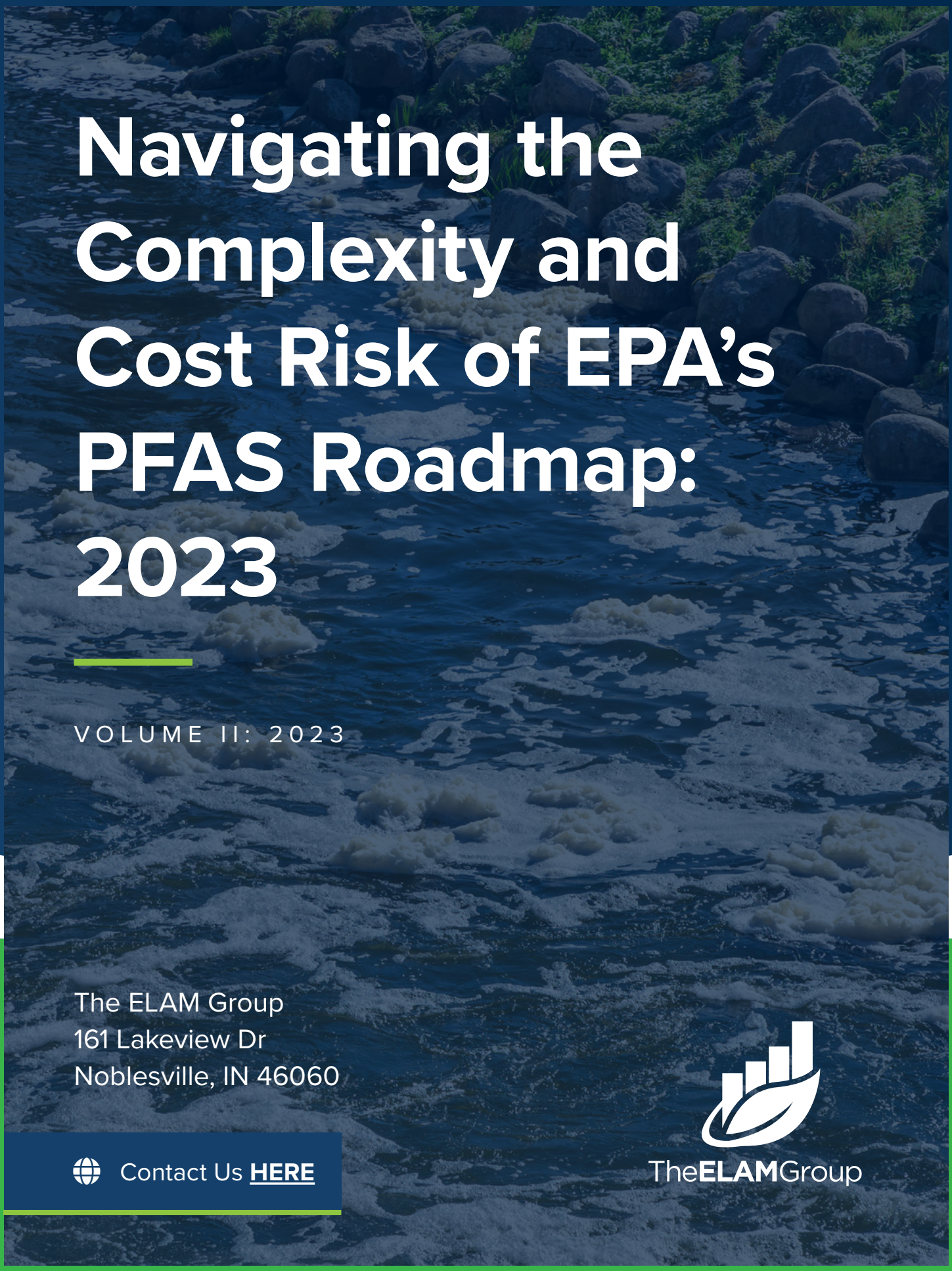

Navigating the Complexity and Cost Risk of EPA's PFAS Roadmap: 2023

VOLUME II: 2023

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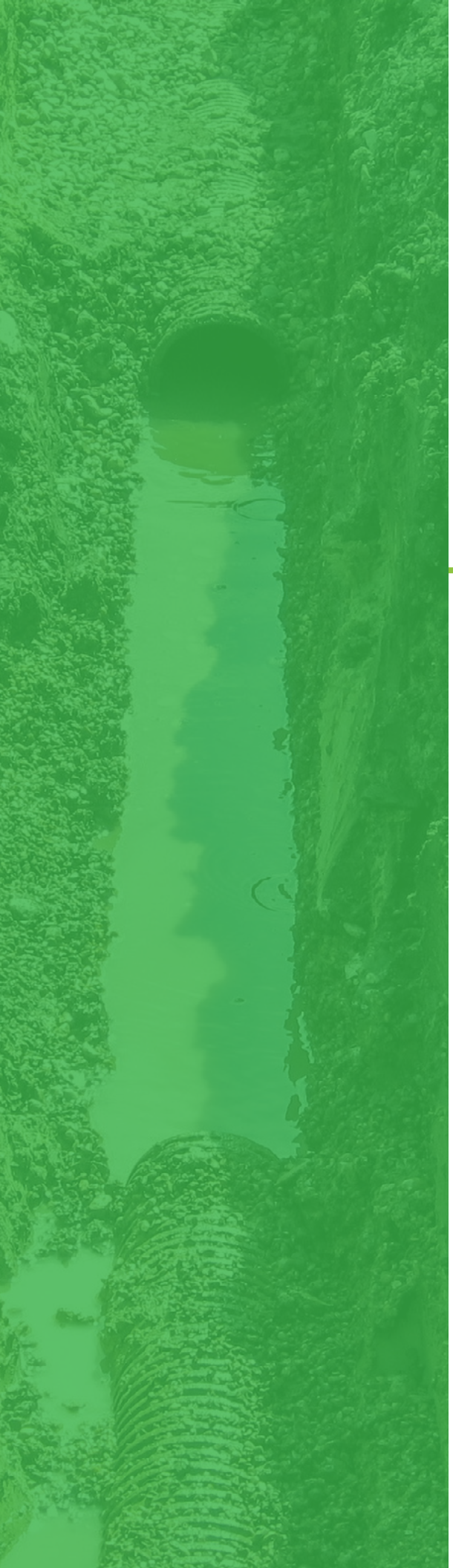

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PREPARING FOR WHAT'S NEXT:

The Final Year of EPA's PFAS Strategic Roadmap

From proposing targeted regulations to considering new national testing requirements, the United States Environmental Protection Agency (EPA) has been taking coordinated action toward researching, restricting, and remediating per- and poly-fluoroalkyl substances (PFAS) in the environment.

As examined in our previous report, Navigating the Complexities and Cost Risk of EPA's PFAS Roadmap, these actions were set in motion in October 2021, when EPA unveiled its strategic roadmap. That plan laid out specific milestones the agency intended to reach by 2024, all aimed at addressing PFAS contamination. Specifically, the agency is looking to ensure it has regulatory authority to hold polluters and other responsible parties accountable, require them to assume remediation responsibility, and prevent future PFAS releases. With just one year remaining in EPA's Roadmap, it is critical for companies to seek expert support from a partner with in-depth knowledge of the changing landscape to ensure compliance, before it's too late.

Since the Roadmap's release, significant actions have been taken to advance these efforts, with the agency proposing several rules and gathering in-depth insight to get upstream of the problem. Many of these efforts have focused on researching and restricting PFAS emissions; moving forward, these actions will help set the path toward required remediation requirements.

The PFAS Strategic Roadmap outlines EPA regulations, which will continue rolling out over the next year, in hopes of achieving four primary goals:

1. Including PFAS as a hazardous substance under the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA)
2. Requiring PFAS tracking in municipal water systems under the Safe Drinking Water Act (SDWA)
3. Identifying PFAS emissions sources and evaluating whether individual PFAS should be considered a Hazardous Air Pollutant (HAP) in alignment with the Clean Air Act (CAA)
4. Expanding disclosure of PFAS reporting under the Toxic Substances Control Act (TSCA)

Increasing regulations under the above statutes have led to additional action under other laws and regulations, including:

- Considering Hazardous Waste designations under the Resource Conservation and Recovery Act (RCRA)
- Adding additional PFAS to the Toxic Release Inventory (TRI)

PREPARING FOR WHAT'S NEXT

Toxic Substances Controls Act (TSCA)

As part of EPA's Strategic PFAS Roadmap, the agency announced plans to expand disclosure of PFAS reporting under the Toxic Substances Controls Act (TSCA). As a key component of the research phase of the Roadmap, TSCA will help establish the groundwork for improving PFAS data.

In October 2021, along with the release of the strategic roadmap, EPA announced it was developing a National PFAS Testing Strategy to advance the agency's understanding of the environmental impact of PFAS. The strategy would give EPA authority under TSCA to require manufacturers to share key information regarding PFAS production and releases, and help inform future regulatory efforts.

EPA issued the first test order for PFAS under the National PFAS Testing Strategy in June 2022 and the second in January 2023—focusing on 24 different categories of PFAS.

In January 2023, EPA also proposed a Significant New Use Rule (SNUR) to strengthen PFAS regulation and prevent the resumption of using inactive PFAS without EPA review. The proposed SNUR would apply to PFAS listed as inactive on the TSCA inventory, which means the chemicals have not been manufactured or processed since June 2006 and not already subject to an SNUR.

WHAT'S NEXT?

The information from the first two rounds of orders will provide EPA with critical information on more than 2,000 similar PFAS that fall within these categories—helping guide additional test orders expected over the next year. Utilizing new methods to evaluate single PFAS chemicals, EPA will also continue refining and adjusting the testing strategy based on identified usage and risk. Additional investments are also expected toward a collaborative research initiative with the Chemical Safety and Pollution Prevention Program, focused on modernizing the process and incorporating scientific advances into future PFAS evaluations under TSCA.

PREPARING FOR WHAT'S NEXT

Clean Air Act (CAA)

In October 2021, at the same time EPA unveiled the PFAS Roadmap, the PROTECT Act was introduced. The legislation is aimed at addressing PFAS contamination by adding certain PFAS chemicals to EPA's Hazardous Air Pollutants (HAP) list under the Clean Air Act (CAA), which will require more facilities to implement technology to reduce PFAS emissions.

There are currently no restrictions regarding PFAS discharges under the CAA, which the PROTECT Act aims to change, by adding PFOA, PFOS, PFBS, and GenX to the list of HAPs. Addressing PFAS air emissions typically happens at a state level, but the PROTECT Act seeks to complement those efforts, expanding the scope of facilities that must reduce PFAS emissions by adopting advanced technology.

WHAT'S NEXT?

A HAP designation under the CAA would require EPA to create a list of major sources emitting PFAS within two years and finalizing regulations within five years. At present, PFAS have not yet been included on the CAA HAP list.

PREPARING FOR WHAT'S NEXT

Safe Drinking Water Act (SDWA)

In March 2023, EPA proposed the first-ever National Primary Drinking Water Regulations (NPDWR) for PFAS. If finalized, this regulation would establish legally enforceable Maximum Contaminant Levels (MCL) for six PFAS in drinking water systems.

Building on existing state efforts, this proposed rule would establish a nationwide health-protective level limit for those six specific PFAS, including PFOA and PFOS. It would also require public water systems to monitor for these PFAS and complete the initial monitoring phase within three years of the rule becoming official. Results acquired during the initial monitoring phase will be used to determine ongoing compliance monitoring requirements. From there, water systems with regulated PFAS above the proposed MCL will be required to install water treatment systems or take additional action to reduce levels until compliant.

In addition to the proposed NPDWR, EPA also issued drinking water health advisories for four PFAS. These advisories indicate a contamination level below which adverse health effects are expected. While not directly enforceable, health advisories provide technical information that federal, state, and local officials can utilize to inform monitoring strategy and future policy.

According to EPA estimates, roughly 66,000 water systems may be subject to the rule, with approximately 6,300 systems anticipated to exceed one or more MCL.

WHAT'S NEXT?

EPA's public comment period for this proposed rule expired May 30, 2023, and the agency anticipates moving forward with finalizing the regulation by the end of the year. If fully implemented, EPA expects the rule to prevent thousands of adverse health effects and reduce ecosystem damage, which means this could lead to critical PFAS-related remediation requirements, quickly.

Looking ahead to 2024, EPA will look to finalize the new drinking water standards—with an additional $56.5 million being provided to accelerate progress on the Roadmap and enable EPA to move more quickly on enforcement actions against PFAS. EPA will also continue its efforts to develop analytical methods, drinking water health advisories, toxicity values, effluent limitation guidelines, as well as risk communication and other tools to support these efforts on a state level. This multi-level approach will put more manufacturers and PFAS users at risk of facing strategic and rapid enforcement.

EPA RELEASES INITIAL NATIONWIDE MONITORING DATA

EPA has released initial nationwide monitoring data for 29 specific PFAS, as well as Lithium. This is the first of 12 total data sets that will be released between now and the end of 2025 under the fifth Unregulated Contaminant Monitoring Rule (UCMR 5). This action will allow EPA to collect additional data on these PFAS with the goal of improving understanding of how often these chemicals are found in drinking water systems, and at what level. Ultimately, the data will help EPA make future decisions regarding public health protections under the SDWA.

PREPARING FOR WHAT'S NEXT

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

One of the most significant and far-reaching moves in the PFAS roadmap has been EPA's efforts under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), otherwise known as the Superfund Act.

In August 2022, EPA proposed a rule that would designate two of the most widely-used PFAS, perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS), as hazardous substances under CERCLA. This rule would increase required transparency around these specific PFAS releases and provide the agency direct authority to hold polluters accountable for remediation.

In April 2023, EPA published an Advanced Notice of Public Rulemaking (ANPRM) seeking public input and data to assist in finalizing the CERCLA designations. The public comment period was originally expected to expire June 12, 2023; however, in response to multiple requests for additional research and information, the agency extended the deadline until August 11, 2023.

A so-called Superfund designation would mean a facility is required to report on PFOA and PFOS releases that exceed selected reportable quantities—and would also afford EPA additional power and tools to address contamination. Specifically, this designation would grant EPA or other agencies power to recover cleanup costs from the Potentially Responsible Party (PRP) or require the PRP to conduct remediation.

Short-term, this could facilitate an increase in the pace of requiring cleanups. Long-term, this designation is expected to lead to additional response actions that go beyond PFOA and PFOS and impact additional PFAS compounds.

Currently, without a Superfund designation under CERCLA, EPA can merely attribute blame to parties it determines contributed to the pollution, but it has no authority to force parties to remediate or pay costs. The designation also triggers considerable reporting requirements. Currently, there are no legal PFAS reporting requirements under CERCLA. If approved, requirements would apply to industries beyond just PFAS manufacturers.

The majority of requests during both public comment periods were asking EPA to determine and outline the potential benefits and hardships associated with the proposed rule, and to ensure comprehensive and accurate analysis. Ultimately, this could lead to more targeted regulations once the rule is finalized.

WHAT'S NEXT?

Now that the extended public comment period has lapsed, EPA will review the remaining comments, then choose whether to move forward with designating these PFAS as hazardous substances under CERCLA. This decision is expected in early 2024. Should that happen, a wide range of manufacturers and users of PFAS materials, downstream distributors, and utilities, among others, will need to take immediate action.

PREPARING FOR WHAT'S NEXT

Resource Conservation and Recovery Act (RCRA)

Another EPA effort is underway to consider hazardous waste designations for four specific PFAS under the Resource Conservation and Recovery Act (RCRA) and to ensure they are subject to clearly defined corrective action requirements. The request was made via petition from New Mexico Governor Michelle Lujan Grisham, highlighting the risks posed by PFAS exposure and stressing the importance of a uniform regulatory process to manage these substances effectively—from manufacturing to disposal.

The rule would require listing some PFAS chemicals, including PFOA, PFOS, perfluorobutane sulfonic acid (PFBS), and GenX, as hazardous substances that must be removed from industrial waste prior to disposal. So far, EPA has initiated two rulemaking processes. First, the agency will evaluate existing data for the four above-mentioned PFAS to propose adding them as RCRA Hazardous Constituents. Second, EPA will clarify that the RCRA Corrective Action Program has the authority to address hazardous wastes, including emerging contaminants like PFAS.

By taking these steps to regulate PFAS under RCRA, EPA aims to provide a comprehensive framework for addressing PFAS contamination, protecting human health, and preserving the environment.

If adopted, these new regulations would particularly affect the operations of water treatment facilities, wastewater plants, and landfills. Eventually, that could lead to RCRA liability claims against PFAS manufacturers, as well as operators of contaminated sites.

WHAT'S NEXT?

EPA has initiated the rulemaking process to propose adding PFOA, PFOS, PFBS, and GenX as RCRA Hazardous Constituents, evaluating existing data and establishing a foundation to support the proposed rule. In addition, the agency has started the rulemaking process to clarify that the RCRA Corrective Action Program has proper authority to require investigation and cleanup for waste meeting RCRA Hazardous Constituent designation.

PREPARING FOR WHAT'S NEXT

Toxic Release Inventory (TRI)

A final rule is now in effect that adds nine additional PFAS chemicals to the Toxic Release Inventory (TRI). This list of PFAS are subject to toxic chemical release reporting under the Emergency Planning and Community Right-to-Know Act (EPCRA) and the Pollution Prevention Act (PPA). Because EPA acted through a Congressional legislative mandate—no notice or comment period is required prior to issuing a final rule.

As established by the National Defense Authorization Act for Fiscal Year 2020, the addition of these PFAS to the EPCRA section 313 list of reportable chemicals is effective January 1 of the calendar year following the chemical's assessment, bringing the growing list of PFAS in the TRI to 189 (172 introduced in 2020, 4 in 2021, 4 in 2022 and now 9 in 2023).

Chemicals are added to the list based on when final toxicity value is issued, when the covered determination or significant new use rule is issued, or the chemical is added to an existing significant new use rule. PFAS would be added to the list once it has been listed as an active chemical under TSCA.

The complete TRI list can be found here: **epa.gov/tri/pfas**

WHAT'S NEXT?

A facility's coverage under TRI is determined by its six-digit North American Industry Classification System (NAICS) code. While not all industries are covered by TRI, those that are, including manufacturing, metal mining, electric power generation, chemical manufacturing, and hazardous waste treatment, should seek support for tracking and collecting data on these chemicals now. Moving forward, there is also an expectation for EPA to include additional industries, and other PFAS – potentially annually.

THE FINAL YEAR

What's Next

As this work continues, EPA will continue focusing on interagency efforts—partnering with the Department of Defense, Department of Health and Human Services, and the Department of Agriculture to garner a better understanding of potential PFAS exposure risks. This means every industry could soon face drastic changes with updated regulations in 2024.

These efforts are likely to gain momentum, with the agency expected to implement numerous other key measures to expedite progress toward addressing PFAS through 2025. As compliance requirements and regulations expand, more disruptions and uncertainty are expected, which is why preparing for looming changes will greatly help mitigate future risks.

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