

NASF Public Policy Update

June 2023

The Biden Administration just released its semi-annual rulemaking agenda last week. The regulatory agenda, which is published twice each year, is a comprehensive indicator of the federal government's current regulatory activity, the status of all rules and target dates for completion for all departments and agencies.

The latest Unified Agenda (it's titled the "Spring" Agenda, but it's two months late) includes approximately 3,200 rulemakings that will be advancing within the next year or so. Notable is that the 280 "major rules" and "1,326 "significant rules" indicate that the volume of federal regulation is moving to its peak versus the past decade for both categories.

Also of interest is that reports from all federal agencies show that a number of important rules are scheduled to be finalized this fall and into early next year, which suggests that the Administration will be facing a challenge to move its full agenda to completion before the end of the current term in late 2024.

NASF follows the agenda closely on behalf of its members and will provide a webinar update shortly on some of the more important priorities for the administration and how they may impact the surface finishing industry. See the spring unified agenda [here](#) and this month's highlights below.

NASF Briefs SUR/FIN Conference Attendees with EPA Officials in Cleveland on EPA's Pending PFAS Wastewater Discharge Survey and Proposed Rule – NASF hosted EPA officials this month at SUR/FIN to jointly discuss attendees the status and outlook for the PFAS wastewater discharge rule. EPA project lead Dr. Phillip Flanders, along with Christian Richter and Jeff Hannapel, reviewed the latest developments on the rule as well as the current draft industry survey still under review at the White House

EPA Clarifies Narrower Scope for the Metal Finishing PFAS Rule During NASF SUR/FIN – During NASF SUR/FIN's Government Affairs session in Cleveland, EPA addressed the agency's ongoing discussions with NASF and noted that per the agency's review thus far, EPA has now determined that the rulemaking will apply ONLY to chromium-based processes and NOT the wider finishing industry as a whole. However, chromate conversion processes will still be included in the scope of the rulemaking. NASF has argued the agency's rulemaking scope must be narrowed further, but EPA highlighted the reasons for its inclusion at this point.

California Proposes a Restrictive New Drinking Water Standard for Hexavalent Chromium – The California State Water Resources Control Board just proposed a new maximum contaminant level (MCL) of 10 parts per billion (ppb) for hexavalent chromium. The proposed MCL

is five times more stringent than the current MCL of 50 ppb. The Water Board will hold a public hearing on the proposal on August 2, 2023 in Sacramento and written public comments are due on August 4, 2023. NASF and its California leadership will be submitting comments on the package.

EPA Delays Final Rule to List PFOS and PFOA as Superfund Hazardous Substances –

EPA has proposed to list PFOA and PFOS as hazardous substances under the federal Superfund law and is also considering listing additional PFAS as hazardous substances under Superfund. With the broad strict, joint, and several liability under the law, if these rules are finalized it would subject any entity linked with PFAS contamination to expensive potential cleanup and remediation liability from EPA and private third parties.

EPA Modifies Its Approach to Defining PFAS – EPA just announced that it is dropping the widespread, controversial “working definition” of PFAS, and will now use “case-specific” definitions for different regulatory programs. The “working definition” of PFAS includes chemical substances and mixtures that contain at least two fluorinated carbons. This broad definition includes over 6,500 substances as PFAS.

Historic U.S. Supreme Court Ruling Narrows Federal Authority over Private Lands under Clean Water Act – The U.S. Supreme Court on May 25, 2023 issued a historic decision and narrowed the reach of the federal Clean Water Act (CWA) over private lands in the case of Sackett v. EPA.

Read More Details Below...

NASF Briefs SUR/FIN Conference Attendees with EPA Officials in Cleveland on EPA’s Pending PFAS Wastewater Discharge Survey and Proposed Rule

NASF hosted EPA officials this month at SUR/FIN to jointly discuss attendees the status and outlook for the PFAS wastewater discharge rule. EPA project lead Dr. Phillip Flanders, along with Christian Richter and Jeff Hannapel, provided an update on the rulemaking as well as the current draft industry survey still under review at the White House.

Dr. Flanders also provided insight on the evolving scope of the rule, possible control technologies under early consideration for reducing PFAS in wastewater discharges and recent agency sampling at finishing facilities to support the development of the rule.

Following the EPA and NASF presentations, the session included an expansive question and answer session for members and conference attendees and members.

EPA Clarifies a Narrower Scope for the Metal Finishing Rule

During the discussion, Dr. Flanders addressed EPA's ongoing discussions with NASF, and noted that per the agency's review thus far, EPA has now determined that the rulemaking will apply ONLY to chromium-based processes and NOT the wider finishing industry as a whole.

However, chromate conversion processes will still be included in the scope of the rulemaking.

Richter and Hannapel highlighted NASF's continued support for narrowing the scope of the rule, arguing that the agency should go further and remove chromate conversion processes from the scope of the rule.

Upcoming Webinar: NASF will Discuss Survey Changes and Rulemaking Scope

With respect to further issues regarding the reach of the rulemaking and ongoing changes in the current draft version of the survey – which will be sent to ALL finishing facilities across the nation to complete under EPA's Clean Water Act authority – NASF will hold a webinar to discuss these and related regulatory topics.

In the meantime, EPA is now attempting to include more efficient “off ramps” in the document's approximately 80 questions to allow facilities not running chromium-based processes to avoid completing the entire survey. Off-ramps will also be included for zero-discharge facilities.

When Will the Survey be Issued?

NASF has noted to members that the survey continues to be delayed. However, EPA is expecting to finalize the survey soon and make it available to surface finishing facilities by July or August.

When the survey has been sent out, NASF plans to have a webinar for members to provide guidance for completing the survey.

In the meantime, NASF will continue working with EPA and White House officials to minimize the impacts of this survey on the surface finishing industry. If you have any questions or would like additional information on the survey or the new wastewater discharge rule for PFAS, please contact Jeff Hannapel or Christian Richter with NASF at jhannapel@thepolicygoup.com or cichter@thepolicygroup.com.

California Proposes New Drinking Water Standard for Hexavalent Chromium

The California State Water Resources Control Board just proposed a new maximum contaminant level (MCL) of 10 parts per billion (ppb) for hexavalent chromium. The proposed MCL is five times more stringent than the current MCL of 50 ppb.

The Water Board will hold a public hearing on the proposal on August 2, 2023 in Sacramento and written public comments are due on August 4, 2023. NASF and its California leadership will be submitting comments on the package. A copy of the proposed rule is available at: [Notice of Proposed Rulemaking- Hexavalent Chromium MCL \(ca.gov\)](#).

In 2011, California's Office of Environmental Health Hazard Assessment (OEHHA) set a public health goal (PHG) for hexavalent chromium in drinking water at an extremely stringent level of 0.02 ppb.

More recently, California officials have been evaluating the new scientific studies of hexavalent chromium that were cited in U.S. EPA's Integrated Risk Information System (IRIS) draft human health assessment for hexavalent chromium. The state's review sets the stage for entirely new cleanup standards and a drinking water MCL for hexavalent chromium.

Features of the Maximum Contaminant Level

The proposed MCL must be set as close to the PHG as is technologically and economically feasible, with an emphasis on public health benefits. The Water Board conducted a cost-effectiveness analysis that compared the proposed MCL to twenty alternative levels and concluded that 10 ppb is the lowest the MCL can be set without sacrificing large decreases in cost-effectiveness.

The state estimates that the proposal would increase the average household cost for drinking water by less than \$20 per month. Industry and local water agencies have indicated that the compliance costs will be significantly higher than the state estimates. Such increases due to the new MCL could be problematic for many minority and low-income households.

The Association of California Water Agencies stated that the MCL needs to be based upon the best available science and should consider economic analyses on the impact of affordability of water for consumers.

Industry has argued that there must be a connection between the cost of compliance and public benefit, as the cost of water for consumers is itself a public health issue. In addition, industry groups have indicated that the proposed MCL is not supported by the best available science.

The outcome for the new MCL will likely depend on the technological and economic feasibility of the rule. NASF will continue to engage stakeholders on this rulemaking and provide updates to NASF members.

If you have any questions or would like additional information, please contact Jeff Hannapel or Christian Richter with NASF at jhannapel@thepolicygroup.com or crichter@thepolicygroup.com.

EPA Delays Final Rule to List PFOS and PFOA as Superfund Hazardous Substances

EPA has proposed to list PFOA and PFOS as hazardous substances under the federal Superfund law and is also considering listing additional PFAS as hazardous substances under Superfund.

With the broad strict, joint, and several liability under the law, if these rules are finalized it would subject any entity linked with PFAS contamination to expensive potential cleanup and remediation liability from EPA and private third parties.

EPA also just announced it will be delaying the final rule from August 2023 to February 2024. The delay is reportedly due to the broad scope of liability under Superfund and potentially unintended consequences of imposing liability on “innocent” parties. EPA is facing sharp criticism from industry that Superfund is not the most appropriate legal tool for addressing ubiquitous PFAS contamination.

In addition, EPA is grappling with its legal authority and administrative process on how best to implement enforcement discretion to minimize the impact of potentially overly broad liability for PFAS cleanup.

NASF will continue to work with industry partners and members of Congress to minimize the potential impacts and liability for PFAS contamination generally on a range of potential sectors and parties, including the surface finishing industry.

If you have any questions or would like additional information on this issue, please contact Jeff Hannapel with NASF at jhannapel@thepolicygoup.com.

EPA Modifies Its Approach to Defining PFAS

EPA just announced that it is dropping the widespread, controversial “working definition” of PFAS, and will now use “case-specific” definitions for different regulatory programs. The “working definition” of PFAS includes chemical substances and mixtures that contain at least two fluorinated carbons.

This broad definition includes over 6,500 substances as PFAS. EPA’s “case-specific” approach allows greater flexibility to address the PFAS that pose the greatest risks for each regulatory program and environmental media. This fragmented and nonuniversal approach to defining PFAS does, however, create uncertainty among EPA’s different regulatory programs.

Environmental groups are critical of EPA's new approach, citing efforts in the European Union to use a broad definition of PFAS and a preference to regulate PFAS as a class rather than on "case-specific" decisions. These organizations claim that the universe of PFAS should include over 12,000 chemical substances and mixtures.

Part of EPA's rationale is that the authority under existing U.S. laws for regulating PFAS as a class is limited. For example, EPA must identify the specific risks associated with a PFAS to list it as a statutory hazardous substance or hazardous waste. In addition, only 400 to 600 chemical substances identified as potential PFAS are currently in commerce.

As a consequence, it appears that EPA will target only those PFAS that pose known risks to human health and the environment. It is not clear how this approach will impact ongoing regulatory developments, such as the PFAS wastewater discharge rule for metal finishing and electroplating.

NASF will continue to work with EPA officials on this new approach as part of rulemakings that are in progress.

If you have any questions or would like additional information on this new policy, please contact Jeff Hannapel or Christian Richter with NASF at jhannapel@thepolicygroup.com or crichter@thepolicygroup.com.

U.S. Supreme Court Narrows the Definition of Waters of the U.S. under Clean Water Act

The U.S. Supreme Court on May 25, 2023 issued a historic decision and narrowed the reach of the federal Clean Water Act (CWA) over private lands in the case of *Sackett v. EPA*. In the now widely followed case, the plaintiffs had filled in a private parcel for construction of a home.

The lot was adjacent to a ditch that connected to a creek that discharged into a lake that was considered a traditional navigable water under the federal Clean Water Act. EPA and the Army Corps of Engineers claimed that the property was a wetland subject to federal permit requirements because of its connection to a navigable water.

All nine Supreme Court justices agreed that the property was not a wetland subject to the jurisdiction of the Clean Water Act. By a 5-4 majority, the justices then ruled that only wetlands that are "undistinguishable" from adjacent traditional jurisdictional waterbodies can be covered by the Clean Water Act.

This occurs only when the wetlands have a "continuous surface connection" to water bodies that are waters of the U.S. (WOTUS) in their own right, such that there is no clear demarcation between the "waters" and "wetlands."

The Court rejected a broader standard that would regulate wetlands with some connection to jurisdictional water bodies, including indirect connections and connections to groundwater. Under the Court's ruling, wetlands that are separate from traditional navigable waters cannot be considered part of these waters, even if they are located nearby.

Departure from the Majority's Opinion

The four concurring justices (including conservative justice Kavanaugh and liberal justices Kagan, Sotomayor and Jackson) departed from the majority opinion stating that it was too narrow and therefore the Clean Water Act would fail to protect many adjacent wetlands.

With the issuance of the Supreme Court ruling, EPA and the Army Corps of Engineers will now be challenged with developing a new rule that is consistent with the opinion. It is reasonable to expect a proposed rule that will include a broader definition than the one outlined in the majority decision. Adjacent wetlands that have some surface connection to navigable waters are separated only some minor barrier or temporary interruption could be considered subject to CWA jurisdiction.

Regardless, the Supreme Court's decision in Sackett narrows the definition of "waters of the United States" and provides long-needed clarification on the issue. This will not, however, resolve all of the disagreements of what should be covered as an adjacent wetland and additional legal challenges are likely when EPA finalizes a new WOTUS rule.

NASF will continue to monitor developments on this issue and provide updates to NASF members as needed.

If you have any questions or would like additional information, please contact Jeff Hannapel or Christian Richter with NASF at jhannapel@thepolicygroup.com or crichter@thepolicygroup.com.