



# Cloudy Skies, Chance of Sun

## A Forecast for U.S. Reform of Chemicals Policy

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As Europe prepares for REACH, the sweeping new regulation on chemical manufacturers, importers, and users, some Americans are asking whether similar reforms are needed in the United States. The political climate is not heartening for passing environmental legislation, especially something as ambitious as comprehensive reform of chemical regulation. But change is in the air. State and local governments are enacting laws to eliminate dangerous substances. New leaders are emerging as advocates for environmental health protection. U.S. businesses are re-evaluating the materials that they make, use, and market. The process of U.S. chemical policy reform has begun.

**F**ederal policy on chemicals in the United States is long overdue for fundamental reform, but it won't be easy. Environmental initiatives stand little chance of passage in the Congress especially given the political climate and the looming November 2006 midterm elections. Nonetheless, many Americans are concluding that a new approach is needed to eliminate dangerous chemicals.

This report surveys recent developments in the United States and assesses the prospects for major changes in the national framework for regulating chemicals. It summarizes the longstanding problems with the principal federal law, describes some of the political obstacles to reform, and explains how the situation is changing as a result of international forces, state legislation, and business leadership.

To illustrate the complex and changing nature of U.S. environmental politics, this report borrows the language of the daily weather forecast. Positive steps toward creation of a modern, effective system for managing chemicals are described as sunny days and fresh breezes. Efforts to thwart policy reform are depicted as cloudy skies or stormy weather.

Of course, these are just symbols to help explain patterns and trends in U.S. chemicals policy. The weather metaphor fails in one critical way. Although it requires hard work to change U.S. laws and regulations, it is much easier than changing the weather. So this paper identifies some of the social and political factors that are likely to influence the future direction of policy reform in the United States.

The U.S. legal framework for regulating most industrial chemicals has not been revised in 30 years. Deep political divides in the United States do not favor bold federal reform of chemicals law at this time. But initiatives at the state and local levels are multiplying, and some business leaders are responding to public demands within the United States and global forces outside.

### Chilly Climate



To appreciate the possibility of positive change in U.S. chemicals policy, it is first important to understand some of the inherent problems with existing federal laws and the political environment that makes reform so difficult.



“Most Americans believe their government is making sure that chemicals used in the market place are safe. Unfortunately, that simply isn’t true.”

Frank Lautenberg,  
U.S. Senator from New Jersey

## Problems with TSCA

Before the advent of the REACH proposal in the European Union, the phrase “chemicals policy” was rarely heard in the United States. Analyses of U.S. chemicals policy consistently find a confusing jumble of federal regulations with inconsistent standards and gaping holes. The main law regulating industrial chemicals, the Toxic Substance Control Act (TSCA) was enacted in 1976 and remains essentially unchanged. Unlike federal laws on air and water pollution, TSCA was intended to screen out dangerous chemicals before they are manufactured. In the U.S. higher than 95 percent (by number and volume) of the chemicals on the market today were “existing” chemicals in 1979, thereby escaping even the minimal scrutiny applied to “new” chemicals.

In practice, TSCA leaves the Environmental Protection Agency (EPA) blind and toothless. The law contains built-in disincentives for generating safety data, including penalties for failure to disclose information but none for failure to gather it. Under this federal law, EPA can only act to restrict an existing chemical after demonstrating that it poses an “unreasonable risk.” Even then, the remedies imposed must be the “least burdensome” to achieve the intended results.<sup>1</sup> Other U.S. laws on pesticides, pharmaceuticals, and some consumer products share some of TSCA’s problems, but none has been as ineffective at protecting health.

In 2005 the Government Accountability Office (GAO), an investigative arm of Congress, found that EPA has exercised its powers under TSCA to require testing on fewer than 200 of the 62,000 chemicals on the original inventory of existing substances.<sup>2</sup> Even worse, TSCA’s powers for banning chemicals have been successfully used on just five substances – and not a single chemical

since 1990. Instead of a credible threat of restrictions, EPA has relied instead upon negotiated agreements for some high-profile chemicals (such as PBDEs and PFOA) and voluntary commitments by industry.

## Lack of Political Will

Despite the recognized failings of TSCA, the Congress has not reauthorized or substantially amended the law in 30 years. This is due in part to broad political resistance to any environment reforms. The legislature is highly polarized between the majority Republican and minority Democratic parties.<sup>3</sup> Bipartisan agreement has been rare in recent years.

With few exceptions, federal chemicals policy has attracted relatively little public attention over the years. The chemical industry remains satisfied with the law as it stands. Some experts and environmental groups have pointed out the obvious problems, including a lack of basic data and EPA’s inability to ban chemicals. But until recently this has not translated into concrete proposals for Congressional action.

The long stalemate over TSCA is beginning to shift. Public concerns about specific chemicals are giving way to a look at systemic failures and root causes. While national political discord is stifling the search for policy solutions, several state and local governments are stepping up to the challenge. As international environmental law advances, in Europe and globally, the impetus of U.S. reform will intensify.<sup>4</sup>

## Cloudy Skies



Three ongoing political battles over U.S. regulation of dangerous substances demonstrate the difficulties of building a new federal chemicals policy.

<sup>1</sup> “Preventing Pollution? U.S. Toxic Chemicals and Pesticides Policies and Sustainable Development,” Lynn Goldman, *Environmental Law Reporter*, 32 ELR 11018, 2002.

<sup>2</sup> “Chemical Regulation: Options Exist to Improve EPA’s Ability to Assess Health Risks and Manage Its Chemical Review Program,” U.S. Government Accountability Office, GAO 05-458, Washington, DC, June 2005.

<sup>3</sup> In reality the partisan balance in Congress is relatively close; Republicans hold 55 percent of the seats in the (upper) Senate and 51 percent in the (lower) House of Representatives.

<sup>4</sup> “New Power for ‘Old Europe,’” Mark Schapiro, *The Nation*, December 27, 2004.



## Erosion of the Right-to-Know

The Toxic Release Inventory (TRI), the flagship U.S. pollutant release and transfer register, has been a source of valuable information and a point of pride for American environmentalists. Established by Congress in 1986 following the industrial disaster in Bhopal, India, TRI reporting has expanded to cover some 650 chemicals from 26,000 industrial facilities, power plants, and other sources. The resulting database, available on the Internet, is a powerful resource for local officials, firefighters, communities and many others. Industry routinely relies on the TRI as a tool for measuring progress internally and reporting it to the public.

Despite this success of TRI, EPA has proposed changes that would systematically reduce the quantity and quality of the data. The agency wants to raise the threshold for weakened reporting from 500 to 5,000 pounds (around 220 kilograms to 2.2 tonnes). EPA would also allow companies to use this short form for persistent, bioaccumulative toxics (PBTs), further reducing the public's right-to-know. EPA also notified Congress that it intends to collect data every second year, weakening this value of the data as an annual scorecard.<sup>5</sup>

## Preempting State Labeling Laws

Congress is currently debating a bill that would limit state authority to enforce food labeling requirements. A principal target of this federal legislation is California's Safe Drinking Water and Toxic Enforcement Act of 1986, more commonly known as Prop 65. This novel law requires the state to maintain a list of chemicals known to cause cancer, birth defects, or other reproductive impacts and to alert citizens about potential exposures. Over the past two decades, California's list has grown to roughly 750 chemicals. To avoid the stigma of such

labels, many manufacturers and retailers have chosen to eliminate their use of Prop 65 substances.

The bill now pending in the Senate would prevent California and other states from administering their own labeling requirements. The effect of this bill would go far beyond Prop 65, watering down or invalidating more than 200 state health and safety laws on milk, shellfish, restaurants and more.<sup>6</sup> Many state governors and attorneys general actively oppose the bill. The vulnerability of state environmental laws makes it all the more important to achieve comprehensive federal reform.

## Failure to Ratify the POPs Treaty

In 2001 President George W. Bush praised the Stockholm Convention on POPs in a White House ceremony and sent his representative to sign this global toxics treaty. Today, the United States remains an observer to this landmark agreement, awaiting Congressional implementing legislation and Senate advice and consent. U.S. ratification requires specific changes to TSCA (as well as the federal pesticide statute). These changes are needed to grant EPA the authority to regulate "new" POPs when the United States "opts in" on POPs chemicals added to the international instrument.

Early in the process U.S. environmentalists testified along side industry representatives and agreed on the scope of the changes. All U.S. stakeholders agree that POPs ratification must not wait for overall reform of TSCA. But in the years since, a number of issues have prevented passage of POPs bills. EPA's authority to take prompt action is one critical issue. It is simply not credible to assume that TSCA's existing "unreasonable risk" standard would allow the agency to regulate future POPs. Another

“ In Alaska we are seeing cancer not only in our people but in the animals we harvest for our traditional foods which sustain us. ”

Shawna Larson  
Indigenous Environmental  
Network and Alaska  
Community Action on  
Toxics<sup>7</sup>

<sup>5</sup> Dismantling the Public's Right To Know: The Environment Protection Agency's Systematic Weakening of the Toxics Release Inventory, OMB Watch, December 2005.

<sup>6</sup> "Shredding the Food Safety Net: A Partial Review of 200 State Food Safety and Labeling Laws Congress is Poised to Effectively Kill with H.R. 4167," A Report from the Center for Science in the Public Interest and the Natural Resources Defense Council, Washington, DC, March, 2006.

<sup>7</sup> Shawna Larson, Alaska Communities Against Toxics and Indigenous Environmental Network, Stockholm Convention 2nd Conference of the Parties, Geneva, May 1-5, 2006.



core issue concerns the rights of state and local governments to maintain POPs requirements that are stricter than federal POPs obligation.<sup>8</sup>

## Scattered Sunshine



Despite these proposed steps backward, positive changes in U.S. chemicals policy are inevitable. Growing scientific evidence and public awareness of chemical dangers are driving state and local governments to take action. In Congress, political leaders are emerging as powerful advocates for environmental health, including better controls on chemicals – before they become pollutants. In the business community many U.S. companies are aligning with market trends and actively seeking safer alternatives.

### State Laws on Chemicals

The lack of decisive federal action on industrial chemicals has increased the pressure on state and local governments to exercise their power to protect public health. Under TSCA, states are free to regulate chemicals that are not already restricted under federal law. Since TSCA has been so ineffective, in practice this means that states have a free hand to impose restrictions on industrial chemicals. For example, as of May 2005 at least six states had passed legislation restricting certain brominated flame retardants, and several others were considering similar proposals and others on mercury-containing products or other persistent pollutants.<sup>9</sup>

Increasingly, the scope of these efforts is expanding from individual substances to chemical groups. For example, the February 2006 Executive Order by the Governor of Maine established a task force to identify and promote safer alternatives

to PBTs, neurotoxins, and other chemicals discovered through biological monitoring.<sup>10</sup> In addition, municipal governments from San Francisco to Boston are incorporating environmentally-conscious criteria in procurement decisions, rewarding companies that offer safer alternatives.

Activities in California are especially relevant, given the state's \$1.4 trillion economy and reputation for environmental leadership. In 2005, 35 bills addressing chemicals and health were introduced in the California legislature. At the request of state lawmakers, the University of California published a March 2006 report, *Green Chemistry in California: A Framework for Leadership in Chemicals Policy and Innovation*.<sup>11</sup> The fascinating document provides a cogent analysis of the problems with federal law and outlines a comprehensive state-level chemicals policy – one with similarities to Europe's REACH proposal. This report has already resulted in a task force to advise on future legislative options and triggered a vigorous debate among California's business community and others.

Some of these state-based chemical initiatives resemble recent state actions on climate change, another pressing environmental issue that has yet to gain political traction at the federal level. No one views a patchwork of state chemical laws as the ultimate goal for a coherent solution to the problems of missing data, inadequate authority, and skewed incentives that plague TSCA. However, these states serve as vital laboratories for shaping the policy ideas, messages, and organizing strategies necessary for eventual breakthrough on a national chemicals policy. Historically, many U.S. policy advances, including safety, environmental and civil rights laws, won first within leading states.

<sup>8</sup> U.S. Ratification of the Stockholm Convention: Analysis of Pending POPs Legislation, Center for International Environmental Law, Washington, DC. Update: March 13, 2006.

<sup>9</sup> U.S. States and the Global POPs Treaty: Parallel Progress in the Fight Against Toxic Pollution, Karen Perry Stillerman, Center for International Environmental Law, Washington, DC, May, 2005. Also, "Enacted and Introduced PBDE Legislation 2005," National Caucus of Environmental Legislators, Bethesda, MD. May 26, 2005.

<sup>10</sup> Governor John E. Baldacci, Maine, Executive Order 12 FY 06/07, An Order Promoting Safer Chemicals in Consumer Products and Services, February 22, 2006.

<sup>11</sup> Green Chemistry in California: A Framework for Leadership in Chemicals Policy and Innovation, Michael Wilson, with Daniel Chia and Bryan Ehlers, California Policy Research Center, University of California, March 2006. <http://www.ucop.edu/greenchemistryrpt.pdf>



## Congressional Champions

Congress' unwillingness to even consider proposals that conflict with the pro-business priorities of the Republican majority prevents many environmental lawmakers from being heard. But many members of the U.S. Senate and the House of Representatives, especially many in the Democratic Party, have fiercely defended the public right-to-know and the legitimate authority of state and local governments to uphold stricter standards. In the struggle to win U.S. ratification of the Stockholm Convention on POPs, Congresswoman Solis from California has introduced a positive alternative and prevented attempts to apply the broken machinery of TSCA to regulate new POPs chemicals.

In July 2005, the "Child, Worker and Consumer-Safe Chemicals Act" was introduced in the U.S. Senate. Known informally as the Kid-Safe Chemicals Act, the bill was authored by Senator Lautenberg, a political veteran from the chemical-intensive state of New Jersey and Senator Jeffords, a former Republican turned Independent from the state of Vermont.<sup>12</sup>

This proposal also resembles the EU REACH proposal: chemical producers would bear the burden of providing basic safety data; thousands of existing and new chemicals would be evaluated in a step-wise process; chemicals that fail to meet specific standards would be phased out, with limited exemptions. In some ways, this proposal goes even further than REACH. The bill includes mandatory biomonitoring, enhanced funding for "green chemistry" research and development, and mandatory substitution of safer alternatives under certain conditions.

Reflecting the sad state of affairs in Congress, the Kid-Safe Chemicals Act has yet to receive so much as a committee

hearing, let alone a preliminary vote. If control of the Senate or House shifts to the Democrats, the new Congress could take up the issue in 2007. Meanwhile, this bill provides a benchmark for future dialogue about U.S. policy reform.

## Business Leadership

For U.S. companies in the global market, changing consumer expectations and international standards are more relevant than the divisive politics in Washington, DC. This is already evident for sectors influenced by existing European directives limiting hazardous substances in cosmetics and electronic equipment. For U.S. computer makers such as Dell and HP, for example, it makes little sense to manufacture a given product both with and without restricted substances.

The situation for cosmetics companies is a bit more complex since they often formulate products for targeted markets. The Safe Cosmetics Campaign, an aggressive effort by a coalition of environmental, health, consumer and other groups, has pressed companies to apply the European cosmetics standards to the products marketed in the United States. Several U.S. multinationals, including Revlon and Proctor & Gamble, are resisting the pressure to abandon double standards. But this has created a competitive advantage for early adopters such as Avalon Natural Products, Burt's Bees, and others.<sup>13</sup>

As in Europe the U.S. companies that appear most proactive in adopting chemicals policies of this kind are downstream users, rather than manufacturers, of chemicals. Kaiser Permanente, a \$28 billion health care organization that serves 8.2 million members through a network of 30 medical centers and over 400 offices, is one interesting example. The company is very consciously leveraging its purchasing power to transform the market for health

“We’ve taken a precautionary approach, meaning that where there is credible evidence that a material may result in environmental or public health harm, we strive to replace it with safer alternatives.”

Lynn Garske, Environmental Stewardship Manager, Kaiser Permanente.<sup>14</sup>

<sup>12</sup> "Child, Worker, and Consumer-Safe Chemicals Act of 2005," S. 1391, 109th Cong., 2005. (Also introduced in the U.S. House of Representatives as H.R. 4308.)

<sup>13</sup> "300 Cosmetics and Body Care Companies Pledge to Make Safer Products," The Campaign for Safe Cosmetics, Press Release, March 28, 2006. <http://www.safecosmetics.org>

<sup>14</sup> Environmental Stewardship at Kaiser Permanente: A Precautionary Approach from a Preventive Health Care Organization, Lynn Garske, California Chemicals Policy Symposium, Oakland, CA, March 16, 2005



care products, including everything from medical devices to construction materials.

Among U.S. companies, there is considerable anxiety about any new laws that might impact existing markets or eliminate substances on which they depend. Yet many recognize the changing expectations of customers, communities, workers and investors. Businesses that succeed in reducing their reliance on inherently dangerous substances are shedding potential liabilities and enhancing their long-term competitiveness.

## Long Term Outlook



Unlike the weather, the future of American chemicals policy is not the result of nature; it is in the hands of people. How the U.S. federal law evolves will ultimately depend on political decisions within Congress and the administration.

Some of the strongest driving forces for chemicals policy reform originate outside U.S. borders. Changing global markets are part of these winds of change. Ideas and experience are also crossing borders. That is one way to explain how concepts familiar to the European REACH debate – no data/no market, safer alternatives for PBTs, precaution – are appearing in state proposals, media stories, investor resolutions, and the language of campaigners in the United States. Adoption of a strong, effective REACH

will likely accelerate the progress toward to fundamental reform in the United States.

A good example of this globalization of environmental activism is the “Louisville Charter for Safer Chemicals,” a set of principles and an organizing platform that builds on international efforts and integrates the aspirations of U.S. workers and communities.<sup>15</sup> This is informing networks of NGOs, health-affected groups, labor and working toward the goal of a “toxics-free future” by the year 2020, in synch with the timeline affirmed at the World Summit on Sustainable Development in Johannesburg.

For environmental health advocates, corporate strategists and far-sighted politicians alike, the road ahead is uncharted. But it is clear that the U.S. government will come under increasing pressure, from its own citizens and international progress, to update its anachronistic policies on chemicals. State bills are certain to grow in number and scope. U.S. businesses will be forced to abandon double standards.

The U.S. elections in November 2006 will usher in new faces in the Congress, and a new president and administration will take office in early 2009. Taken together, the long term forecast for U.S. reform of chemicals policy is looking better than ever. With a concerted effort by the many who stand to benefit from a safer, saner approach to chemicals, this upbeat forecast will be fulfilled.

<sup>15</sup> The Louisville Charter for Safer Chemicals, 2005. [www.louisvillecharter.org](http://www.louisvillecharter.org)

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