

CHEMICAL AND ENGINEERING NEWS

Possible Dispute Over EU Policy

Cheryl Hogue, Washington
June 28, 2004

ACC is concerned that parts of REACH could violate World Trade Organization standards

The European Union's proposed regulatory scheme for chemicals continues to worry chemical makers in the U.S. and elsewhere. Much of this concern has focused on whether and how industry will be able to comply with the planned registration, evaluation, and authorization of chemicals (REACH) program—and what the cost will be.

Now, industry is beginning to raise a new set of arguments, one that could lift the debate into the global arena of the World Trade Organization. The American Chemistry Council (ACC) says parts of REACH may conflict with international trade rules because the proposal contains provisions that could lead to a formal trade dispute.

The European Commission—the administrative arm of the EU—insists that REACH has undergone rigorous review for compliance with WTO regulations. And environmental groups characterize ACC's arguments solely as a tactic to delay or weaken REACH before the plan is finalized. The European Parliament is expected to complete a final version of the new regulatory system for chemicals within the coming year.

ACC'S CONCERNS about whether the proposed EU chemicals program would comply with international trade rules are detailed and specific. Michael P. Walls, senior assistant general counsel for ACC, explains that international trade rules forbid technical regulations, such as REACH, to be more restrictive on trade than necessary. ACC believes that REACH could be modified to be less restrictive on trade while still meeting the EU's goal of improving its chemical regulation system, he says.

Walls offers several examples of how REACH could become a barrier to trade. For instance, REACH would require manufacturers or importers of chemicals to supply specific toxicity and other information about their products. The greater the volume of production or importation, the more data would be required to register that chemical. Walls says a company that sends 9 metric tons of a substance to

the EU per year may not have to conduct toxicity or other tests to register the compound if it is the sole supplier. But if an EU entity is also manufacturing 110 tons of the same chemical, the importer would have to help the EU company pay for generating the extra data that would be required for registration because of the greater annual production volume. This could discourage the foreign firm from shipping the chemical to the EU, he says.

David Waskow, director of the Friends of the Earth international program, says this aspect of REACH doesn't seem to be a trade concern. An EU manufacturer of a small volume of a chemical would also have to be involved in testing efforts if an EU competitor produced a larger volume of the same substance and triggered a need for more information to register the compound, he notes. "I fail to see how there's a difference" between a situation with a large and a small EU producer and one with a large EU producer and a small importer, Waskow says.

IN ADDITION, ACC and many U.S. chemical makers bristle at the EU's requirement for testing based on a chemical's production volume without linking these requirements to risk. Risk considers whether the substance poses a hazard and whether and how the environment or people are exposed. Walls explains that not all of the data required for REACH registration may be necessary for making sound environmental, health, and safety decisions about a substance.

To make REACH less restrictive on trade, the policy could call for chemical makers to provide EU authorities with all the data they currently have on a substance, Walls said. Manufacturers already have data to ensure safe use of their chemicals, he adds. After this existing information is evaluated, EU officials could determine what additional data would be needed for sound decisions on managing any risks from that compound. This would add up to "huge resource savings" for industry and the EU government, Walls said.

Mary Bottari, an analyst for Public Citizen who is based in Madison, Wis., dismisses this idea as "simply a delaying tactic to weigh down regulators" who, she says, would spend their time and money determining whether enough toxicity data existed for tens of thousands of chemicals instead of regulating.

Another of ACC's trade-related concerns about REACH addresses polymers, Walls says. Under the proposed chemical regime, polymers would be exempt, at least at first, from registration requirements. However, the monomers from which polymers are made appear to be subject to REACH registration, regardless of whether the monomers are polymerized in the EU or elsewhere in the world, Walls says.

Although REACH attempts to place the same requirements on EU manufacturers and importers of polymers, its application would have significantly different--and adverse--impacts on importers, Walls argues. This is because companies in the EU importing a polymer from a manufacturer abroad--perhaps from the Americas or Asia--would have to ensure one of two things. One is that the import and production levels for the polymer fall below the volume threshold for REACH registration of monomers so that no action is needed. Second, if this threshold were exceeded, the EU company importing the polymer would have to ensure that the monomers used to make the polymer are registered under REACH, Walls says.

If REACH registration were required, EU customers would have to ask foreign suppliers for information on the monomer or monomers used to make the polymer, he says. This requirement seems odd because "the monomer isn't on the market in Europe--the polymer is," Walls says.

The identity of monomers is often sensitive business information, which foreign companies making polymers may not wish to supply to their EU customers, Walls says. In some cases, a single polymer can be made through different processes that employ different monomers. Foreign manufacturers may be hesitant to share this information because data on monomers could be used to decipher the proprietary process used to produce a polymer, Walls says.

In contrast, he continues, EU manufacturers of the same polymer would have to register their monomer or monomers under REACH but would not have to reveal the identity of these chemicals to their EU customers. And their customers would not have to worry about whether monomers were properly registered, Walls says. "If I'm an EU purchaser, I might want to buy locally," he adds. Thus, Walls argues, this provision of REACH could be viewed as a barrier to trade.

Daryl W. Ditz of the Center for International Environmental Law, who has tracked development of REACH, is skeptical about this ACC argument on polymers. He says the pending proposal would apply only to products entering the EU, not the raw materials, such as monomers, from which they are made elsewhere in the world.

"The fact it was made out of some mystery monomer shouldn't matter," Ditz says. "You don't have to tell how it's made." WTO rules prohibit countries from discriminating against imported goods based on how the products were made--if the finished products are identical to the same goods made domestically. "The Europeans would be incredibly cautious about this," Ditz adds.

REACH's authorization provisions could also affect importers of chemicals, Walls says. The proposal would require companies to get explicit authorization from regulators to import or produce substances that are carcinogens, mutagens, reproductive hazards, or are persistent, bioaccumulative, and toxic. Authorization would be triggered by a chemical's hazard but would not take into account whether there would be any exposure to the substance, Walls says.

A PARTICULAR CONCERN, Walls continues, is that the current version of the REACH proposal requires authorization of qualifying chemicals when those substances are registered. Instead, he says, regulators should review registration materials for these hazardous types of compounds, then determine whether they should undergo authorization.

Michael Warhurst, head of EU toxics policy at World Wildlife Fund's European policy office in Brussels, says authorization is designed as an incentive for chemical companies to shift away from production of chemicals with the specified hazardous characteristics.

Waskow says assessment of a chemical's hazards rather than its risk is a policy call--and has no specific connection to international trade, though it affects commerce in general. "It's inappropriate to suggest there's a trade problem" with REACH's authorization requirements, because this policy would affect EU and foreign producers equally, Waskow says.

Furthermore, Walls continues, registration under REACH would be particularly burdensome because not just two parties--chemical makers and EU regulators--would be involved in the process. National governments in the EU--at least one per chemical--would also participate in evaluating the data that

companies submit on substances. This complexity could conflict with WTO rules, too, he says.

ACC's arguments, while influential because the trade association's members account for a majority of chemical exports, do not represent the entire U.S. chemical industry.

The industry association of batch, custom, and specialty chemical makers--the Synthetic Organic Chemical Manufacturers Association (SOCMA)--has a somewhat different take on REACH's possible conflicts with international trade rules. James Cooper, manager of government relations at SOCMA, says on the surface, REACH appears to comply with international trade rules. But, he says, the plan is so broad that as EU nations put it into place, they could impede international trade in chemicals. This would be especially true if individual EU countries implement REACH on their own, rather than if a centralized regulatory agency oversees the day-to-day operations of the policy, Cooper says.

"It sets up a system that could be pretty easy to exploit" to disrupt the flow of chemical imports into a country, Cooper says.

Geoffrey B. Gamble, chief international counsel for DuPont, says levying allegations that REACH runs afoul of trade rules is "a last resort, a sledgehammer. It's adversarial." Gamble would rather see chemical makers work with EU officials before REACH is finalized to retain the industry's competitiveness while achieving the government's goal of boosting the amount of information available on chemicals. He adds that implementation of this goal should not be burdensome and should not involve unnecessary animal testing.

EU officials, meanwhile, say REACH complies with WTO rules.

Ewa Hedlund, spokeswoman for European Environment Commissioner Margot Wallström, says: "The European Commission takes our free trade commitments very seriously. REACH has been designed to be compatible with WTO rules, and therefore treats domestic and imported substances equally." Hedlund notes that the EU had been accepting comments from its trading partners on whether REACH complies with WTO rules. Those comments were due last week.

"WE EXPECT that there may be some arguments, but we have a very good case, as WTO allows the level of

environmental protection that [governments] deem necessary," she says. Warhurst says EU trade officials have carefully analyzed REACH for compliance with WTO rules.

Waskow of Friends of the Earth says ACC seems more interested in the impacts REACH will have on commerce in chemicals rather than international trade concerns related to the EU proposal. WTO panels that arbitrate trade disputes allow governments to establish and implement policy goals, such as protection of the environment, that are not merely disguised barriers to trade. Implementation of these goals through laws and regulations may intrude on commerce--such as pollution controls that impose costs on industry--but such measures are different than restricting trade, Waskow explains.

Waskow characterizes the industry arguments as "using WTO language as a cudgel, apparently without putting forward any well-grounded legal arguments to attack the protections the EU wants to establish" through the new policy on chemicals.

"This policy was not created to be a trade barrier," Public Citizen's Bottari says. Nor was it designed to harm the chemical industry in the U.S. or elsewhere. Bottari says WTO rules are written so broadly that "clever lawyers in government can create an array of arguments against any regulatory system" installed abroad. Warhurst says the trade arguments about REACH likely stem more from fear about the proposal than clear WTO complaints.

Instead, this clash reflects a policy divergence between the EU and the U.S. that has led to other trade disputes, Bottari says. The U.S. regulates on the basis of demonstrated risk, whereas the EU has adopted the precautionary principle. This difference, Bottari says, has led the U.S. government to file complaints with WTO over the EU's refusal to allow imports of beef products produced with growth hormones or genetically modified foods or crops.

Although ACC is raising potential WTO concerns now, any possible trade dispute could not be initiated until REACH is finalized and implemented, which is expected to happen in early 2006. Only a national government--and not industry--can initiate a trade dispute through WTO, Walls notes. The Office of the U.S. Trade Representative, the part of the U.S. government that files trade disputes at WTO, failed to respond to repeated inquiries by C&EN on this issue.