NASF Public Policy Report
January 2022

With the beginning of a new year, several significant regulatory developments are emerging. This month's update provides a summary of these key developments in Washington and states that are impacting the surface finishing industry.

- **U.S. Supreme Court Issues a Stay of OSHA's COVID-19 Workplace Vaccine Standard –** The U.S. Supreme Court issued a stay on the implementation of the OSHA COVID-19 Vaccine, Testing and Face Coverings emergency temporary standard.
- **EPA Proposes to List PFOS and PFOA as (Superfund) Hazardous Substances –** EPA submitted proposed a rule to list PFOS and PFOA as Superfund hazardous substances to the White House for review. The rule could subject PFOS and PFOA to release reporting and cleanup cost recovery requirements.
- **EPA Adds N-Propyl Bromide to Hazardous Air Pollutants List –** The first new chemical since the Clean Air Act Amendments were passed in 1990 is added to the list of hazardous air pollutants (HAPs).
- **Science Advisory Board (SAB) Criticizes Draft EPA PFAS Documents Over Lack of Transparency –** Scientific panel questions EPA' s scientific data and conclusions to support drinking water standard for PFOS and PFOA.
- **Wisconsin State Agency Recommends Stringent Groundwater Standard for Hexavalent Chromium –** New standard for hexavalent chromium in groundwater is several orders of magnitude more stringent that existing federal and state standard.

A more detailed summary of these issues is provided below.

Supreme Court Issues Stay of OSHA's COVID-19 Workplace Vaccine Standard

On December 17, 2021, the US Court of Appeals for the Sixth Circuit dissolved the nationwide stay of the COVID-19 Vaccination, Testing, and Face Coverings emergency temporary standard

(ETS), which had been issued in early November by the Fifth Circuit. That same night, several of the petitioners in the legal challenge immediately appealed the Sixth Circuit's decision to the U.S. Supreme Court.

On January 7, 2022, in an expedited process the Supreme Court heard oral argument in the consolidated cases challenging the legality of OSHA's COVID-19 Vaccination, Testing, and Face Coverings emergency temporary standard. Specifically, the question before the Court was whether OSHA had the authority to impose the ETS and whether the requirements of the ETS should be stayed.

On January 13, 2022 the Supreme Court issued a decision to stay OSHA's ETS that applies to employers with at least 100 employees. Here is a link to the opinion of the Court. As a result, the enforcement of the ETS has been halted and there are no regulatory obligations to meet under the rule, such as employers needing to determine each employee's vaccination status and requiring unvaccinated employees to wear face coverings and be subject to weekly COVID testing.

Only a Temporary Stay

While the Court's decision technically is only a temporary stay of the ETS pending a full review of the legal challenges to the rule by the Sixth Circuit (such as whether the Constitution would allow OSHA to impose the broad-ranging requirements of the ETS), the Court appeared to signal that it believes OSHA exceeded its statutory authority in issuing a workplace standard to address an issue of broad public health. The Court specifically noted that:

> *Although COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.*

Additional Arguments and Outlook

The Court also stated: *"[t]hat is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. . . . But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face."*

For now, implementation of the rule is blocked and the ETS requirements are not in effect. The substantive legal issues on whether OSHA has authority to issue such a broad-ranging ETS will be argued in the U.S. Court of Appeals for the Sixth Circuit.

NASF will continue to work with OSHA officials and industry coalitions on this issue 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 Submits for White House Review its Proposed Rule to List PFOS and PFOA as Hazardous Substance under CERCLA

On January 10, 2022, EPA formally submitted to the White House Office of Management and Budget (OMB) its first-time plan to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as "hazardous substances" under Comprehensive Environmental Response, Compensation & Liability Act (CERCLA or the Superfund law). Such a designation would set new precedent as EPA has never before designated a new chemical as a CERCLA hazardous substance.

OMB reviews are generally intended to last 90 days, so EPA appears to be on track to issue the proposal in March 2022. The agency expects to issue a final rule in the summer of 2023.

Once finalized, the regulation would trigger a host of actions, from release reporting to cost recovery and contribution claims. The reporting will enable federal, state, and local authorities to collect information regarding the location and extent of releases of PFOS and PFOA. In addition, EPA, other agencies or private parties may be able to seek cost recovery or contributions for costs incurred for the cleanup of releases of PFOS and PFOA.

NASF will continue to monitor this rule development and provide updates to NASF members. If you have any questions or would like additional information on this issue, please contact Jeff Hannapel at jhannapel@thepolicygroup.com.

EPA Adds N-Propyl Bromide to Hazardous Air Pollutants List

EPA has set a new precedent and is adding a new chemical, n-propyl bromide (also known as 1-bromopropane), to the Clean Air Act's list of hazardous air pollutants (HAPs), also known as air toxics. This chemical is used as a degreaser and cleaner for metal parts in the surface finishing industry, with specific aviation and aerospace applications. 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 until now has not added any new ones.

The final rule was published in the Federal Register on Jan. 5, 2022. The consequences of a new HAP listing could be significant. New HAP 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 (smaller) sources to become major sources subject to more stringent requirements. EPA will be working to revise current NESHAP regulations and identify whether additional NESHAP are warranted.

The addition of this new HAP will likely be subject to a legal challenge because the administrative process that EPA used to add the new HAP has been criticized by several stakeholders because it was not consistent with notice and comments requirements of the Administrative Procedure Act. Several industry trade groups have indicated that they intend to challenge EPA's perceived "regulatory shortcut" to listing new pollutants. The outcome of the legal challenge will likely set the precedent for future HAP listing decisions such as possible HAP listings for PFOS and PFOA.

EPA will be working to revise current NESHAP regulations and identify whether additional NESHAP requirements are warranted. Under a separate action, EPA is developing a regulatory infrastructure that will address compliance and implementation issues that may arise from the addition of a new chemical to the list of HAPs. More information is available on the EPA website at: https://www.epa.gov/haps/addition-1-bp-npb-clean-air-act-list-hazardous-air-pollutants.

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.

Science Advisory Board (SAB) Criticizes Draft EPA PFAS Documents Over Lack of Transparency

In the first week of January 2022, the Science Advisory Board (SAB) PFAS Panel reviewed draft documents for deriving a maximum contaminant level goal (MCLG) for perfluorooctanoic acid (PFOA) or perfluorooctanesulfonic acid (PFOS) as well as an analysis of cardiovascular disease (CVD) risk reduction as a result of reduced PFOA and PFOS exposure in drinking water. EPA uses health-based MCLGs to set enforceable drinking water standards after taking into consideration cost and technology concerns. EPA will use the CVD document in its cost-benefit analysis for the enforceable drinking water standard.

EPA has asked the panel to weigh in on a number of issues related to the MCLG documents. These include: whether the agency clearly described the studies it considered in developing the MCLG process documents, whether the agency has chosen the right endpoints for assessing noncancer effects, whether the agency has made the right cancer classifications and properly

calculated the cancer slope factor, whether the agency's toxicokinetic models are appropriate, whether the agency chose the appropriate epidemiological studies to derive the reference doses (RfDs) for PFOA and PFOS, and whether the agency's decision to use a relative source contribution of 20 percent is appropriate.

EPA science advisors criticized several aspects of the draft documents the agency plans to use to set enforceable drinking water limits, saying that even when the agency's approach appears to be reasonable, EPA has failed to adequately explain its rationale. The criticisms follow, and in some cases echo, concerns a variety of public commenters have raised about the documents, where state health officials, industry groups and drinking water officials have said the documents contain numerous errors and inconsistencies. Specifically, the panel reviewed a draft framework for estimating noncancer risks associated with PFAS mixtures, raising concerns it could hamper ongoing state efforts to control the chemicals.

While the SAB panel raised numerous technical concerns over EPA's data and conclusions, it was not clear if the panelists would provide clear direction to EPA. Public commenters urged the SAB to provide specific recommendations and definitive direction to EPA regarding the scientific basis provided to support a drinking water standard for PFOS and PFOA. The technical and scientific information provided by EPA and reviewed by the SAB will be part of the administrative record to support EPA's rulemaking process to set drinking water standards for PFO and PFOA.

On behalf of NASF, The Policy Group will continue to work with EPA, state agencies, drinking water utilities, and industry trade groups on this rulemaking development and provide updates to NASF members. If you have any questions or would like additional information, please contact Christian Richter or Jeff Hannapel with NASF at crichter#@thepolicygroup.com or jhannapel@thepolicygroup.com.

Wisconsin State Agency Recommends Stringent Groundwater Standard for Hexavalent Chromium

The Wisconsin Groundwater Coordinating Council (comprised of representatives from several state agencies, the Governor's office and universities) prepares an annual report that summarizes the operations and activities of the council, describes the state of the groundwater resource and its management and makes recommendations. In the 2021 Wisconsin Groundwater Coordinating Council Report to the Legislature, the naturally-occurring chromium in groundwater was referenced. The report noted that "[a]s water flows underground, metals such as chromium, may be dissolved from rock or soil and be mobilized, and therefore present in groundwater. Natural sources of chromium in groundwater include some types of igneous bedrock and soils derived from those bedrock sources."

While both trivalent chromium and hexavalent chromium are found in groundwater, in Wisconsin water quality analysis for chromium is generally done for "total chromium." The US EPA has established a public water supply MCL for total chromium at 100 micrograms per liter (µg/L) and, in Wisconsin, the groundwater quality enforcement standard for total chromium is also 100 µg/L.

The Wisconsin Department of Natural Resources (DNR) Remediation and Redevelopment program requested a health-based groundwater standard for hexavalent chromium. The Wisconsin Department of Health Services (DHS) recently recommended a groundwater quality enforcement standard of 70 nanograms per liter (ng/L) and a preventive action limit (PAL) of 7 ng/L for hexavalent chromium based on its potential to cause cancer. DHS must identify the health-based level at the estimated cancer risk of one in one million for a person with body weight of 177 pounds. The PAL is then set at ten percent of the enforcement standard as required by state statute. The scientific Support Documents for this recommended standard is available on the DHS website at: https://www.dhs.wisconsin.gov/publications/p02434v.pdf.

Wisconsin has issued a white paper for rule development for this stringent groundwater standard, and has requested comments on the white paper. This recommended level for hexavalent chromium is several orders of magnitude more stringent that the existing standard for total chromium. and could have a significant impact on the monitoring, control and remediation of groundwater in Wisconsin. If you have any questions or would like additional information on this issue, please contact Jeff Hannapel with NASF at crichter#@thepolicygroup.com or jhannapel@thepolicygroup.com.

NASF Washington Forum, April 4-6, 2022

The NASF Washington Forum for the surface finishing industry will be held April 4-6, 2022 at the Ritz Carlton in Pentagon City, VA. The Forum includes presentations and briefings from national and global experts on pertinent policy, technical, regulatory, and management issues impacting the surface finishing industry, including environmental regulatory issues, labor and workplace trends, tax policy, economic outlooks, supply chain challenges, globally regulatory developments, and political and election outlooks. The schedule includes a Welcome Reception on the evening of April 4th, Policy Briefings, Lunch Keynote Speaker, and Evening Reception on the 5th, and an opportunity to meet with members of Congress and their staffs to educate them about the importance and impact of the surface finishing industry, the challenges facing companies, and specific policy priorities of concern on the 6th.

Please join your industry colleagues at this significant and informative event. More information on the Washington Forum is available on the NASF website at: https://nasf.org/events/washington-forum/. If you have any questions, please contact Christian

Richter or Jeff Hannapel with NASF at crichter@thepolicygroup.com or jhannapel@thepolicygroup.com.