



## **NASF Government Relations Quarterly Report February 2020**

NASF has prepared this report on recent regulatory, legislative and policy developments to keep NASF members informed on critical issues impacting the surface finishing industry. Provided below is a summary of some of the critical issues facing the surface finishing industry and what efforts NASF is taking to address these issues. If you have any questions or would like additional information, please contact Christian Richter or Jeff Hannapel with NASF at [crichter@thepolicygroup.com](mailto:crichter@thepolicygroup.com) or [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com).

### **FEDERAL REGULATORY DEVELOPMENTS**

#### ***CSB Accidental Release Reporting Rule***

On February 5, 2020 the U.S. Chemical Safety Board (CSB) issued a final rule on accidental release reporting requirements. A prepublication version of the rule is available at <https://www.csb.gov/assets/1/6/prepublicationcopy2-3-20.pdf>. Although the CSB has been in existence more than 20 years, it has not had a rule outlining accidental release reporting requirements. On February 4, 2019, a federal court ordered CSB to promulgate a final rule by February 5, 2020. The CSB issued a proposed rule on December 12, 2019, with a public comment deadline of January 13, 2020.

According to the CSB, the types of companies expected to be impacted the most by this rule (based on past accidental release reports) include: petroleum refineries, oil and gas operation support, crude petroleum and natural gas extraction and other chemical and allied products. Surface finishing facilities could be impacted if fatalities, serious injuries, or a spill or fire trigger reporting requirements.

Under the proposed rule, the owner or operator of a facility must submit accidental release reports to the CSB within four hours if the release results in a fatality, serious injury or substantial property damages (defined as one million dollars). The facilities must provide CSB with contact information, time of the incident and location, description of the incident and its ramifications, the materials involved, the number of fatalities and/or serious injuries, estimated property damage, whether an evacuation order impacting the public was given, and details if such an evacuation occurred.

NASF and other industry trade groups have expressed some concerns about the proposed rule, including rulemaking procedural irregularities, the unreasonable requirement to submit reports within four hours of a release, unnecessary and duplicative reporting requirements (such as existing requirements to report releases to National Response Center (NRC) and fatalities to OSHA), overly broad definitions of

serious injury and substantial property damage, and potential data security risks (accidental release reports will be publicly available under the Freedom of Information Act). The agency has also indicated that it will refrain from enforcing violations of the reporting provision for one year from the effective date of the rule, unless there is a “a knowing failure to report.” Those who knowingly violate may be subject to administrative penalties as well as civic and/or criminal action.

#### *Changes in Final Rule from the Proposed Rule*

Provided below is a summary of the changes in the final rule from the proposed rule, based primarily on industry comments.

*Definition of “Serious Injury”* -- The CSB amended its proposed definition of “serious injury” in a way that significantly reduces the scope of reportable events. The proposed rule covered more injuries than required for the OSHA 300 log, but the final rule more closely tracks OSHA’s reporting requirements that include only fatalities and in-patient hospitalizations.

*Reporting Deadline* -- The final rule also doubled the reporting deadline from four hours to eight hours, consistent with our comments that the reporting deadline should at least parallel the amount of time allowed under OSHA’s reporting rule for fatalities. The CSB also revised the time frame for owners/operators to report NRC identification numbers to CSB after already reporting to NRC, from “immediately” to “within 30 minutes.”

*Reporting by Multiple Owners/Operators* -- The CSB added a new subsection stating that multiple owner/operators may agree in advance or at the time of release to a single, consolidated report, but that any such report should include information regarding all relevant owners/operators.

*Revised or Updated Reports* -- The CSB added a provision that allows owners/operators to submit revised or updated reports to the CSB within 90 days, if the submitter can reasonably explain why the revision or update could not have been made within 30 days.

#### *Provisions in the Proposed Rule that Were Finalized*

Unfortunately, the CSB did not make changes in other areas, due in part to the tight court-ordered deadline to issue a final rule. Provided below is a summary of the provisions of the proposed rule that stayed the same, and CSB’s rationale for keeping them.

*Duplicative Reporting to NRC* -- The CSB did not change the requirement that, if an NRC report is made, the owner/operator must report the NRC identification number to the CSB. The CSB indicated that it considered comments to avoid duplication of existing reporting requirements, but rejected them because incidents within its jurisdiction were broader than the existing reporting requirements.

*Definition of “Ambient Air”*-- The CSB defined “ambient air” to include air inside of buildings, despite EPA’s definition of “ambient air” in its national ambient air quality standards (NAAQS) and associated case law to air external of buildings. CSB indicated that its enabling legislation includes the safety interests of both the general public *and* workers.

*Definition of “Extremely Hazardous Substances”* -- The CSB decided to retain its definition of “extremely hazardous substances.” A key function of the CSB is to make recommendations to the EPA about improving the rules designed to prevent chemical accidents. Such recommendations would include CSB suggestions to EPA to list new substances. The CSB was established specifically to look past established statutory criteria and known hazards. The hazard investigation function of the CSB includes identifying new, previously unknown hazards, even those caused by substances not yet discovered or in widespread use.

*Definition of “Property Damage”* -- The CSB kept its definition of “property damage,” including its application to the loss of use of equipment. The CSB also retained the one million dollar threshold for “substantial property damage.”

*Definition of “Stationary Source”* -- The CSB did not change its definition of “stationary source,” despite comments suggesting that it should be limited to stationary sources that are regularly staffed. CSB explained that with the increase in the reporting time to eight hours, the owner/operator should have ample time to learn about such a release even in a remote part of the source.

*Content of Reports* -- The final rule does not change any part of the required content of reports because, the CSB said that the content requirements are minimal and much of the information need not be reported if unknown.

*Public Availability of Records* -- The CSB did not make any changes to the public availability of records provision, which allows reports to be made available through FOIA. The CSB responded that the rule is a reporting rule, not a disclosure rule.

#### *Future Guidance*

In response to the many compliance concerns raised by commenters, the CSB indicated in the final rule that it would consider issuing guidance on a variety of topics, including:

- whether an explosion is a *per se* accidental release;
- whether serious injuries that result from an intentional release (e.g., an approved and controlled discharge) are reportable; and
- clarification of the definition of “extremely hazardous substances.”

The rule takes effect 30 days after publication in the Federal Register. For one year following the effective date of the rule, the CSB will refrain from referring violations for enforcement, unless there is a knowing failure to report, to allow adequate time for compliance education and to address any other compliance issues raised in the comments.

It remains to be seen if any stakeholders will file a legal challenge to the rule. The short time frame from proposed rule to final rule (less than two months) could pose some challengeable procedural issues.

### ***Final Rule Issued on Waters of the U.S.***

On June 26, 2015 EPA and the U.S. Army Corps of Engineers (Corps) published a final rule to expand Clean Water Act (CWA) definition of “waters of the United States.” This rule prompted the filing of numerous legal challenges to the final rule in federal courts. A district court in North Dakota invalidated the rule in 13 states, and subsequently, the U.S. Court of Appeals for the 6th Circuit issued a nationwide stay of the rule until the case could be reviewed more fully. Ultimately, the U.S. Supreme Court ruled that district courts had proper subject matter jurisdiction with authority to issue a stay of the rule, thereby invalidating the 6th Circuit’s nationwide stay of the rule. Accordingly, the new rule was then effective, except in the 13 states subject to the stay issued by the North Dakota district court.

President Trump signed, Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” (WOTUS) Rule on February 28, 2017 directing EPA and the Corps to review the rule and issue a notice and comment for a proposed rule rescinding or revising the rule. On July 27, 2017 EPA and the Corps published a proposed rule to rescind the 2015 final rule and to re-codify the definition of waters of the U.S. that existed prior to the 2015 rule. On February 1, 2018 EPA extended the effective date of the WOTUS rule by two years to allow time for the proposed rule to rescind and re-codify the rule to be finalized.

In February 2019, EPA and the Corps proposed a rule that clarifies the federal authority under the CWA with a more clear, understandable and implementable definition of WOTUS. This proposal was intended to provide some additional clarifications of the regulations that existing prior to the 2015 WOTUS rule.

After the February 2019 proposal, EPA repealed the 2015 WOTUS rule and restored the regulatory text that existed prior to the 2015 rule. This action, effective December 23, 2019, narrowed the definition of WOTUS consistent with the CWA and U.S. Supreme Court decisions and alleviated the regulatory confusion that had arisen with the implementation and legal challenges of the WOTUS rule.

On January 23, 2020 EPA and the Corps issued a final regulation to define federal jurisdiction over waters of the U.S. under the CWA. The new Navigable Waters Protection Rule replaces the Obama administration’s controversial 2015 WOTUS rule, which expanded federal jurisdiction to nearly all waterways and many areas that only temporarily hold water.

The new rule identifies four categories of waters that are federally regulated under the CWA:

- the territorial seas and traditional navigable waters,
- perennial and intermittent tributaries,
- certain lakes, ponds and impoundments, and
- wetlands adjacent to jurisdictional waters.

It also details waters not subject to federal control that include: features that only contain water in direct response to rainfall; groundwater; many ditches including farm and roadside ditches; prior converted cropland; farm and stock watering ponds; and waste treatment systems. Specifically, the new rule will erase protections for so-called ephemeral streams, which flow only after rain or during

snowmelt. The rule maintains protections for both streams that flow year-round and those that flow only intermittently in a "typical year."

The rule also erases protections for wetlands that do not have surface water connections to intermittent or perennial streams, which account for more than 51 percent of the nation's wetlands. Wetlands serve as the nation's kidneys, filtering pollution, buffering stormwater and absorbing floodwaters, as well as acting as habitat for wildlife.

The new rule will most assuredly be the subject of numerous legal challenges from environmental groups and some states. Many industry and agricultural groups have expressed their support for the new rule. A Democrat presidential victory in 2020 could also lead to repeal of this rule and replacement by a rule with more restrictions.

### ***NASF Pollution Prevention Project with EPA Region 5***

NASF teamed with the National Center for Manufacturing Sciences (NCMS) under an EPA Grant to develop Pollution Prevention (P2) projects that provide technical assistance and training to surface finishing facilities that promote source reduction strategies. The goal of the project was to promote widespread implementation of P2 technologies and approaches for the surface finishing industry with a focus on innovative P2 methods, through the development of case studies and tools for implementing successful P2 projects.

The results of the P2 practices project with EPA Region 5 are posted on the STERC website, including a Rinsing Manual and Drip Calculator for drag out. A copy of the full P2 report is available on the STERC site at: [http://www.sterc.org/epa\\_p2\\_project.php#dev](http://www.sterc.org/epa_p2_project.php#dev).

The rinsing manual provides guidance on how plating shops could improve their rinsing techniques. That manual is available on the STERC website at: <http://www.sterc.org/subs/rinseman.php>. A drip calculator tool was also developed to demonstrate how facilities can save as much as \$30,000 annually by increasing drag out time to allow more solution to remain in the bath as opposed to rinse tanks. The drip calculator is available on the STERC site at: <http://www.sterc.org/subs/rinsemanD.php>.

If you have not already reviewed these materials, we encourage you to evaluate this tool and try implementing some of the P2 practices to improve environmental performance and decrease operating costs.

## **PFAS ISSUES**

### ***PFAS Legislation***

On December 20, 2019 the President signed the National Defense Authorization Act. This legislation only included limited PFAS provisions for EPA, including the following.

- Toxics Release Inventory (TRI) reporting -- starting January 1, 2020, approximately 160 PFAS that are listed as an “active chemical substance” or are subject to TSCA significant new use rules (SNURs) are added to the TRI reporting requirements. The reporting threshold for these PFAS is 100 pounds, and that threshold can be reevaluated in five years. Also, any PFAS with a final EPA toxicity value shall be added to the TRI reporting on January of the year following finalization of the toxicity value, and there are additional PFAS that are to be evaluated for inclusion for TRI reporting in two years. With a reporting threshold of 100 pounds, this may not impact the surface finishing industry significantly, because most facilities use only grams of the substances on an annual basis.
- EPA has to finalize the significant new use rule on import of long-chain PFCAs and PFSAs from 2015.
- Starting in Jan 2023, all manufacturing companies have to submit to the EPA information on PFAS in their products.
- EPA shall issue guidance for destruction of PFAS in legacy AFFF, bio solids, soil, textiles, spent filters, resins, GAC and other membranes, landfill leachate, and waste streams.
- EPA shall provide guidance on testing and monitoring of PFAS in air, effluent and soil at disposal sites.
- Fifteen million dollars per year funding ORD for research: shall further research human health effects, develop a process for prioritizing which PFAS are subject to additional research, develop new analytical methods, research remediation technologies, develop communication tools and materials for the public.

The U.S. House of Representatives recently passed a bill, H.R. 535, that included the following more expansive PFAS provisions:

- EPA to designate all, or any, PFAS as hazardous substances under CERCLA,
- EPA to promulgate National Primary Drinking Water Standards,
- EPA to evaluate the need for PFAS effluent limitations and pretreatment standards,
- EPA to add PFAS on the Federal Water Pollution Control Act list of toxic pollutants,
- prohibition on the use of PFAS substances for land-based applications of firefighting foam, and

- additional funding for CDC ATSDR for additional PFAS health studies.

Senate Republican leadership has indicated that it is unlikely that the bill will be considered in the Senate, and even if it did it would not pass. In the unlikely event the bill passed the Senate, the White House indicated that it would veto any such expansive PFAS legislation. The 2020 elections could impact the nature and scope of future PFAS legislative proposals.

### ***PFAS Regulatory Initiatives***

EPA continues to address several PFAS efforts (e.g., listing of PFOS and PFOA as hazardous substances under CERCLA and determination on the need for a drinking water standard for PFOS and PFOA). EPA officials are also evaluating the need to include PFAS in effluent limitation guidelines (ELGs). EPA officials have indicated that they are in the preliminary investigative stage on the ELG issues, and NASF is having discussions with EPA staff regarding the ELG process for PFAS. EPA has developed groundwater contamination guidance for PFAS, and also continues to develop new toxicity profiles for PFAS compounds.

Critics have complained that EPA is moving too slowly to address PFAS, but the administrative process for notice and comment rulemakings takes time in order to ensure that the rules are developed appropriately in a manner to withstand legal challenges.

### ***TRI ANPRM***

On December 4, 2019, the U.S. Environmental Protection Agency (EPA) published an advance notice of proposed rulemaking (ANPRM) soliciting information as EPA considers a future rulemaking to add certain PFAS to the list of toxic chemicals subject to reporting under TRI. This action complements the TRI provisions in the NDAA discussed above. EPA could decide to revise reporting thresholds for PFAS or list additional PFAS for TRI reporting. Comments on the ANPRM were due February 3, 2020. A copy of the ANPRM is available at: <https://www.federalregister.gov/documents/2019/12/04/2019-26034/addition-of-certain-per--and-polyfluoroalkyl-substances-community-right-to-know-toxic-chemical>.

### ***EPA Region 5/ORD/MI EGLE PFAS Test Results***

EPA Region 5, EPA Office of Research and Development (ORD) and the Michigan Department of Environment, Great Lakes and Energy (EGLE) conducted PFAS testing of fume suppressants currently in use and effluent discharge at approximately 12 plating shops in Michigan. The goal of this project was to determine if any PFOS is present in the fume suppressant currently in use and which PFAS, if any, may be in the effluent discharges of finishing shops. NASF is awaiting the final results from this testing, which are expected soon.

### ***PFAS Groundwater Guidance***

EPA released guidance for PFAS in groundwater suggesting a screening level of 40 parts per trillion (ppt) and cleanup level of 70 ppt at federal facilities. These cleanup levels could be used at other sites with

PFAS contamination. A copy of EPA's release is provided at: <https://www.epa.gov/newsreleases/epa-releases-pfas-groundwater-guidance-federal-cleanup-programs-fulfilling-pfas-action>.

### ***PFAS New Test Methods***

EPA announced a new validated method for testing PFAS in drinking water. This new validated test method complements other actions the agency is taking under the PFAS Action Plan to help communities address PFAS nationwide. EPA's new Method 533 focuses on "short chain" PFAS, *i.e.*, those PFAS with carbon chain lengths of four to six carbons. Method 533 complements EPA Method 537.1 and can be used to test for 11 additional PFAS. Method 533 also incorporates an analytical technique called isotope dilution, which can minimize sample matrix interference and improve data quality. More information is available on the EPA website at: [www.epa.gov/pfas](http://www.epa.gov/pfas).

### **STATE DEVELOPMENTS**

#### ***"Green Ooze" in Michigan***

The Electro-Plating Services facility in Madison Heights, Michigan has posed a potential environmental concern for several years. It has been described by federal and state regulators as an industrial hoarding situation. Citing contamination and improper storage and management of hazardous chemicals, federal and state officials closed the shop in 2016 and conducted removal actions with costs of approximately two million dollars. The owner of the facility has been sent to federal prison and ordered to pay 1.5 million dollars in cleanup costs. Since the initial removal actions, EPA and the state have indicated that additional remediation actions were not taken at the site because the site did not present one of the highest priorities of risk to human health and the environment.

In December 2019, "green ooze" was identified leaking through concrete barriers on an interstate freeway near the facility. The "green ooze" was traced back to the Madison Heights facility, and it contained levels of hexavalent chromium and other hazardous constituents. Federal and state officials have detected levels of hexavalent chromium, other metals, cyanide and PFAS in groundwater and soils near the facility, but no levels above drinking water standards at this time. EPA and the state are now conducting an investigation, additional testing, and a risk assessment to determine if the site should be listed as a Superfund site, and if additional remediation actions are needed.

This company is not an NASF member and is clearly not representative of how surface finishing facilities operate. Nonetheless, the press coverage associated with the awful conditions at the site and the potential environmental hazards that they pose will most likely result in greater environmental compliance scrutiny and regulatory oversight for surface finishing operations nationwide, and particularly in Michigan.



### ***Michigan Lawsuits against PFAS Manufacturers***

The State of Michigan has filed a lawsuit against 17 manufacturers and large distributors of PFOS and PFOA for potential contamination in the state. This effort is a result of the private law firms who are working on a contingency basis for the state in pursuing this legal action. This is the first phase of the anticipated lawsuits regarding PFAS in Michigan. Law firms are also approaching municipalities to file lawsuits on a contingency basis to recover costs associated with addressing PFAS in those municipalities.

### ***California Water Board Order to Sample for PFAS***

In late October, the California Water board issues orders to approximately 270 plating shops in California requiring them to submit work plans to sample for PFAS in effluent discharge, stormwater, soil and groundwater, or provide evidence why they should not have to sample. NASF has been assisting the California Chapters to successfully negotiate an extension until January 24<sup>th</sup> for the Questionnaire and March 30<sup>th</sup> for the Work Plan for 67 NASF members. Based on the state's estimates, the costs of sampling could range from \$20,000 to \$130,000.

NASF has engaged Dr. Janet Anderson to develop a template for a facility-specific Work Plan and Sampling and Analysis Plan (SAP) to provide a consistent approach for NASF members and to reduce the costs of sampling for individual members by limiting the amount of sampling needed. At a meeting in Sacramento in early January, California officials responded favorable to the NASF approach. The state will be working with the regional water boards to accept this approach. NASF plans to unveil this approach to NASF members in California with a webinar and step-by-step instructions for developing facility specific Work Plans.

Funds from the NASF 1000 are being used to support Dr. Anderson and her team to develop the Work Plan and SAP. This Work Plan and SAP appear to be a good investment, because it is estimated to save the California NASF members approximately \$600,000.

## **NASF PROGRAMS AND EVENTS**

### ***NASF 1000***

The *NASF 1000* was established to ensure that the industry would have funds to mount significant challenges to – or defend against – regulatory, legislative or activist group actions that may threaten the industry. The NASF 1000 funds are used to provide support for many of the issues described above. For those who are participating in this program, NASF greatly appreciates your leadership and continued support of our efforts to sustain the surface finishing industry. If you have not yet joined the NASF 1000 program, we urge to consider supporting this critical program. In addition, please help by encouraging your colleagues and fellow leaders in the industry to join you and contribute to the NASF 1000. More information on the NASF 1000 is available on the NASF website at <https://nasf.org/aboutnasf/supporters/> or contact Jeff Hannapel at [jhannapel@thepolicygroup.com](mailto:jhannapel@thepolicygroup.com).

### ***Washington Forum***

Plan to attend the 2020 NASF Washington Forum to be held April 20-22, 2020, at the Ritz Carlton in Pentagon City, VA. The Forum includes presentations and briefings from national and global experts on critical policy, technical, regulatory, and management issues impacting the surface finishing industry. In addition participants will also have an opportunity to meet with their own congressional representatives and their staffs to educate them about the surface finishing industry, the challenges facing their businesses, and how critical issues are impacting their businesses. More information on the Washington Forum is available on the NASF website at <https://nasf.org/events/washington-forum/>.

### ***SUR/FIN***

The industry's premier conference and trade show for the surface finishing industry will be held June 15-17 in Atlanta, GA. We encourage you to attend this valuable event. More information on SUR/FIN is available on the NASF website at <http://www.nasfsurfin.com/>.