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The Precautionary Principle

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*REACH and the  
Long Arm of the  
Chemical Industry*

[By Joseph DiGangi](#)

In February 2001, the European Union released a plan for a sweeping reform of chemical regulatory policy. The plan, known as REACH, requires manufacturers to provide safety information about chemicals before putting them on the market, and proposes a method for restricting use of the most dangerous chemicals.

REACH was designed to address a previous European regulatory system that left the majority of chemicals out of requirements for safety data. This system resembles the current situation in the United States, where 95 percent of the chemicals in use today lack basic safety data about possible hazards to human health and the environment.

Unlike current U.S. regulations, the underlying basis of REACH is the Precautionary Principle. This principle advocates taking precautionary action when chemicals pose possible threats to human health and the environment, rather than waiting for complete scientific proof of cause and effect. This prevents damage while new information accumulates. The U.S. government does not accept the Precautionary Principle as a basis for policy. As one U.S. government official told the New York Times, "We consider it to be a mythical concept, perhaps like a unicorn."

But REACH is no myth, and chemical companies and their political allies in Washington have reacted aggressively to subvert the European proposal.

Documents obtained from anonymous sources and through the Freedom of

Information Act lay out elements of a full-fledged, closely coordinated lobby campaign to weaken REACH waged by narrow chemical industry interests and the Bush administration's Environmental Protection Agency (EPA), State Department, Commerce Department and United States Trade Representative (USTR). By the estimates of its leading propagators, the campaign, which remains ongoing, has had some considerable success.

### **The Birth of Reach**

In the 1980s, European Union (EU) regulations divided chemicals into two classes: existing substances and new substances marketed since 1981. Risk assessments were required for the new chemicals, but existing chemicals effectively received a "grandfathered" exemption -- manufacturers of these chemicals did not have to provide any toxicity data to regulators or the public. Since existing chemicals constituted 99 percent of the chemicals in use, this system led to a situation in which there was inadequate safety information for most of the chemicals in widespread use.

In 1993, the European Union adopted the Existing Substances Regulation. This law marked 141 existing chemicals for toxicity testing, placing the burden for this process on the government. In 10 years, less than 50 of those chemicals have been examined and fewer than five have been regulated.

The ineffectiveness of chemical regulation policies spurred an EU review of the regulatory process, which began in 1998. In 2001, the EU issued a "White Paper on a Future Chemicals Policy." In May 2003, the EU formally proposed its REACH -- Registration, Evaluation and Authorization of Chemicals -- policy. Registration requires companies to provide data on their products including toxicity and information about how humans or the environment might be exposed to them. This places the responsibility and cost for information about the industry's products on the industry. Evaluation is required for chemicals produced in large amounts or chemicals that are especially toxic. One consequence of evaluation might be to ban certain uses of a chemical. The most toxic chemicals would require authorization. These chemicals could include carcinogens, mutagens, reproductive toxicants and chemicals that persist and accumulate in the environment. One consequence of authorization is an outright ban on certain chemicals in favor of safer alternatives.

The European Union estimates the direct cost of REACH to be approximately \$4 billion; or less than 0.1 percent of EU chemical industry sales. The indirect costs of the proposal have been estimated at approximately \$15 billion to \$30 billion. Though not easily quantified, the monetary benefits of REACH have also been estimated. The European Union estimates approximately \$20 billion to \$50 billion in savings, taking into account only occupational health benefits. By expanding the health benefits of REACH to the general public -- but not taking into account

environmental benefits -- the World Wildlife Fund estimates approximately \$180 billion in net health benefits, over and above the costs of implementation.

## **Galvanizing U.S. Opposition**

In February 2001, the European Union published the White Paper that described the REACH proposal. Internal documents reveal that the U.S. government began to work on REACH the same year with personnel from EPA, the State Department, the Commerce Department and USTR working with each other and with the chemical industry. From the beginning, the goal appeared to be intervening and changing REACH before the legislation became finalized.

A document drafted by Charlie Auer, director of the EPA Office of Pollution Prevention and Toxics, reveals the key role of the EPA in making and framing regulatory arguments against REACH. The paper points out that the United States does not recognize the Precautionary Principle as a principle of international law. The document also comments on the EU's reluctance to adopt the U.S. form of voluntary regulation of chemicals, and makes clear EPA's coordination with industry in this regard: "EPA is quite comfortable with a collaborative relationship with industry in such voluntary efforts."

U.S. government and industry leaders began a host of meetings to coordinate their campaign against REACH. A June 14, 2001 document describes U.S. government meetings with industry and coordination among government agencies with the goal of influencing REACH in agreement with industry interests. "Staff from TD [Trade Development] and MAC [Market Access and Compliance] have met with the American Chemistry Council and the American Plastics Council and have consulted with individual chemical companies to solicit their views on the strategy and its impact on the U.S. chemicals industry and European chemicals trade. Ö USEU/FCS [United States Mission to the European Union] has also met with a number of U.S. chemical companies based in Europe."

But the chemical industry complained the administration was not being responsive enough to its demands. In September 2001, Fred McEldowney of the American Chemistry Council e-mailed Stuart Keitz of the Department of Commerce, that "government officials engaged in the discussion have not viewed their role as joint partners in the search for opportunities for creating more freedom in the Atlantic marketplace. Instead, they have chosen to respond only to the specifics of industry proposals without setting forth ideas of their own."

The U.S. government responded by attending a meeting at American Chemistry Council headquarters on January 17 and 18, 2002. Present were members of State,

Commerce, EPA, USTR, EU officials and industry representatives. The group was welcomed by Bush "Pioneer" fundraiser and American Chemistry Council CEO Fred Webber, and the two-day meeting provided the chemical industry access to high-level government officials from the United States and EU.

The chemical industry pushed for greater U.S. involvement in EU policy-making, for U.S.-style risk assessment, and for no regulation of existing chemicals. The U. S. government echoed this position in a "white paper" on the EU policy: "U.S. concerns with EU chemicals proposals are related to transparency, risk assessment and mutual acceptance of existing chemicals."

By now, the Bush administration was complaining that the U.S. chemical industry was not defending its interests sufficiently. A briefing paper for Assistant Secretary of Commerce Linda Conlin reveals the Department's impatience with the chemical industry and its active solicitation of the industry to lobby against REACH.

The U.S. government agencies were so anxious to begin lobbying on the industry's behalf, they did not wait for the industry's position paper to begin the campaign. According to the Commerce Department briefing paper, "because of the slow pace of industry response to the Strategy and growing concerns about trade effects and the influence of the Strategy on international environmental programs/activities for chemicals, Commerce, USTR and EPA drafted a preliminary set of questions on the Strategy and provided them to the Commission in December. USTR also met with Commission officials at that time."

But it wasn't as if the industry was sitting on its hands. Lots of lobby and strategy meetings were going on. "Commerce and USTR have met with representatives from the Synthetic Organic Chemical Manufacturers Association (SOCMA), the American Chemistry Council (ACC), the American Plastics Council, ISAC 3, DuPont and Dow to identify industry concerns," according to the briefing paper for Conlin.

### **The U.S. "Nonpaper"**

The connections between the administration and chemical industry solidified with the publication of the U.S. government position, in a "nonpaper." Curiously, the "nonpaper" was an undated document lacking letterhead that no government agency wanted to take credit for writing. USTR and other agencies claim that the "nonpaper" was not an "official" U.S. position, though it would be utilized in official State Department communications, and despite the fact that a nearly identical version of it appeared in the June 2002 issue of the magazine of the American Chemistry Council in an article entitled, "U.S. Government Responds to the EU Chemicals Policy." The author was Jennifer Yoder Prescott, of the Office of

the U.S. Trade Representative.

The "nonpaper" effectively replicated the viewpoint of the chemical industry as the U.S. government position. For example, the "nonpaper" asserted that REACH would reduce consumer choice due to restrictions on four toxic chemicals; acrylonitrile, propylene oxide, 1,3-butadiene, and phenol. The document quoted chemical industry cost estimates nearly word for word, claiming these restrictions would result in a loss of \$8.8 billion in U.S. exports.

In fact, these figures were mostly based on the groundless assumption that U.S. computer sales to Europe would be blocked by REACH.

This financial estimate was widely quoted in press reports on the possible impact of REACH on the chemical industry.

The "nonpaper" also attacked several measures strongly opposed by the chemical industry. Like the chemical industry, the "nonpaper" attacked the substitution of safer chemicals for hazardous ones, calling it "arbitrary discrimination." The "nonpaper" also attacked the Precautionary Principle, describing it as a way to "provide cover for politically motivated bans and other severe restrictions."

Enter Colin Powell

On March 21, 2002, Colin Powell responded to the chemical industry's call for help by sending an "action request" cable to the U.S. embassies in EU Member States and 35 other countries. "There is a perception among industry that their views have not been heard by key policymakers," the cable stated.

Powell's cable outlined chemical industry concerns that REACH "would be significantly more burdensome to industry and government than current U.S. and EU regulatory approaches." The memo outlined chemical industry arguments against the proposal and used financial estimates generated by the American Chemistry Council to make cost arguments against REACH.

Finally, Powell's memo issued a call to action to distribute the U.S. government "nonpaper." "Posts are requested to raise the EU chemicals policy with relevant government officials (e.g. officials from the Environment Ministry, Economics/Trade Ministry, and Foreign Affairs Ministry) and the local business community and offer the nonpaper as a brief description of USG [U.S. government] views."

### **Chipping Away**

A high-level meeting between U.S. and EU officials took place December 16, 2002. Participants included European Commissioner for Enterprise and

Information Erkki Liikanen, Under Secretary of Commerce Grant Aldonas, Deputy Assistant Secretary of Commerce Henry Levine and other Department of Commerce officials. A key agenda item was U.S. concerns about the White Paper.

The U.S. team invoked international trade rules in its lobbying efforts, suggesting that REACH was incompatible with the EU's obligations under the rules of the World Trade Organization.

The proposal "must be applied in ways that are consistent with the EU's obligations to its trading partners under the WTO," the U.S. officials warned their EU counterparts. "The proposals could also violate the non-discrimination requirements of the WTO, and could impose more trade-restrictive measures than are necessary to accomplish the EU's health and safety objectives." WTO rules require countries to adopt the least-trade restrictive alternatives to achieve legitimate health objectives.

The Commerce Department briefing paper pointed to heavy U.S. industry lobbying of the Europeans on REACH. "Both sides of the Trans-Atlantic Business Dialogue Chemical Working Group have been very active in lobbying the Commission, as well as Member States, on the draft legislation."

The briefing paper also stated that U.S. government efforts were beginning to have an effect on the EU policy. "The U.S. Government has had an ongoing dialogue with the Commission on the issue, and succeeded in getting some proposals modified to address U.S. concerns."

### **Government-Industry Collaboration**

An April 4, 2003 e-mail message from an official of the U.S. Trade Representative to industry trade associations and consultants reveals that Catherine Novelli, the Assistant U.S. Trade Representative for Europe and the Mediterranean, had "tasked" the chemical industry and the company Intel to develop "themes" for the U.S. government to use in opposing REACH.

According to the e-mail, "At the last meeting, Cathy had tasked the industries to come up with 'themes' for their concerns about the proposed legislation. The chemical industry had done a list of themes dealing with the EU process. Intel had done a list of substantive themes." The e-mail indicates that industry representatives met with USTR officials on April 3, 2003, to present these "themes."

According to the e-mail, USTR officials indicated that the U.S. government would convey "all the issues from the [American Chemistry Council] and Intel themes" to

the European Union.

The e-mail states that the USTR officials and the industry representatives agreed that the prominence of the messenger for these themes must be elevated and discussed how to "take on" Margot Wallstrom, Commissioner for the Environment at the European Commission, who is responsible for developing the REACH proposal. "The only thing that will get the EU to stop is having the EU heavyweights come in and say that the Commission can't take this forward until a real cost-benefit analysis is done," asserts the e-mail. "But who will take on Wallstrom -- the answer is only other Ministers or Heads of State."

The April 4, 2003 e-mail from USTR to industry groups reveals the extent to which the administration worked with U.S. industry to create this opposition to REACH within the European Union.

The e-mail states: "It was agreed that the following Member States needed to be particularly targeted: Germany, UK, France, Italy, Netherlands and Ireland because they all have large production of chemicals and downstream products. In Italy, it will be important to get to [European Commission President Roman] Prodi. In addition, we need to get to the Swedes and Finns and neutralize their environmental arguments."

The e-mail made specific suggestions for companies that should be enlisted in this effort. As part of the effort to "neutralize" Sweden and Finland, the e-mail states, "it was agreed that the electronics industry would see if Nokia and Ericsson might be helpful, although it was noted that neither manufacture in Europe anymore. It was then suggested that Volvo (and Saab) might be helpful, as well as the paper industry, with its huge papermaking operations in Scandinavia."

The e-mail from USTR even made specific assignments to companies and industry groups. According to the e-mail: "The following industry reps agreed to coordinate comments for particular countries (note: this does not mean that they intended to do all the work, but just to coordinate, so we know the full extent of our efforts): Bill Primosch (NAM [National Association of Manufacturers]) -- Italy and UK; Patricia Sherman (Siemens) -- Germany; Robbins Pancake (Agilent) -- France; Steve Harper (Intel) -- Ireland; Jason Linnell (EIA [Electronics Industries Alliance]) -- Sweden."

### **Powell Redux**

On April 29, 2003, just several days before REACH was released for public comment, Colin Powell sent a cable on a "priority" basis to diplomatic posts in European Union nations. The cable repeated industry objections to REACH and

urged U.S. government agencies "to reiterate to the European Commission and EU Member States our general concerns before the Commission finalizes its formal proposal in early May.

Powell's talking points included objections to the Precautionary Principle, REACH's "complex regulatory approach," and its overly broad focus on "tens of thousands of chemicals." In its place, the State Department memo proposed the industry-favored U.S.-style regulatory system as one where "environmentally sound management of chemicals can be achieved through approaches that better balance risk and economic considerations."

The language in Secretary Powell's cable closely tracked the industry "themes" summarized in the April 4, 2003 e-mail from USTR. For example, an industry theme highlighted in the April 4 e-mail was that "REACH will work to stifle innovation and the introduction of new safer chemicals." Powell's cable stated, "These compliance costs may negatively impact innovation and EU development of new, more effective, and safer chemicals and downstream products."

In total, the April 4 e-mail indicates that there were 11 themes that the industry wanted U.S. officials to pursue. All 11 of these themes are reflected in Secretary Powell's cable.

### **Watering Down REACH**

The extensive U.S. efforts had an impact on the REACH proposal. The draft REACH proposal was released in February 2001. Over two years later, on October 29, 2003, the European Union released a final proposal, which was watered down in response to the concerns raised by the industry and the U.S. government.

For example, Powell's April 29 cable had advocated "the exclusion or more limited treatment of certain low risk types of chemicals -- such as certain polymers and intermediates where exposure is negligible -- and most constituents of articles." The final REACH proposal was revised to exempt polymers from registration, and the requirements for chemical substances in articles were relaxed. Additionally, the European Commission announced that it would present a new impact assessment as advocated by the Bush administration.

The U.S. lobbying efforts also appeared to succeed in building opposition within the European Union. In April 2003, a USTR e-mail had discussed the importance of getting the "EU heavyweights" -- ministers or heads of state -- to "take on" the European Commission and "say that the Commission can't take this forward until a real cost-benefit analysis is done." Five months later, in September 2003, the leaders of the United Kingdom, France and Germany wrote to the President of the

European Commission to express concern about REACH and request additional analysis and an assessment of the effects on industry.

The net effect of the changes was a significantly weaker proposal.

For its part, the American Chemistry Council acknowledged that the "major intervention by the U.S. government" resulted in "significant concessions" in REACH. "ACC rallied opposition to the draft proposal," brags the trade association's 2003 annual report, "including a major intervention by the U.S. government, and ACC actively supported the European industry's advocacy efforts with the leaders of Britain, France and Germany, and many Southeast Asian nations. These efforts helped to build an aggressive position worldwide, and brought about significant concessions in the draft now being considered by the European parliament."

### **Never Enough**

But the industry and its Bush administration allies were still not satisfied. In early January 2004, the administration produced a new internal analysis of REACH that called for further watering down of the proposal, including by excluding more chemicals from its purview.

The U.S. position echoed chemical industry calls to guarantee that "useful" chemicals remain in commerce regardless of risk and raised doubts about whether REACH would comply with World Trade Organization rules.

The paper also signaled a new direction in U.S. lobbying: coordination by the White House Council on Environmental Quality (CEQ), which requested its preparation. Senior administration officials characterize CEQ's chair, James Connaughton, as "the architect of the administration's environmental policy." Connaughton is a former corporate lobbyist and attorney with clients that included General Electric, Asarco and the Chemical Manufacturers Association (currently called the American Chemistry Council).

In the spring of 2004, the aggressive administration- industry lobbying campaign to undermine REACH caught the attention of the Congress. The House Committee on Government Reform-Minority Staff Special Investigations Division produced a report for Representative Henry Waxman, D-California, that outlined the administration's efforts to weaken REACH at the behest of the U.S. chemical industry. The report described the effort as "a case study of how a well-connected special interest can reverse U.S. policy and enlist the support of numerous federal officials, including a cabinet secretary, to intervene in the environmental policies of other countries."

The European Commission responded to the Congressional report by expressing concern over the lack of "balance" in development of U.S. policy. "We certainly are not prepared to give special attention to the demands of the U.S. chemical industry at the expense of sustainable development, the quality of the environment, our duty to protect public health or indeed other industry sectors such as downstream chemicals users whose concerns are sometimes very different," the Commission stated.

The Bush administration opened a new front on the anti-REACH lobbying campaign by recycling a litany of criticisms in a World Trade Organization (WTO) committee. While a full WTO challenge is premature until the draft law is final (sometime in 2006), the administration launched a preemptive attack through the WTO Technical Barriers to Trade Committee.

On June 21, 2004, the Bush administration submitted comments to the committee that strongly criticized REACH as "costly, burdensome and complex," and asserted that the proposal would disrupt global trade.

The administration's broadside provoked a letter from Senators James Jeffords, I-Vermont, and Frank Lautenberg, D-New Jersey, to U.S. Trade Representative Robert Zoellick. They expressed concern that the U.S. position reflected only chemical industry viewpoints, "without the consideration of the broader ramifications for the U.S. economy, national interest, public health and the environment."

Questions were raised about another key element of the lobbying effort against REACH in August 2004. One of the administration arguments against REACH is that it unnecessarily duplicates current regulatory initiatives and could even undercut these efforts. One U.S. example that the administration cites is a voluntary EPA effort called the High Production Volume (HPV) Challenge Program. This program encourages the chemical industry to test, and provide to the public safety information on, chemicals produced in large amounts. The key designer of the program was the environmental organization Environmental Defense, which collaborated with the American Chemistry Council and EPA to develop it.

As the principal creator of the HPV program, Environmental Defense took issue with the administration's complaint about its incompatibility with REACH.

In a letter to the U.S. Trade Representative, Environmental Defense rejected the administration claim that REACH would undercut the HPV program, since REACH requires industry to provide information on chemicals -- the same aim as HPV. Environmental Defense endorsed REACH's more stringent requirements, and

suggested that "most concerns raised by the U.S. government regarding REACH continue to be comprised of assertions that are either unsubstantiated generalities or factually erroneous (or both)."

The erosion of White House credibility on REACH has been somewhat contained by support from an unexpected source; an important Member of the European Parliament. The new chair of the European Parliament Environment Committee, Karl-Heinz Florenz declared in September that REACH should take U.S. policies into account.

"I think it's important to have a regulation that is consistent with other major parts of the world, such as the USA," Florenz told Environment Daily. Florenz's committee will play a key role in guiding the fate of REACH in the Parliament.

Florenz's comments make clear that the compelling evidence of REACH's benefits will not by itself be enough to protect the environmental and public health initiative. The raw political power of the chemical industry and its U.S. governmental allies, as well as its friends in European governments, stands as an ongoing threat to the REACH approach of precautionary-based protection of public health.

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