continual source of publicly available information on PFAS uses and releases to the environment throughout the United States. However, with the standard TRI de minimis exemption in place for regulated PFAS for reporting years 2020–2022, reporting of PFAS under the TRI Program has been minimal at only 44–46 facilities out of the more than 21,000 facilities that report under the program annually. This small number of reporting facilities led to notable public outcry on the availability of the TRI de minimis exemption for PFAS, lawsuits against the USEPA, and ultimately development of a Proposed Rule in December 2022 to regulate PFAS under TRI as "Chemicals of Special Concern."

The impacts of shifting PFAS to the "Chemicals of Special Concern" list are significant, and include removal of the following "Burden Reduction Tools" in place for standard TRI-regulated chemicals:

1. ***Eliminates the de minimis exemption***. ALL concentrations of regulated PFAS in mixtures, no matter how small, must be considered in TRI threshold assessments and release calculations. To date, perfluorooctanoic acid (PFOA) at concentrations below 0.1 percent and all other TRI-regulated PFAS at concentrations below 1 percent had been exempt from threshold and release calculations; this is no longer the case.

2. ***Eliminates the Form A reporting option***. A Form A report is a certification statement that facilities can submit in place of the standard Form R report when they manufacture/process/otherwise use less than 1 million pounds of a regulated chemical and the total annual reportable amount for that chemical is less than 500 pounds. All PFAS TRI reports must be submitted via a Form R with full release and waste management pathway reporting.

3. ***Eliminates range code reporting***. The exact number of pounds of PFAS released per pathway must be reported on PFAS Form R reports, where previously range codes for 1–10, 11–499, and 500–999 pounds were an option.

   Note that these three "Burden Reduction Tools" are NOT available for any chemicals currently on the TRI "Chemicals of Special Concern" list and this change is not just specific to regulated PFAS being added to the list.

USEPA published the Final Rule on 31 October 2023 to move all PFAS currently regulated under the TRI program over to the list of "Chemicals of Special Concern," along with future PFAS added to the program based on the criteria established in the National Defense Authorization Act. Effective on 30 November 2023, the rule change applies to reporting year 2024 TRI reports due on 1 July 2025. The expectation is that many more TRI-regulated facilities will be required to report for PFAS under this rule change, due to the ubiquitous nature of PFAS in the supply chain and the very low 'manufacture,' 'process,' and 'otherwise use' reporting thresholds of only 100 pounds/year per regulated PFAS.

EPCRA Supplier Notification Impacts

The Final Rule also makes a significant change to the EPCRA Supplier Notification requirements. In general, EPCRA Supplier Notification requires companies in TRI-regulated industries that manufacture, import, or process a TRI-regulated chemical and then sell or otherwise distribute a product containing that chemical to customers also in a TRI-regulated industry, to provide their customers written notification of the following:

1. **A statement** that the mixture or trade name product **contains a toxic chemical or chemicals** subject to the TRI reporting requirements

2. The **name** of each toxic chemical, and the associated **CAS number** of each chemical, if applicable; and

3. The **percent by weight** of each toxic chemical in the mixture or trade name product.

Under EPCRA Supplier Notification, disclosure of TRI-regulated carcinogens present at <0.1 percent or non-carcinogens present at <1 percent have historically not been required. However, to facilitate reporting of PFAS as "Chemicals of Special Concern," the Final Rule modifies the EPCRA Supplier Notification requirements to remove this de minimis exemption for all current and future TRI-regulated PFAS and the existing PBTs already regulated as "Chemicals of Special Concern."

Under this rule change, regulated suppliers are now required to disclose TRI-regulated PFAS and existing PBT chemicals at ANY concentration in their products. This change impacts the current 189 TRI-regulated PFAS, future regulated PFAS, 15 individual PBT chemicals, and 6 PBT categories, of which 3 have defined CAS number lists and 3 do not. Collectively, this change involves hundreds of chemicals that will now have to be disclosed at any known concentration in products. This change is being made to create the chemical composition disclosures needed for TRI facilities to identify low levels of

regulated PFAS/PBTs in their raw materials and to facilitate their TRI reporting process. See image below for listing of the existing PBTs on the "Chemicals of Special Concern" impacted by this rule change along with the TRI-regulated PFAS.

Existing TRI PBTs		
Aldrin	Isodrin	Pendimethalin
Benzo(g,h,i)perylene	Lead (not in stainless/brass/bronze)	Pentachlorobenzene
Chlordane	Lead Compounds ★	Polychlorinated biphenyl (PCBs) ★
Dioxin and Dioxin-Like Compounds ☆	Mercury	Polycyclic Aromatic Compounds (PACs) ☆
Heptachlor	Mercury Compounds ★	Tetrabromobisphenol A
Hexabromocyclododecanes (HBCD) ☆	Methoxychlor	Toxaphene
Hexachlorobenzene	Octachlorostyrene	Trifluralin

See the full list of PFAS chemicals added to the TRI pursuant to Section 7321 of the National Defense Authorization Act through Reporting Year 2023

☆ Defined list of CAS#s

★ Undefined list of CAS#s

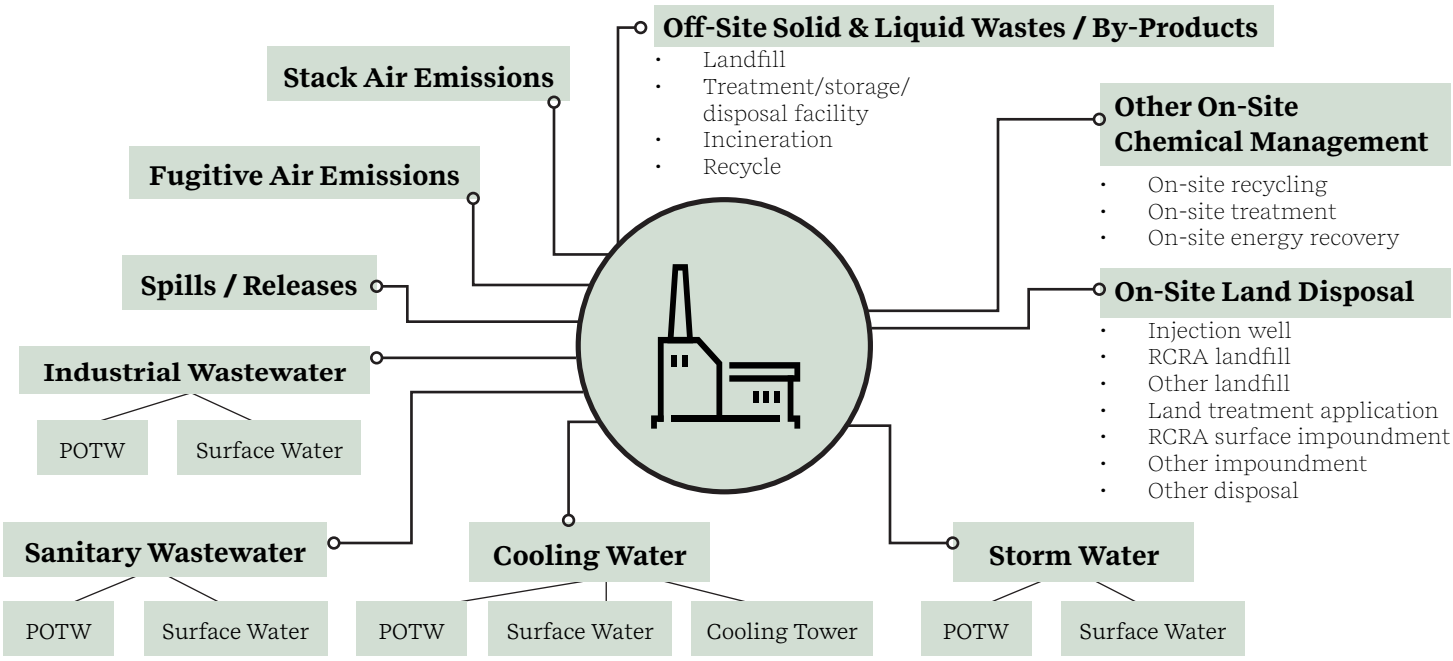
Since disclosures of these low levels of chemicals have not been required to date, propagation of this composition disclosure information down through the supply chain will obviously take some time. So, compliance with these requirements will require an agile response plan within a company's Regulatory and Product Compliance groups to track and facilitate these disclosures on a routine basis as new composition information is identified. Note that a company has 30 days to provide/correct their EPCRA Supplier Notifications once they learn of the presence of a TRI-regulated chemical in a product previously sold to a TRI-regulated customer.

ERM Insights

While the TRI program has many decades of reporting history for hundreds of toxic chemicals, with some more historically controversial than others, the level of controversy surrounding PFAS in the public sector is unprecedented and becoming more prolific by the day.

To report under TRI, each of the pathways depicted below must be evaluated for each reportable chemical and the annual pounds released or managed for the year via each applicable pathway calculated and reported to the USEPA. These values are then published by the USEPA for the public's use and interpretation. The stakeholder groups that access the published TRI dataset include the public, governmental agencies, politicians, academia, and NGOs, to name a few. Their reasons for accessing the TRI dataset to research toxic chemical releases from facilities are varied, along with their level of understanding of chemical toxicology, risk assessment, exposure levels, etc. However, one thing is certain; reporting on PFAS releases via the TRI Program will draw stakeholder attention to a facility and company, particularly considering the USEPA's increased focus on environmental justice considerations when evaluating projects, permits, and enforcement concerns.

TRI Reportable Chemical Release/Waste Management Pathways



While reporting for a regulated PFAS under TRI is not optional if a facility exceeds a reporting threshold, the implications of reporting PFAS releases from a facility should be carefully considered well in advance of report submission. It is highly advisable that an organization develop a comprehensive plan for how it will manage and respond to public and shareholder inquiries on its published PFAS release data, including plans for briefing the C-Suite and Board of Directors on the business risk implications. Pre-planned responses for each facility specific to their reported TRI data and a clearly detailed chain of command to follow for all inquiries is advisable.

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With all that said, the ongoing compliance challenges presented by the EPCRA Supplier Notification changes and the risk of TRI reporting putting your company on the public's radar are just two of the more imminent regulatory drivers in the US right now. The multitude of regulatory and non-regulatory drivers around PFAS are extensive and growing nationally and internationally, and the reputational, compliance, and financial risks those present to a company are varied and incredibly consequential. Be aware that this risk is not just affecting companies that manufacture PFAS. Due to the ubiquitous presence of PFAS in the supply chain and environment, the business risks from PFAS can affect almost any industry.

PFAS represent a complex and cross-functional risk that spans a company's operational footprint and enterprise. Identifying where PFAS exist within your company's value chain, what risks those PFAS present, and which risks are material for your company, and then establishing and implementing an agile PFAS risk management plan to address those risks is critical.

Drivers:

- Ubiquity in historical and current supply chains
- Emerging and disparate local, national, and global regulations
- Social and political outrage and shareholder demands

Implications:

- Damaged company and brand reputation
- Product deselection (both B2C and B2B)
- Disruptions in operations due to restrictions/regulations
- Cost and time to identify PFAS in value chain and reformulate
- Increased cost of regulatory and product compliance
- Increased environmental liabilities and legal claims

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How ERM Can Help

ERM has decades of specialized experience completing multifaceted TRI program applicability evaluations and TRI reporting for individual facilities and national portfolios across the TRI-regulated industries. However, ERM's TRI program services and capabilities are by no means limited to just annual TRI reporting. Our team's deep experience in the TRI program and supporting clients with identifying and tracking PFAS in their product portfolios make us an excellent partner to help our clients:

- Develop and implement PFAS supply chain engagement and due diligence programs to identify where PFAS exist within the supply chain.
- Design and implement PFAS data strategies, focusing on data governance best practices for PFAS.
- Identify and manage PFAS enterprise risks.
- Assess potential social risks around TRI data disclosure and advise on public affairs and community engagement to manage reputational risks through proactive and customized stakeholder engagement programs.
- Scope and optimize company data collection and management systems for diverse purchasing/operational/environmental datasets. Build a sustainable data collection and reporting process to support clients' TRI reporting and compliance assurance needs.
- Plan and develop and/or enhance internal company TRI reporting programs for provision of corporate oversight and compliance assurance of reporting requirements at the facility and portfolio levels.
- Perform detailed technical audits of client TRI programs to assess compliance and resolve identified TRI violations under the USEPA's audit policies.
- Support liability mitigation efforts for historic TRI reporting during acquisitions and divestitures.

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