

February 3, 2020

VIA ELECTRONIC FILING

Mr. Daniel R. Bushman
Toxics Release Inventory Program Division
Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: Addition of Certain Per- and Polyfluoroalkyl Substances; Community Right-to-Know Toxic Chemical Release Reporting, 84 Fed. Reg. 66,369 (Dec. 4, 2019); Docket No. EPA-HQ-TRI-2019-0375; FRL-10002-70

Dear Mr. Bushman:

The undersigned Associations submit these comments to the U.S. Environmental Protection Agency (“EPA” or “Agency”) as it considers proposing a future rule to add certain per- and polyfluoroalkyl substances (“PFAS”) to the Toxics Release Inventory (“TRI”).¹ Many of our members manufacture, transport, store or use products that contain certain PFAS, and therefore have a vested interest in the outcome of this rulemaking.

We understand and appreciate the importance of responsibly reporting the releases of certain PFAS from industrial and federal facilities, and recognize the need for an appropriate risk-based federal approach for potentially including certain PFAS chemicals that is based on the best available science and weight of the scientific evidence. The appropriate addition of chemicals to the TRI helps better inform decisions made by all stakeholders as further regulatory actions are contemplated by federal, state, and local agencies alike. To fulfill these goals, it is important that PFAS reporting presents an accurate view of releases to the environment. We are committed to working with regulators to protect human health and the environment.

As detailed further below, we offer to EPA the following comments, which include:

1. EPA should act expeditiously to assess the 160 PFAS added to the list of chemicals covered by the TRI reporting requirements by the “National Defense Authorization Act for Fiscal Year 2020” (“NDAA”) to determine their applicability, as prescribed in in section 313(d) of the EPCRA;

¹ Addition of Certain Per- and Polyfluoroalkyl Substances; Community Right-to-Know Toxic Chemical Release Reporting, 84 Fed. Reg. 66,369 (Dec. 4, 2019), *available at* <https://www.federalregister.gov/documents/2019/12/04/2019-26034/addition-of-certain-per--and-polyfluoroalkyl-substances-community-right-to-know-toxic-chemical>.

2. Should EPA decide to add additional PFAS to the TRI, the Agency should do so on an individual chemical basis, or in limited instances, as discreet groups; and,
3. EPA should use the best available science, weight of the evidence, and provide a clear rationale if the reporting threshold is lowered for any PFAS that may be added to the TRI.

I. Background

PFAS are a broad class of chemical substances that are used across a wide cross-section of industries, including aerospace, automotive, construction, electronics, energy, first responder and emergency response services, healthcare, and telecommunications. Beneficial products enabled by PFAS technologies include semiconductors, solar panels, high-performance electronics, medical garments, fuel-efficient automobiles, and certain fluorinated firefighting foams that are needed for emergency response operations.

EPA and other federal agencies are considering options to assess and regulate specific PFAS chemicals. In order to address growing national concerns regarding the releases of certain PFAS into the environment, EPA convened a “National Leadership Summit” in May 2018.² The purpose of this summit was to share information regarding ongoing efforts to: (1) characterize risks from certain PFAS and develop monitoring and treatment techniques; (2) identify specific near-term actions, beyond those already underway, that are needed to address challenges currently facing states and local communities; and (3) develop risk communication strategies that will help communities address public concerns with PFAS.³ Stakeholders from both the state and federal level attended the summit to provide their perspectives on the complex issue at hand.⁴

EPA subsequently hosted a series of community engagement events across the country over the course of that summer in localities affected by PFAS.⁵ These events provided EPA with the opportunity to hear directly from affected stakeholders as to how best to help states and communities that have been directly affected by certain PFAS. EPA also opened a public docket for those stakeholders unable to attend an event and that wished to submit additional information on the matter for the Agency to consider.

These events helped inform the development of EPA’s “PFAS Action Plan.” The PFAS Action Plan, released in February 2019, “represents the first time EPA has built a national, multi-

² U.S. ENVTL. PROT. AGENCY, *PFAS National Leadership Summit and Engagement*, available at <https://www.epa.gov/pfas/pfas-national-leadership-summit-and-engagement>.

³ *Id.*

⁴ U.S. ENVTL. PROT. AGENCY, *PFAS National Leadership Summit List of Confirmed Organizations* (May 22, 2018), available at https://www.epa.gov/sites/production/files/2018-05/documents/pfas_summit_list_of_confirmed_organizations_5.22.18.pdf.

⁵ U.S. ENVTL. PROT. AGENCY, *PFAS Community Engagement*, available at <https://www.epa.gov/pfas/pfas-community-engagement>.

media, multi-program, research, management, and risk communication plan to address emerging chemicals of concern within a class like PFAS.”⁶ The PFAS Action Plan identifies a host of short-term and long-term strategies for addressing and regulating certain PFAS.⁷

One of the long-term actions that EPA is considering, as reflected in this advance notice of proposed rulemaking (“ANPRM”), is the addition of certain PFAS to the list of chemicals covered by the TRI reporting requirements. Congress initially established the TRI under the Emergency Planning and Community Right to Know Act of 1986 (“EPCRA”),⁸ and later expanded the program through the Pollution Prevention Act of 1990,⁹ in order to create a public database that provides information regarding the releases of certain chemicals from covered facilities throughout the United States.

Congress added an initial list of 308 chemicals and 20 chemical categories subject to TRI reporting requirements in 1986.¹⁰ Section 313(d) of the EPCRA provides EPA with the authority to add or delete chemicals from that list.¹¹ Notably, since 1986, a variety of chemicals and categories of chemicals have been both added to and removed from that list.¹² The current list of chemicals subject to TRI reporting requirements now includes 755 individual chemicals and 33 chemical categories.¹³

Should a chemical or chemical category be added to the TRI by EPA, section 313(d) outlines three specific listing criteria, although only one criterion need be met for action to be taken. EPA, however, must determine that none of the criteria are met in order to remove a chemical from that list. Those criteria are:

1. *Acute Human Health Criterion*: the chemical is known to cause or can reasonably be anticipated to cause significant adverse acute human health effects at concentration levels that are

⁶ *Examining PFAS Chemicals and their Risks, Hearing Before the Subcomm. on Environment of the H. Comm. on Oversight and Reform*, 116th Cong. (Mar. 6, 2019) (statement of David P. Ross, Assistant Adm’r., EPA Office of Water, 4-5), available at https://www.epa.gov/sites/production/files/2019-03/documents/epa_ross_hor_pfas_testimony_-_final_for_march_6.pdf.

⁷ *Id.* at 5.

⁸ 42 U.S.C. § 11023 *et seq.*

⁹ 42 U.S.C. § 13106.

¹⁰ 84 Fed. Reg. at 66,370 (citing 42 U.S.C. § 11023(c)).

¹¹ 42 U.S.C. at § 11023(d)(1).

¹² U.S. ENVIL. PROT. AGENCY, *Changes To The TRI List Of Toxic Chemicals* (June 11, 2018) available at https://www.epa.gov/sites/production/files/2018-06/documents/tri_chemical_list_changes_06_11_2018.pdf.

¹³ U.S. ENVIL. PROT. AGENCY, *TRI-Listed Chemicals*, available at <https://www.epa.gov/toxics-release-inventory-tri-program/tri-listed-chemicals>.

reasonably likely to exist beyond facility site boundaries as a result of continuous, or frequently recurring, releases.¹⁴

2. *Chronic Human Health Effects Criterion*: the chemical is known to cause or can reasonably be anticipated to cause in humans: cancer or teratogenic effects, or serious or irreversible reproductive dysfunctions, neurological disorders, heritable genetic mutations, or other chronic health effects.¹⁵
3. *Environmental Effects Criterion*: the chemical is known to cause or can be reasonably anticipated to cause, because of its toxicity, its toxicity and persistence in the environment, or its toxicity and tendency to bioaccumulate in the environment, a significant adverse effect on the environment of sufficient seriousness, in the judgment of the Administrator.¹⁶

Section 313(f) of the statute provides thresholds for reporting purposes. As outlined in the statute, the threshold for a chemical used at a facility is 10,000 pounds per year, and for those chemicals manufactured or processed at a facility, the threshold for reporting on or before July 1, 1988 was 75,000 pounds of a chemical, but has since been lowered to 25,000 pounds for those forms submitted since July 1, 1990.¹⁷ EPA also has the discretion to establish a different reporting threshold amount for certain chemicals or categories of chemicals, should it be warranted.¹⁸

II. The Addition of Certain PFAS to the Toxics Release Inventory

On December 20, 2019, the President signed the NDAA into law.¹⁹ Section 7321 of the NDAA immediately added 160 PFAS to the list of chemicals covered by the TRI and lowered the reporting threshold for those PFAS to 100 pounds.²⁰ Additionally, other PFAS may be subject to

¹⁴ 42 U.S.C. § 11023(d)(2)(A).

¹⁵ *Id.* at § 11023(d)(2)(B).

¹⁶ *Id.* at § 11023(d)(2)(C). Please note that this criterion *may not* constitute, in the aggregate, no more than 25 percent of the total number of chemicals on the list.

¹⁷ *Id.* at § 11023(f)(1).

¹⁸ *Id.* at § 11023(f)(2).

¹⁹ National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92 (2019), *available at* <https://www.congress.gov/116/bills/s1790/BILLS-116s1790enr.pdf>.

²⁰ *Id.* at § 7321(b) (The specific PFAS immediately added to the TRI are: perfluorooctanoic acid (“PFOA”) and three associated salts; perfluorooctane sulfonic acid (“PFOS”) and five associated salts; hexafluoropropylene oxide dimer acid (“GenX”), and one associated compound, perfluorononanoic acid (“PFNA”), perfluorohexanesulfonic acid (“PFHxS”), and other specific PFAS that are listed as active chemical substances under the Toxic Substances Control Act (“TSCA”) and subject to either of two significant new use rules promulgated under TSCA)).

future inclusion following an assessment or determination by the Agency, and EPA must, within 5 years, determine whether the reporting threshold should be adjusted.²¹

We believe that EPA should act expeditiously to assess PFAS compounds that are currently in commerce and meet the listing criterion and use the best available science to evaluate these PFAS compounds to determine applicability in adding to the TRI. This includes ensuring there are proper analytical methods in place for these PFAS compounds, and there are appropriate data available to allow EPA to go through its regulatory process of evaluating whether these compounds meet EPA's criteria and should be added to the TRI list. If that includes the current 160 PFAS as required by the NDAA, we remain committed to supporting the ongoing national effort to protect our environment and improve public health.

Making these additions to the TRI may potentially provide stakeholders and the public with additional information about those chemicals, including releases, waste management, and pollution prevention at covered industrial facilities, where accurate sampling and analytical protocols have been approved and followed closely. At the time of this ANPRM, however, no specific PFAS or categories of PFAS had been added to the list of chemicals covered by TRI reporting requirements.²²

If EPA proceeds to add additional PFAS to the TRI beyond the 160 that were included in the NDAA, EPA should proceed with a notice-and-comment rulemaking, and those PFAS should be included individually or, where appropriate data on the subclass and analytical methods support adding, as a subclass. Further, EPA should not lower the reporting threshold any further unless the best available science and weight of the scientific evidence provide a clear rationale for doing so. It is imperative that EPA make its determination to add chemicals based on accepted scientific principles or laboratory tests, or appropriately designated and conducted epidemiological or other population studies.

a. PFAS That Should be Listed

EPA should act expeditiously to assess those PFAS that are currently in commerce and meet the listing criteria, and use the best available science to evaluate these chemicals, but should not add any additional PFAS to the list of chemicals subject to TRI reporting requirements at this time. Insufficient human and environmental toxicity data exists that would support the listing of additional PFAS on the TRI, and methods for measuring or estimating releases, such as air emissions, for a variety of PFAS are still evolving. Due to this lack of information, it may prove very challenging for those submitting reports to synthesize accurate and quality reports.²³

Should supplementary data become available in the future that would otherwise support the listing of additional chemicals on the TRI, EPA should carry out the appropriate regulatory process

²¹ *Id.*

²² 84 Fed. Reg. at 66,369-73.

²³ It is important to note that at the time of publication of the ANPR, EPA has not approved testing methods for air, wastewater, and solid sampling and analysis.

and ensure that its decision is made on a systematic review of the best available science and a weight of the scientific evidence approach.

EPA notes in the ANPRM that when adding chemicals to the list of those covered by TRI reporting requirements, it considers “whether reporting would occur on the chemical if it were to be added” and whether “those PFAS are still active in commerce.”²⁴ As such, a suggested starting point for the future consideration of adding certain PFAS to the list of chemicals subject to TRI reporting requirements are those chemicals in this class that are reported to the Agency via the “Chemical Data Reporting” (“CDR”) rule promulgated under TSCA. This requires any covered facility that manufactures and/or imports a chemical substance on the TSCA Inventory in quantities of 25,000 lb. or more to submit a CDR report.²⁵ This reporting threshold would therefore mirror the statutory threshold provided for in the EPCRA.

Further, EPA should consider, per the authority described in section 313(d) of the EPCRA, deleting from the TRI any of the 160 PFAS added by the NDAA, should the Agency determine that there is insufficient evidence to establish any of the criteria outlined in section 313(d)(2) of the EPCRA. At the time that the NDAA was signed into law, there was little or no data supporting such a listing, based on such criteria, for many of those PFAS were included in the bill’s text. That information should be provided in order for the scientific community to understand the basis for listing.

b. How to List Certain PFAS on the Toxics Release Inventory

Sound science and the weight of the scientific evidence must always be utilized when evaluating this large and diverse class of chemicals. Given this diversity, EPA should not list or regulate PFAS as a class in this action, or any other forthcoming action. These chemicals should be assessed and listed individually, or in certain instances, discreet groups, since there is clear evidence to support a wide range in the toxicity potential within this class of chemicals. Narrow, well-defined categories or groups of PFAS chemicals *could* be considered if their chemical and structural properties are shown to result in similar toxicity and mode of action. No discrete groupings or individual PFAS compounds should be listed unless there is scientific support that those individual PFAS chemicals or groups meet one or more of the listing criteria outlined in section 313(d) of the EPCRA.²⁶

Specific PFAS in this large class of chemicals display a wide variety of physiochemical properties, including bioavailability, toxicity, mobility and bioaccumulation. As such, these chemicals have a wide range of potential hazard and exposure profiles, including compounds and groups that would not be expected to be of health or environmental concern.

²⁴ 84 Fed. Reg. at 66,371.

²⁵ See U.S. ENVTL. PROT. AGENCY, 2016 *Chemical Data Reporting Results*, available at <https://www.epa.gov/chemical-data-reporting/2016-chemical-data-reporting-results>.

²⁶ 42 U.S.C. § 11023(d)(2)(A)-(C).

We note that the Organisation for Economic Cooperation and Development (“OECD”) has developed widely-accepted criteria for a “polymer of low concern” that represent the combined experience and knowledge of global regulatory authorities and apply factors to compounds based on size, structure, and ionic character to understand and predict health and environmental hazards.²⁷ Fluoropolymers, such as PTFE, for example, are distinctly different from other PFAS or subclasses of PFAS. As such, the assumption that all classes of PFAS should be grouped together, or that regulation of PFAS using a definition such as “any chemical with at least one fully fluorinated carbon atom”, or the contention that all PFAS exhibit similar hazardous properties and differ only by potency, is not scientifically justified.

c. Reporting Thresholds

EPA should use the best available science, weight of the evidence, and provide a clear rationale before lowering the reporting threshold for current or additional PFAS that may be added to the TRI. Lowering the reporting thresholds for certain PFAS without a scientific justification would otherwise distort the information on releases of those PFAS, as compared to other chemicals subject to TRI reporting requirements. This could be misconstrued to indicate more releases, which may not be the case, and inadvertently increase the potential for “zero reports” given the lack of sufficient data on a vast majority of chemicals in this class.

Notably, the 100 pound reporting threshold already mirrors that of the reporting threshold established for certain persistent bioaccumulative toxic (“PBT”) chemicals.²⁸ There are currently 16 PBT chemicals and 5 PBT chemical categories subject to the TRI reporting requirements, and those PFAS added to the list of chemicals subject to TRI reporting requirements through the NDAA are not part of such a distinction.²⁹ Therefore, the Agency should not lower the reporting threshold unless the Agency has scientific justification and data supporting the designation of certain PFAS as PBTs.

As the Agency considers adding additional PFAS to the list covered by TRI reporting requirements and, within 5 years, whether the reporting threshold for those added through the NDAA should be adjusted, it is imperative that EPA provides stakeholders with a clear rationale, supported by sound science and the weight of the scientific evidence, for its decisions.

²⁷ See, e.g., Organisation for Economic Cooperation and Development, *Considerations and Criteria for Sustainable Plastics from a Chemical Perspective, Background Paper 1*, available at <https://www.oecd.org/chemicalsafety/risk-management/considerations-and-criteria-for-sustainable-plastics-from-a-chemicals-perspective.pdf>.

²⁸ *Persistent Bioaccumulative Toxic (PBT) Chemicals; Lowering of Reporting Thresholds for Certain PBT Chemicals; Addition of Certain PBT Chemicals; Community Right-to-Know Toxic Chemical Reporting*, 64 Fed. Reg. 58,666 (Oct. 29, 1999).

²⁹ U.S. ENVTL. PROT. AGENCY, *Persistent Bioaccumulative Toxic (PBT) Chemicals Covered by the TRI Program*, available at <https://www.epa.gov/toxics-release-inventory-tri-program/persistent-bioaccumulative-toxic-pbt-chemicals-covered-tri>.

d. Additional Information to Consider

De Minimis and Article Exemptions

EPA should confirm, in any future rulemaking or relevant agency guidance, that the *de minimis* exemption applies to those PFAS added to the list of chemicals covered by the TRI reporting requirements via the NDAA. When EPA implemented section 313 of the EPCRA, the Agency adopted a *de minimis* exemption, which permits covered facilities to disregard *de minimis* levels for threshold and reporting calculations.³⁰ This exemption adopts a 1.0% *de minimis* level, and 0.1% *de minimis* level for chemicals considered carcinogens, “as defined in 29 C.F.R. 1910.1200(d)(4).”³¹ 29 C.F.R. 1910.1200(d)(4), previously addressed the Occupational Safety and Health Administration’s (“OSHA”) “Material Safety Data Sheets” requirements, and considered a chemical as a carcinogen or potential carcinogen for hazard communication purposes if it is found on either: the National Toxicology Program, Annual Report on Carcinogens; the International Agency for Research on Cancer Monographs, or 29 C.F.R. 1910, subpart Z.³²

Similarly, because of the language included in the NDAA, we ask that EPA confirm, in either a future rulemaking or agency guidance, that the TRI Article Exemption will apply to those PFAS subject to the TRI reporting requirements. As EPA has itself explained, the article exemption states that if a toxic chemical is present in an article at a covered facility, then that facility is not required to consider the amount of the toxic chemical(s) contained in the article when calculating reportable quantities of TRI-listed chemicals.³³ Should certain PFAS be present in an article, there is a low likelihood of a release, and it would be an unnecessary burden on covered industrial facilities to otherwise determine if they need to report that presence on a case-by-case basis.

Storage of PFAS-Containing Materials

While we understand that the purpose of the ANPRM is for reporting and use, per section 313 of the EPCRA, EPA should clarify and confirm that the mere storage of PFAS-containing items will not trigger TRI reporting requirements under section 312 of the statute. For example, certain PFAS are an important ingredient in aqueous film-forming foam (“AFFF”), which is used to extinguish hydrocarbon fires. Many of the manufacturing facilities subject to TRI reporting store AFFF in the event of an emergency. Some of these PFAS may now be subject to TRI reporting, and depending on EPA’s determination, the quantity of PFAS used in that AFFF may exceed the established reporting threshold. Given that this would otherwise not meet the standard of

³⁰ *Toxic Chemical Release Reporting; Community Right-to-know*, 53 Fed. Reg. 4,500 (Feb. 16, 1988), available at <https://cdn.loc.gov/service/ll/fedreg/fr053/fr053030/fr053030.pdf>.

³¹ *Id.*

³² See *Community Right-to-Know; Corrections to Toxics Release Inventory (TRI) Reporting Requirements*, 84 Fed. Reg. 65,739 (Nov. 29, 2019), available at <https://www.govinfo.gov/content/pkg/FR-2019-11-29/pdf/2019-25356.pdf> (clarifying that the definition is no longer found at 29 C.F.R. 1910.1200(d)(4)).

³³ See *Toxics Release Inventory Articles Exemption Clarification Proposed Rule*, 74 Fed. Reg. 42,625 (Aug. 24, 2009), available at <https://www.govinfo.gov/content/pkg/FR-2009-08-24/pdf/E9-20293.pdf>.

“manufacture, process, or otherwise use,” on-site storage of AFFF should not trigger reporting – this should only be required when that AFFF is actually used and the amount used would exceed the reporting threshold.

Deferral of 2021 Reporting Deadline

EPA should consider deferring the reporting deadline for 2020 reporting. The timeframe for which the NDAA was signed into law, with the expectation of immediate implementation by January 1, 2020, is unachievable. The TRI program has currently established processes and steps that need to be completed, prior to industry being able to meet TRI reporting requirements.

For example, the “Supplier Notification Requirement” is not yet in place. A supplier is required to include on their safety data sheet a statement that a chemical is subject to the TRI. It is not practicable for a manufacturer or a supplier to make this adjustment to their SDS within 2 weeks, over a holiday, to be in place by January 1, 2020. Further, the full list of applicable PFAS is not yet completely finalized, thus manufacturers and suppliers do not yet know completely what chemicals must be reported. Stakeholders need regulatory certainty in order to comply with the TRI reporting requirements, and therefore EPA should defer initial reporting until such notification requirements are in place.

PFAS Action Plan

Lastly, we encourage EPA to clearly articulate, through either a subsequent “notice of proposed rulemaking” or other agency guidance, how the data collected on PFAS releases through the TRI will contribute to the Agency’s overall strategy with regard to PFAS.

III. Conclusion

We appreciate the opportunity to comment on this important matter and look forward to working with you as the regulatory process continues.

Sincerely,

U.S. Chamber of Commerce
Airlines for America
American Coatings Association
American Forest & Paper Association
American Fuel & Petrochemical
Manufacturers
American Petroleum Institute
Council of Industrial Boiler Owners
Flexible Packaging Association
International Liquid Terminals Association

National Association for Surface Finishing
National Association of Manufacturers
National Mining Association
Plastics Industry Association (PLASTICS)
Society of Chemical Manufacturers &
Affiliates
Specialty Graphics Imaging Association
Single Ply Roofing Industry
TRSA – the Linen, Uniform and Facility
Services Association