



NASF Public Policy Update June 2021

This month, new legislation has been introduced on Capitol Hill naming the [metal finishing industry and a handful of other sectors](#) as national priorities for EPA regulation of PFAS. On other fronts, the search for bipartisanship in Congress intensifies on major infrastructure legislation, a new White House “strike force” is launched to secure vulnerable supply chains, and big announcements have hit the street on OSHA COVID workplace rules and EPA air rules for hexavalent chromium.

As we’re going to press, President Biden is releasing his first updated regulatory “to-do” list which outlines an ambitious expansion of federal activity across all agencies, including the environment, labor and employment, healthcare, education and other policies. We’ll cover some of the most relevant issues for the industry in the coming days.

MAJOR NASF DEVELOPMENT IN CONGRESS – The surface finishing industry is highlighted for regulatory action as a “priority industry” along with 8 other specific industries in [new PFAS legislation](#) just introduced in the House and Senate. The bill has not yet been assigned a bill number, but we're sharing the full text of the bill to NASF members nationwide.

These and other new developments are below:

- OSHA issues limited emergency COVID workplace standard
- Congress proposes PFAS legislation for surface finishing and other water discharges
- NASF comments on small business impacts of EPA’s n-propyl bromide rule
- California air board phase-out of hexavalent chromium
- President’s goal to increase the number of OSHA inspectors
- EPA to overturn major Trump rollback of Obama-era “Waters of the U.S.” rule
- EPA rescinds Trump administration’s benefit-cost rule for air regulations
- OSHA COVID guidance for industries other than healthcare

We've summarized below some of the more pertinent legislative and regulatory developments and new announcements from recent days.

NASF Virtual Public Policy Updates for Chapters

The NASF Government Affairs team is continuing its outreach to NASF Chapters and members with virtual public policy briefings. If you would like to schedule an NASF public policy briefing for your chapter or your region, please contact Matt Martz at mmartz@nasf.org or Jeff Hannapel at jhannapel@thepolicygroup.com. To join NASF or find out more about membership, please contact Matt Martz at mmartz@nasf.org.

OSHA Issues Limited COVID Emergency Temporary Workplace Standard (ETS)

In a closely watched development, OSHA on June 10th released its COVID-19 Emergency Temporary Standard (ETS) for the nation's workplaces. A major feature of the new measure is that it applies solely to the health-care industry, as OSHA determined that health-care workers treating COVID patients remain at risk. Importantly, general industry – including surface finishing – has received updated guidance in alignment with CDC's framework for COVID which has evolved as vaccinations have rolled out and incidence of transmission nationwide has fallen

The agency had originally submitted the ETS for review by the White House on April 26th, which held over 50 meetings with industry, labor and other stakeholders – the second most ever for an OSHA rule. More information on the ETS is available on the OSHA website at: <https://www.osha.gov/coronavirus/ets>.

OSHA's revised guidelines for a wide array of industries other than health-care advise employers how to protect workers who have not yet been vaccinated (See information and articles further below).

Proposed Legislation to Regulate PFAS under Clean Water Act – Names Surface Finishing

[Legislation](#) to require EPA to regulate PFAS under the Clean Water Act has emerged in both the Senate and the House to regulate discharges of PFAS from nine industry sectors, including electroplating and metal finishing, along with organic chemicals; plastics and synthetic fibers; pulp, paper and paperboard; textile mills; leather tanning and finishing; paint formulating; electrical and electrical components; and plastics molding and forming. The measure would also require water quality criteria to be finalized by a date certain.

EPA currently does not regulate PFAS discharges under the Clean Water Act, but is undertaking an effort to identify industrial sources that may warrant further study for potential regulation of PFAS through national effluent limitation guidelines. NASF has continued to work closely with EPA on informing the agency's decisions on new regulation.

The bill would also authorize \$200 million annually in grants to aid implementation by publicly owned treatment works (POTWs). The bill would mandate EPA to develop CWA water quality criteria for all measurable PFAS or PFAS classes within two years, and develop effluent limitations guidelines and standards for the same within four years, the release says. This would include setting pretreatment standards to block PFAS from entering publicly owned water treatment facilities.

Kirsten Gillibrand (D-NY) is spearheading the bill, the Clean Water Standards for PFAS Act, in the Senate, while Chris Pappas (D-NH) Pappas and Antonio Delgado (D-NY) are leading the push for the legislation in the House. Representative Pappas says he is working to build consensus on the legislation with Republicans and Democrats and will try to move it ahead. He notes that the bill "is already a bipartisan effort," and that its "outlines" are included in Representative Debbie Dingell's (D-MI) bipartisan comprehensive PFAS Action Act, introduced earlier this year.

Pappas says while the bill's sponsors are encouraged by EPA Administrator Michael Regan's commitment to addressing PFAS, "we need to hold the EPA's feet to the fire and encourage them to act with speed while also making sure that our [POTWs] have the resources they need so that the costs do not get downshifted to local ratepayers."

And Gillibrand in the release said, "By developing effluent limitations guidelines and clear standards for all measurable PFAS, we can stop PFAS at the source and prevent contamination of our drinking water."

The bill is drawing support from the Environmental Working Group (EWG), an environmental group that has long been at the forefront on the push for regulation of PFAS. EWG notes that while PFAS have been identified in drinking water supplied to more than 2,300 communities, thousands of manufacturers are still legally allowed to discharge the chemicals into water. According to EWG attorney Melanie Benesh, "[t]o address the PFAS contamination crisis, we need to turn off the tap of PFAS pollution."

As we noted, NASF has been working collaboratively with EPA officials on its evaluation of the effluent limitation guidelines for metal finishing for several years and has shared available data.

This proposed legislation could prompt further action from EPA even if it does not become law. NASF remains fully engaged in the issue and will be discussing this legislation with decision makers as well as providing updates to NASF members. If you have any questions regarding the proposed legislation, please contact Jeff Hannapel with NASF at jhannapel@thepolicygroup.com.

NASF Submits Comments to Minimize Small Business Impact of EPA Rule for the Use of N-Propyl Bromide

EPA held a meeting of the Small Business Advocacy Review (SBAR) Panel on May 11, 2021 to discuss EPA's potential proposed rulemaking for n-propyl bromide (1-Bromopropane) under TSCA §6(a). NASF and two of its members have been designated as small entity representatives (SREs) and participated in this meeting. EPA identified unreasonable risks associated with certain conditions of use and laid out its proposed approach to impose restriction on the use on n-propyl bromide. This included setting an existing chemical exposure limit (ECEL) of 0.05 parts per million (ppm) for n-propyl bromide based primarily on calculated occupational exposure risks.

As part of this process, NASF submitted comments on EPA's approach that is under considerations. The comments noted that the ECEL would not be achievable, even with expensive, state-of-the-art vacuum degreasers. Accordingly, facilities that must use n-propyl bromide based on customer approvals or specifications would have to switch to alternatives.

Unfortunately, while some of the available alternatives may be promising, none of them appear to be a drop-in replacement at this time due to technological and economic feasibility considerations. To avoid potentially major consequences for small surface finishing businesses, NASF requested that EPA consider allowing at least five years to implement any restrictions on the use of n-propyl bromide for critical applications. This additional time could help to reduce the potential adverse impacts of the rule on small surface finishing businesses.

The SBAR Panel will consider all of the comments (both verbal and written from the small entity representatives) on the rule and will prepare a report for the EPA Administrator on potential ways to reduce impacts to small entities that may arise from this rulemaking. Following this input, EPA will draft a proposed rule to identify management options for n-propyl bromide that protect human health and the environment and will minimize impacts on small businesses. EPA must issue a proposed rulemaking by August 2021. For more information of this process and NASF's comments, please contact Jeff Hannapel with NASF at jhannapel@thepolicygroup.com.

California Rule to Transition Hexavalent Chromium Processes to Trivalent Chromium

The California Air Resources Board (CARB) has issued its draft proposed regulatory language and held its Technical Working Group Meeting #5 in late May regarding its new rulemaking to transition hexavalent chromium plating to trivalent chromium. CARB indicated that it is now looking at the following deadlines for transitioning to trivalent chromium:

- July 1, 2024 for decorative chromium plating,
- July 1, 2028 for functional chromium plating, and
- July 3, 2033 for chromic acid anodizing

NASF, its members and expert industry representatives have voiced multiple concerns with the rule, including:

- CARB's regulatory deadlines are very aggressive and unrealistic;
- the proposed rule is technologically and economically infeasible;
- the market does not accept trivalent chromium for many applications;
- efforts are misdirected in focusing on eliminating hexavalent chromium emissions from an industry that represents less than one percent of total hexavalent chromium emissions;
- substantial adverse impacts on defense and aerospace applications; and
- the potential devastating economic impact on the plating industry in California as well as critical supply chains and the economy in California more broadly.

At this time CARB is not looking at any other requirements for any other type of hexavalent chromium processes, but may look at these processes at a later date. CARB officials indicated that they welcome comments on the draft regulatory language for the rule, particularly on the issues that NASF and industry representatives have raised concerns. The schedule for completing the rule has been extended approximately six months with a final rule planned for mid-2022.

NASF California Chapters in the meantime continue a major letter-writing campaign to CARB members, state legislators, and customers regarding the significant negative impact this rule will have on surface finishing in California and the California economy. In addition, NASF is also reaching out to customers in several key supply chains, including defense, aerospace and automotive, to support the industry's efforts on this rule.

NASF and its California Chapters will also continue working with state officials and industry partners to develop a rule that is protective of human health and the environment and is technologically feasible and economically sustainable. For more information on this rulemaking, please contact Jeff Hannapel with NASF at jhannapel@thepolicygroup.com.

White House Goal Doubles the Number of OSHA Inspectors

President Biden has stated a goal of doubling OSHA's inspection force to roughly 1,500 by 2024. This goal faces daunting challenges—from recruiting and training people with the needed skills to convincing lawmakers to pay for the new positions. The administration's plans to increase inspectors is driven by frustration with OSHA's inability to respond to an overwhelming number of worker complaints during the pandemic.

As of April, OSHA had 748 inspectors, officially called compliance safety and health officers. At its current staffing level OSHA is limited in how many inspections it can do that are not in response to immediate reports of injuries or hazards. The buildup would cost tens of millions of dollars annually and require a long-term financial commitment, according to the president's fiscal 2022 budget proposal.

Budget Proposal -- The proposed OSHA budget, \$664.4 million appropriations for fiscal 2022, would essentially take OSHA's peak budget during the Obama administration and adjust it upward for inflation. The 2022 enforcement budget would grow 10 percent from fiscal 2021 to \$254.6 million.

Action by Congress -- Neither the House nor Senate appropriations committees have scheduled votes on Department of Labor spending proposals. The current chairs of the Senate and House subcommittees with responsibilities for OSHA's appropriation have supported past efforts to increase funding. President Biden's nominee to lead OSHA, Doug Parker, told senators during his May 27 confirmation hearing that recruiting and training new staff was his "top priority."

EPA Announces it will Make Changes to Trump's Rollback of Obama's Clean Water Act Rule Defining which "Waters of the U.S." are Subject to Regulation

EPA chief Michael Regan in recent days announced the agency would embark on a major effort to overturn the Trump administration's loosening of the Obama era "Waters of the U.S." rulemaking. The Obama Administration's measure in 2015 contained an expansive read of federal authority of a wide range of water bodies or "waters of the U.S." (WOTUS) under the Clean Water Act). The Trump Administration repealed the 2015 Waters of the U.S. rule in 2019,

and in June 2020, replaced it with the new Navigable Waters Protection Rule (NWPR). The NWPR narrowed the definition of waters of the U.S that were subject to federal authority under the Clean Water Act. The rules were the subject of substantial legal challenges. The Biden Administration identified the NWPR as a rule it intends to review and revise.

In recent congressional hearings, EPA Administrator Michael Regan said he doesn't intend to go back to the Obama-era WOTUS rule. Specifically, he said that EPA does not intend to simply pull the Obama-rule off the shelf after the agency has learned so much over the years. Changes to the rule are anticipated because Regan indicated that agency officials are not quite satisfied that the WOTUS rule developed under the Trump Administration is as protective of water quality as it could be.

Regan indicated that EPA intends to set up a structured stakeholder engagement with industry, agriculture and environmental groups. Through this process, EPA officials will listen to those who are impacted by regulations in order to come to some conclusions on what is the best way to move forward to protect the nation's water quality in a balanced way. Regan has acknowledged that EPA officials have learned lessons from both versions of the rule, have seen complexities in both approaches, and have determined that both rules did not necessarily listen to the will of the regulated community and public interests.

While the scope of change is not clear, EPA has clearly identified its intent to proposed a revised version of the WOTUS rule soon after a stakeholder engagement process. If you have any questions or would like additional information about the WOTUS rule development process, please contact jeff Hannapel at jhannapel@thepolicygroup.com.

EPA Rescinds Trump Administration Clean Air Act Benefit-Cost Rule

On May 13, 2021 EPA announced steps to rescind the Trump Administration Benefit-Cost Rule, entitled "Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process." The Trump-era rule is considered by some to be too favorable to industry. In response to President Biden's regulatory review order, EPA conducted a comprehensive review of the Benefit-Cost Rule and concluded that the rule should be rescinded in its entirety for several reasons.

EPA held a virtual public hearing its decision on June 9, 2021. The agency's interim final rule will become effective 30 days after publication in the Federal Register. EPA invites public comment on this rule, and intends to follow it with a final rule that responds to comments received during the public comment period.

More information on the rescission of the Benefit-Cost Rule is available on the EPA website at: <https://www.epa.gov/air-and-radiation/rescission-2020-benefit-cost-rule>.

“DEEP DIVE” COVERAGE: OSHA GENERAL INDUSTRY GUIDANCE FOR COVID-19

NASF Member References and Background for OSHA’s COVID-19 ETS and General Industry Guidance

For NASF members’ reference, some helpful background and details underlying OSHA’s June 10, 2021 decision on its Emergency Temporary Standard (ETS) and new general industry guidance are as follows:

COVID Cases Dramatically Decrease -- First, the conditions in the U.S. related to the spread of COVID-19—in terms of positivity rates, new cases, hospitalizations and deaths, and vaccination rates—have dramatically improved since OSHA delivered the proposed final ETS to the White House in April.

The 7-day cumulative number of COVID-19 cases per 100,000 people in the U.S. dropped to 28, down from 49 the week before, and 56, 70, 91, 105, and 147 for the six weeks prior. This is the lowest 7-day case rate since early March of 2020. The 7-day average number of new cases per day in the U.S. was at 14,000 last week, down from 22,000 the week before, and 27,000, 35,000, 44,000, 51,000, 60,000, and 70,000 for the six weeks prior.

The national test positivity rate has remained under 2.5% for the past 2 weeks, dropping from 3.1%, 3.5%, 3.9%, and 5.0% in the prior four weeks. The number of people hospitalized with COVID-19 is approximately 24,000, down from 27,000 last week, and 31,000, 35,000, 39,500, 42,800, and 46,300 the five weeks prior. An average of roughly 415 deaths per day were recorded in the U.S. last week, down from 490 per day the week before, and 590, 610, 685, 695, and 710 the five weeks prior.

CDC Mask and Distancing Guidelines -- When the CDC introduced its new guidance relaxing mask and distancing requirements for fully vaccinated people, Dr. Walensky, the head of the CDC, was asked in a widely circulated interview specifically about whether it was safe for a fully vaccinated employee to sit all day at work right next to a known unvaccinated co-worker who may not be fully mask compliant.

She answered that it's safe for the vaccinated worker who is 95 to 97 percent protected from disease, and even those rare breakthrough infections are resulting in mostly asymptomatic cases. According to Dr. Walensky, the vaccines are essentially 100 percent effective at preventing severe infections, hospitalizations, and death, and create very low risk of infecting others with low or no shedding of virus to others.

Legal Standard and Politics for ETS -- Given the data listed above, it's apparent that the CDC's goal of lifting restrictions for fully vaccinated individuals as a way to motivate others to get vaccinated is working. And it would seem to undermine any claim by OSHA today that the conditions meet the legal standard to justify an emergency temporary standard – that COVID-19 in the workplace (other than the health-care industry) meets the threshold of presenting a “grave danger” that only an ETS can address. Politically, it's no longer be helpful for the Biden Administration to put in place an onerous mask and distancing requirement for industries other than health-care so many weeks after the CDC has cleared that requirement for vaccinated workers.

Doug Parker, President Biden's nominee to head OSHA, had his Senate confirmation hearing a couple of weeks ago. Although he was pressed hard to acknowledge that there is no need for a federal ETS, he would not concede that an ETS was not needed. To the contrary, he said the conditions still justify an ETS, these conditions still meet the legal standard for a grave danger, and that OSHA needed to “finish the fight.”

California COVID Emergency Standard – Recent developments in California appear to support Parker's view on the need for a COVID ETS. California OSHA (Cal OSHA) just completed an unusual rulemaking process for its version of a COVID ETS. Cal OSHA introduced a draft revised version of its COVID-19 ETS on May 7th, asking its Standards Board to vote to adopt it on May 20th. But after the CDC issued its updated guidance about fully vaccinated individuals, Cal OSHA pulled back its proposal so it could revisit the revisions.

Although it appeared the delay was a sign the Division would improve at least a few of the most problematic provisions to align with the CDC guidance, the revised version ignored the CDC guidance. The version that the Board ultimately adopted does not recognize an exception to the mask mandate for employees who are indoors and fully vaccinated (unless all people in the room are fully vaccinated). The revised ETS also imposed various new requirements, including one that employers provide N95 respirators to unvaccinated employees for voluntary use.

OSHA Shifting Focus to Advance a Permanent, Broader Infectious Disease Rulemaking – In light of the recent developments on COVID, OSHA appears to be shifting its focus on advancing a *permanent infectious disease standard*. President Biden’s FY22 budget request introduced last week included a significant OSHA spending proposal tied specifically to renewing and advancing the Obama-era permanent infectious disease rulemaking.

According to that budget proposal, OSHA intends to offer a draft version of an infectious disease rule for public comment in FY22 (which could be as soon as October 2021). The previous version of the infectious disease rulemaking was limited to healthcare workers. If OSHA intends to convert that into an all-industry infectious disease rule, it would have to incorporate several steps in the rulemaking process such as potential impact on small business. As a traditional, non-emergency rulemaking, it would be required to follow typical notice-and-comment procedures, and could incorporate what OSHA and the CDC have learned from the current pandemic.

As part of an industry coalition that met with the White House recently on the ETS, NASF will continue to educate OSHA and other stakeholders regarding appropriate guidance for industries other than health-care to protect workers from COVID in the workplace. As NASF discusses the rule with industry allies and federal officials, we will keep members updated on new developments. If you have questions, please reach NASF by contacting Christian Richter at crichter@thepolicygroup.com or Jeff Hannapel at jhannapel@thepolicygroup.com.

What does the New OSHA COVID Guidance Mean for Industries Other than Health-Care?

OSHA’s new guidance intends to assist employers and workers not covered by the narrow ETS to identify COVID-19 exposure risks for workers who are unvaccinated or otherwise at-risk, and to help them take appropriate steps to prevent exposure and infection.

[CDC's Interim Public Health Recommendations for Fully Vaccinated People](#) explains that under most circumstances, fully vaccinated people need not take all the precautions that unvaccinated people should take. For example, CDC advises that most fully vaccinated people can resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance.

People are considered fully vaccinated for COVID-19 two weeks or more after they have completed their final dose of a COVID-19 vaccine authorized by the U.S. Food and Drug Administration in the United States. However, CDC suggests that people who are fully

vaccinated but still at-risk due to immunocompromising conditions should discuss the need for additional protections with their healthcare providers. CDC continues to recommend precautions for workers in [certain transportation settings](#).

Unless otherwise required by federal, state, local, tribal, or territorial laws, rules, and regulations, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure. The guidance focuses only on protecting unvaccinated or otherwise at-risk workers in their workplaces (or well-defined portions of workplaces).

This guidance contains recommendations as well as descriptions of mandatory safety and health standards, the latter of which are clearly labeled throughout as "**mandatory OSHA standards**." The recommendations are advisory in nature and informational in content, and are intended to assist employers in providing a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.

Who Are "At-Risk Workers"?

Some conditions, such as a prior transplant, as well as prolonged use of corticosteroids or other immune-weakening medications, may affect workers' ability to have a full immune response to vaccination. Under the Americans with Disabilities Act (ADA), workers with disabilities may be legally entitled to reasonable accommodations that protect them from the risk of contracting COVID-19 if, for example, they cannot be protected through vaccination, cannot get vaccinated, or cannot use face coverings. Employers should consider taking steps to protect these at-risk workers as they would unvaccinated workers, regardless of their vaccination status.

Guidance for Protecting Workers

The guidance emphasizes that vaccination is the key in a broader approach to protect workers and urges workers to learn about and take advantage of opportunities that employers may provide to take time off to get vaccinated. In the new voluntary framework, the CDC highlights recent new evidence that suggests that fully vaccinated people are less likely to have symptomatic infection or transmit the virus to others. See [CDC's Guidance for Fully Vaccinated People](#).

If workers are unvaccinated or otherwise at-risk (e.g., because of a prior transplant or other medical condition) and even if the employer does not have a COVID-19 prevention program,

they can protect themselves by following a number of recent recommendations. See CDC's [Personal & Social Activities Guidance for Unvaccinated People](#).

How Will OSHA View Employers: Roles of Employers and Workers in Responding to COVID-19

Under the OSH Act, employers are responsible for providing a [safe and healthy workplace free from recognized](#) hazards likely to cause death or serious physical harm. The agency reminds employers of its approach to the issue:

Except for workplace settings covered by OSHA's ETS and mask requirements for public transportation, most employers no longer need to take steps to protect their workers from COVID-19 exposure in any workplace, or well-defined portions of a workplace, where all employees are fully vaccinated. Employers should still take steps to protect unvaccinated or otherwise at-risk workers in their workplaces, or well-defined portions of workplaces.

For full details on how OSHA views employer and worker roles, see the extensive guidance on the agency's website at: <https://www.osha.gov/coronavirus/safework>.

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