



## **NASF Public Policy Update**

### **August 2021**

As the summer winds down, the finishing industry continues faces new regulatory and legislative challenges from the Biden administration, Congress, states and advocacy groups. This month's update highlights the resurgent COVID pandemic, historic action on major infrastructure legislation, a few broad regulatory developments, federal action on "emerging contaminants," and NASF initiatives and activities to advance finishing across the nation.

If you have questions about this update or NASF activities, please reach us – contacting Jeff Hannapel at [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com) or Christian Richter at [crichter@thepolicygroup.com](mailto:crichter@thepolicygroup.com). To join NASF or find out more about membership, please contact Matt Martz at [mmartz@nasf.org](mailto:mmartz@nasf.org).

#### **NASF PUBLIC POLICY UPDATE: AUGUST 2021 TOPICS**

- OSHA's revised COVID guidance for non-healthcare workplaces
- The Senate approves a still-massive bipartisan infrastructure bill
- NASF closer to releasing industry economic impact and key trends study
- Environmental Working Group targets 4,700 surface finishing facilities as suspected sources of PFAS contamination
- A rollback of Trump regulations on which US waters should be subject to federal regulatory jurisdiction
- EPA's expanded powers to regulate a wider universe of substances as hazardous air pollutants
- EPA is extending the comment deadline for its proposed PFAS reporting rule
- California proposes new public health goals for PFOS and PFOA
- NASF and California Chapters engage regional water boards on PFAS sampling order.

## OSHA Updates COVID Guidance for Non-Healthcare Workplaces

Following the lead from the Centers for Disease Control (CDC), on August 13, 2021 OSHA updated its primary COVID-19 guidance for non-healthcare employer – [Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#).

The guidance embraces CDC’s recent updated mask recommendations for vaccinated individuals from July 27<sup>th</sup>. OSHA’s updated guidance includes several links directly to CDC’s July [Interim Public Health Recommendations for Fully Vaccinated People](#), as well as CDC’s [COVID-19 Integrated County View Data Tracker](#), which depicts levels of county-level community transmission (low, moderate, substantial, or high).

OSHA’s updated COVID-19 guidance tracks CDC’s updated guidance closely. For example, OSHA now recommends that:

- Fully vaccinated workers in areas of substantial or high community transmission wear masks in order to protect unvaccinated workers; and
- Fully vaccinated workers everywhere in the country who experience a close contact exposure with a COVID-19 case wear a mask for 14 days or until they receive a negative COVID test taken at least 3 days after the contact.

### *Recommendations for Protecting Unvaccinated Workers*

Additionally, the guidance clarifies OSHA’s recommendations for protecting unvaccinated workers and other at-risk workers in “*workplaces with heightened risk due to workplace environmental factors*,” including those in manufacturing, meat and poultry processing, seafood processing and agricultural processing.

OSHA’s previous COVID-19 guidance was aimed at non-vaccinated workers and otherwise-at-risk workers, but the updated guidance applies in many circumstances to fully vaccinated workers. Provided below is a summary of the major changes in OSHA’s updated guidance:

- *Encouragement of vaccines through vaccine/testing mandates.* OSHA “suggests” that employers consider adopting policies that require workers to get vaccinated or, if they remain unvaccinated, to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing. It is unlikely that an employer would be cited under the General Duty Clause for not implementing a vaccine mandate, but this new guidance can bolster efforts by employers to incentivize vaccines.
- *Quarantine for fully vaccinated workers.* Employers should encourage fully vaccinated people who have a known exposure to someone with suspected or confirmed COVID-19

to get tested three to five days after exposure, and ensure that they wear a mask in public indoor settings for 14 days, or until they receive a negative test result.

- *Face coverings.* Employers should provide workers with face coverings or surgical masks, as appropriate, unless their work task requires a respirator or other PPE. In addition to unvaccinated and otherwise at-risk workers, employers should ensure that even fully vaccinated people wear masks in public indoor settings in areas of Substantial or High transmission. Employers *should allow* fully vaccinated people to wear masks in public indoor settings regardless of the level of community transmission, particularly if they are at risk or have someone in their household who is at risk or not fully vaccinated. Additionally, employers should *suggest or require* that all customers, visitors or guests wear face coverings in public, indoor settings in areas of Substantial or High transmission.

#### *OSHA Conducting Inspections and Issuing Citations*

Even with this new guidance, OSHA's enforcement of COVID-19 protocols for industries other than healthcare (e.g., mask and quarantine policies) is limited, for the time being, to the General Duty Clause. In 2021 OSHA has already conducted more than 700 inspections under its COVID-19 National Emphasis Program, and it has issued at least five times more General Duty Clause citations than in the entire year of the pandemic before then, including at least two willful GDC violations. General duty citations are essentially judgments of employers' actions relative to a "reasonable employer" standard, and the citations we have seen include references to CDC's and OSHA's COVID-19 guidance.

#### *OSHA Likely to Revisit Decision to Exclude Non-Health Care Workers*

OSHA's updated guidance has raised concern that OSHA will revisit its decisions to exclude non-healthcare workplaces from its COVID-19 emergency temporary standard (ETS). One of the major reasons that OSHA issued the narrow healthcare-focused rule was the CDC's guidance in May that emphasized how safe vaccinated individuals are, and relaxed COVID protocols for vaccinated workers. With the updated COVID-19 workplace protocols for vaccinated workers, OSHA could decide to issue an ETS for all workplaces.

NASF participates in an industry coalition focused on the COVID-19 ETS and workplace protocols, and will continue to monitor developments that may impact the surface finishing industry. If you have any questions or would like additional information on this issue, please contact Christian Richter or Jeff Hannapel with NASF at [crichter@thepolicygroup.com](mailto:crichter@thepolicygroup.com) or [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com).

## **Bipartisan Infrastructure Bill Passes the Senate**

After months of negotiations, the Senate has approved a \$1 trillion bipartisan infrastructure deal by a 69-30 vote (including support from 19 Republican Senators). The legislative package includes nearly \$550 billion in new spending and could mean new jobs over the next decade through federal investments in roads and bridges, broadband internet, public transit and electric utilities. The bill now goes to the House of Representatives for consideration.

The Senate infrastructure bill, the [Infrastructure Investment and Jobs Act](#), would authorize new federal spending over five years. According to the White House, projects funded by the bill would add "around 2 million jobs per year over the next decade." The infrastructure areas that would receive funding are summarized below.

Lawmakers set aside the largest share of the money, \$110 billion, for roads and bridges. The infrastructure bill also includes roughly:

- \$73 billion for electric grid and power infrastructure
- \$66 billion for passenger and freight rail
- \$65 billion for broadband investments
- \$55 billion for water systems and infrastructure
- \$50 billion for Western water storage
- \$39 billion for public transit
- \$25 billion for airports
- \$21 billion for environmental remediation projects
- \$17 billion for ports and waterways
- \$15 billion for electric vehicles
- \$11 billion for road safety

### *Senate Bill Does NOT Include PFAS and Metal Finishing Requirements*

Unlike the House infrastructure bill that passed last month, this infrastructure bill does not include the several specific provisions to accelerate the regulation of PFAS compounds. The bill does, however, include the reinstatement of the Superfund tax on chemicals (to help pay for the infrastructure projects) that would most likely raise the prices of chemicals and many consumer products.

It is not clear how soon the House of Representatives could take up the bill, House Speaker Nancy Pelosi has indicated that the House will be back into session the week of August 23rd.

### *New \$3.5 Trillion Package in House*

Democrats in both the Senate and the House would also like to add a separate but complementary \$3.5 trillion spending plan that would advance "human infrastructure," like money for education, health care, child care, climate initiatives and housing. This broader investment package could move forward through so-called "budget reconciliation," a legislative tool that would allow Democrats to approve the plan without a Republican vote. Moderate Democrats and Republicans have voice opposition to this larger spending bill, at least until the bipartisan infrastructure bill is considered for approval.

### *Spending Plan Priorities*

The four key areas of focus in the upcoming spending plan include the following.

- Families and education -- Fund universal preschool, with a new child care benefit for families; make community college tuition-free for two years; extend this year's tax child tax credit and earned income tax credit beyond 2021; and create a federal paid family and medical leave program.
- Climate -- Work to meet the administration's goal for the US to get 80% of its power from emissions-free sources by 2030 by funding a collection of clean-energy initiatives, including rebates for individuals and families for home electrification and weatherization.
- Infrastructure -- Fund public housing, green and sustainable housing; rehabilitate aging Veterans Administration buildings and hospitals; and provide workforce development and job training programs.
- Health care -- Expand federal health care benefits by adding dental, vision and hearing benefits to the Medicare program; fund in-home and community-based services to help seniors, persons with disabilities and home care workers; and work to reduce prescription drug costs.

While substantial progress has been made on the smaller yet historic infrastructure bill, significant work must be done to get this passed in Congress to become law. Efforts on the larger, \$3.5 trillion spending bill to be addressed through the budget reconciliation process has the potential to derail the Senate's bipartisan measure. The White House and Congressional leaders in both parties will be working to resolve differences in order to pass legislation before the end of the year.

## **NASF Economic Impact and Market Trends Report to Be Presented at SUR/FIN**

NASF has commissioned an economic impact and market trends study for the surface finishing industry. The analysis will include an assessment of the industry size, employment numbers, revenues, impact on GDP, profitability, and more. The team of economists has been reviewing data and interviewing industry leaders to gather this information. The study will provide valuable information for NASF members, as well as share with government officials and supply chain partners.

The report is expected to be completed in early Fall 2021 and a summary of the results will be presented at a dedicated session at SUR/FIN November 2-4 in Detroit. If you have any questions or would like more information regarding this economic impact and market trends study, please contact Christian Richter or Jeff Hannapel with NASF at [crichter@thepolicygroup.com](mailto:crichter@thepolicygroup.com) or [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com).

## **Activist Group Analysis Identifies Metal Finishing, Electroplating and Nearly 30,000 “Suspected” Industrial PFAS Dischargers**

Based on their new analysis of government data, the activist Environmental Working Group (EWG) projects that nearly 30,000 industrial sites may be using, making or releasing per- and polyfluoroalkyl substances (PFAS) -- a number much larger than previously identified estimates.

In releasing an updated map of PFAS manufacturers and users, EWG said that the industrial sites are not known dischargers of the substances, but they are known or suspected to make, use or release the chemicals. EWG has long tracked PFAS issues, identifying areas where the persistent class of chemicals has impacted water supplies, and advocating for regulatory action.

The EWG analysis broke down the sites by industry sector, which appear to be more heavily concentrated in the eastern half of the country. According to this breakdown, EWG says that of the sites on its list, more than 4,700 use PFAS for electroplating and polishing; more than 3,000 are petroleum stations and terminals; more than 2,300 are chemical manufacturers; over 2,200 are metal product manufacturers; more than 2,100 are commercial printing facilities; over 1,800 are plastics and resin manufacturing sites; greater than 1,500 are paint and coating manufacturers; over 1,200 are semiconductor manufacturers; and more than 1,000 are electric component manufacturers. EWG also stated that after adding landfills and sewage treatment plants, the estimated number of sites that could be discharging PFAS is more than 41,000.

Among that total, EWG estimates that 4,700 electroplating and polishing facilities discharge PFAS, with the surface finishing industry having the largest number of facilities discharging PFAS. EWG identified the companies and locations using a variety of government data, including EPA’s chemical data reporting rule database and its enforcement and compliance

history online database, along with data from the Federal Aviation Administration and New York state. It appears that EWG identified all facilities in these broad categories covering finishing without any reference to the use of PFAS or processes that contain PFAS.

While the number of surface finishing facilities suspected of discharging PFAS is inaccurate and misleading, the net result is the EWG has clearly put surface finishing in the bull's eye as a large source of PFAS discharges. The surface finishing industry will need to continue to be vigilant in addressing the continually emerging PFAS issues. NASF has met with EPA officials to point out flaws in the EWG analysis, provide clarification on the industry's use of PFAS and highlight proactive industry efforts to phase out use and minimize future releases of PFAS from the surface finishing industry.

### **EPA and Army Corps of Engineers Announce Plans for Revising Major US Waters Rule**

EPA and the Army Corps of Engineers announced a series of meetings, comment sessions and other outreach they say will fulfill their promise to craft a "reasonable" definition of waters of the United States (WOTUS) that reflects input from all stakeholders.

EPA Administrator Michael Regan stated that the Agency is "committed to crafting an enduring definition of WOTUS by listening to all sides so that we can build on an inclusive foundation." He added that "[u]ncertainty over the definition of WOTUS has harmed our waters and the stakeholders and communities that rely on them. I look forward to engaging all parties as we move forward to provide the certainty that's needed to protect our precious natural water resources."

#### *Goal is a Reasonable Definition for Which Waters Should Be Regulated*

In the announcement, EPA and the Corps said they "are committed to developing a reasonable, effective, and durable definition of WOTUS that protects public health, the environment, and downstream communities while supporting economic opportunity, agriculture, and other industries."

According to the July 30th release EPA and the Corps will revise the Trump-era definition in two steps, similar to the way the Trump administration revised the Obama-era definition. First, they will issue a "foundational rule" to restore the regulations that defined WOTUS prior to the 2015 Obama rule, with updates to be consistent with relevant Supreme Court decisions. Then, in a second, separate rulemaking the agencies say they intend to "refine this regulatory foundation and establish an updated and durable" definition of waters of the US.

### *EPA Schedules Series of Virtual Public Meetings*

The agencies say they have scheduled a series of virtual public meetings in August (18<sup>th</sup> – 31<sup>st</sup>) to facilitate that process, and could add an additional virtual meeting on September 2<sup>nd</sup> for individuals to provide three-minute oral recommendations on what the new definition should look like. EPA and the Corps are accepting written recommendations on both rules and initiating federalism and tribal consultations with states and Native American tribes on the foundational rule. The agencies also intend to host a series of dialogues with state and tribal co-regulators this fall to discuss both rulemakings.

Republican Senators have expressed concern over the transparency of the stakeholder engagement and the rulemaking process. In particular, EPA's intent to have a two-step rule this summer may not allow for formal and meaningful stakeholder engagement to inform the proposal. Nonetheless, revisions are expected for the WOTUS rule this year and the definition of WOTUS will remain uncertain.

### **EPA Process for Designation New Hazardous Air Pollutants (HAPs)**

Hazardous air pollutants (HAPs) are those pollutants that are known or suspected to cause cancer or other serious health effects. The original list of HAPs in the Clean Air Act Amendments of 1990 included 189 pollutants. Since 1990, EPA has removed two pollutants from the list, but has not added any new ones. Sources of HAP emissions are subject to national emissions standards for hazardous air pollutants (NESHAP), such as the NESHAP for chromium electroplating and anodizing.

On June 11, 2021 EPA issued an advanced notice of proposed rulemaking (ANPRM) regarding the addition of 1-bromopropane (also known as n-propyl bromide) as a hazardous air pollutant. In the action, EPA asserted that the substantive decision to designate 1-bromopropane was made last year on June 18, 2020 in a Federal Register notice that granted the petition to list it as a HAP. EPA noted that the decision would not have legal effect until the regulatory HAP list is amended through a rulemaking. In the notice, EPA sought comments on a wide range of implementation issues related to the listing of 1-bromopropane as a HAP.

EPA's process may be problematic for several reasons – because of how the agency did this, additional listings of air pollutants could be on the horizon with little opposition. For example, several stakeholders have been advocating for listing PFOS and PFOA as HAPs.

The consequences of a new HAP listing could be significant. New listings could reopen current air rules for industry source categories and drive modifications to facility permits. The additional potential new HAP emissions could also trigger some area sources to become major sources subject to more stringent requirements.



Several industry trade groups have indicated that they intend to challenge EPA's perceived "regulatory shortcut" to listing new pollutants. The challenge will be in the context of the HAP listing for a single substances, 1-bromopropane, but it will likely set the precedent for future HAP listing decisions. NASF will continue to work with other industry trade groups on the effort and provide updates to members. If you have any questions or would like additional information on this issue, please contact Jeff Hannapel with NASF at [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com).

### **Comment Deadline Extended for EPA Proposed Reporting Rule for PFAS Compounds**

On June 28, 2021, EPA proposed a [new reporting and recordkeeping rule](#) for per- and polyfluoroalkyl substances (PFAS) under the Toxic Substances Control Act (TSCA). The proposed rule applies to manufacturers and importers of PFAS chemicals, including small manufactures and manufacturers who produce PFAS as a byproduct. In addition, the proposal would subject articles containing PFAS to reporting requirements. The rule does not require processors or users of PFAS to report.

If finalized, the rule would require certain persons that manufactured or imported PFAS in any year since January 1, 2011, to report information for each substance and mixture related to chemical identity and molecular structure; categories of use; volumes manufactured and processed; byproducts resulting from the manufacture, processing, use and disposal; environmental and health effects, worker exposure, and method of disposal.

The proposed rule includes several issues of concern that will need to be addressed in comments, including:

- the fact that ALL PFAS are included,
- there is no small business exemption,
- there is no minimum reporting threshold,
- there is no "article" exemption,
- there is no clear definition of an article,
- the scope of the definition of manufacturers and importers needs clarification,
- further clarification on which articles containing PFAS could trigger reporting, duplicative reporting requirements, and the reporting period includes a retrospective review of ten years (which is highly unusual and very burdensome).

Industry stakeholders have asked EPA to consider providing exemptions to reporting and phase in additional reporting only if it is needed to gather the appropriate data on the manufacture and import of PFAS.

EPA recently extended the comment period on the proposed rule until September 27, 2021. The statutory deadline for the final rule is January 1, 2023, and the effective date of the reporting requirements will January 1, 2024. NASF is working with several industry trade groups in Washington to develop comments and will also submit comments on behalf of NASF to address issues of specific concern to the surface finishing industry. If you have any questions or would like additional information, please contact Jeff Hannapel with NASF at [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com).

### **California Proposes Public Health Goals for PFOS and PFOA**

The California Office of Environmental Health Hazard Assessment (OEHHA) released proposed Public Health Goals for PFOA and PFOS on July 22, 2021. The full 632-page report is posted on the OEHHA website at: <https://oehha.ca.gov/water/cnr/announcement-availability-draft-technical-support-document-and-public-workshop-proposed>.

OEHHA set the Public Health Goal for PFOA at 0.007 parts per trillion (ppt) and for PFOS at 1 ppt. There are serious questions regarding the scientific justification for these goals and whether these levels can be measured.

There will be a 60-day public comment period that will end on September 28, 2021. OEHHA will hold a public workshop on the proposed PHGs on September 28th and the drafts will also undergo external scientific peer review after the workshop.

NASF plans on working with its outside toxicologist to develop comments on this proposal (particularly as it impacts NASF members in California), and coordinate with the American Chemistry Council PFAS Stakeholders Group.

If you have any questions or would like additional information on this issue, please contact Jeff Hannapel with NASF at [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com).

### **California Platers Engage Regional Water Boards on PFAS Sampling Order**

The California State Water Control Board and regional water boards are in the process of implementing an order to chromium platers in California to sample for PFAS compounds. NASF and its California Chapters negotiated a model Work Plan for facilities to use in conducting sampling. The Work Plan that was reviewed and approved by the State and Regional Water Boards included a phased approach to sampling.

Under this approach, facilities would first sample wastewater and stormwater to determine if PFAS were present. These sampling results would determine if it was necessary to conduct the more expensive soil and groundwater sampling. The approach was designed to minimize the

burden on small businesses and avoid more expensive and invasive drilling sampling if the preliminary results indicated that PFAS were not detected above levels of concern.

While many Work Plans based on the model template have been approved, facilities have received revised Work Plans from regional water boards that included extensive soil and groundwater sampling. Some of the regional water boards are now requiring facilities to conduct all sampling at the same time, which could include costs that exceed \$50,000 per facility. In addition, some facilities have been threatened with civil penalties if they did not comply with the onerous drilling requirements. This is clearly inconsistent with the phased approach that was initially approved by the water boards.

NASF and its California Chapters have raised concerns about this expansive approach to PFAS sampling to Los Angeles Regional Water Board officials at public hearings and scheduled calls.

In addition, the California Chapters recently submitted a letter to the L.A. Regional Water Board that highlighted key concerns, sought further justification for requiring subsurface soil and groundwater sampling, and asked the board to reconsider its approach to PFAS sampling for surface finishing facilities.

NASF and its Chapters will continue to facilitate compliance with the state order and to minimize the burden on surface finishing facilities. If you have any questions or would like additional information on this matter, please contact Jeff Hannapel with NASF at [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com).