How litigation is shaping implementation of TSCA reform

Lawsuits currently pending before US federal courts are likely to mould how the US EPA implements the 2016 Lautenberg amendments to TSCA for years to come, says partner at law firm Wiley, Erik Baptist

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As with many other environmental statutes, the US federal courts may ultimately shape how the US EPA implements the 2016 Lautenberg amendments to TSCA.

Regardless of which political party is in charge of the executive branch of the federal government, there is, inevitably, always litigation over significant policy interpretations and applications of environmental laws. In those situations, the courts represent the final arbiter of these disputes – whether the EPA acted contrary to law or arbitrarily and capriciously when taking a particular action.

For TSCA, this situation is no different. Since the 2016 amendments, there have been over 20 lawsuits filed against the EPA over its implementation. Only one decision has resulted in a precedent-setting interpretation, and that ruling was limited in scope. Therefore, the lawsuits currently pending before the courts are likely to shape the way the agency implements the amendments for decades to come.

Past litigation on the EPA's framework rules

Complying with the express directives in the 2016 TSCA amendments, the EPA issued 'framework rules' to codify the procedures that it would follow when prioritising and evaluating existing chemicals under section 6 of TSCA.

These rules were quickly challenged and consolidated in the US Court of Appeals for the Ninth Circuit, headquartered in San Francisco, California. The court issued its decision in November 2019.

The petitioners in this litigation – representing a variety of interest groups – raised three issues with the EPA's framework rules, primarily challenging the rule relating to how the agency would conduct its risk evaluations of existing chemicals. As discussed below, the Ninth Circuit reached the merits of the TSCA interpretation questions on only the third and final argument – leaving resolution of the other issues for another day.

First, the petitioners argued that the EPA's risk evaluation framework rule impermissibly asserted that the agency had authority to determine whether individual 'conditions of use', in isolation, present unreasonable risks, instead of evaluating the risks of the chemical collectively. The Ninth Circuit held that the petitioners' arguments were too speculative and therefore not 'justiciable" in this litigation. Because the rule did not definitively state the agency's intention, the court said that "it is very uncertain whether EPA plans to do what [p]etitioners fear." Ultimately, EPA followed this bifurcated approach, which is now at issue in pending litigation (discussed later in this article).

Second, the petitioners challenged the EPA's purported intent to exclude certain conditions of use from the

scope of a risk evaluation. The Ninth Circuit ruled against them because it found that the preamble to the rule was "not the sort of language that indicates an agency has intended to bind itself – in fact, it appears to be just the opposite." The court also disagreed with the petitioners' interpretation because "the meaning they attribute to these provisions is inconsistent with the provisions themselves." Their arguments therefore failed to persuade the court. Again, leaving this issue to subsequent litigation on risk evaluations where the EPA actually excluded certain conditions of use.

Third, the petitioners argued that the agency could not categorically exclude 'legacy activities' from the definition of conditions of use. These include legacy uses (which the EPA defined as "the circumstances associated with activities that do not reflect ongoing or prospective manufacturing, processing or distribution"), 'associated disposals' (which refer to future disposals from legacy uses) and 'legacy disposals' (which the EPA defined as "disposals that have already occurred", regardless of whether the substance disposed of is still manufactured for its pre-disposal use). The Ninth Circuit held that "EPA's exclusion of legacy uses and associated disposals contradict[ed] TSCA's plain language, but that EPA's exclusion of legacy disposals [did] not."

In response to this decision, the agency announced that it would conduct a supplemental risk evaluation for asbestos to address its legacy uses and associated disposals. It has not yet announced a schedule for this. Under the prior administration, the EPA stated that it would follow the same process as it would for any risk evaluation, indicating that it would release scope document and risk evaluation drafts prior to making any final determination on whether these legacy activities present unreasonable risks.

Future court decisions impacting the EPA's risk evaluations

Because the Ninth Circuit's 2019 decision did not decide the question of TSCA interpretation for two of the three issues in the litigation challenging the EPA's framework rules, these are now pending again before the Ninth Circuit in litigation challenging the agency's determination that certain conditions of use for methylene chloride (dichloromethane, DCM) – one of the first ten risk evaluations conducted by the EPA – do not present an unreasonable risk. The outcome of this is likely to impact the scope and quality of the EPA's risk evaluations for the foreseeable future.

Following up on their previous Ninth Circuit litigation, some interest groups have maintained that the EPA cannot proceed with a bifurcated approach to evaluating chemicals under TSCA section 6. But that argument may undermine their practical aims. If these groups want quick action by the EPA to regulate the conditions of use found to present an unreasonable risk, then they should support a bifurcated approach – especially as the agency has announced that it will perform 'surgical' revisions to the recently finalised risk evaluations. In other words, if these interest groups prevail in court, the EPA's reopening of the completed risk evaluations would prevent it from issuing regulations to restrict the uses that presented unreasonable risks until it completes its revisions.

Interestingly, by announcing that the EPA will perform surgical revisions to the completed risk evaluations, while also publicly stating that the agency will also move as quickly as possible to issue risk management rules for the unreasonable risks, it appears that the new administration is doubling down on the bifurcated approach of its predecessor.

In its risk evaluation for methylene chloride and other chemical substances, the agency decided to exclude certain conditions of use that were already assessed and managed under other environmental statutes. The EPA wanted to focus on the pathways that posed the greatest areas of potential concern. Given its limited resources, it had to decide how to fulfil the promise and mandates of the 2016 TSCA amendments. If the agency included all conditions of use in its risk evaluations, then it would have needed to rely more heavily on conservative assumptions when modelling each one – probably without incorporating data and information from the affected industries that actually manufacture, process and use these chemicals. The EPA would simply have had neither the time nor the resources, to conduct a scientifically robust and defensible assessment for each of these conditions of use. By focusing on the greatest areas of potential concern, the agency sought to use its limited resources in an efficient manner.

Seeing the delays in issuing the final risk evaluations for the first ten chemicals – far exceeding the statutory timeframe required by Congress – the EPA clearly needed to focus its efforts. And judging by the stakeholder reaction to them, it appears that the EPA will need to refine them to address their significant flaws.

With the first ten complete, except for the surgical revisions and the supplemental asbestos risk evaluation, the EPA has started its next round of risk evaluations.

Congress mandated that the agency double its workload and evaluate at least twenty chemicals. If the Ninth Circuit requires the EPA to evaluate all conditions of use – even pathways that are already sufficiently regulated under the Clean Air Act, for example – then the workload burden on agency staff may become insurmountable, leading to risk evaluations that cannot be defended in court due to their inability to dig deep into the data and rely on the best available information.

Conclusion

With the new administration and the pending lawsuits on important questions of interpretation, the EPA and its implementation of the 2016 TSCA amendments are at a pivotal moment. Will the agency be required to potentially triple its workload and evaluate all pathways of a chemical substance, thereby leading to more superficial risk evaluations? If the EPA issues evaluations that are neither robust nor defensible, will additional litigation over them create an existing chemicals backlog of reviews – similar to what we have seen in the new chemicals programme? And at what point does Congress need to reevaluate the mandates that it has imposed on the EPA and create a more workable regime that contains realistic timelines and clear direction to the agency? All of these questions will be answered in time. But I suspect that many may not welcome the answers.

The views expressed in this article are those of the expert author and are not necessarily shared by Chemical Watch.