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Appellate Court Vacates EPA's TSCA Section 5 Orders Prohibiting Inhance from Manufacturing or Processing PFAS during Its Fluorination Process

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On March 21, 2024, the U.S. Court of Appeals for the Fifth Circuit vacated the U.S. Environmental Protection Agency's (EPA) December 2023 orders prohibiting Inhance Technologies, L.L.C. (Inhance) from manufacturing or processing per- and polyfluoroalkyl substances (PFAS) during its fluorination process. The court notes that in March 2022, EPA "charged for the first time" that Inhance's fluorination process was subject to the significant new use rule (SNUR) regarding long-chain perfluoroalkyl carboxylate chemical substances. The court states that "[b]ecause the EPA exceeded its statutory authority in doing so, we vacate the orders."

Background

As reported in our December 7, 2023, blog item, EPA announced on December 1, 2023, that it issued orders to Inhance directing it not to produce PFAS, "chemicals that are created in the production of its fluorinated [high-density polyethylene (HDPE)] plastic containers." EPA states that in December 2022, Inhance submitted significant new use notices (SNUN) for nine long-chain PFAS. According to EPA, "[u]pon review of the SNUNs and consistent with EPA's Framework for Addressing new PFAS and New Uses of PFAS, EPA has determined that three of the PFAS (Perfluorooctanoic acid [PFOA], perfluorononanoic acid [PFNA] and perfluorodecanoic acid [PFDA]) are highly toxic and present unreasonable risks that cannot be prevented other than through prohibition of manufacture." Therefore, under Section 5(f) of the Toxic Substances Control Act (TSCA), EPA prohibited the continued manufacture of PFOA, PFNA, and PFDA that are produced from the fluorination of HDPE.

EPA notes that it also determined that "the remaining six of the nine PFAS chemicals manufactured by Inhance (PFuDA [perfluoroundecanoic acid], PFDoA [perfluorododecanoic acid], PFTrDA [perfluorotridecanoic acid], PFTeDA [perfluorotetradecanoic acid], PFHxDA [perfluorohexadecanoic acid] and PFODA [perfluoro-n-octadecanoic acid])" may present an unreasonable risk of injury to health or the environment and, under TSCA Section 5(e), is requiring Inhance to cease manufacture of these chemicals and to perform additional testing if it intends to restart production. According to EPA, Inhance's current fluorination process for plastics produces all nine of the PFAS chemicals subject to these orders simultaneously, however, including PFOA, PFNA, and PFDA. Thus, EPA states, "the production of the other six PFAS could not restart so long as the fluorination process continues to produce PFOA, PFNA and PFDA."

Court's Decision

The court states that it agrees with Inhance that EPA "exceeded its statutory authority by issuing orders under Section 5 instead of Section 6 because Inhance's forty-year-old fluorination process is not a 'significant new use' under TSCA." Inhance maintained that its fluorination process cannot be considered new because it is a "decades-old" process that did not "recently come into existence," while EPA argued that a significant new use is "any use 'not previously known to the EPA.'" Because Inhance did not identify its fluorination process as an "ongoing use" during the SNUR rulemaking process, EPA argued that the fluorination process qualified as a significant new use.

The court states that Inhance's interpretation of TSCA Section 5 is "more persuasive," for two reasons: "it more closely aligns with the text of Section 5 and the design of TSCA as a whole"; and "TSCA's broader structure demonstrates that Section 5 is intended only to regulate significant new uses prior to first manufacture." According to the court, EPA's interpretation of TSCA Section 5 "distorts TSCA's framework and defies common sense." The court notes that under EPA's approach, "the agency can regulate a use under Section 5 anytime it 'discovers' a use not previously known to the agency, even if that use has existed for decades." This reading would undermine Section 6 and "shortcut[] Congress's express directive to the agency to weigh the costs to businesses and the overall economy before shutting down an ongoing manufacturing process." In addition, EPA's definition of significant new use "presents serious constitutional concerns." During the SNUR rulemaking process, EPA required companies to submit their prior manufacture or use of PFAS for approval under the proposed SNUR. As stated by the court, "[u]nfortunately for Inhance, neither it nor the EPA knew that its fluorination process resulted in the creation of PFAS until March 2022" and "neither the 2015 proposed SNUR nor the 2020 final version included the fluorination industry as an industry that might be affected by the SNUR." Finding that "such foresight is 'more than the law requires,'" the court eschewed EPA's interpretation of "significant new use" and adopted Inhance's "more straightforward" interpretation. (Citations omitted.) According to the court, "that dooms the EPA's orders at issue here, because Inhance's fluorination process was not a significant new use within the purview of Section 5."

The court "hasten[s] to add that our ruling [prohibiting EPA's December 2023 orders] does not render the EPA powerless to regulate Inhance's fluorination process." According to the court, EPA "can properly proceed, abiding the [Administrative Procedure Act's (APA)] procedural guardrails, under TSCA's Section 6 by conducting *inter alia* the appropriate cost-benefit analysis required for ongoing uses — a proposition even Inhance concedes." The court notes that EPA "is just not allowed to skirt the framework set by Congress by arbitrarily deeming Inhance's decades-old fluorination process a 'significant new use.'"

Commentary

The court's ruling is important for several reasons. First, the court clearly concludes that a condition of use (COU) that is ongoing at the time a SNUR is proposed cannot be a significant new use, regardless of whether the manufacturer or EPA is aware that the significant new use is ongoing. The court was not required to make a finding this sweeping to vacate the orders. The court could have concluded that only if a significant new use was not known to be ongoing at the time of the SNUR proposal by the company and EPA, the SNUR would not apply to that COU. That is to say, the court might have found that if a company knew that a significant new use was ongoing and opted to not participate in notice and comment, then the company had effectively acquiesced to the significant new use being prohibited.

Second, the court did not address the byproduct and impurity issues. The court could have concluded that the PFAS in question were both byproducts and impurities and thus exempt from the requirement to submit a SNUN. This interpretation alone would have been sufficient to vacate the orders. It is interesting that the court remained silent.

Third, it is unclear whether the decision undermines entirely “dead chemical” SNURs (SNURs that prohibit all manufacturing, processing, and use of a substance). If a COU has been undertaken in the past, but is no longer ongoing, can EPA prohibit that COU under its SNUR authority? One interpretation of the court’s decision is that if a COU has ever been undertaken, regardless of when it was abandoned, that COU cannot be called “new” and therefore cannot be the subject of a SNUR.

It will be interesting to see what EPA does in response to the court’s ruling.

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