



TSCA Litigation Update

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The information provided in this presentation is drawn entirely from public information. The views expressed in this presentation are the authors' alone and not those of the authors' clients.

Herb Estreicher, Ph.D.

- ◆ Herb Estreicher is a prominent environmental lawyer who holds a Ph.D. in Chemistry from Harvard University in addition to his U.S. law degree. Herb is an expert on the TSCA and is frequently quoted in Inside EPA, Chemical Watch, and BNA Environmental Law Reporter. He has successfully argued many cases before the European Chemicals Agency Board of Appeal and has briefed cases before the EU General Court and the European Court of Justice.
- ◆ Herb represents leading manufacturers of chemicals, pesticides, and consumer products. His broad practice in international environmental regulatory law allows him to take an interdisciplinary approach with his clients and their needs. His extensive background in organic chemistry, risk assessment, and bioengineering is valued highly by his clients in the chemical, nanotechnology, and biotechnology industries.
- ◆ Herb provides advice on product liability risk control and assists his clients with crisis management for embattled products, including wood preservatives and persistent, bioaccumulative, and toxic (PBT) chemicals. He helps clients secure and maintain chemical approvals and pesticide registrations in Canada and Europe and advises clients on matters involving the Canadian Environmental Protection Act and on European chemical directive.



Eric P. Gotting

- ◆ Eric Gotting represents Keller and Heckman's clients in litigation and related issues, specializing in complex civil and appellate matters, internal investigations, and regulatory compliance. With an extensive background in environmental law, he has expanded his practice over the years to cover many of Keller and Heckman's industry sectors and regulatory areas. Eric is a former Am Law 50 litigation partner and U.S. Department of Justice, Civil Division, Trial Attorney.
- ◆ Eric's practice spans a broad range of legal issues, including administrative and constitutional law, agency enforcement actions, toxic torts, product liability, general business litigation, and regulatory advice. He works with a diverse set of industries, involving chemicals, plastics, pesticides, fuels and pipelines, food and packaging, consumer goods, telecommunications, and e-cigarettes.
- ◆ As a litigator, Eric has tried cases to verdict and argued appeals before federal and state courts across the country. His experience includes class actions, mass tort litigation, AAA arbitrations, and agency proceedings. Eric has also litigated challenges to federal and state statutes, regulations, and orders. He has particular knowledge involving the Administrative Procedure Act (APA), the First Amendment, the Due Process Clause, and federal preemption. He has also filed amicus briefs in litigation involving regulatory issues facing a variety of industry sectors.



Cases (1)



| | | | | |
|--|--|-----------------------|------------------------|--|
| Alaska Community Action on Toxics (ACAT) v. EPA | 9 th Circuit | 20-73099 | | 10/16/20 – Petition for Review |
| Agricultural Implement Workers of America (UAW) v. EPA | D.C. Circuit → Moved to 9 th Circuit | 21-70009 | HBCD Evaluation | 12/3/20 Petition for Review |
| California Professional Firefighters v. EPA | 9 th Circuit | 20-73578 | | 12/9/20 – Petition for Review |
| Asbestos Disease Awareness Organization, et. al, v. EPA | 9 th Circuit | 21-70160 | Asbestos Evaluation | 1/26/21 Petition for Review |
| EDF et. al, v. EPA <u>joined with</u> State of New York v. Regan | 9 th Circuit | 21-70162 | 1,4-Dioxane Evaluation | 1/25/21 Petition for Review (EDF) |
| Center for Environmental Health (CEH) et. al, v. EPA | 9 th Circuit | 21- | 1,4-Dioxane Evaluation | 2/1/21 Petition ; Related to EDF Petition for Review (21-70162) |
| UAW v. EPA | D.C. Circuit → 9 th Circuit | 21-1057 → 21-70930 | 1,4-Dioxane Evaluation | 2/10/21 Petition for Review |

Cases (2)



| | | | | |
|--|--|--|---|---|
| New York et. al, v. EPA | 9 th Circuit | 21-70684 | 1,4-Dioxane Evaluation | 3/22/21 Petition for Review |
| ACAT v. EPA | 9 th Circuit | 21-70168 | DecaBDE Rule | 1/27/21 Petition for Review |
| Yurok Tribe, et. al v. EPA | 9 th Circuit | 21-70670 | | 3/19/21 Petition for Review |
| Center for Environmental Health, et. al, v. Regan | U.S. District Court N. District of CA → Transfer to U.S. District Court in NC → 4 th Circuit Appeal | 4:21-cv-01535 → 22-00073 → 23-1467 | PFAS TSCA Testing | 3/3/21 Complaint for Declaratory and Injunctive Relief 2/1/22 Amended Complaint |
| Asbestos Disease Awareness Organization, et. al, v. EPA | U.S. District Court For The Northern District of California At San Francisco | 21-cv-03716 | Asbestos Evaluation | 5/18/21 Complaint |
| Breast Cancer Prevention Partners et. al, v. EPA | U.S. District Court For The Northern District of California | 21-cv-7360 | Delayed Proposal to List Diisononyl Phthalate (DINP) on Toxics Release Inventory (TRI) | 9/22/21 Complaint |
| Air-Conditioning, Heating, and Refrigeration Institute et al., v. EPA | D.C. Circuit | 21-1196 | PIP Rule Delay | 10/1/21 Petition for Review |
| National PFAS Contamination Coalition et al., v. EPA | D.C. District Court | 22-cv-00132 | Reporting Loopholes in PFAS TRI Listing | 1/20/22 Complaint for Injunctive Relief |
| Vinyl Institute, Inc., v. EPA | D.C. Circuit | 22-1089 | Test Order | 5/23/22 Petition for Review |
| National Foam, Inc., v EPA | D.C. Circuit | 22-1208 | PFAS Test Order | 8/15/22 Petition for Review |

Cases (3)

| | | | | |
|--|---|-------------------------------|--|---|
| TDCE Consortium v. EPA | D.C. Circuit | 22-1216 | TDCE Test Order | 8/22/22 Petition for Review |
| Lanxess Corp, et al., v. EPA | 3 rd Circuit | 22-2036 | Test Order for <i>o</i> -dichlorobenzene | 5/31/22 - Petition for Review |
| Denka Performance Elastomer LLC v. EPA | U.S. Dist. Ct. Eastern District of Louisiana | 23-cv-00147 | EPA Chloroprene Assessment | 1/11/23 - Complaint |
| U.S. v. Inhance Technologies → Inhance Technologies v. U.S. | Dist. Ct. Eastern District of Pennsylvania → 5 th Circuit | 22-cv-05055-JFM → 23-60620 | SNUR Enforcement | 12/19/22 Complaint 12/8/23 Petition in 5 th Cir. |
| DuPont de Nemours, Inc., v. EPA | 3 rd Circuit | 23-1444 | PFAS Test Order | 3/9/23 Petition for Review |
| Cherokee Concerned Citizens v. EPA | D.C. Circuit | 23-1096 | EPA Approval of Pyrolysis Chemicals | 4/7/23 Petition for Review |
| Environmental Defense Fund v. EPA | D.C. Circuit | 23-1166 | TSCA Confidential Data Rule | 6/29/23 Petition for Review 7/31/23 American Chemistry Council Motion to Intervene in Support of Respondents (EPA) |

Cases (4)

| | | | | |
|--|---|------------------------|---|--|
| American Chemistry Council, Inc., v. National Academy of Sciences et al. | U.S. District Court for D.C. | 23-cv-2113 | Peer Review of Formaldehyde IRIS Assessment | 7/20/23 Complaint 9/15/23 – Amended Complaint |
| In re Ecology Center et al., v. EPA | 9 th Circuit | 23-70158 | TSCA Lead Wheel Weight Rule | 8/22/23 – Petition for Writ of Mandamus |
| Community In-Power and Development Ass’n. Inc., et al., v. EPA | Dist. Ct. D.C. | 23-2715 | Past-Due TSCA Chemical Evaluations | 9/18/23 Complaint for Declaratory and Injunctive Relief |
| American Chemistry Council (ACC) v. EPA | Dist. Ct. D.C. | 23-3726 | | 12/13/23 Complaint for Declaratory and Injunctive Relief |
| Utility Solid Waste Activities Group v. EPA | D.C. Circuit | 23-1300 | PCB Cleanup Rule | 10/30/23 Petition for Review |
| American Chemistry Council and GA Chemistry Council v. EPA | 11 th Circuit → 5 th Circuit | 24-11206 → 24-60193 | Asbestos Rule | 4/18/24 Petition for Review |
| Asbestos Disease Awareness Organization v. EPA | D.C. Circuit → 5 th Circuit | 24-1090 → 24-60193 | | 4/19/24 Petition for Review of the Asbestos Rule |

Cases (5)



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|--|--|-----------------------|---|---|
| United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union (USW) v. EPA | D.C. Circuit → 5 th Circuit | 24-1089 → 24-60193 | | 4/19/24 Petition for Review |
| Texas Chemistry Council v. EPA | 5 th Circuit | 24-60193 | | 4/19/24 Petition for Review |
| National Association of Chemical Distributors, et al., v EPA | D.C. Circuit | 24-1127 | Risk Management Program (RMP) Rule Update | 5/10/24 Petition for Review |
| Worksafe, Inc. v. EPA | 9 th Circuit → D.C. Circuit | 24-3234 → 24-1202 | TSCA Risk Evaluation Rule | 5/21/24 Petition for Review |
| USW v. EPA | D.C. Circuit | 24-1151 | | 5/21/24 Petition for Review |
| International Assoc. of Machinists and Aerospace Workers v. EPA | 4 th Circuit → D.C. Circuit | 24-1462 → 24-1182 | | 5/21/24 Petition for Review |
| Texas Chemistry Council and ACC v. EPA | 5 th Circuit → D.C. Circuit | 24-60257 → 24-1185 | | 5/23/24 Petition for Review |
| American Fuel & Petrochemical Manufacturers and American Petroleum Institute v. EPA | D.C. Circuit | 24-1237 | | 7/10/24 Petition for Review |
| East Fork Enterprises, Inc. v. EPA | 5 th Circuit | 24-60256 | | 2024 Methylene Chloride Rule |
| Sierra Club v. EPA | 9 th Circuit → 5 th Circuit | 24-3350 → 24-60256 | | 5/28/24 Petition for Review |
| ACC v. EPA | D.C. Circuit | 24-1256 | 2024 Methylene Chloride Rule | 7/19/24 Petition for Review |
| CEH and Public Employees for Environmental Responsibility (PEER) v. EPA | D.D.C. | 24-2194 | PFAS TSCA Rulemaking | 7/25/24 Complaint |

Where do I file my lawsuit?

- ◆ TSCA Judicial Review Provision – Section 19 (15 USC 2618)
 - ◇ EPA rulemaking or certain TSCA orders (Section 4, 5(e), 5(f), 5(i))
 - DC Circuit Court of Appeals or
 - Federal Circuit Court where principal place of business is located
 - E.g., TSCA risk evaluation rule (4th, 5th, 9th, and DC Circuits)
 - E.g., *Vinyl Inst. v. EPA* (DC Cir. 22-1089) (112-TCE test order)
 - ◇ Section 6(b) low priority designation
 - DC Circuit Court of Appeals only

Where do I file my lawsuit (cont.)?

- ◆ TSCA Section 20 (15 USC 2619) citizens suit against non-EPA defendant
 - ◇ U.S. District Court where violation occurred or
 - ◇ U.S. District Court where the defendant has principal place of business
 - ◇ **E.g., NGO suits alleging company failed to make required filings with EPA**
- ◆ TSCA Section 20 citizens suit against EPA
 - ◇ U.S. District Court in DC or
 - ◇ U.S. District Court where the plaintiff is located
 - ◇ **E.g., *CEH et al. v. EPA* (DDC 24-2194)**

Where do I file my lawsuit (cont.)?

- ◆ TSCA Section 21 (15 USC 2620) citizens petition denial
 - ◇ U.S. District Court (28 USC 1391)
 - ◇ *E.g., Food and Water Watch v. EPA (N.D. Cal. 17-02162)*
- ◆ TSCA Section 16 (15 USC 2615) civil penalty appeal
 - ◇ DC Circuit Court of Appeals or
 - ◇ Federal Circuit Court where you are headquartered or transact business

How do I initiate my lawsuit?

- ◆ Federal circuit court of appeals
 - ◇ Petition for Review
 - ◇ Statement of Issues (DC Circuit)
 - E.g., *National Foam v. EPA* (DC Cir. 22-1208)
- ◆ Federal district court
 - ◇ Complaint
 - E.g., *Cnty. In-Power v. EPA* (DDC 23-2715)
 - E.g., *ACC v. EPA* (DDC 23-3726)

Injunction or Stay Order

- ◆ Four factors
 - ◇ Substantial likelihood of success on the merits
 - ◇ Irreparable harm (must be imminent)
 - E.g., *Inhance Tech. v. U.S.* (5th Cir. 23-60620)
 - ◇ Balance of equities
 - Prejudice to EPA
 - Potential harm to public interest
 - E.g., *Inhance Tech. v. U.S.* (5th Cir. 23-60620)
- ◆ Petition for EPA administrative stay first?
 - ◇ FRAP 18(a)(1) (“must ordinarily move first before the agency”)

Intervention

- ◆ FRCP 24
 - ◇ Intervention as of right
 - Timely motion
 - Third party's rights will be impaired or impeded
 - Do existing parties adequately represent third party interests?
 - ◇ Permissive intervention
 - Timely motion
 - Third party shares a common question of law or fact with existing parties
 - Cannot unduly delay or prejudice existing parties
- ◆ FRAP 15
 - ◇ 30-day deadline
 - ◇ Courts generally follow FRCP 24
- ◆ *E.g., East Fork Enter. v. EPA (5th Cir. 24-60256)*

Merits Briefing and Amicus Briefs

- ◆ Merits briefs
 - ◆ Review typically limited to the administrative record
 - ◆ Court will not entertain *post hoc* agency rationale
 - ◆ No additional discovery or admission of evidence
 - ◆ No trial-like proceedings
 - ◆ Court decides on the briefs
- ◆ Amicus briefs (“friend of the court”)
 - ◆ Not a party to the litigation
 - ◆ Provide additional context (e.g., point of law, impact on industry, etc.)
 - ◆ Cost-effective form of participation
 - ◆ FRAP 29 (file 7 days after merits brief)
 - ◆ *E.g., Inhance Tech. v. U.S. (5th Cir. 23-60620) (KH coalition brief)*

Additional Thoughts

- ◆ Build coalitions to reduce litigation costs
- ◆ Rely on amicus briefs to stake-out position
- ◆ Participate in public rulemaking comments to preserve arguments
- ◆ Consider impact of recent Supreme Court decisions
 - ◇ *Loper Bright Enter. v. Raimondo* (overruled *Chevron* doctrine)
 - ◇ *Jarkesy v. SEC* (Seventh Amendment right to jury)



Please join us at 1:00 PM Eastern U.S.
Wednesday, Aug. 21, 2024
<https://www.khlaw.com/OSHA3030>



Please join us at 10:00 AM Eastern U.S.
Wednesday, Aug. 28, 2024
<https://www.khlaw.com/REACH-3030>



Please join us at 1:00 PM Eastern U.S.
Wednesday, Sept. 18, 2024
<https://www.khlaw.com/TSCA-3030>

Register Now!



 Keller &
Heckman

**NAVIGATING TSCA:
BASICS AND BEYOND 2024**

NOVEMBER 14-15, 2024
RENAISSANCE ARLINGTON
CAPITAL VIEW HOTEL

Thank You

Any questions?



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