



NASF Public Policy Update December 29, 2021

As the year comes to a close, speculation abounds over whether the U.S. Supreme Court will block OSHA from enforcing its emergency COVID-19 workplace standard for large employers – the Court will hold a special hearing on January 7, 2022 as OSHA delays enforcement efforts until January 10, 2022. See the detailed update with an FAQ link further below.

Agencies: The Centers for Disease Control just updated its COVID-19 isolation and quarantine guidance that cuts from 10 to 5 days the recommended isolation period for asymptomatic individuals.

White House: President Biden signed bipartisan defense policy legislation authorizing \$770 billion for the Pentagon.

Congress: Democrats are assessing options for advancing pieces of their economic and social agenda when they return from the holidays after failing to win passage of the \$2.5 trillion package this year.

Action to Continue Next Year: This month's update wraps up a year of action from NASF. Just a few notable recent developments of many more anticipated in 2022:

- Congress took up legislation specifically targeting the surface finishing industry for the first time in recent memory with a focus on new discharge restrictions.
- The Biden administration's EPA launched a multi-year rulemaking to assess the impact of the finishing industry's wastewater discharges as well on human health and the environment, with an option to impose more stringent controls.
- California and other states have been increasingly active with proposed bans, product disclosure rules and other initiatives that will impact finishing.

The agenda in the coming year will be challenging and there will be much to accomplish. In January we'll have some early indicators on what's likely to unfold in the midterm election year.

December Issue Summary:

CDC Shortens Isolation and Quarantine Recommendations – The Centers for Disease Control (CDC) yesterday announced it was shortening its recommended isolation and quarantine periods for the general population.

OSHA’s COVID-19 Standard for Employers is Back On – In the latest decision in a flurry of litigation, the U.S. 6th Circuit Court of Appeals on December 17, 2021, reversed a nationwide stay that had prevented OSHA from implementing its COVID-19 Emergency Temporary Standard (ETS) for the workplace. OSHA has announced it will delay its enforcement efforts until January 10, 2022 as Supreme Court has scheduled an expedited review of the ETS for January 7, 2022.

President Biden Signed the \$770 billion Defense Policy Bill – The President signed into law the annual National Defense Authorization Act (NDAA) this week. The legislation, which authorizes funding the Pentagon’s activities for fiscal year 2022, recently passed the Senate on December 15 by a wide margin of 88-11, adding \$25 billion more than the White House originally requested.

EPA Prepares for Drinking Water Standard for PFAS – EPA released stringent health-based levels to serve as guidance for setting drinking water standard for PFOS and PFOA.

EPA Looks to Expand RCRA Corrective Action Authority to Address PFAS Contamination – EPA announces that it intends to list four PFAS as hazardous constituents under federal hazardous waste laws and expand its corrective action authority for cleanup of releases of PFAS and other emerging contaminants.

ProPublica Releases Map of Toxic “Hotspots” from Industrial Air Emissions – Areas identified by zip-code are described as “sacrifice zones” that threaten disadvantaged communities with industrial air emissions.

EPA Proposes to Formally Scrap Trump “Waters of the US” Rule – EPA signed a proposed rule to scrap the Trump-era WOTUS rule and replace it with pre-2015 regulations until it can develop a new revised WOTUS rule.

More details on these topics are below:

CDC Shortens Isolation and Quarantine Recommendations

The Centers for Disease Control (CDC) announced this week it was shortening its recommended isolation and quarantine periods for the general population. The CDC's statement ([CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population | CDC Online Newsroom | CDC](#)) lays out the new guidance, which recommends five days of isolating instead of 10 for people who have tested positive for Covid-19 but are asymptomatic. The CDC's actual Isolation Guidance webpage, however, was not yet updated at press time.

Among other highlights the CDC statement notes that “[b]oth updates [to the isolation and quarantine periods] come as the Omicron variant continues to spread throughout the U.S. and reflects the current science on when and for how long a person is maximally infectious.” The CDC statement, including summaries and graphics for easy reference, can be found here, [CDC Updates and Shortens Recommended Isolation and Quarantine Period for General Population | CDC Online Newsroom | CDC](#).

OSHA Vaccine Mandate Rule Back On, U.S. Supreme Court Schedules Expedited Hearing

OSHA's issuance on November 5, 2021 of its long-anticipated emergency temporary standard ([COVID-19 Vaccination and Testing ETS | Occupational Safety and Health Administration \(osha.gov\)](#)) for COVID-19 spawned a wave of litigation that has left many employers confused and frustrated.

Lower courts have since been split on the constitutionality of the standard which, as we summarized in last month's report, requires a vaccine-or-test requirement for employers with more than 100 employees. In response to a number of lawsuits, the 5th Circuit Court of Appeals issued a temporary stay of OSHA's enforcement, which was directly followed by the 6th Circuit Court of Appeals decision on December 17, 2021, that allowed the rule to go forward.

In response to petitioners' requests to reinforce the stay, the U.S. Supreme Court has now scheduled a special hearing for a group of federal vaccine mandate cases on January 7, 2022.

OSHA Enforcement Discretion until January 10, 2022

OSHA has clarified that it will use its enforcement discretion and not issue citations for violations regarding ETS testing requirements until Jan. 10, 2022, if employers are exercising "reasonable, good-faith efforts" to come into compliance with the standard.

More guidance will be made available in early January in light of the upcoming oral arguments before the Court and other likely announcements. In the meantime, NASF members with more

than 100 employees should consider any steps that might be taken to ensure compliance with OSHA's vaccine and testing mandates in the event the emergency standard survives in the coming weeks.

To assist members in understanding the basics and finer points of the standard, our colleagues at Conn Maciel Carey in Washington have shared an extensive list of Frequently Asked Questions for companies to consult: [CMC Vaccine and Testing Mandate QA Dec. 2021.01.pdf \(mcusercontent.com\)](#).

President Biden Signs Bipartisan \$770 Billion Defense Policy Bill

The President this week signed into law the annual National Defense Authorization Act (NDAA) this week. The legislation, which authorizes funding for the Pentagon's activities for fiscal year 2022, passed the Senate on December 15 by a wide margin of 88-11.

An earlier version passed the House by a vote of 316-113 in September. The bill authorizes \$25 billion more than the White House originally requested. A summary of the bill can be found here: [FY22 NDAA Agreement Summary.pdf \(senate.gov\)](#).

The show of bipartisan support may nudge congressional leaders toward a compromise package on federal spending bills, none of which have yet been agreed to – Congress instead has passed two short term bills to keep the government funded at last year's levels until its self-imposed deadline of February 18.

EPA Releases Draft Health-Based Levels for PFAS in Drinking Water

As part of its PFAS Strategic Roadmap, EPA committed to developing a proposed drinking water standard for PFOS and PFOA by Fall 2022 and a final standard by Fall 2023. As part of this process, EPA must first set a health-based maximum contaminant level goal (MCLG). The Safe Drinking Water Act (SDWA) requires EPA to consider cost and technical feasibility when setting maximum contaminant levels (MCLs) as the enforceable drinking water standard.

Draft Values Much Lower

EPA recently released draft risk values for PFOS and PFOA that are orders of magnitude lower than EPA calculated in 2016, raising potential new challenges for drinking water utilities. EPA is proposing a reference dose (RfD) (or greatest amount an adult can ingest daily over the course of a lifetime without health risks) of 1.5×10^{-9} milligrams/kilograms (mg/kg)-day for PFOA and an RfD of 7.9×10^{-9} mg/kg-day for PFOS.

This is significantly more stringent than the RfD values of 2×10^{-5} mg/kg-day for both chemicals that EPA used in setting its 2016 lifetime health advisories of 70 ppt for the chemicals. Using the same formula EPA used in developing the 2016 health advisories, and adjusting it to be protective of children, would result in a range of 6 to 7 parts per quadrillion (ppq), or 0.006 to 0.007 ppt, for PFOA and 30 to 37 ppq, or 0.030 to 0.037 ppt, for PFOS -- levels that are below most laboratories' detection limits.

Furthermore, if EPA finalizes its proposed health-based conclusion that PFOA is a likely carcinogen, then the MCLG would be zero. However, any final enforceable drinking water standard would most likely be some number above zero because economic and technical feasibility considerations for setting the MCLs. Many environmental organizations have advocated for an MCL of 1 ppt for all PFAS.

Non-enforceable Health Advisories Are De Facto Limits

In addition to any MCLG, EPA is also likely to issue revised non-enforceable health advisories before setting MCLs. Even though the health advisories are non-binding, for drinking water utilities they are in practice de facto MCLs due to public pressure.

With more stringent PFOA and PFOS health advisories, as well as an upcoming first-time health advisory for additional PFAS, utilities will be forced to make decisions about whether to take contaminated wells offline or to buy wholesale water from other suppliers. On November 16, 2021, EPA released a press release indicating that it had submitted the draft risk values for PFOS and PFOA to the Science Advisory Board (SAB).

Outlook for Action

While the agency has not set a target date for revised PFOA and PFOS advisories, EPA has indicated that it "will move as quickly as possible to issue updated health advisories for PFOA and PFOS that reflect" the new science and input from the agency's Science Advisory Board, which is scheduled to review the PFOS and PFOA documents in December 2021 and January 2022.

While EPA has a lot of work to do before it can issue a proposed drinking water standard for PFOS and PFOA next year, it appears that the MCLG and likely health advisories for PFOS and PFOA in drinking water could be very stringent (and possibly below detection limits).

NASF will continue to work with EPA officials and provide critical updates on this rulemaking to NASF members. If you have any questions or would like more information regarding the draft health-based levels that will be used to set drinking water standards for PFOS and PFOA,

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

EPA to List PFAS as RCRA Hazardous Constituents and Trigger Broader Corrective Action Authority

EPA in October responded to a petition submitted by the Governor of New Mexico by announcing that it would initiate two new rulemakings under the Resource Conservation and Recovery Act (RCRA) related to perfluoroalkyl and polyfluoroalkyl substances (PFAS). The Agency has not yet formally proposed either rule.

Rulemaking to Add Four PFAS Chemicals to the RCRA List of Hazardous Constituents

EPA announced it intends to add four PFAS chemicals: PFOA, PFOS, PFBS, and GenX to the list of RCRA “hazardous constituents” (40 C.F.R. Part 261, Appendix VIII). EPA has not indicated that it intends at this time to list the four chemicals as “hazardous wastes” that would be subject to the full range of regulatory controls under Subtitle C of RCRA.

Listing the chemicals as hazardous constituents would, however, trigger cleanup authority under the RCRA “corrective action” program. Under the RCRA corrective action program, permitted treatment, storage or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility. Accordingly, listing the PFAS chemicals as hazardous constituents would allow the use of the RCRA corrective action program to cleanup releases of PFAS.

Rulemaking to Broaden RCRA Corrective Action Authority

In its October 26, 2021 response to the Governor of New Mexico, EPA also announced that it would initiate a rulemaking to “clarify” that the corrective action program provides authority to require investigation and cleanup for wastes that meet the RCRA statutory definition of hazardous waste, rather than just wastes that meet the narrower regulatory definition that establishes the scope of EPA’s hazardous waste management standards under RCRA Subtitle C. This would apparently amend the rules to apply the broader statutory definition for purposes of corrective action.

If such a change were adopted, EPA could potentially require permitted facilities to undertake corrective action not only for releases of wastes that are listed as hazardous wastes or characteristically hazardous (as well as for releases of listed hazardous constituents, as discussed above), but also for releases of wastes covered by the broad statutory definition of hazardous

waste. Accordingly, EPA could potentially address releases of all PFAS chemicals (not just the four listed as hazardous constituents) as well as other emerging contaminants of concern without going through the process of listing them as hazardous constituents and without expanding the hazardous waste listings or characteristics. This potential rulemaking to broaden RCRA corrective action authority to cover PFAS and other emerging contaminants could have significant impacts for facilities where these chemicals were used.

Regulatory agencies could have an additional enforcement tool to require the cleanup of PFAS that have been released to the environment. NASF will continue to monitor this rulemaking effort and provide updates to NASF members. If you have any questions or would like additional information on this issue, please contact Jeff Hannapel with NASF at jhannapel@thepolicygroup.com.

New Map Released of Toxic Hotspots from Industrial Air Emissions

Investigative journalist group ProPublica has released an analysis indicating where toxic air pollution is emitted from industrial sources and could be elevating cancer risk in their communities. The report and detailed map are available on the ProPublica website at: <https://projects.propublica.org/toxmap/>.

ProPublica's analysis of five years of modeled EPA data identified more than 1,000 toxic hot spots across the country and found that an estimated 250,000 people living in them may be exposed to levels of excess cancer risk that the EPA deems unacceptable. The EPA's threshold for an acceptable level of cancer risk is 1 in 10,000, meaning that of 10,000 people living in an area, there would likely be one additional case of cancer over a lifetime of exposure.

EPA has also said that the added level of cancer risk from air pollution should be far lower, 1 in a million. The ProPublica map highlights areas where the additional cancer risk is greater than 1 in 100,000 — 10 times lower than the EPA's threshold. The group argues that the EPA has never released this data in a way that allows the public to understand the risks of breathing the air where they live.

Using the reports submitted between 2014 and 2018, ProPublica calculated the estimated excess cancer risk from industrial sources across the entire country. Individual manufacturing facilities can be identified through a search of zip codes. In many cases the risks identified by this report may be significantly overestimated.

The group also asserts that the EPA allows polluters to turn neighborhoods into "sacrifice zones" where residents breathe carcinogens. The report claims that census tracts with majority non-

white populations experience about 40 percent more cancer-causing industrial air pollution on average than tracts where the residents are mostly white.

Environmental advocacy groups and community organizations are using this tool to identify areas of potential concern with an emphasis on environmental justice. It may be advisable to review this report and map to ensure that the information provided for your area is accurate.

If you have any questions or would like additional information on the report and map of toxic hotspots, please contact Jeff Hannapel or Christian Richter with NASF at jhannapel@thepolicygroup.com or crichter@thepolicygroup.com.

EPA Scraps Trump “Waters of the US” Rule and Intends to Propose Refined Definition

On November 18, 2021 EPA and the Army Corps of Engineers, signed a proposed rule that would scrap the Trump-era Navigable Waters Protection Rule (NWPR), and replace it with more restrictive pre-2015 rules.

The Trump Administration repealed the 2015 Waters of the United States (WOTUS) rule in 2019, and in June 2020, replaced it with the new NWPR that narrowed the definition of WOTUS that were subject to federal authority under the Clean Water Act. The NWPR was the subject of substantial legal challenges and recent federal court rulings vacated the Trump-era rule.

This recent action to scrap the NMPR is the next step to solidify the rules of the road for a stable implementation of WOTUS while the agencies continue to consult with stakeholders to refine the definition of WOTUS in both implementation and future regulatory actions.

Outreach to Achieve a Durable Definition

EPA chief Michael Regan noted that “whiplash” from shifting definitions of WOTUS has created uncertainty and that EPA is continuing outreach to find a definition that protects public health and the environment, including downstream communities, while supporting agriculture and other industries reliant on clean water.

Earlier this year Regan 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 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.

EPA's action decision drew a partisan response, with Republicans warning the rule would frustrate infrastructure and Democrats stating that the proposal paves the way to develop a definition that provides certainty and better protects our nation's precious waters and wetlands, while also supporting economic opportunity and industries that depend on clean water.

It is not clear yet when EPA will release a new definition for what constitutes a "water of the U.S.," and which wetlands and streams will be protected under the rule. It is likely that the new WOTUS rule will more closely resemble the 2015 Obama WOTUS rule compared to the 2020 Trump WOTUS rule.

More information on WOTUS and recent regulatory action is available on the EPA website at www.epa.gov/wotus. If you have any questions or would like additional information about the WOTUS rule development process, please contact Jeff Hannapel 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 or membership matters, please contact Christian Richter at crichter@thepolicygroup.com or Jeff Hannapel at jhannapel@thepolicygroup.com.