

C. Toxic Substances Control Act

1. Safer Chemicals, Healthy Families, v. U.S. Environmental Protection Agency, 943 F.3d 397 (9th Cir. 2019)

A variety of environmental and other organizations (collectively, petitioners)¹ sought review in the Ninth Circuit of the “Risk Evaluation Rule,”² (the Rule) promulgated by the U.S. Environmental Protection Agency (EPA) under its authority granted by a 2016 amendment to the Toxic Substances Control Act³ (TSCA), which established a process to evaluate the health and environmental risks of chemical substances. Petitioners argued that certain provisions of the Rule relating to evaluating the risks of a substance’s “conditions of use” violated requirements of the TSCA, challenging the Rule on three separate grounds.⁴ The Ninth Circuit held that: concerning the first grounds, it lacked jurisdiction; concerning the second grounds, it failed on the merits; and concerning the third grounds, it granted, in part, the petition for review.

The TSCA was enacted by Congress in 1976 “to prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances.”⁵ Addressing shortcomings of the implementation of the TSCA, Congress amended the Act in 2016 to restructure how chemicals are evaluated and regulated, while leaving intact the purpose of the TSCA. The 2016 amendments directed the EPA to evaluate chemicals to determine whether they present an unreasonable risk and to prioritize them as high- or low-priority, as well as prescribed statutory deadlines by which the evaluations must be completed. If the EPA determines the chemical presents an unreasonable risk, then it must be regulated. The amendments also require the EPA to evaluate the chemical substances under their “conditions of use,” defined to mean “the circumstances, as determined by the Administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.”⁶

As required by the TSCA, the EPA promulgated the Rule in July 2017, addressing the prioritization and risk evaluation. The Rule stated that to evaluate the chemicals under their conditions of use, EPA “will determine whether the chemical substance presents an unreasonable risk of injury to health or the environment under each condition of uses [sic] within the scope of the risk evaluation.”⁷ The Rule adopted the same definition for “conditions of use” as the TSCA, but it explained that the scope of the evaluation will include “[t]he condition(s) of use, as determined by the Administrator, that the EPA plans to consider in the risk evaluation.”⁸ The Rule also listed three categories of uses and activities excluded from the definition of conditions of use, collectively referred to as “legacy activities.”⁹ The Rule also stated in the preamble that the EPA “intends to exercise discretion in addressing circumstances where [a] chemical substance . . . is unintentionally present as

¹ Petitioners in this consolidated action included: Safer Chemicals, Healthy Families; Alaska Community Action on Toxics; Environmental Health Strategy Center; Environmental Working Group; Learning Disabilities Association of America; Sierra Club; Union of Concerned Scientists; United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC; WE ACT for Environmental Justice; Asbestos Disease Awareness Organization; Vermont Public Interest Research Group; Alliance of Nurses for Healthy Environments; Cape Fear River Watch; Natural Resources Defense Council; and Environmental Defense Fund.

² 40 C.F.R. §§ 702.31–702.51 (2019).

³ Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (2012).

⁴ This case was brought directly to the Ninth Circuit pursuant to the judicial review provisions of the TSCA granting circuit courts exclusive review of rules promulgated under the TSCA. *Id.* § 2618.

⁵ S. REP. NO. 94-698, at 1 (1976).

⁶ 15 U.S.C. § 2602(4).

⁷ 40 C.F.R. § 702.47.

⁸ *Id.* § 702.41(c).

⁹ “Legacy activities” are defined as: 1) “circumstances associated with activities that do not reflect ongoing or prospective manufacturing, processing, or distribution,” which EPA calls “legacy uses”; 2) “disposals from such uses,” which EPA calls “associated disposal”; and 3) “disposals that have already occurred,” which EPA calls “legacy disposal.” Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, 82 Fed. Reg. 33,726, 33,729 (July 20, 2017).

an impurity in another chemical substance that is not the subject of pertinent scoping,” but that “it would be premature to definitively exclude a priori specific conditions of use from risk evaluation.”¹⁰

Petitioners filed petitions for review of the Rule pursuant to the judicial review provisions of the TSCA¹¹ and the Administrative Procedure Act (APA).¹² The petitions were consolidated, and a number of industry groups moved to intervene.¹³ A motions panel of the Ninth Circuit granted the motion to intervene. Petitioners challenged the Rule on three grounds: that the TSCA requires the EPA to evaluate the risks associated with uses of chemicals collectively and the Rule contradicts that mandate; that the Rule “expresses an impermissible intent to exclude some conditions of use from the scope of the risk evaluation”;¹⁴ and that the exclusion of “legacy activities” from the definition of “conditions of use.”¹⁵

Petitioners’ first challenge interpreted three provisions of the Rule to mean that the EPA plans to conduct evaluations on a use-by-use basis, rather than evaluating all of the uses of a chemical collectively, which petitioners claimed the TSCA requires. The Ninth Circuit held that this claim was not justiciable because petitioners’ interpretation of EPA’s intentions and the resulting theory of injury were too speculative and therefore not ripe.¹⁶ Petitioners maintained that they were injured by the Rule because the EPA will underestimate risk where there is exposure from multiple activities involving a chemical and that the Rule will deprive petitioners of information regarding the risk of chemicals. The Ninth Circuit concluded that the ambiguous text of the Rule creates a justiciability problem because it is not clear under the Rule how the EPA will conduct the risk evaluations and without that there is no concrete, imminent harm to petitioners. The court noted that should the EPA, in the future, conduct a risk evaluation that petitioners believe failed to consider all conditions of use and resulted in harm, petitioners could challenge the improper determination, but here, the court held the challenge to be not justiciable.

Petitioners next argued that, whether or not their assertions on the first claim were correct, the Rule contravenes the TSCA’s requirement that EPA “consider *all* of the chemical’s conditions of use when conducting a risk evaluation.”¹⁷ Petitioners pointed to language in the Rule’s preamble that suggested that the EPA may exclude circumstances in which a chemical appears unintentionally as an impurity in a second chemical, and another suggestion that the EPA may exclude existence of an impurity if the risk associated with it is *de minimis*.¹⁸ Petitioners also pointed to specific provisions of the Rule that referred to the conditions of use “within the scope of” the evaluation,¹⁹ arguing that the provisions demonstrate that some conditions of use will be outside the scope of the evaluations. Regarding the language from the preamble, the Ninth Circuit explained that the language did not indicate that the EPA was binding itself, and therefore, the court held that the language in the preamble was not a final agency action reviewable under the APA.

Turning to the scope provisions challenged by Petitioners, the court first noted that the challenged language was not ambiguous, so unlike Petitioners’ first challenge, it was not speculative whether the Rule authorizes the EPA to do what Petitioners claim, thus finding the challenge ripe. However, the Ninth Circuit held that petitioners’ challenge failed on the merits, explaining that “the conditions of

¹⁰ *Id.* at 33,730.

¹¹ 15 U.S.C. § 2618 (2012).

¹² Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

¹³ Intervenors included: American Chemistry Council; American Coatings Association; American Coke and Coal Chemicals Institute; American Forest & Paper Association; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Battery Council International; Chamber of Commerce of the United States of America; EPS Industry Alliance; IPC International, Inc.; National Association of Chemical Distributors; National Mining Association; Polyurethane Manufacturers Association; Silver Nanotechnology Working Group; Society of Chemical Manufacturers and Affiliates; Styrene Information and Research Center, Inc.; and Utility Solid Waste Activities Group.

¹⁴ *Safer Chemicals, Healthy Families, v. U.S. Envtl. Prot. Agency*, 943 F.3d 397, 409 (9th Cir. 2019).

¹⁵ *Id.* at 422.

¹⁶ *Id.* at 411 (noting that “[c]onstitutional ripeness is often treated under the rubric of standing because ripeness coincides squarely with standing’s injury in fact prong”).

¹⁷ *Id.* at 416.

¹⁸ See Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act, 82 Fed. Reg. 33,726, 33,730 (July 20, 2017).

¹⁹ See 40 C.F.R. §§ 702.41(a)(5), (a)(8), (a)(9), (c)(4)(1), (c)(4)(iii), (d)(2); 702.49(b)–(d) (2019).

use within the scope of” an evaluation more naturally refers to the EPA’s discretion in determining the conditions of use that are applicable to a certain substance, rather than excluding a certain use from the evaluation. Therefore, “the challenged provisions unambiguously d[id] not grant the EPA the discretion petitioners contend,”²⁰ and the court denied the challenge.

Petitioners’ final claim challenged the EPA’s exclusion of “legacy activities” from the definition of “conditions of use.” After again finding the claim to be justiciable, the court reviewed the EPA’s interpretation of the TSCA’s “conditions of use” definition, applying *Chevron* deference.²¹ Unlike petitioners’ second challenge, here, the EPA conceded that the exclusion of “legacy activities” was reviewable, despite being in the preamble language, because the agency intended to apply it as a binding statutory interpretation, and the court agreed. The TSCA defines “conditions of use” to mean “the circumstances, as determined by the administrator, under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of.”²² The EPA justified its interpretation excluding the “legacy activities” by arguing the use of “intended” and “reasonably foreseen” indicates that “conditions of use” are meant to be forward looking, and the use of “known” when combined with “to be” is a present tense verb, while “intended,” “known,” and “reasonably foreseen” are meant to require the EPA to exercise its judgment. As an example, the EPA explained that it could not regulate the disposal of asbestos insulation previously installed in a building because the insulation is no longer manufactured. Therefore, the EPA contended, Congress’ intention was that EPA focus on future activities. Petitioners disputed the EPA’s claim that “when a substance is no longer manufactured or distributed for a particular use, it is unable to evaluate or regulate that use and associated disposal,”²³ and argued that the EPA’s exclusion of “legacy activities” undermines the core purpose of the TSCA.

The Ninth Circuit first stated that the EPA’s contention that a reasonable interpretation of the TSCA’s “conditions of use” refers to future uses and associated disposals of products only when the product is still being manufactured was without merit. The EPA resisted this, arguing the TSCA granted the agency broad discretion to determine what constitutes a condition of use. Although the court agreed the TSCA provided the EPA with discretion, it stated, “that discretion may only be exercised within the bounds of the statutory definition itself.”²⁴ The court explained that the EPA’s asbestos example is actually useful in showing why the EPA’s interpretation cannot be upheld: “[t]he *future* disposal of asbestos is clearly an example of a chemical being ‘disposed of.’”²⁵ Finding the TSCA’s definition of “conditions of use” to clearly include uses and future disposals of chemicals even if they are no longer being manufactured, the Ninth Circuit held that the EPA’s exclusion of “legacy uses” and “associated disposals” was unlawful. The court drew a distinction, however, between “legacy uses” and “associated disposal,” on the one hand, and “legacy disposals” on the other, which are disposals that have already occurred. The court found the TSCA unambiguously does not require past disposals to be considered conditions of use. The court noted that uncontrolled discharges such as spills and leaks could be considered *independent* disposals, and therefore be regulated because the disposal is *ongoing*, but recognized that that does not mean “legacy disposals” should be considered “conditions of use.”

In conclusion, the Ninth Circuit dismissed the petition for review with respect to petitioners’ first claim for lack of justiciability, denied the petition with respect to petitioners’ second claim and part of petitioners’ third claim on the merits, and granted the petition, in part, with respect to Petitioners’ challenge of the exclusion of “legacy uses” and “associated disposals,” vacating those portions of the preamble.

²⁰ *Safer Chemicals*, 943 F.3d at 419.

²¹ *Chevron, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Under *Chevron* deference, courts defer to an agency’s reasonable interpretation of an ambiguous statute. *Id.*

²² 15 U.S.C. § 2602(4) (2018).

²³ *Safer Chemicals*, 943 F.3d at 424.

²⁴ *Id.* at 425 (citing *Massachusetts v. U.S. Envtl. Prot. Agency*, 549 U.S. 497, 533 (2007)).

²⁵ *Id.* at 424.