



NASF Public Policy Update November 2021

Several new announcements have been made in recent weeks, including:

- **Key Metals Added to U.S. Critical Minerals List** – The US Geological Survey proposed adding nickel and zinc to the 2021 draft *U.S. Critical Minerals List*;
- **New PFAS Strategic Roadmap Released** – EPA’s ambitious and wide-ranging new PFAS Strategic Roadmap for regulation;
- **OSHA COVID-19 Workplace Vaccine Standard Under Legal Scrutiny** – OSHA’s recently published COVID-19 Emergency Temporary Standard already being litigated in the federal courts; and
- **Infrastructure Bill Passed, Signed by President Today** -- Congress passed a historic bipartisan infrastructure bill to support traditional, physical infrastructure projects, but none of the “social infrastructure” provisions that the Biden Administration had sought.

This month’s update provides a summary of these key developments in Washington.

Nickel and Zinc Added to the 2021 Draft U.S. Critical Minerals List

The US Geological Survey issued a draft update to the federal Critical Minerals List on November 9. The new list refines the original 2018 list, which was prompted by the “mineral security” provisions of the Energy Act of 2020. Under the Energy Act, the list is required to be reviewed every three years.

The 2021 draft list makes two notable additions – nickel and zinc – and removes helium, potash, rhenium, and strontium. The new list also increases the number of mineral commodities from 35 commodities and groups on the final 2018 list to 50 commodities on the 2021 draft list, primarily resulting from splitting the rare earth elements and platinum group elements into individual entries rather than including them as mineral groups.

The Energy Act of 2020 defined critical minerals as those which:

- i. “are essential to the economic or national security of the United States;
- ii. the supply chain of which is vulnerable to disruption (including restrictions associated with foreign political risk, abrupt demand growth, military conflict, violent unrest, anti-competitive or protectionist behaviors, and other risks through-out the supply chain); and
- iii. serve an essential function in the manufacturing of a product (including energy technology, defense, currency, agriculture, consumer electronics and healthcare-related applications), the absence of which would have significant consequences for the economic or national security of the United States.”

Among the factors behind adding new entries are those minerals vulnerable to a “single point of failure” and which serve an essential economic function for the nation. NASF is reviewing the list and the underlying methodology from USGS. Comments are due December 9, 2021.

EPA Releases PFAS Strategic Roadmap

On October 18, 2021 EPA released its PFAS Strategic Roadmap that includes a comprehensive and ambitious plan for addressing the potential risks associated with PFAS. A copy of the document is available at: [PFAS Strategic Roadmap: EPA’s Commitments to Action 2021—2024](#).

EPA Administrator Michael Regan formed an EPA Council on PFAS comprised of members from numerous offices within EPA Headquarters and Regions who were instrumental in developing the Roadmap – Radhika Fox, Assistant Administrator for Water, and Deb Szaro, Acting Regional Administrator, Region 1, co-chair the EPA Council on PFAS.

The Roadmap provides a detailed outline of the key actions EPA plans to undertake to address PFAS with proposed time lines for each action. A summary of the key actions and target dates is provided below.

National PFAS Testing Strategy

- Issue test orders to PFAS manufacturers
- Require PFAS manufacturers to conduct and fund testing (Expected by end of 2021)

TRI & TSCA Reporting

- Expand TRI reporting for PFAS (Spring 2022)
- Finalize new PFAS reporting rule under TSCA Section 8 (Winter 2022)

Drinking Water (DW)

- Monitor PFAS in DW (Fall 2021)
- Develop DW standard for PFOS & PFOA (Proposed - Fall 2022 & Final – Fall 2023)

Revise ELG for PFAS discharges to POTWs

- Proposed rule for organic chemical, plastics, and synthetic fiber manufacturers can release into water (Summer 2023)
- Proposed rule for Metal Finishing (Summer 2024)

Water Discharges

- Use NPDES permits to reduce PFAS discharges into waterways (Winter 2022)
- Develop water quality criteria for PFAS
 - Aquatic life criteria (Winter 2022)
 - Human health criteria (Fall 2024)
- Monitor fish tissue for PFAS (Summer 2022) and issue fish advisories (Spring 2023)

Waste Management and Remediation

- Finalize risk assessments for PFOA and PFOS in biosolids (Winter 2024)
- Designate PFAS as hazardous substances under CERCLA (Proposed Spring 2022 & Final Summer 2023)
- Update guidance on destruction and disposal of PFAS (Fall 2023)

Air Emissions

- Build technical foundation to address PFAS air emissions (Fall 2023)

Technical Research and Development

- Finalize and lab validate analytical methods for PFAS (Winter 2022)
- Continue to assess human health and environmental risks for PFAS
- Evaluate and develop technologies for reducing PFAS in the environment

Enforcement & Compliance

- Address Environmental Justice concerns in communities impacted by PFAS (Fall 2021)
- Use enforcement tools to address PFAS releases at facilities
- Establish a PFAS Voluntary Stewardship Program (Spring 2022)

Public Outreach

- Educate the public about the risks of PFAS
- Issue Annual Reports on progress to address PFAS (Winter 2022)

One broad area of concern is EPA's repeated reference to PFAS generally as a class as opposed to specific PFAS compounds (with a few exceptions). NASF and its industry partners continue to oppose the regulation of PFAS as a broad class, advocating that each individual PFAS compound should be assessed on its own merits and potential risks to the environment and human health.

In addition, EPA identified a schedule for developing the PFAS wastewater discharge limits for the metal finishing industry sector. EPA has targeted Summer 2024 for a proposed rule. While it is favorable news that the surface finishing industry will have additional time for the rulemaking, The Policy Group on behalf of NASF has initiated recent discussions with EPA officials on this new rulemaking and has begun gathering data to inform the process.

If you have any questions about the PFAS wastewater discharge rulemaking or the EPA PFAS Strategic Roadmap, contact Jeff Hannapel or Christian Richter with NASF at jhannapel@thepolicygroup.com or crichter@thepolicygroup.com.

OSHA Issues COVID-19 Vaccination, Testing, and Face Coverings Emergency Rule

The Biden Administration recently called on all employers to ensure that as many workers are vaccinated as quickly as possible. On November 5, 2021, the Department of Labor's Occupational Safety and Health Administration (OSHA) issued its emergency rule requiring employers with 100 or more employees to ensure each of their workers is fully vaccinated or tests for COVID-19 on at least a weekly basis.

The OSHA rule will also require that these employers provide paid-time for employees to get vaccinated, and ensure all unvaccinated workers wear a face mask in the workplace. The rule covers 84 million employees.

The new rule has eight core requirements that are summarized below.

1. Paid time off (PTO) for time getting vaccinated
2. Paid sick leave for time recovering from vaccination
3. Written vaccination, testing, and face covering policy
4. Soft vaccine mandate (i.e., proof of fully vaccinated status or a weekly negative test to report to work)
5. Face coverings for unvaccinated workers
6. Notice, medical removal and return-to-work for COVID cases
7. Provide info to employees re: ETS and related issues

8. Report all work-related COVID-19 hospitalizations or deaths regardless of time between exposure and outcome

Who Is Covered by the Rule?

Employers with 100 or more employees in most industries are covered by the rule. The employee count is determined on a company-wide basis, and includes part-time, seasonal, and all other employees hired directly by employer regardless of work location (e.g., home-based, outdoors, etc.). It does not, however, include temporary workers from a staffing agency assigned or independent contractors. In addition, each employer on multi-employer worksites would count only their own employees to determine emergency temporary standard (ETS) coverage.

The employee count is based on the number of employees as of effective date of ETS (i.e., November 5, 2021) or any date thereafter when the employee count increases to 100 (including seasonal hires). ***Once 100 employee threshold is met, the employer is covered for the life of the ETS.***

Who Is Not Covered by the Rule?

Although included in the employee-count to determine coverage, the substantive requirements of the ETS do NOT apply to:

- workplaces covered by OSHA’s COVID-19 ETS for healthcare (while it remains in effect until mid-December ‘21),
- workplaces covered by vaccine-mandates for federal contractors,
- employees who do not report to a workplace where other individuals are present (co-workers or public),
- employees who work from home, and
- employees who work outdoors.

Working Outdoors Exemption – to qualify for this exemption employee must work outdoors every day (i.e., employee who works indoors some days and outdoors others is not exempt). In addition, employee cannot share communal indoor workspaces as part of their work duties (e.g., employees who drive to work together in a company vehicle are not exempt).

The cumulative time spent indoors, such as using a multi-stall bathroom or admin office, must be “brief” (unfortunately “brief” is not defined in the rule). Buildings under construction may be considered outdoor space if substantial portions of the structure such as walls and ceiling elements are not in place.

Truck Drivers – Upon announcement of the rule, Labor Secretary Marty Walsh said in an interview on MSNBC that “[m]ost truckers are not covered by OSHA’s emergency standard.” The applicable exemption applies to work in solitary locations (e.g., a research station where only one person is present at a time), where the “employee is not exposed to any potentially infectious individuals at work.”

If the driver interacts indoors with others such as at dispatch or during loading/unloading, then such actions would likely trigger application of the ETS. Any time that a truck driver spends indoors must be brief for the exemption from the rule to apply.

Who Pays for Testing of Unvaccinated Employees?

The ETS explicitly states that it “does not require the employer to pay for any costs associated with testing.” Employers may have to pay for the weekly testing if required by other laws, regulations, or collective bargaining agreements.

In addition, the employer would most likely be responsible for testing costs under the Americans with Disabilities Act or Title VII, if testing is provided as an accommodation for medical reasons or sincerely held religious beliefs.

The ETS does not, however, prohibit employers from paying costs associated with testing if they choose.

Legal Challenge Resulted in Stay of the ETS

On November 6, 2021, just after the rule was issued, the U.S. Court of Appeals for the 5th Circuit issued a temporary restraining order (TRO) to stay implementation of the ETS. The court simply stated without further explanation that: “[b]ecause the petitions give cause to believe there are grave statutory & constitutional issues with the Mandate, [it] is hereby STAYED pending further action by this court.”

The court has expedited legal proceedings in this matter with DOL’s response to the stay and a permanent injunction due within days and the petitioners reply due the following day. Additional legal challenges to the rule have been filed in other Circuits (including the D.C. Circuit) by businesses, religious organizations, the Republican National Committee and several states. Further decisions by U.S. appellate courts are expected, with a possible petition to the U.S. Supreme Court.

The Bases for the Legal Challenges – Some of the arguments put forth to challenge the ETS are summarized below.

- OSHA overstepped its authority by issuing an ETS too late in the pandemic
- Stay is necessary because implementation of ETS will harm covered employers (e.g., labor shortages and resources to implement compliant policies)
- ETS authority limited to workplace hazards, but COVID is Society-wide Danger
- OSHA cannot now claim COVID is a grave danger for all larger employers in all industries when OSHA just concluded that only healthcare faced a grave danger
- COVID is not grave danger to all workers—varies by age/health, not by number of co-workers
- ETS not sufficiently “narrowly tailored” because mandate applies regardless of each employee’s personal risk and different working conditions
- ETS authority limited to new hazards from substances or agents determined to be physically harmful—cannot stretch to cover any communicable disease

Time Frame for Compliance

While the courts are sorting the legal challenges to the rule, OSHA has set a compliance deadline of December 5, 2021 for employers to implement the following:

- a written vaccination policy,
- begin providing PTO for employees getting vaccinated,
- begin providing sick leave for employees suffering the ill effects of vaccination,
- removal from workplace of employees with positive COVID-19 tests,
- requiring face coverings for unvaccinated employees, and
- confirming vaccination status of workforce.

In addition, employers are to begin testing unvaccinated workers by January 4, 2022 to verify a weekly negative test to allow them to report to work.

Given the broad application of the ETS, significant activities are expected to develop quickly over the next few weeks. NASF will continue to work with its industry coalitions and reach out to OSHA officials regarding updates and developments on the ETS. If you have any questions or would like additional information on the ETS, please contact Jeff Hannapel or Christian Richter with NASF at jhannapel@thepolicygroup.com or crichter@thepolicygroup.com.

Congress Passes Bipartisan Infrastructure Bill

On November 6, 2021 Congress passed a \$1.2 trillion bipartisan infrastructure bill. The 2,702-page bipartisan bill contains \$550 billion in new spending for traditional or physical infrastructure. President Biden was preparing to sign the bill this afternoon. The \$1.2 trillion figure comes from including additional funding normally allocated each year for highways and other infrastructure projects.

The new spending includes the following investments.

\$110 billion for roads and bridges. In addition to construction and repair, the funding also helps pay for transportation research at universities, funding for Puerto Rico's highways, and "congestion relief" in American cities.

\$66 billion for railroads. Funding includes upgrades and maintenance of America's passenger rail system and freight rail safety, but nothing for high-speed rail.

\$65 billion for the power grid. The bill would fund updates to power lines and cables, as well as provide money to prevent hacking of the power grid. Clean energy funding is also included.

\$65 billion for broadband. Includes funding to expand broadband in rural areas and in low-income communities. Approximately \$14 billion of the total would help reduce Internet bills for low-income citizens.

\$55 billion for water infrastructure. This funding includes \$15 billion for lead pipe replacement, \$10 billion for chemical cleanup, and money to provide clean drinking water in tribal communities.

\$47 billion for cybersecurity and climate change. The Resilience Fund will protect infrastructure from cybersecurity attacks and address flooding, wildfires, coastal erosion, and droughts along with other extreme weather events.

\$39 billion for public transit. Funding here provides for upgrades to public transit systems nationwide. The allocation also includes money to create new bus routes and help make public transit more accessible to seniors and disabled Americans.

\$25 billion for airports. This allocation provides funding for major upgrades and expansions at U.S. airports. Air traffic control towers and systems would receive \$5 billion of the total for upgrades.

\$21 billion for the environment. These monies would be used to clean up superfund and brownfield sites, abandoned mines, and old oil and gas wells.

\$17 billion for ports. Half of the funds in this category would go to the Army Corps of Engineers for port infrastructure. Additional funds would go to the Coast Guard, ferry terminals, and reduction of truck emissions at ports.

\$11 billion for safety. Appropriations here are to address highway, pedestrian, pipeline, and other safety areas with highway safety getting the bulk of the funding.

\$8 billion for western water infrastructure. Ongoing drought conditions in the western half of the country will be addressed through investments in water treatment, storage, and reuse facilities.

\$7.5 billion for electric vehicle charging stations. The Biden administration asked for this funding to build significantly more charging stations for electric vehicles across the nation.

\$7.5 billion for electric school buses. With an emphasis on bus fleet replacement in low-income, rural, and tribal communities, this funding is expected to allow those communities to convert to zero-emission buses.

What Was Not Included in the Bipartisan Infrastructure Bill

The so-called “social infrastructure” provisions were not included in this legislation. Congress is expected to take on these proposed provisions in a separate legislative package. Provided below is a summary of these provisions.

- \$400 billion for childcare and universal preschool
- Family and medical leave
- \$200 billion for Child Tax Credit and Earned Income Credit
- \$150 billion for home care
- \$150 billion for housing
- \$40 billion higher education and workforce development
- \$25 billion for the Small Business Committee
- \$90 billion for equity and other investments
- \$5 billion in supply chain investments
- \$10 billion to support child nutrition
- State and Local Tax (SALT) deduction relief
- Agreement to lower prescription drugs costs
- \$130 billion in ACA credits

- \$35 billion Medicare hearing coverage
- \$550+ billion for clean energy and climate
- Corporate alternative minimum tax
- \$100 billion for immigration
- Medicare dental and vision benefits
- Free community college
- Billionaires' income tax

The infrastructure bill and the projects to upgrade existing infrastructure and promote new initiatives and technologies could provide substantial opportunities for the surface finishing industry. It is important that the industry continues to make efforts to position itself for success in these areas. NASF will continue to be engaged in the infrastructure process and provide updates to members.

If you have any questions or would like more information about the infrastructure legislation or possible opportunities for the surface finishing industry, please contact Christian Richter at crichter@thepolicygroup.com or Jeff Hannapel with NASF at jhannapel@thepolicygroup.com.

Support the NASF 1000 Today!

The NASF 1000 program was established to ensure that the surface finishing industry would have resources to effectively address regulatory, legislative and legal actions impacting the industry, NASF members and their workplaces.

All funds from the NASF 1000 program are used exclusively to support specific projects and initiatives that fall outside the association's day-to-day public policy activities.

The commitment to this program is one of the most vital contributions made in support of surface finishing and directly shapes the future of the industry.

The sustained commitment from industry leaders has helped the NASF remain strong and credible in informing regulatory decisions across the nation.

Specific projects funded through the NASF 1000 make a measurable difference in how the industry navigates emerging challenges, communicates credibly with policy makers, and advocates for a strong science base for rules or standards that affect surface finishing.

Please consider supporting the NASF 1000 program.

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

To join NASF or find out more about membership, please contact Matt Martz at mmartz@nasf.org.