



With the Toxic Substances Control Act (TSCA) celebrating its 37th birthday today, I was thinking what we should get it as a birthday gift. Here's one idea; how about a little respect. I've blogged before about how the statute has become one of the most denigrated environmental laws on the books. It seems that every other year or so, the General Accounting Office, Congressional Research Service, an NGO, or law professor (myself included) issues yet another condemnation of the statute and the program. And the latest incarnation of TSCA reform legislation sits in Congress still, now ostensibly bi-partisan and in some ways worse for it. To be sure, at 37 TSCA is due for some serious changes, but as we light the candles on the cake, it's worth considering a few points about TSCA and its implementation.

At its birth, TSCA was a remarkable advance—the first truly multi-media regulatory program. It had many of the features for which the European Union's REACH regulation is now celebrated, registration of chemicals in commerce, a pre-market review program, testing authority, and chemical use reporting. Clearly those features need upgrades, but at the time they were state of the art. And their particulars, such as the lack of self-executing testing requirements, limited time for pre-market review, the "least burdensome alternative" constraint on regulatory action under Section 6 and others, reflected compromises necessary to produce an acceptable bill.

But to a great degree, TSCA was a victim of its time. Just as it was hitting its stride, it had to compete against the Hazardous and Solid Waste Amendments, the Clean Air Act Amendments, and Superfund for funding, resources and organizational attention. Lacking the hard hammer mandates and Congressional deadlines facing the other programs, it is no wonder that it starved. Losses in certain court cases, most notably *Corrosion Proof Fittings*, further buffeted the program. But rather than respond to the challenges presented by those decisions, the agency essentially walked away from aggressive implementation. It is fair to question whether the admittedly lackluster performance in terms of testing rules and

regulatory actions had more to do with underfunding and timid management than with statutory language and court decisions.

When you consider the resource constraints and bureaucratic jumble surrounding TSCA implementation, in some ways it is remarkable what the agency has accomplished. Take the New Chemical Review program. Certainly reform is needed, but aspects of that program provide a striking example of agency scientists and managers adapting as best they can to difficult circumstances. EPA developed a streamlined new chemical review process, making risk management decisions far faster and with substantially less information than in other settings. Along the way, it pioneered use of predictive approaches to toxicology such as use of chemical categories and structure activity relationships. Again, there are significant problems with the TSCA pre-market review process—but let's give some credit where credit is due.

So in evaluating TSCA and making the fixes, it's important to distinguish structural problems inherent in the statute from failures of implementation such as limited funding, conservative lawyering and lack of political will. Addressing the former without considering the latter will leave us yet another underperforming program.