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POPS, PIC, AND LRTAP: THE ROLE OF THE U.S. AND DRAFT LEGISLATION TO IMPLEMENT THESE INTERNATIONAL CONVENTIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

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POPS, PIC, AND LRTAP: THE ROLE OF THE U.S. AND DRAFT LEGISLATION TO IMPLEMENT THESE INTERNATIONAL CONVENTIONS

TUESDAY, JULY 13, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON ENVIRONMENT,
AND HAZARDOUS MATERIALS,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:08 p.m., in room 2123, Rayburn House Office Building, Hon. Paul E. Gillmor (chairman) presiding.

Members present: Representatives Gillmor, Pitts, Terry, Rogers, Issa, Otter, Barton (ex officio), Solis, Capps, Allen, Gonzalez, Rush, Stupak, Green, and Dingell (ex officio).

Staff present: Mark Menezes, majority counsel; Jerry Couri, majority policy coordinator; Nandan Kenkeremath, majority counsel; Tom Hassenboehler, majority counsel; Michael Abraham, legislative clerk; Michael Goo, minority counsel; and Richard Frandsen, minority counsel.

Mr. GILLMOR. The subcommittee will now come to order. And before the recognizes himself for the purpose an opening statement, I would like to thank the members and our panelists for their attendance, and their participation.

And I would also like to advise everyone that some of our witnesses do have official obligations that will require them to travel later today. And in order for the members to have ample opportunity to ask questions, I would appreciate the indulgence of the members in being mindful of those obligations.

And now I recognize myself for the purpose of an opening statement.

In April 2001, the Bush Administration pledged the commitment of the United States to join the Stockholm Convention on Persistent Organic Pollutants. This pledge punctuated a 10 year period of bipartisan cooperation and leadership concerning global protection of the environment and public health. These efforts included the RS Protocol on long range transbounding air population of POPs and the Rotterdam Convention on prior informed consent, and also persistent organic pollutants.

Today our subcommittee is meeting to review a discussion draft that I released 3 weeks ago. This draft, in my opinion, reasonably implements the POP and the PIC Conventions, and the LRTAP

Protocol. And I am interested in constructive suggestions from this hearing.

To date I have received a number of useful comments on this draft, and we have identified a few places where improvements can be made. I look forward to our testimony today, and any new constructive suggestions that may come forth.

The most important thing is that our committee will be in a position to move this legislation and U.S. leadership forward. And while I realize that the other body has yet to provide advise and consent on POPs and PIC, I have not heard any reason why they would not do this. And, in fact, may be waiting for us before doing so. Therefore, if moving a legislative product is what is necessary to convince the other body that they must act now, then our committee should show that leadership.

If the United States is to remain a leader in the global environmental debate, it must have legislation that fully implements these treaties. The meetings are where important decisions will be made regarding future activity under these agreements, and those meetings are about to occur. We as a country cannot make a meaningful difference if we do not have a legitimate role in that debate.

The discussion draft will allow us to implement these treaties and become a full partner in them. It was assembled in a few categories and based upon a few important principles.

The first category includes provisions, those that fulfill the regulatory prohibitions and restrictions necessary to address chemicals that are already listed in the treaties. And while I believe that there may be technical drafting issues, I am not sure that there are many fundamental policy decisions on the objectives of those provisions.

The second set of issues concerns a process by which the United States participates in decisions involving the potential addition of new chemicals to the lists and the treaties. I do not believe that the United States should simply defer to the decisions of an international body with respect to the U.S. position on such additions. This seems to be the clear intent of the opt-in provisions negotiated heavily by officials in the Clinton Administration. And I also do not believe U.S. courts should determine what actions the United States should take regarding future amendments to the treaties.

The discussion draft allows the public to be fully informed and to provide comment to the executive branch about potential actions under the agreements.

A third set of issues concerning possible additional tailored EPA rulemaking authority for new chemicals that might be added to the treaty lists. Currently the U.S. has addressed a regulation of chemicals under these treaties through a range of regulatory authorities. It's hard to predict the future decisions of the international body. It may very well be that the same authorities will be both sufficient and appropriate to address amendments to the treaties. However, let me be clear: I am proposing additional authority only for chemical substances or mixtures added to these treaties and not as a means of generally expanding EPA regulatory authority over manufacturing use or distribution in commerce of chemicals.

The potential to regulate manufacturing, use and distribution in commerce is a sweeping power and should not be delegated from Congress to a bureaucracy lightly.

I am satisfied, however, that the provisions I have proposed provide sound principles to both protecting human health in the environment and to consider the costs and benefits of alternative means of protecting human health in the environment.

I look forward to the testimony of our witnesses on these agreements, and on the draft legislative language. Together we can and we should make a positive difference for a global environment, economy and health.

And the Chair is now pleased to recognize the—ah, the distinguished ranking member has come in, and I would be pleased to first recognize the gentleman from Michigan, Mr. Dingell.

Mr. DINGELL. Mr. Chairman, I thank you for the recognition.

I thank my dear friend and colleague Ms. Solis.

Over 3 years ago the President announced that the United States would sign the Stockholm Convention on Persistent Organic Pollutants called POPs. Since then 151 nations have signed the POPs treaty. Over 70 countries have ratified it, and the treaty went into effect on May 17, 2004. Today this subcommittee is holding its first hearing on this matter.

Mr. Chairman, I want to make it clear out of respect for you and affection for you, it is our intention to try and be as helpful as we can, and that this statement is intended to be a friendly one. But I think you will observe that there is some dissatisfaction on this side of the aisle on the way this matter has been handled.

All the 12 POPs' chemicals listed in the treaty, known as "the dirty dozen" are already banned or tightly controlled in the United States. These are some of the most dangerous chemicals known to man and include such infamous substances as DDT, PCBs, and dioxins. The POPs Convention created a science-based procedure that will govern the inclusion of additional chemicals to the convention, and defines the criteria that must be met. These criteria focus on substances that are toxic, that bioaccumulate and that are resistent to natural breakdown, and that can be transported long distances.

The task now before the Congress is to provide the Environmental Protection Agency, EPA, with rulemaking authority and a regulatory standard that allows the agency to promptly implement the control measures recommended by the Conference of the Parties for a new chemical, the 13th POP if you wish. The implementing legislation must allow the agency to proceed in an efficient and expeditious manner using the results of the science-based international process. And I want to stress that this is a science-based process.

We have had little time to review the majority discussion draft, which I understand comes on the heels of numerous meetings with the administration to which I would note, with more than a little distress, Democratic members and our staff were not invited. If this legislation is to be considered in a bipartisan fashion, then I would assume that consultation with the minority was very much in order, and would be consistent with the attitudes of my friend the chairman.

Also, the administration has yet to submit a legislative proposal for implementing the treaty. And I will observe then that I have significant concerns about the process so far. I am willing to work with the Chair both on substance and to come up with a more acceptable process.

I also have serious concerns that the rulemaking standard and the criteria contained in the discussion draft do not allow the EPA to act in an efficient manner on realistic and expeditious timeframe. Moreover, that standard appears nowhere in the treaty or in existing United States law. This I find to be difficult to accept, and it poses an opportunity for litigation and years of delay. It may not properly account for public health benefits or recognize the work of science-based international processes.

Our ability to regulate additional extremely dangerous substances is not clear. We must be mindful of a recent example: EPA's experience with asbestos, a known carcinogen. The Nation saw the EPA spend 10 years from 1979 to 1989 doing analyses and assessments to support regulation that bans certain uses of asbestos. I should note that the final rule was struck down by the courts. If we cannot regulate a substance as dangerous as asbestos, our ability to regulate a 13th POP also appears to be inadequate and should be the matter of both consideration in the legislation, but also in discussions with the minority.

It has been suggested that there is insufficient control by the United States over this listing process. I do not believe that is the case, although I am willing to listen to statements which would so indicate. The United States will participate fully in any amendment process. In addition, I understand the President intends to require an affirmative opt-in by the U.S. Government for each new chemical listed, on top of the United States rulemaking process.

Administration officials have also indicated that they would not oppose separate advice and consent by the U.S. Senate for each new chemical added by the Convention. Passage of solid implementing legislation for the POPs treaty appears to be highly desirable, and also readily doable. But I would remind the Chair that this will only be in the context of a full, fair and bipartisan process. This committee has always addressed problems related to the environment in a bipartisan fashion, and the result of that has been not only better legislation, but an easier process which was happier as it went forward, and I think happier in its conclusion. This hearing is a somewhat belated first step.

And I look forward to the testimony of our witnesses and I thank you for your courtesy to me.

Mr. GILLMOR. The Chair recognizes the gentlewoman from California, who is the ranking member of the subcommittee, Ms. Solis.

Ms. SOLIS. Thank you very much, Mr. Chairman, for holding this hearing this afternoon. It is a very important topic that brings us all here today, and I am very pleased to see a good number of our colleagues here with us at this subcommittee hearing.

I want to thank all the witnesses for being here today, as well. Today we are taking the first step as a committee to better understand the Stockholm Convention on POPs and the PIC and the LRTAP POPs. These are complex treaties that deserve our time to fully understand. Not only do these treaties have an impact on

laws of the U.S. and other countries, but they also have the potential of having a profound effect on our public health.

Persistent organic pollutants are highly toxic chemicals that have adverse effects on public health and the environment. These pollutants impact public health in the United States and around the world. It is my understanding that the United States played a large role in negotiating of this treaty initially, and that there is general agreement between the government, industry, Republicans and Democrats alike about the need to regulate the dirty dozen pollutants.

I believe that the United States should continue to be a world leader. We were a leader not only on the negotiation and regulation of the first 12 pollutants already identified, but we should also remain No. 1 when addressing the 13th, 14th and 15th POP.

I have been extremely disturbed and dismayed at the Bush Administration's desire to act unilaterally on so many issues, and hope that the United States can use this as an opportunity to work together with our allies to protect our public health. But the process by which we have come together today as a committee may make achieving ratification difficult.

Three weeks ago on June 22 staff was notified of the chairman's bill and of the process that the majority had gone through to develop this legislation. A week later, with less than 30 legislative days left in session, we heard personally for the first time in 3 years that ratification of the treaty was an administration priority.

So we come to this discussion today having been left out of what, in my opinion, needs to be a bipartisan effort. The United States and the world would have benefited had we been included from the get-go. But that is not the route the majority chose. The majority chose to go it alone and here we are today trying to understand these issues.

I have questions and concerns about the majority's draft, and about its impact on public health, and the ability of the United States to be a world leader. Specifically I am concerned about the standard established by the EPA to regulate the next internationally agreed upon pollutant. I am concerned about the authority the EPA had been given to act to protect public health. And I am concerned about what impact these new regulations that we adopt will have on our ability to consider future U.S. regulations for pollutants as necessary.

The language that we choose to define how the United States abides by the treaty must preserve the intent of the treaty or the United States will not be viewed as a world leader, but instead as undermining the treaty. The legislation we are discussing today is key because it will determine how we deal with the next POP, the next pollutant that is found to adversely effect our public health. The road that we choose for domestic regulation will show whether the U.S. is really a world leader or if it is just all talk.

We should not sacrifice the intent of the treaty for an ideology that does not protect our public health globally.

Mr. Chairman, I hope we can air these questions today. While we may not resolve them, at least let us have a discussion.

Yield back.

Mr. GILLMOR. I thank the gentlelady. And let me make one comment regarding part of the gentlelady's opening statement, also that of the ranking member that somehow the minority was excluded.

I have been here in the majority, I have been here in the minority. And when the current minority was in the majority, I mean you are coming up with a new rule now. Nobody in that majority ever thought they had to go to the minority to draft a discussion draft. So we are using basically the same procedure you did.

Second, 3 weeks notice of a discussion draft strikes me as being more than ample time.

The gentleman from Chicago, Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman. And I thank you for holding this hearing.

Given the complexity of this issue, I hope that this only the first in a series of comprehensive, deliberative and bipartisan hearings.

On that note, Mr. Chairman, I want to join my colleagues in the minority to stress that this should be a deliberative and bipartisan approach. While I comment your efforts on the discussion draft that is before us today, I am also disturbed by the fact that no Democratic members were involved in this drafting. Given the international dimension and given that that the purported urgency of passing and implementing legislation, I do not see why the majority would not sit down with us and craft a bipartisan, noncontroversial bill that could easily pass the House and be reconciled with the Senate.

At the very least, I hope that this discussion draft is just that; a draft for discussion and that the Chairman will encourage and welcome constructive input from Democratic members of this subcommittee.

Having said that, I will briefly say that after an initial review of the discussion draft I find it cumbersome and loaded with needless regulatory hurdles. The discussion draft looks less like implementing legislation and more like a deliberate attempt to thwart domestic regulations stemming from international agreements, international agreements that are supposed to be painstakingly brokered by the executive branch.

POPs are some of the most deadliest chemicals on the plant, and we should not take them lightly. In order for the U.S. to add new POPs to the existing list of banned POPs, the administration must opt-in and affirmatively agree to banning or regulating a new chemical.

In addition, under the terms of the treaty, this opt-in process only takes place after exhaustive scientific studies most likely led by our country. Given that this process will take 5 years by itself, it is curious why the discussion draft would want to bog the process down further with so called implementing legislation by creating additional regulatory hurdles.

To use section 6 of the Toxic Substance Control Law makes little sense if the Chairman and if other members of the majority is interested in simply implementing the terms of the international agreement. As everyone knows, section 6 has been a complete failure and hasn't resulted in the regulation of one toxic substance. Simply put, if the EPA can't even use its authority to regulate as-

bestos, I do not see how it will be able to regulate additional POPs as mandated by an international treaty.

So I look forward to the discussion today. And I welcome the guests. And I hope they will shed some light on a very, very complicated issues.

And I thank you, Mr. Chairman.

I yield back the balance of my time.

Mr. GILLMOR. The gentleman yields back.

The gentleman from Maine.

Mr. ALLEN. Thank you, Mr. Chairman.

We do legislation to enable the United States to become a party to three international agreements that ban the use of the world's most dangerous and persistent pollutants, including the persistent organic pollutants or POPs treaty. These chemicals should be banned abroad as they are banned in this country.

The Clinton Administration negotiated these agreements and the Bush Administration embraced them. But, unfortunately, the legislation we have before us reflects a profound hostility to using international organizations to deal with global problems. The debate is about a simple difference in approach: Will the United States work within international bodies or act unilaterally. Over the last 4 years this Nation has gone from a world leader to a world piraya in the eyes of many around the world.

The U.S. helped draft the POPs treaty establishing an international science-based process to access future persistent organic pollutants. The U.S. should work within that process to determine if chemicals should be regulated as POPs in the future. But the majority's working draft implementing legislation rejects the international standard and process for declaring POPs, apparently because it grants decisionmaking authority to an international institution. Under this legislation EPA would ignore the years of international analysis that led the community of nations to act. Instead, EPA would have to come to its own conclusions using an entirely separate set of criteria on the necessity of regulation. This threatens to undermine the treaty established to regulate promptly the most dangerous chemicals we can identify.

Moreover, this legislation is impractical as drafted. It proposed to use cost benefit analysis as the standard for determining whether a POP should be regulated. There are fundamental challenges to assessing the benefits of banning international pollutants with long term impacts that economists do not know how to qualify. What is the dollar value of a 2. IQ reduction in future generations of children? Can we value the loss of our bald eagle populations once decimated by DDT?

Natural resource and human health damage assessment has come away, but resource economists are at least a generation away from this kind of valuation.

But even more concerning is the international nature of the impacts. Benefits analysis of environmental regulation in the United States rests heavily on what is known as the value of statistical life, a relative simple quantification of Americans' willingness to pay to avoid deadly risk. EPA basis its $6.4 million value on studies of Americans because people in developing countries do not have the equal means to value risk avoidance. The six major eval-

uation studies performed in the developing world reveal the value of statistical life less than $1 million. So what do we? Do we take the U.S. value and discount it? Do we find Americans to be more valuable than people in other countries? We cannot afford to use such an imperfect standard on chemicals as dangerous as DDT and PCBs. The established health base standard established by the POPs treaty itself is sound policy. We ought for once to work with international organizations to cope with the global problem. This should be an opportunity for us to recover some respect around the world.

I thank you.

Mr. GILLMOR. The gentlelady from California?

Ms. CAPPS. Thank you, Mr. Chairman. And I am pleased with the subcommittee's interest in the Persistent Organic Pollutants Treaty. In signing this treaty our country went on record that identified toxic substances pose a worldwide threat to human health and the environment. The U.S. Government, industry, public health and the environmental community all played a large role in drafting this treaty which has wide spread support. However, 3 years after signing we have yet to act or consider implementing legislation on this historic treaty. In the meantime, creation of manufacturing of toxic substances goes on unabated.

The treaty eliminates, or significantly reduces the global production and use and release of the 12 worst polluting substances, already tightly controlled in our country. It also establishes a science-based process for adding other persistent organic pollutants to the list in the future. These identified toxic substances persist for years in the environment, travel great distances on wind and in water currents and accumulate in food chains. Everyday Americans are exposed to POPs through fish and dairy products. And because they collect in body fat, women can transfer these toxic substances to their offspring and to infants during breast feeding.

Even at extremely low levels these substances can cause irreversible damage. Scientific evidence has definitely linked persistent organic pollutants to decreased birth weights, cancers and learning and reproductive disorders.

As a Public Health nurse I value the giant step forward the treaty takes in reducing human exposures to these toxic substances. But, unfortunately, this draft of implementing legislation takes a giant step backward.

First, it would severely slow down any future attempt to eliminate toxic chemicals and pesticides. It would require EPA to undergo unnecessary analysis in the event it chooses to regulate a new polluting substance. As a party to the treaty we will already be participating in a thorough scientific investigation of additional substances before they are added to the treaty. And with all due respect, this draft would ignore these results. Instead, it could force EPA to start additional time consuming and costly studies. Even worse, this draft contains no requirement that EPA even do anything after an international decision to add a new persistent organic pollutant.

There is no time line for EPA to act, no obligation for them to say why not and no citizens petition process to challenge EPA.

I am concerned also with the draft's proposed regulatory standard for considering additional POPs. If EPA decided to regulate it could only do so if it finds a reasonable balance between human health and the economic costs in regulation.

I am running out of time, so I am just going to defer to what my colleague so eloquently stated when he talked about the cost analyses. It is such a disservice to what the value of human life to try to equate the value of life, whether plant or animal or human to economic standards. We have to find a different way of adding value.

So, I support the treaty, but not this draft legislation.

And I yield back.

Mr. GILLMOR. The gentleman from Michigan. Needs some oil on his microphone.

Mr. STUPAK. Yes, I think so.

Thank you, Mr. Chairman.

I look forward to hearing from our panels today as we discuss the U.S. role in implementing these important international conventions and the draft proposal Mr. Gillmor has prepared.

The Stockholm Convention which bans or severely restricts 12 of the most dangerous chemicals called persistent organic pollutants, POP, has wide support including that of industry, labor and environment and health groups.

The United States was heavily involved in the negotiations leading to the convention and insisted the treaty contain a science-based process under which governments may nominate suspected POPs in the future. Because of the 12 current POPs are already banned or severely regulated in the United States, the primary issue which discussing implementing legislation is the regulation of future hazardous chemicals that may be added to the treaty's list.

The proposed draft before us to implement these international conventions creates a separate standard for the United States when adding additional POPs. The U.S. already negotiated for an international standard that every country including the U.S. must follow under this treaty. But now this proposal, which is filled with a new cost benefit standard, sets a different standard for the U.S.

Over the past 3 years we have continued to alienate the world by having our own "play by our rules" type of attitude.

Another issue that concerns me is the sudden sense of urgency with this legislation when the administration has not set implementing legislation in this Congress to our committee. It has been over 3 years now since the administration signed the POPs Treaty. It took the President an entire year after signing the POPs Convention to send it to the Senate for advice and consent. The treaty has now been in force for 2 months.

This is a complicated issue that deals with implementing 3 treaties that are designed to protect public health and our environment. With the public interest and health at stake, this is not time to shut out a bipartisan process and ram flawed legislation through the waning days of this Congress. We should be enacting bipartisan legislation that we can be sure to pass through this committee or any other committee. With minimal legislative days left in this session we should not try to stampede legislation through this committee.

Let us begin with priorities. I am still extremely disappointed that this committee and the administration continues to ignore what should be a priority of implementing the U.S./Canadian agreement concerning the transboundary movement of hazardous waste to protect the citizens of Michigan from unwanted trash imports. A year ago at a hearing held by this subcommittee, the administration said we could expect legislation to be sent up shortly to allow this important agreement to be enforced. Nothing has been submitted to Congress yet. Nothing.

On top of that, the administration refuses to take a position on H.R. 411 or H.R. 1730 bipartisan bills which I and many members of this committee have cosponsored that would provide the necessary authority. The citizens of Michigan and the Great Lake States deserve better.

Mr. Chairman, this committee should act on interstate waste legislation as a matter of priority before we recess for the summer.

I look forward to the testimony of our witnesses.

Mr. GILLMOR. The gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman, for holding the hearing on these international agreements. And I am going to specifically talk about the POPs Convention, which is the most potential impact on the economy.

The POPs Convention dealing with DDT and PCBs and dioxin and other controlled chemicals is uncontroversial. It is important to the American chemical industry that this convention goes into force and that America is a party to this convention. To do so we must have implementing legislation in time for the U.S. to be part of it in February 2005. I think it's a reality in this closely divided Congress that we have a consensus and bipartisan implementing legislation. Most importantly, I believe we must protect the opt-in nature of the convention. Our government and our industries should not be forced to regulate additional POPs solely based on international decisions.

Opt-in is needed to ensure that the POPs Convention does not become a tool for other country's industries to seek competitive advantage against ours under the guise of environmental regulations. It is my understanding that all sides, both industry and environmental organizations, agree to the opt-in approach, but for the POPs Convention to work as industry and environmental groups intended, the Convention must be implemented soon.

Giving the few legislative days remaining between now and the deadline, I would like to see consensus and bipartisan implementing of this legislation. And I am not going to go into details but understand, Mr. Chairman, your draft of the legislation, our panelists will talk about that very well. But I am concerned if this turns into a partisan philosophical and ideological battle; nobody is going to get what they want except perhaps the Europeans who will be making the decisions in the Convention instead of us.

It is my understanding that the Gillmor legislation was not developed in a consensus bipartisan matter, but I would hope from this day forward we will be able to put that together.

Mr. Chairman, again, bipartisan practical compromised legislation done on POPs and all sides can postpone our ideological debates or battles until we have some other issue. But I think this

is important because otherwise will hinder another industry in our country to be competitive or be at the table at the international conference.

I yield back my time.

Mr. GILLMOR. The gentleman yields back.

The other gentleman from Texas, Mr. Gonzalez.

Mr. GONZALEZ. Yes, Mr. Chairman. I will submit my statement in writing. Thank you.

[Additional statements submitted for the record follows:]

PREPARED STATEMENT OF HON. CHARLES A. GONZALEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you Mr. Chairman.

Welcome to all nine witnesses. You share a breadth of expertise that will provide us and our staffs with valuable perspectives about the complex treaties, collectively known as the "POPs Treaties" that internationally regulate the most toxic chemicals known to man.

I have been very pleased to learn that the three international agreements we are examining today—the 2001 Stockholm Convention on Persistent Organic Pollutants (POPs); the 1998 Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution (LRTAP); and the 1998 Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides—were all negotiated in an inclusive manner. Representatives from the chemical and pesticide industries, scientists, environmentalists and government experts were all heavily involved. The net result was that the Stockholm Convention was embraced by all sides. I don't doubt that each side started with their own idea of how the convention should have taken shape, and so I think that all the parties involved deserve credit for reaching the agreement they struck.

In that same spirit, the Senate acted on a bipartisan basis last year when the Environment and Public Works Committee reported a bill that would implement those provisions of the POPs Treaties related to the Toxic Substances Control Act.

Mr. Chairman, as this subcommittee does its part to craft legislation to implement the international agreements on persistent organic pollutants, I would hope that we also work in a cooperative bipartisan manner. After all, at the end of the day, this issue will be back in the Senate's hands, which must ratify these agreements by a two-thirds vote. By working in a bipartisan manner in this subcommittee, we ensure that implementing legislation can easily reach and pass a ratification vote in the other body. I look forward to working with you, Ranking Member Hilda Solis and all the members of the subcommittee to reach a bipartisan agreement on moving forward with implementing the POPs Treaties.

PREPARED STATEMENT OF HON. JOE BARTON, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Thank you, Mr. Chairman, for holding this hearing to discuss implementing legislation for three international agreements that the United States has negotiated and signed over the past decade. The Stockholm Convention on Persistent Organic Pollutants (POPs), the Aarhus Protocol on Long Range Transboundary Air Pollution (LRTAP), and the Rotterdam Convention on Prior Informed Consent (PIC), all center around the banning or severe restriction of chemicals known as persistent organic pollutants. These chemicals, which are exceedingly toxic and take years to break down in the environment, have been brought to the attention of the global community because of their lasting effects on human health and the environment and their ability for long-range transport, respecting no national boundaries.

These treaties have their genesis in the first Bush administration, were negotiated under the Clinton administration, and finalized and signed onto by the current Bush administration. While the Senate plays an important role in the ratification procedures, the House must also pass implementing legislation to amend current law to be in compliance with these agreements. I thank Chairman Gillmor and the Subcommittee for their leadership in authoring this discussion draft and making efforts to move this process forward.

The draft seeks to address three important issues surrounding full implementation and ratification of these agreements. First, it fulfills the regulatory prohibitions and restrictions necessary to address chemicals that are already listed in the trea-

ties. Second, it addresses the process by which the United States participates in decisions involving the potential addition of new chemicals to the lists in the treaties. Finally, it gives EPA tailored rulemaking authority for chemical substances or mixtures added to the treaties, only to the extent necessary to meet the obligations of the United States under the treaties.

We cannot move forward if the Administration will not forcefully and effectively communicate the need for this bill and our participation. With these assurances, it is my sincere hope that the efforts of the Subcommittee will allow this process to go forth. Once again, I thank all the witnesses for their participation, and I look forward to hearing the testimony.

Mr. GILLMOR. Thank you very much.

We will now proceed to our first panel, which consists of Claudia McMurray, who is the Deputy Assistant Secretary for Environment, the Bureau of Oceans and International Environmental and Scientific Affairs with the U.S. Department of State. And Ms. Susan Hazen, who is the principal Deputy Assistant Administrator, the Office of Prevention Pesticides and Toxic Substances of the U.S. EPA.

And Ms. McMurray, if you would like to proceed. Is that order satisfactory with the two of you, or it does not matter? Okay.

STATEMENTS OF CLAUDIA McMURRAY, DEPUTY ASSISTANT SECRETARY FOR ENVIRONMENT, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEPARTMENT OF STATE; AND SUSAN B. HAZEN, PRINCIPAL DEPUTY ASSISTANT ADMINISTRATOR, THE OFFICE OF PREVENTION PESTICIDES AND TOXIC SUBSTANCES, U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. MCMURRAY. Mr. Chairman, I would like to thank you and the members of this subcommittee for holding this hearing on legislation that would allow the United States to join three international agreements to control dangerous toxic chemicals and pesticides. The three treaties that have already been mentioned here are the Stockholm Convention on Persistent Organic Pollutants, the Protocol On Persistent Organic Pollutants of the Convention on Long Range Transboundary Air Pollution or LRTAP, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

Mr. Chairman, I have a long statement that I would like to submit for the record with your permission.

Mr. GILLMOR. Without objection, so ordered.

Ms. MCMURRAY. Thank you.

Mr. Chairman, swift approval of implementing legislation would demonstrate bipartisan support for these agreements and the benefits to public health and the environment that they provide. There is a widespread consensus that the accords represent a significant step in the effort to protect the global environment.

President Bush expressed his strong support for the Stockholm Convention in a Rose Garden ceremony in 2001. On that occasion, Secretary Powell and former EPA Administrator Whitman also highlighted the benefits of the Stockholm Convention and the need for continued U.S. leadership in the field of persistent organic pollutants.

It is particularly crucial that the U.S. join these agreements now. All three have entered into force and the parties will begin making crucial decisions as soon as 6 weeks from now.

The Stockholm Convention, which was concluded in 2001 aims to protect human health and the environment from 12 chemicals that are of particular concern. These chemicals all have four intrinsic characteristics. They are toxic, they have the potential to accumulate in unhealthy quantities in humans and animals, they are stable and thus resistent to natural breakdown, and obviously most important in the international context, they can be transported over long distances through the atmosphere and oceans.

The Stockholm Convention deals with intentionally produced chemicals such as DDT or PCBs, unintentionally produced substances such as dioxins and furans and wastes from those substances. The Convention creates a science-based procedure to govern the addition of chemicals to the Convention beyond the current list of 12 substances.

The Convention's Conference of Parties will make decisions about whether to add chemicals to the Convention's coverage. If a chemical is added through an amendment, the United States can decide whether we want to become party to that amendment. At the time of ratification we intend to declare, consistent with our ability to do so under the treaty, that any amendment shall enter into force for the United States only upon our deposit of an instrument of ratification indicating acceptance or approval of that amendment.

Utilization of this so-called opt-in procedure for becoming party to the amendments will ensure that decisions made by the Conference of the Parties do not prejudge our domestic decisionmaking process.

The Stockholm Convention will hold its first Conference of Parties next spring. At that meeting, important decisions will be made such as the composition of the technical review committee that will consider new chemicals that are proposed for addition. Also rules of procedure will be considered. Unless legislation is enacted during the current session of Congress and as soon as possible, the United States will be sitting on the sidelines of this meeting.

Two additional international agreements dealing with toxic chemicals and pesticides are covered in the Chairman's draft implementing legislation.

The first agreement closely related to the Stockholm Convention, is the POPs Protocol to the Long Range Transboundary Air Pollution Convention. The obligations in LRTAP are somewhat similar in nature and scope to those in the Stockholm Convention. The LRTAP Executive Body will hold its next meeting 5 months from now. It will also make decisions such as establishing procedures for the conduct of technical reviews of substances proposed for addition to the protocol at that time.

The other agreement covered in the implementing legislation is the Rotterdam Convention on Prior Informed Consent. This agreement is designed to promote fully informed decisionmaking by both exporting and importing countries in order to promote decisions that appropriately protect human health and the environment. The Rotterdam Convention's, First Conference of Parties will be held 2 months from now. Among the key decisions at this meeting will be

the membership of the new review committee that will consider possible new chemicals for addition to the Convention.

In summary, Mr. Chairman, together these three treaties address a number of critical chemical management problems faced by the international community. These treaties enjoy broad support from the public, from environmental groups and industry groups as well, and as we have heard today, from many Members of Congress. As the country with the world's most comprehensive risk management scheme for toxic chemicals, the United States should continue its leadership role as an active and influential participant with a seat not just at the table in this multilateral forum, but at the head of the table. In short, these issues are too important for the United States to sit on the sidelines as an observer.

I look forward to working with both sides of the aisle to expedite U.S. ratification of these important treaties.

Thank you, Mr. Chairman. I would be happy to answer any questions that you or other members of the subcommittee may have.

[The prepared statement of Claudia McMurray follows:]

PREPARED STATEMENT OF CLAUDIA MCMURRAY, DEPUTY ASSISTANT SECRETARY OF STATE FOR OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, UNITED STATES DEPARTMENT OF STATE

Mr. Chairman, I would like to thank you and the members of the Subcommittee for holding this hearing on your draft implementing legislation that would allow the United States to join three international agreements to control dangerous toxic chemicals and pesticides. The three treaties are the Stockholm Convention on Persistent Organic Pollutants (the "Stockholm Convention"), the Protocol on Persistent Organic Pollutants of the Convention on Long-Range Transboundary Air Pollution ("LRTAP"), and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the "Rotterdam Convention"). The Administration strongly supports ratification of these agreements and therefore urges the Committee to approve implementing legislation as soon as possible.

Mr. Chairman and members of the Subcommittee, I would respectfully suggest to you that your swift approval of implementing legislation would demonstrate bipartisan support for these agreements and the benefits to public health and the environment that they provide. There is a widespread consensus that the accords represent a significant step in the effort to protect the global environment. President Bush expressed his strong support for the Stockholm Convention in a Rose Garden ceremony in 2001. On that occasion, Secretary Powell and former EPA Administrator Whitman also highlighted the important foreign policy, environmental and health benefits of this agreement and the need for continued U.S. leadership in this field.

For over three decades the United States has been a leader in developing sound and effective risk management regimes in the fields of toxic chemicals and pesticides. In fact, the United States was the first country to begin addressing the human health and environmental threats posed by pesticides and other toxic substances. Our expertise in this field is continually sought out by other countries seeking to establish their own domestic programs. Clearly we can make a unique contribution to the success of these three international agreements.

It is particularly critical that the United States join these agreements now because all three have already entered into force. Over the course of the next months, the governing bodies of each of these agreements will meet for the first time and will begin making decisions on the future of their respective accords. As the recognized leader in the field of toxic chemicals management, it is important the United States be present to help shape the development of each treaty.

The Stockholm Convention, which was completed in 2001, aims to protect human health and the environment from twelve chemicals that are of particular concern. These chemicals are unique because they have four intrinsic characteristics: they are toxic; they have the potential to accumulate in unhealthy quantities in humans and animals; they are stable and thus resistant to natural breakdown; and they can be transported over long distances through the atmosphere and oceans. The twelve persistent organic pollutants ("POPs") are: aldrin, hexachlorobenzene, chlordane,

mirex, DDT, toxaphene, dieldrin, polychlorinated biphenyls (PCBs), endrin, heptachlor, dioxins and furans.

POPs are capable of affecting human health and the environment far away from the regions where they are used and released. The twelve chemicals covered by the Stockholm Convention have been banned, severely restricted, or controlled in the United States, but they are still in widespread use abroad, particularly in developing countries. As a result, they can have a negative impact on the health of U.S. citizens. These chemicals, which have been found in disturbingly high concentrations in Alaska and the Great Lakes region, have been linked to cancer, damage to the nervous system, reproductive disorders, and disruption of the immune system. The risks are especially high for indigenous populations, who rely heavily on certain fish, marine mammal, and wildlife species. Some of the POPs, such as DDT, are known to have negative impacts on wildlife. Because POPs are capable of long-range transport, no one country acting alone can address their human health and environmental effects. A global agreement is needed to control the use of these substances.

The Stockholm Convention deals with intentionally produced POPs, such as DDT or PCBs; unintentionally produced POPs, such as dioxins and furans; and POPs wastes. For intentionally produced POPs, the Convention prohibits their production and use, subject to certain exemptions such as the continued use of DDT for malaria and other disease vector control. The Convention also prohibits or restricts trade in such substances. For unintentionally produced POPs, the Convention requires countries to develop national action plans to address releases and to apply "Best Available Techniques" on specified key source sectors to control them. Parties must also take appropriate measures to ensure that POPs wastes are managed in an environmentally-sound manner.

Recognizing the needs of developing countries in managing POPs, the Convention includes a flexible system of financial and technical assistance through which developed countries will help these countries meet their obligations. In fact, the United States has already spent over $20 million assisting several developing countries in building capacity in this area. The Global Environment Facility will serve as the interim funding mechanism for the Convention and has already set up a program to support treaty-related projects. Because the majority of POPs releases occur in developing countries, funding to expedite the phase out of these substances is particularly important.

Finally, the POPs Convention creates a science-based procedure to govern the addition of chemicals to the Convention beyond the current twelve substances. This process will, among other things, allow scientific experts to review and recommend to the Parties to the Convention whether chemicals proposed for addition to the agreement meet such criteria as toxicity, bioaccumulation, persistence, and long-range transport. In the language of the Convention, this science-based procedure involves an evaluation of "whether the chemical is likely, as a result of its long-range environmental transport, to lead to significant adverse human health or environmental effects, such that global action is warranted."

If a determination is made that a chemical is likely to lead to significant adverse effects, the review procedure then will consider information on socio-economic considerations. This includes the technical and economic feasibility of control measures to meet risk reduction goals, availability of alternatives, and other socio-economic factors. Based on the risk profile and risk management information gathered through the steps described above, a recommendation can be made on whether a chemical should be considered for addition to the Convention.

The Convention's Conference of Parties will make final decisions about whether to add chemicals. Once they are added through an amendment, countries can decide the conditions under which they will consent to an amendment. At the time of ratification, we intend to declare that any amendment shall enter into force for the United States only upon our deposit of the U.S. instrument of ratification, acceptance or approval. Utilization of this so-called "opt-in" option for adopting amendments will ensure that decisions made by the Convention Parties do not prejudge our domestic decision making process.

The Stockholm Convention, which has now been ratified by 70 countries, entered into force on May 17, 2004 and will hold its first Conference of Parties (COP) next spring. At that meeting, important decisions will be made on the future course of the Convention. One of the key issues before the COP will be the membership and composition of the technical review committee that will consider new chemicals that are proposed for addition to the Convention's control regime. The COP will also agree upon rules of procedure, including voting rules, financial rules, and the location of the Convention Secretariat. These are all important issues for the United States, but we will not be able to participate as a Party in these deliberations unless

legislation is enacted during the current session of Congress, and as soon as possible, since the United States will not become Party to the agreement until 90 days after depositing its instrument of ratification.

The implementing legislation drafted by this Committee would also permit the United States to implement and become a Party to two additional international agreements dealing with toxic chemicals and pesticides. The first agreement—closely related to the Stockholm Convention—is the POPs Protocol to the Long-Range Transboundary Air Pollution Convention. LRTAP is a regional agreement negotiated under the auspices of the United Nations Economic Commission for Europe, which includes the United States, Canada, Europe, and the former Soviet Republics. The obligations in LRTAP are generally similar in nature and scope to those in the Stockholm Convention. One of the key differences is that LRTAP includes four substances (lindane, chlordecone, hexabromobiphenyl, and polycyclic aromated hydrocarbons) not contained in the global accord reached in Stockholm.

LRTAP entered into force on October 23, 2003. The LRTAP Executive Body (EB), which serves as the governing body for all LRTAP Protocols, will hold its next meeting from November 29-December 3, 2004—only five months from now. The EB will make decisions on the specific procedures under which the LRTAP POPs Task Force, which was set up last year, and will conduct technical reviews of substances proposed for addition to the Protocol. It will also adopt guidance for an overall review by the Task Force of the Protocol's sufficiency and effectiveness.

The other agreement covered in the implementing legislation is the Rotterdam Convention on Prior Informed Consent, which is designed to promote shared responsibility between exporting and importing countries in protecting human health and the environment. The Rotterdam Convention stipulates that export of certain especially hazardous chemicals, in particular those whose use has already been banned or severely restricted in a number of countries, can only take place with the *prior informed consent* of the importing country. The Convention also contains safeguards to ensure that an importing country cannot apply the agreement's provisions in a discriminatory manner, thus ensuring a level playing field. The Rotterdam Convention significantly enhances the safe management of chemicals by enabling countries, especially developing countries, to identify their risks and make informed decisions about their importation and use.

The Rotterdam Convention, which has to date been ratified by 73 countries, entered into force on February 24, 2004. The Convention's first Conference of Parties (COP) will be held in September 2004, less than two months from now. Among the key decisions for deliberation at the COP meeting will be the membership of the new review committee that will consider possible new chemicals for addition to Convention. The COP will also decide whether to formally add about 14 substances, which have been reviewed by the Convention's interim body over the past two years, to the list of chemicals covered by the Convention. In addition, the COP will also finalize its rules of procedure and financial rules and decide on the location of the Convention Secretariat.

In summary, Mr. Chairman, together these three treaties address a number of critical chemical management problems faced by the international community. These treaties enjoy broad support from the public, from environmental and industry organizations, and from many members of Congress. All of these agreements will provide considerable health and environmental benefits to our citizens and those around the world.

As I have already noted, the requisite number of countries have already ratified these agreements and all three are now in force. Their respective governing bodies will be meeting for the first time in the upcoming months and critical decisions will be made on the future course of each accord. As the country with the world's most comprehensive risk management scheme for toxic chemicals, the United States should continue its leadership role as an active and influential participant with a seat not just at the table, but at the head of the table. In short, this issue is too important for the United States to sit on the sidelines as an observer.

Mr. Chairman and members of the Subcommittee, it is therefore urgent that, in the less than 30 days of the legislative session remaining, the Congress pass implementing legislation that will allow us to ratify these agreements and participate as Parties in these upcoming meetings. I look forward to working with both sides of the aisle to expedite U.S. ratification of these important treaties.

Thank you, Mr. Chairman. I would be happy to answer any questions that the Subcommittee members may have.

Mr. GILLMOR. Thank you, Ms. McMurray.

Ms. Hazen?

STATEMENT OF SUSAN B. HAZEN

Ms. HAZEN. Thank you, Mr. Chairman, Congresswoman Solis and members of the committee.

As was said earlier, my name is Susan Hazen. I am currently serving as the Principal Deputy Assistant Administrator for the Office of Prevention, Pesticides and Toxic Substances at EPA.

I have a longer prepared testimony, which I would like to be entered into the record.

The U.S. has been a very active player in each of these treaties. We have been part of their inspiration, their direction, and a major part of their negotiation. And the administration now seeks implementing legislation that would allow the United States to take that final step and join these three important environment agreements this year.

I would like to thank you, Mr. Chairman, for the opportunity to testify and for your commitment to developing implementing legislation. We have welcomed the opportunity to provide technical assistance to your staff as this proposal has been developed.

As we have provided technical assistance, we have attempted to remain focused on one fundamental issue: Would the draft legislation provide the legal authority necessary for the United States to fully implement all of the Toxic Substance Control Act-related obligations of the three agreements, thereby helping to ensure that the United States remains in the forefront of worldwide efforts to reduce or eliminate production, use, or release of persistent organic pollutants, or POPs. We believe this proposal would accomplish this objective.

We look forward to working with you as the process continues.

I am also pleased to have the opportunity to address our domestic and international activities to effectively manage the currently listed pesticides and chemicals. We think it is vitally important from the outset that we continue to share our expertise with the rest of the world as each of these treaties contributes in its own way, not only to a healthier global environment, but to a healthier America.

In the United States, these agreements are of special importance for selected populations and environments which can be particularly impacted by POPs transported by air and water from outside sources. By joining with the rest of the world to phaseout or reduce these toxic pollutants, we protect the health and the environment not only of our fellow Americans, but of all those who share our plant.

EPA continues to take measures that promote the objectives of all three of these treaties, including providing technical assistance and financial assistance to developing countries and countries with economies in transition. For example, we are currently working with Russia and China to identify and develop strategies that would eliminate stockpiles of POPs pesticides and PCBs. We are supporting an international effort to destroy stockpiles of POPs pesticides in Africa in an environmentally sound manner. And we have also provided technical assistance to develop tools and guidance to help other countries meet their obligations under the Stockholm Convention.

The United States already has the authority to meet most of the Toxic Substance Control Act-related obligations of these treaties. We believe that the bill drafted by this committee, if enacted, would enable the U.S. to comply with and to effectively implement the obligations of the treaties.

The administration is fully committed to participate in the procedures set up for the listing of additional chemicals to the POPs agreements and to assure that the robust scientific process to do so works as intended during the negotiations. Chairman Gillmore's discussion draft would enable the United States to join future convention amendments that are consistent with U.S. law and policy, and this is a very important element of the legislation for the administration. We appreciate efforts that went into its development.

In addition, the information collection provisions in this legislation provide the opportunity to help ensure that the United States is appropriately informed as to the risks, benefits, production, uses and other pertinent factors concerning candidate chemicals when it is participating in negotiations determining the possible addition of chemicals.

Early last year the administration identified six guiding principles for taking domestic action on the listing of new chemicals, which we will take into consideration as your legislative process moves forward. Very briefly, these principles are:

First, that the United States should have the ability, when appropriate, to take domestic regulatory action on the addition of future chemicals to the Convention; Second, that the goal of taking regulatory action is to achieve a high degree of public health and environmental protection; Third, that the United States should make an explicit domestic determination as to whether the best available scientific information supports the listing, and whether the specific regulatory measures included in the international listing are necessary and adequate; Fourth, during its domestic process, the U.S. should consider the information taken into account at the international level, with emphasis on information that is reviewed, valid and replicable; and Fifth, the United States should compare the international decisions to measures that are more or less stringent, thereby facilitating the identification of control options that reflect the most reasonable balance of benefits, risks and cost. And finally, in finding that balance the United States should consider domestic production, export, and use of the chemical, and any national and international consequences that are likely to arise as a result of domestic regulatory action.

The administration is seeking swift enactment of implementing legislation for these agreements. All three of these treaties have entered into force over the course of the last 9 months. And, as noted earlier, it is imperative that the U.S. be a party to these agreements at the outset or as early as possible.

The administration is proud of the leadership role of the United States on these very important environmental treaties, all of which illustrate how effectively global action can be accomplished when nations are driven by common environmental objectives.

After ratification, we hope to continue to work with Congress along with industry, environmental organizations and others, as we implement these agreements.

Thank you for the opportunity to discuss these important international environmental agreements today. Enacting legislation this year is an important priority. As we continue to review this draft, and as the committee continues its deliberations, we will appreciate the opportunity to work with the committee and its members on legislative refinements that would be consistent with the President's agenda and budget.

Again, thank you for the support and leadership, and we want to assure you that this administration is looking forward to working with the committee to advance these important agreements by finalizing the necessary implementation legislation.

Thank you. And I, too, would be pleased to answer any questions.

[The prepared statement of Susan B. Hazen follows:]

PREPARED STATEMENT OF SUSAN B. HAZEN, PRINCIPAL DEPUTY ASSISTANT ADMINISTRATOR, OFFICE OF PREVENTION, PESTICIDES, AND TOXIC SUBSTANCES, U.S. ENVIRONMENTAL PROTECTION AGENCY

I. INTRODUCTION

Mr. Chairman and Members of the Committee, thank you for the invitation to appear before you today to discuss the legislation necessary to implement three very important international environmental agreements: the Stockholm Convention on Persistent Organic Pollutants (POPs), the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC), and the Protocol on Persistent Organic Pollutants, negotiated under the United Nations Economic Commission for Europe's Convention on Long Range Transboundary Air Pollution (LRTAP POPs Protocol).

The United States has been an active player in each of these three treaties. We have been part of their inspiration, direction, and negotiation. The Administration now seeks implementing legislation that would allow the United States to take the final step and join these three important environmental agreements this year. Towards that end, I would like to thank Chairman Gillmor and his staff for developing a draft bill that would allow the United States to join these international agreements which seek to promote the global reduction, if not virtual elimination, of some of the world's most persistent and toxic substances. Recently, at your request, my staff has been providing technical assistance during the development of this proposal. I want to thank you for that courtesy and commend your staff for their professionalism in this process. While the current legislative draft reflects the elements that this Administration believes are needed to move forward domestically, and to reaffirm our commitment internationally to promote environmental health and safety, we look forward to further refining this draft as it is considered by the Committee.

The Administration is committed to working closely with all the members of this Committee to facilitate swift enactment of implementing legislation that provides appropriate legal authority to implement the obligations in the three treaties. As President Bush has stated, the risks from these pollutants are great, and the need for swift action is clear. Becoming Party to these treaties will help ensure that the United States retains its current position as an international leader in the industrial chemical and pesticide arena. Our leadership in these treaties is essential.

I appreciate this opportunity to discuss this important effort. The Administration supports a targeted approach to the legislation and believes that it is imperative that this legislative process moves forward as quickly as possible. As we have provided technical assistance to your staff, we have attempted to remain focused on the fundamental issue: would the draft legislation provide the legal authority necessary for the United States to implement fully all of the Toxic Substances Control Act related obligations of the three agreements, thereby helping to ensure that the United States remains in the forefront of worldwide efforts to reduce or eliminate production and use of persistent organic pollutants? We believe that this proposal would accomplish this objective, and look forward to working with members of this subcommittee as the process continues.

II. BACKGROUND

I would like to take a minute to identify what the Administration sees as the value of these three treaties, and thus the importance of acting to pass imple-

menting legislation. Each of these treaties contributes, in its own way, to a healthier global environment and to a healthier America. The Stockholm Convention, called the POPs Convention, prohibits or restricts the production, use, or release of twelve chemicals that are toxic, persist in the environment for long periods of time, and bioaccumulate as they move up through the food chain. These substances are also capable of traveling thousands of miles by wind and water, far from the sources where they are released, and can cause an array of adverse effects in humans and on the ecosystem. The reduction or elimination of these POPs sources will have significant benefit to the United States by reducing exposures that affect human health and the environment.

The POPs Protocol to the Long Range Transboundary Air Pollution Convention (the LRTAP POPs Protocol) is similar to the POPs treaty, except that it covers four additional substances and is regional in nature. The agreement covers the 55 Member States of the United Nations Economic Commission for Europe, which includes, among others, the United States, Canada, Russia, parts of the former Soviet Union, and Eastern Europe. The Rotterdam PIC Convention was developed to promote information exchange and informed riskbased decisionmaking in the global movement of hazardous chemicals and pesticides. The Convention requires the exchange of certain health and safety information related to the covered chemicals and pesticides, which empowers governments and citizens to make their own domestic science and riskbased decisions in an informed manner. The Convention also ensures that the parties monitor not only which substances come into their borders, but also provides a notification mechanism to monitor what goes out of their borders. This notification mechanism facilitates informed trade in the PIC listed substances as well as provides an additional opportunity for the exporting party to comply with the importing decisions of another party, which is particularly helpful and important to developing countries that may lack the capacity to enforce their own regulatory decisions.

III. THE U.S. ROLE AS AN INTERNATIONAL LEADER

I am pleased to have the opportunity to address our domestic and international activities to effectively manage the currently listed pesticides and chemicals and to explain the kinds of legislative provisions that will be necessary to effectively implement these agreements.

Here in the United States, we have already taken extensive steps to address risks posed by the substances covered by the global POPs Convention and the LRTAP POPs Protocol. We take the threats posed by these pesticides and chemicals to our environment and public health very seriously. The United States was the first country to begin a thorough scientific reassessment program for pesticides and, I believe, is still the only nation that is looking at the cumulative risks posed by similar groups of pesticides. We started cancelling pesticide registrations or prohibiting production and use of some of these substances in the 1960's. Because of these types of actions, the levels of most of these substances in the United States have stabilized or declined. Other countries look to the United States to provide strong leadership to address hazardous substances, including those that are persistent and may bioaccumulate. EPA is internationally recognized for its sciencebased risk assessments and regulatory decisionmaking. Our actions are respected and frequently adopted in other countries across the globe.

But standalone action by any one country is not enough. We think it is vitally important, from the outset, that we continue to share our expertise with the rest of the world and continue our role as a world leader in decisionmaking related to controlling the production, use, and release of these types of chemicals. These chemicals continue to pose real health risks to U.S. citizens and to people around the world due to the inherent nature of the substances themselves: their persistence, their toxicity, their bioaccumulation, and their potential for long range environmental transport. In the United States, these agreements are of special importance for selected populations and environments which are particularly impacted by POPs transported by air and water from outside sources. This is particularly true for those populations whose diets traditionally rely heavily on fish and wildlife, such as in Alaska and around the Great Lakes. By joining with the rest of the world to phase out or reduce these toxic pollutants, we protect the health and the environment, not only of our fellow Americans, but of all those who share our planet.

EPA continues to take measures that promote the objectives of all three of these treaties, including providing technical and financial assistance to developing countries and countries with economies in transition to help them comply with their international obligations. The United States is committed to working globally to provide such assistance, and has already taken some steps to do so. For example, we are helping Russia and China identify and develop strategies to eliminate stockpiles

of POPs pesticides and PCBs. We are supporting an international effort to destroy stockpiles of POPs pesticides in Africa in an environmentally sound manner. The United States has also provided its technical expertise to develop tools and guidance to help countries meet their obligations under the Stockholm Convention.

IV. LEGISLATIVE CHANGES NECESSARY TO IMPLEMENT POPS, PIC, AND LRTAP

While the United States already has authority to meet most of the Toxic Substances Control Act (or TSCA)related obligations of the three treaties, the proposed legislation would allow us to meet all the TSCA related obligations of the treaties. For the POPs and LRTAP substances, implementing legislation needs to contain language to prohibit any manufacturing, use, processing, distribution in commerce for export, and disposal consistent with the obligations of the treaties. We believe that this draft bill would enable the United States to comply with the obligations in the POPs treaties to prohibit or restrict the production, use, import, export, or release of the substances covered by TSCA.

To effectively implement the PIC Convention, the Administration agreed that any legislative language should also track obligations in the Convention relating to notice of control action, export notification, export controls and labeling. Again, we believe that this draft legislation does that by, for example, providing EPA with the authority to issue notices that would communicate to our own domestic producers and exporters the importing decisions of other countries with respect to the PIClisted chemicals and pesticides.

The Administration is fully committed to participate in the procedures set up for the listing of additional chemicals to the POPs agreements and to ensure that the robust scientific process to do so works as intended during the negotiations. The information collection provisions in this legislation provide the opportunity to help ensure that the United States is appropriately informed as to the risks, benefits, production, uses, and other pertinent factors concerning candidate chemicals when it is participating in negotiations concerning the possible addition of chemicals. The proposed draft legislation would enable the United States to join future convention amendments that are consistent with U.S. law and policy. This is a very important element of the legislation for the Administration, and we appreciate the effort that went into its development. Early last year, the Administration identified six "guiding principles" for taking domestic action on the listing of new chemicals, which we will continue to take into consideration as your legislative process moves forward. These principles are:

1) The United States should be able to take domestic regulatory action on additional chemicals when the U.S. Government is in agreement with an international decision to list the chemical under the POPs Treaty;
2) The goal of taking regulatory action is to achieve a high degree of public health and environmental protection;
3) In determining whether domestic action with respect to a chemical that has been listed in the Convention is appropriate, the United States should make an explicit determination as to: (a) whether the best available scientific information (e.g., data on persistence, bioaccumulation, toxicity, long range environmental transport, and the risk profile) supports the listing, and (b) whether the specific domestic regulatory measures (prohibitions or restrictions) included in the international listing are necessary and adequate for the chemical in its various uses;
4) In determining whether the best available scientific information supports the international listing, the United States should consider the information considered in the international listing process, with emphasis on information that is peerreviewed, valid in its research design and methods, and replicable by qualified scientists;
5) In determining whether the domestic regulatory measures are necessary and adequate, the United States should compare the international decision to measures that are more and less stringent, thereby facilitating a riskmanagement decision as to which measure(s) provide(s) the most reasonable balance of benefits, risks and costs for specific uses; and
6) In weighing benefits, risks and costs, the United States should consider domestic production, export and use of the chemical, and any national and international consequences that are likely to arise as a result of domestic regulatory action, including consequences that cannot be quantified and including consideration of the possible consequences of using likely substitute chemicals.

The processes set forth in Article 8 of the POPs Convention and the LRTAP Executive Body Decision 1998/2 for listing future chemicals are rigorous and sciencebased, and we fully support those processes. We are confident that they can identify strongest candidates for listing based on a scientific risk assessment and

can efficiently eliminate those that fail to meet the POPs criteria or for which global action is not warranted. The Administration is firmly committed to maintaining the high degree of analytical and scientific rigor in the POPs process that has led to international recognition of the United States for its strong scientific risk assessments and regulatory decisionmaking.

V. A CALL FOR SWIFT RATIFICATION

The Administration is seeking swift enactment of implementing legislation for these Agreements. All three of these treaties entered into force over the course of the last nine months. As noted earlier, it is important that the United States be a party to these Agreements at the outset or as early as possible to enable the U.S. to play a strong role from the start in the implementation of these three treaties. Furthermore, the United States would like to demonstrate its ongoing commitment to the goals of these important treaties, and, by our example, encourage other countries to ratify these Conventions.

VI. RATIFICATION IS IN THE U.S. INTEREST

The Administration is very proud of the leadership role of the United States on these very important environmental treaties, which provide excellent examples of how industry and environmental interests can work together to address serious environmental issues. These three agreements illustrate how effectively global action can be accomplished when nations are driven by common environmental goals. After ratification, EPA will continue to work with Congress, along with the industry, environmental organizations, and others as we implement these agreements. We are committed to work together with our domestic stakeholders and the international community to address these chemicals globally. In order to do so, it is necessary for the United States to be a party. Important decisions will be made early in the process, and the United States should be there to help shape those decisions, based on both domestic and international priorities.

VII. CONCLUSION

Thank you for the opportunity to discuss these important international environmental agreements today. Enacting legislation this year is an important priority for the Administration, as it is firmly committed to becoming a party to the global POPs Convention, the PIC Convention, and the regional LRTAP POPs Protocol. As we continue to review this draft, and the committee continues its deliberations, we appreciate the opportunity to continue to work with Chairman Gillmor and other members on legislative refinements that would be consistent with the President's agenda and budget. Again, I want to thank you for your support and leadership and assure you that this Administration is looking forward to working with the Committee to advance these important agreements by finalizing the implementing legislation necessary for the United States to meet our obligations under the agreements.

I will be pleased to answer any questions.

Mr. GILLMOR. Thank you very much.

And we will proceed to our first round of questions.

And if I might direct my questions actually to both of you. Do you believe that the discussion draft provides the United States with the authority to implement the convention?

Ms. MCMURRAY. Mr. Chairman, yes we do. I can answer for both of us, I think.

Mr. GILLMOR. Okay. Like my wife, she answers for me all the time, and better.

Do you believe this discussion draft provides the United States the authority to take regulatory action when the U.S. Government is in agreement with an international decision to list a chemical under the POPs treaty?

Ms. HAZEN. Yes, Mr. Chairman, we do.

Mr. GILLMOR. And does the discussion draft allow the best available scientific information to be used in supporting the listing and to justify the regulation of new chemicals?

Ms. HAZEN. Mr. Chairman, the discussion draft requires that the Administrator use sound and objective scientific practices and to determine the weight of scientific evidence concerning such risks or effects based on the best scientific information, including peer reviewed studies in the rulemaking record.

Mr. GILLMOR. Thank you.

Does the discussion draft allow the U.S. to consider the information that is gathered and evaluated as a part of the international listing process?

Ms. MCMURRAY. Yes, Mr. Chairman, it does.

Mr. GILLMOR. And does the discussion draft allow the United States to make risk management decisions that provide a reasonable balance of benefits, risk and cost for the evaluation of new chemicals?

Ms. HAZEN. Mr. Chairman, the draft includes as part of its rulemaking authority that the Administrator, when issuing rules, would in fact look to achieve a reasonable balance of social, environmental and economic costs and benefits. It is specifically in the language.

Mr. GILLMOR. Thank you.

And does the discussion draft allow the United States in weighing benefits, risks and costs to consider domestic production, export, and use of the chemical as well as national and international consequences that will arise as a result of the regulatory action?

Ms. HAZEN. Yes, Mr. Chairman, it does.

Mr. GILLMOR. And in light of these answers and also in light of the testimony which states that the current legislative draft reflects the element that this administration believes are needed to move forward domestically, thus allowing the United States to become a full party to the agreements the discussion draft contemplates, would you support this draft as a way of moving the process forward through the House?

Ms. MCMURRAY. Mr. Chairman, while I am unable to express the administration's support for this legislation or, indeed, any legislation that has come before either body to this point, I can say as you heard in my testimony that we are quite anxious to move this process forward and become party to all three of these agreements. So if indeed you were to schedule action on this bill, we would be supportive of that as a way to move the process forward.

Mr. GILLMOR. Thank you.

And let me also ask you whether at this point, and I presume this will be done at the first round of meetings, but I just want to clarify this, whether the decision has been made as to what countries would be on the review panels or how those countries would be selected? IS that process not yet developed and is likely to be developed at these meetings?

Ms. MCMURRAY. That is a process that will be engaged in at the first conference of the parties. And it is our hope that the United States would have the opportunity to be on that committee.

Mr. GILLMOR. Okay. Thank you.

Gentlelady from California, Ms. Solis for opening questions.

Ms. SOLIS. Thank you, Mr. Chairman.

First of all, I would like to ask both of you has the administration taken a position on endorsing this draft legislation that has

been introduced by Mr. Gillmor or the Senate legislation, Senate Bill 1486?

Ms. MCMURRAY. Congresswoman Solis, I indicated in my prior answer that we have, as an administration, not taken a position on either the Chairman's draft proposal or the bill that was considered by the Senate Environment and Public Works Committee.

Ms. SOLIS. Would the Senate proposed legislation in your opinion also be ready to be actually implemented? Would it meet the standards?

Ms. MCMURRAY. We actually gave the Senate committee that response when they asked. Yes, it enables us to fulfill our obligations under the treaty.

Ms. SOLIS. So you have two bills right now that you are telling me that could possibly move forward, and the administration has not taken a position on either?

Ms. MCMURRAY. Not on the particular substance of either bill. But we want to provide enough guidance so that you will have confidence that we will be able to implement these treaties. And we believe that both of these bills do that.

Ms. SOLIS. What is the urgency for having this treaty implemented in such a shortened period of time when we have had 3 years now that it was officially agreed upon by the administration; why now?

Ms. MCMURRAY. Well, while this committee has just begun its activity, there have been a number of other fora where we have been working with other parts of the Congress to try and get implementing legislation moving forward.

As you know, there are two other committees in addition to the Senate Environment Committee and this committee who have jurisdiction over portions of the subject matter here. The House Agriculture Committee and the Senate Agriculture Committee as well.

Ms. SOLIS. When did you start working with them?

Ms. MCMURRAY. It has been at least a year, I would say.

Ms. SOLIS. A year? And on the draft language that we have before us, I understand you provided technical assistance to Mr. Gillmor. When did you begin in that process to actually craft the legislation?

Ms. MCMURRAY. Well, I would have to ask the Chairman when he first put forward this legislation. But if I were to venture a guess here, I would say it has been a couple of months we have been working.

Ms. SOLIS. A couple of months?

Ms. MCMURRAY. Yes.

Ms. SOLIS. More than two?

Ms. MCMURRAY. It might be slightly more than two, but I do not think it has been that long.

Ms. SOLIS. Just another question. I had heard that OMB was also involved in this process. This legislation was actually approved by them. I mean, it went all the way up, I guess, leaving your agency up the chain of command now. Is that true?

Ms. MCMURRAY. Well, Congresswoman, we have a standard process for reviewing legislation of any subject matter through the administration. And OMB provides in general a coordinating function. Especially if agencies disagree on particular issues, they'll

bring all of us together and figure out a way to develop a comprehensive administrative position, so——

Ms. SOLIS. So this has had to take a good amount of time if it went to that level, and obviously there were differing points of view.

Ms. MCMURRAY. Yes.

Ms. SOLIS. What I am amazed at is that, and I do not mean to be rude, but it just sounds to me that the process if we really want to achieve a bipartisan effort here, that we could have been involved in some way or at least given knowledge that this was in the works. I think we all agree that there has to be a standard, a set standard to help regulate the POPs and what have you. And I really believe that there are members on this side of aisle who really want to achieve that. I am just concerned that we were not allowed to be a part of the process.

And in our conversation last week we spoke also regarding your input on potential draft legislation that I could share with you. And I got word from your office late yesterday that you could not at that time provide me with any assistance for such a turnaround.

Ms. MCMURRAY. Yes. If I could clarify. First of all, we would be most willing to provide the same amount of technical assistance that we provided to the majority staff on this committee and also to the Environment and Public Works Committee on both sides of the aisles.

In addition, I can tell you that while we have taken a preliminary look at other legislation other than what is offered by the chairman here, we do have a process that requires clearance by every agency effected by the legislation. And I would be happy to make sure that that process is expedited on your behalf.

Ms. SOLIS. Okay.

I have no further questions at this time.

Mr. GILLMOR. Thank you very much.

We have a series of three votes which have been called.

Let us break at this point. It is impossible to estimate on how long these things take. They are three votes and we are about 10 minutes into this vote. Probably about 25 minutes when members would be able to get back.

We stand in recess.

[Brief recess.]

Mr. GILLMOR. The committee will come to order.

I might advise you that the 3 votes took longer than we anticipated because of the process of the first vote. The voting machine broke down, so they had to reboot it and we had to do all those votes over again. So that is why it took so long.

I would like to recognize——

Mr. OTTER. Mr. Chairman, is that just today's vote or do we get to go all the way back to last week?

Mr. GILLMOR. I do not know.

I recognize the gentlelady from California.

Ms. SOLIS. Thank you, Mr. Chairman.

Mr. Chairman, I understand that as we were away voting that we were notified that the official from the State Department left without apparently giving us notification. And, as you know, under House rules each committee shall apply up to 5 minute rule during

the questioning of witnesses and hearing until such time as each member of the subcommittee who desires has had an opportunity to question a question. And my inquiry is to how was she able to leave without giving us notification?

Mr. GILLMOR. You remember in my opening statement I mentioned that some of the witnesses had planes to catch and asked the members be mindful of that in their questioning.

I was called and told that because of this vote she was going to have to leave. I asked staff to inquire if she would answer questions in writing, I do not feel like it was appropriate for us to make her miss her plane after she had told us in advance she had one.

Plus, we do not have any power to hold a witness here anyway. They can thumb their nose at us and walk out whenever they want, once we subpoena, which we have not done.

Ms. SOLIS. Mr. Chairman, with all due respect, it is a rule of the committee. And I would just ask that we at least allow for members who did show up be given the opportunity to ask questions and submit them in writing.

Mr. GILLMOR. Yes, we have already done that. I have already done that. And the witness has agreed to answer questions——

Ms. SOLIS. In writing.

Mr. GILLMOR. [continuing] that any members might submit.

Let us see if there are further questions of the witness. I believe we go to Mr. Otter? No questions?

Mr. OTTER. I do not have any questions.

Mr. GILLMOR. Ms. Capps, gentlelady from California.

Ms. CAPPS. Thank you.

Well, I did have a question for Ms. McMurray, panel 1. But I will express it to you, Ms. Hazen, if I may. It has to do with polybromated diphenyl ethers, PBDEs. And these are chemicals that are used as flame retardants on plastic. These chemicals have been shown to disrupt thyroid functions and cause developmental problems in unborn or fetuses. And in the State of California, my State, there is a ban for several forms of PBDEs with a phaseout to occur the year 2008. If PBDEs are recommended to be added to the treaty, will California law be allowed to stand no matter what action EPA takes, or could the California law be preempted under this discussion draft?

Ms. HAZEN. Congresswoman, I will take an attempt at answering that with Claudia not being here.

Ms. CAPPS. Sure.

Ms. HAZEN. As you said, California has a ban that will phase in up until year 2008. Currently in the U.S., most of the production and use of PBDEs is in the process of being regulated. The one manufacturer of most of them has voluntarily agreed to discontinue its production, and that will be covered by an action from EPA, a significant new use rule, which would prohibit further production without prior notification. It would make sure that future production notifications would have to come to the agency.

The reason I mention that is because, obviously then there will be no domestic manufacture, therefore no domestic use in the U.S. The significant new use rule that I mentioned will also cover imports. Therefore, the U.S. will not be importing any of these flame

retardants for use in products. So that, too, is the next stop gap for their use in products in the United States.

The answer to your question, which gets to States' issues regarding Federal regulations, is as follows. As you know, States, the interpretation as I understand it and again I am perhaps a little over my head here, but States are always able to regulate more stringently than the Federal Government. In that case, I do not believe there is an issue.

I would be happy to take this question back, however, and make sure that the answer I have given you is correct. And if there is any inaccuracy in my statement, we will get back to you with that.

Ms. CAPPS. Well, your statement is, of course, something I would like to hear.

Ms. HAZEN. I understand.

Ms. CAPPS. Because we are not only talking about domestic use, but importing and also then that means whether or not this chemical is not allowed to be imported to our country, whether or not it is part of the ban, part of the POPs then there would be a chilling effect. However, on page 60 and I understand you were just speaking generally, but this is the question that I have which relates not only to PBDEs, but I used it as an example, page 60 of the discussion draft, line 20 states which I think contradicts what you said. And that is what I would like to see clarified if not today, but you personally. And I do not want to put you on the spot. But if we could have follow up in writing.

This is the quote from page 60: "No State or political subdivision may establish or continue in effect any requirement that is applicable to a POPs chemical substance or mixture." And then that would follow to me that California law would be preempted. And that is a great concern. Not just with this particular chemical, but with any future chemical that might be proposed as being part of the POPs ban during that time that this draft is asking us to study further prolonging the time of use of what a State has considered to be a dangerous substance, you see, then it really does violate State rights.

What if EPA action is less stringent than the California law? Would California law or any State law be allowed to stand under this discussion draft? That is my question. And if you want to consult with staff, that is fine.

Ms. HAZEN. Congresswoman, what I would like to do is take this back and make sure we get you a response for the record. I do have a copy here of the relevant provision of TSCA. But rather than try to read and respond to you at the same time, let us take this back so that we get you accurate information.

Ms. CAPPS. Okay. I guess I am just about out of time.

I had another topic, which I will just lay out, but I am very concerned about this draft. Maybe somebody else will follow up, which is the precautionary approach that is set forth in principle 15 of the Rio Declaration of Environment and Development, the objective of the convention being to protect human and environment from persistent organic pollutants, but where does this discussion draft specifically include the precautionary approach as a principle consideration for regulation, to reflect the primary goal of the treaty? And that could be another 5 minutes. But I am very concerned that we

do justice to the previous convention with respect to the value of human life.

Thank you.

I yield back.

Ms. HAZEN. Thank you.

Mr. GILLMOR. The Chair would recognize Ms. Solis for another 5 minutes, second round.

Ms. SOLIS. Thank you, Mr. Chairman. I probably will not take all of the five. But I did have a question for Ms. McMurray, but she has left. But I wanted to ask Ms. Hazen if she had seen the letter that Mr. Dingell and I had sent the State Department that at the last meeting we had she was going to respond to? And in that letter what I wanted to ask is whether or not the State Department described an extensive science-based process used to decide whether to regulate a pollutant according to section 8 of the convention, and you believe this process allows parties and observers to bring all appropriate scientific and alternative information necessary to make a credible listing decision?

Ms. HAZEN. Congresswoman Solis, I have seen the response that the State Department provided. The process laid out in that particular section of the treaty allows for a fairly robust opportunity for all countries to bring to the table any information that they believe is relevant to the decision.

Ms. SOLIS. So you agree then?

Ms. HAZEN. I agree that the treaty provides an opportunity for any country who is a party to bring any piece of relevant information to the table, yes.

Ms. SOLIS. Okay. My next question is the House Republican bill in my opinion establishes a new regulatory cost benefit standard with criteria that go beyond existing law and imposes a new analysis and assessment on EPA. Do you agree with the U.S. process to decide to regulate, and how should that be constructed to allow the U.S. to act promptly and efficiently to regulate, if necessary?

Ms. HAZEN. Congresswoman, if I understand your questions correctly, the domestic statute, TSCA, is a cost benefit statute, and it does provide for cost benefit analysis as does FIFRA, for example, for nonfood uses of pesticides.

Ms. SOLIS. But, ma'am, that is a standard that has not been effectively use to regulate asbestos.

Ms. HAZEN. That standard, the cost benefit standard and the related least burdensome approach provision of TSCA, were the two issues that the court brought into question, yes.

Ms. SOLIS. "Least burdensome," those are critical here.

Ms. HAZEN. With respect to the least burdensome approach, the court specifically referenced that the agency had not taken that into consideration in the asbestos issue.

Ms. SOLIS. So in my opinion that standard is not sufficient then to be used?

Ms. HAZEN. The combination of cost-benefit and least burdensome approach, the combination of the two, provided the basis for the court's decision in asbestos.

The draft discussion bill, while it envisions discussion and consideration of a balance of environmental and economic costs and

benefits, does not bring into play the issue of the least burdensome approach. That is not——

Ms. SOLIS. But the term using "balance," that does not show up in the legislation. So, you are making your own interpretation here. That is not in the law.

Ms. HAZEN. I'm sorry, which——

Ms. SOLIS. You just said "balanced."

Ms. HAZEN. A reasonable balance of social, environmental and economic costs I believe is the language in the discussion bill, is that not correct?

Ms. SOLIS. I mean in the current print law.

Ms. HAZEN. Current?

Ms. SOLIS. No.

Ms. HAZEN. TSCA talks about cost benefit and least burdensome, you are correct.

Ms. SOLIS. I have no further questions, Mr. Chair.

Mr. GILLMOR. The Chair would recognize the gentleman from Michigan for 5 minutes.

Mr. STUPAK. Thank you, Mr. Chairman.

Ms. Hazen, I appreciate you urging us to move as quickly as possible, to move this legislation. But this bill has been sitting—I should say treaty has been sitting for 3 years after the President announced that the U.S. would become a party to the Stockholm Convention.

As I mentioned in my opening statement, I have another concern though, another important agreement does not seems to be a priority with the administration, and the U.S./Canadian Transboundary Movement of Hazardous Waste to protect the citizens from Michigan from unwanted trash and possible hazardous waste material.

A year ago at a hearing held by this subcommittee I asked the administration when could we expect legislation to be sent up to allow this important agreement to be enforced, and they said shortly. It has been a year ago, nothing has been sent up. Do you have any idea where that proposed legislation would be?

Ms. HAZEN. Congressman, I apologize, but I will have to take that question for the record. That is not a piece of legislation that I have been involved in.

Mr. STUPAK. Well, can you explain to me what "shortly" means then for the EPA? I asked the same question in 1994. In 1994 the EPA said it would be shortly. I asked the same question in 2003. The EPA said it would be shortly. Here we are in 2004 and if all these agreements, especially international agreements are such a priority, I would think after 10 years shortly would become a reliability and we would get some kind of direction from the administration.

Ms. HAZEN. Congressman, I can certainly understand the frustration with the amount of time you cite as having waited. And I will, as I say, go back and get answers for you for the record.

Mr. STUPAK. And would you also ask them then, ask the Bush administration then if they would take a position on H.R. 411 and H.R. 1730 bipartisan pieces of legislation which again deals with the movement of Canadian trash in Michigan and Ohio, and other

States, would you ask them to do that for us? That has been a over on that legislation also?

Ms. HAZEN. I will certainly address those.

Mr. STUPAK. Okay. Ms. Hazen, Dr. Goldman who was the assistant administrator of your office for 6 years in the 1990's stated the following about the regulatory standard in Gillmor, what we have been calling the discussion draft here this afternoon. And in her prepared testimony she says "These proposed standards are actually worse than the provisions of current law and would render the EPA's efforts completely ineffective."

Has the EPA made any effort in the past few months to work with knowledgeable officials like Dr. Goldman in the public health community in an effort to forge a broad consensus for implementing this legislation?

Ms. HAZEN. Congressman, the agency has provided technical assistance for those committees who have come to the agency asking for technical assistance. We have also made ourselves available to meet with any groups that have asked to meet with us. I personally have attended two meetings with members of the environmental community, we have had meetings with others. If one were to look at——

Mr. STUPAK. I guess I am not looking for groups. I am looking for legislators. Have you worked with any legislators other than Mr. Gillmor to get a broad consensus for just implementing the legislation? If I heard Ms. McMurray testify, in 6 weeks is sort of a critical time line we had this legislation that this side of the aisle has not been consulted with, we have grave concerns. So how do you forge a broad consensus for implementing legislation? If we are on this fast track to get this thing done, I would think you would want to work with everybody up here so we could get it done and get it passed. And not only our committee, I am sure other committees want jurisdiction on this legislation, too. So I would think you would want to do a broad consensus.

So my question was really what groups form that broad consensus?

Ms. HAZEN. In August 2003 and October 2003 we met with full committee staff of the Energy and Commerce Committee. What we presented at that time was the SEPW draft that had been worked on and the provisions of that draft. And at that time expressed the administration's desire to move as rapidly as possible. At that time we did invite anyone who was interested in working with us to provide us their thoughts or ask us for our thoughts or technical assistance. We made ourselves available to them.

Mr. STUPAK. If it was October 2003, why are we waiting then with like 20 days left in this sessions then to put forth legislation?

Ms. HAZEN. Congressman, all I can say is that we made folks aware that we were putting POPs forward as a priority, offered up our technical assistance where we could, and provided it whenever requested.

Mr. STUPAK. It sounds like the Chairman has taken the EPA's definition of shortly then. Just a joke.

What other outside groups have you worked with on this? Have you worked with some of the environmental groups, and some of the business groups to try to develop this legislation? Once you get

the legislation, would you sit down any of the groups; let me ask it like that. Once you got the Chairman's discussion draft were you able to sit down with any of the groups to try to solicit support for implementing legislation?

Ms. HAZEN. We have not specifically done so with this particular draft, but we have sat down with many groups to hear their thoughts and ideas, their concerns on how this treaty should be implemented and enforced. In fact, we have met with folks who were instrumental in the actual development of the treaty itself.

Mr. STUPAK. Yes. But since the legislation you have not met with any groups yet?

Ms. HAZEN. No, we have not.

Mr. STUPAK. Okay.

Mr. ROGERS [presiding]. Mr. Stupak, your time is up.

Mr. STUPAK. Thank you, Mr. Chair.

Mr. ROGERS. I'm going to give Ms. Capps of California another 3 or 4 minutes.

Ms. CAPPS. I do appreciate your staying for this opportunity for a second round.

I brought up this topic just at the end of my last 5 minutes with you, and it is to follow on what the ranking member has brought up, because I think it is so important.

As you know, Ms. Hazen, the substances regulated under the Persistent Organic Pollutants Treaty are some of the most dangerous persistent and well traveled substances known to man with potentially widespread and long term effects on human health and the environment. Because of this, the very first thing the treaty says in article 1, and I am quoting now and the emphasis is on precautionary approach: "Mindful of the precautionary approach as set forth in principle 15 of the Rio Declaration of Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants." Precaution including transparency and public participation is a guiding approach throughout this treaty.

Yet I cannot find anything in this draft that resembles such a precautionary approach. So my question is where does the discussion draft specifically include the precautionary approach as a principle consideration for regulation to reflect the primary goal of the treaty.

Ms. HAZEN. Congresswoman, if you are looking for a specific reference to the word "precautionary approach," they will not be there. What has been built in, as I have been able to read through it, is a number of things that I think are important.

In terms of transparency, there are multiple opportunities during the process envisioned in the bill to engage the public, the public in its broadest possible sense, in understanding what is happening in terms of chemicals that are being considered, chemicals where the U.S. is trying to negotiate or put forward a position. So there are multiple opportunities to bring the broad public in in terms of stakeholder involvement.

As I said earlier, I think it is critical to involve our stakeholders because the U.S. has probably the most robust data base in the world to bring to the table the information that will allow us to be—if you put quotes around the word "precaution" in the sense

that I think what we bring to the table is the most robust source of information which allows——

Ms. CAPPS. I do not mean to interrupt you, but I do want to make this point clear. Then why was not the precautionary approach, which is so central to the treaty, why is it deliberately omitted even though you are talking about a lot of things that surround it. It is a guiding principle of the treaty. Instead what I hear and the language that I see in this drift is being substituted by the phrase "reasonable balance." And that, I think is such a difference from the treaty to how we are disguising it now. It is as though you have a scale and on one side you put fetal deformatives, you put increases in cancer, you put mental retardation. And on the other side you put business cost. And somewhere we are trying to draft legislation with all this data, which we do have, but we are talking about value of life. I am begging for a affirmation of a precautionary principle which does justice to this goal. And maybe you can find something else. But to me this draft does not rise to the level that the treaty asks for.

Ms. HAZEN. Congresswoman, I hear exactly what you are saying. I do not think you will find the term precautionary approach in any of the various bills that have been put forward. What I can say, and I——

Ms. CAPPS. Can you tell me why?

Ms. HAZEN. Let me——

Ms. CAPPS. Okay. You are going to tell me why? Go ahead.

Ms. HAZEN. Well, I am going to explain at least my perception of it.

Ms. CAPPS. Good.

Ms. HAZEN. I think to get specific answers probably we need to discuss the issue with the drafters themselves.

But I think the term "reasonable balance" of social, environmental and economic costs, and I understand your concern with the balance issue; my understanding of the "social and environmental" cost component of that would certainly bring in this concept of precaution. As I say, it is not a term of art that has been any of the bills that have been drafted. But I think the consideration of social costs, the very issues that you raise and they are obviously of concern, have the ability to be brought in here and be part of the equation.

Ms. CAPPS. Right.

Well, Mr. Chairman, I know I have used my time. But I just want to go on record as saying I think it is quite remarkable that the language that is so prominent in the treaty of precautionary approach is absolutely missing from any of the bills that have to do with its ratification.

Mr. ROGERS. The gentlelady's time is up.

We do have another panel of eight folks. I thank the first panel, Ms. Hazen, and you can excused. And we would invite the second panel to come forward.

Ms. HAZEN. Thank you.

Mr. ROGERS. We have: Michael P. Walls the Senior Counsel of the American Chemistry Council; Steven Goldberg, CropLife America; Jim Roewer, Executive Director Utility Solid Waste Activities Group; Mr. Scott Slesinger, Vice President, Governmental Affairs,

Environmental Technology Council; Brooks P. Yeager, the Vice President of Global Threats World Wildlife Fund; Dr. Lynn Goldman, the Professor of the Environmental Health Sciences, Bloomberg School of Public Health, Johns Hopkins University; Ms. Lisa Heinzerling, Professor of Law, Georgetown University Law Center, and; Mr. Glenn Wiser, Senior Attorney and Intern Coordinator for the Center for International and Environmental Law.

I would say up front that your entire statements if you want to abbreviate them, will be submitted for the record.

We would like you to stay within the 5 minute time limit.

We will go ahead and start with Mr. Walls.

STATEMENTS OF MICHAEL P. WALLS, SENIOR COUNSEL, THE AMERICAN CHEMISTRY COUNCIL; STEVEN GOLDBERG, CROPLIFE AMERICA; LYNN GOLDMAN, PROFESSOR OF THE ENVIRONMENTAL HEALTH SCIENCES, BLOOMBERG SCHOOL OF PUBLIC HEALTH, JOHNS HOPKINS UNIVERSITY; BROOKS P. YEAGER, VICE PRESIDENT OF GLOBAL THREATS WORLD WILDLIFE FUND; LISA HEINZERLING, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER; GLENN M. WISER, SENIOR ATTORNEY AND INTERN COORDINATOR, CENTER OF INTERNATIONAL AND ENVIRONMENTAL LAW; SCOTT SLESINGER, VICE PRESIDENT, GOVERNMENTAL AFFAIRS, ENVIRONMENTAL TECHNOLOGY COUNCIL; AND JAMES R. ROEWER, EXECUTIVE DIRECTOR UTILITY SOLID WASTE ACTIVITIES GROUP

Mr. WALLS. Thank you, Mr. Chairman. Good afternoon.

I am Michael Walls, I am Senior Counsel at the American Chemistry Council. And we appreciate the opportunity to be here today to reiterate the chemical industry's support, not only for the treaties that are the subject of this hearing, but also our support for the draft legislation that has been put forward for consideration. In our view these agreements are an important step in achieving appropriate harmonized controls on the small side of chemicals that pose global and environmental risks.

We also believe that the draft amendment developed by the subcommittee is an important step in assuring that the United States will be able to continue its leadership role in the international implementation of these agreements. And we urge the subcommittee to act on that legislation as soon as possible.

Now, we believe that the draft legislation provides all the statutory authority necessary for the United States to fulfill its obligations under the agreements. TSCA already provides EPA with consideration authority to regulate in a manner consistent with the convention. There are some modest amendments that are absolutely required as part of the legal obligations that the U.S. would exceed to under these agreements. But let me focus specifically on the question of additions to the list of chemicals, the list of POPs in particular.

Strictly speaking, the POPs agreements do not obligate the parties to establish a domestic mechanism to address the treaty amendment. In our view, however, it would it be prudent for the Congress to consider such an adding mechanism as part of the implementing legislation.

Now under the treaty process a chemical is nominated as a POPs. That nomination is considered by a review committee along with information on the hazards, uses, exposures, risks and social economic consideration attendant that listing, and a decision is made by the parties to the agreement. Now, there are two major aspects to that additions process that merit comment with respect to U.S. implementation.

First, ACC believes it is important that the United States have an opportunity to take an independent look at a proposed listing before regulating domestically. There may be any number of reasons why; a listing agreed under the treaties does not warrant U.S. action or regulatory response.

Second, the POPs agreements themselves adopt a process for additions that are grounded in science, risk and cost benefit considerations. The governments that negotiated the POPs agreements did not say that hazard alone was the basis for regulation. They explicitly called for the consideration of scientific evidence, risk analyses and cost benefit considerations to inform their decisions.

Annex D and E to the Stockholm Convention, for example, established the information requirements for nominated chemicals. The purpose of this information is to establish that as a result of its long range transport a particular substance is likely to cause significant health and environmental impacts such that action under these agreements is warranted.

The review committees are consider, as I said, hazard information, production use and exposure information, data on environmental fate and transport, risk assessments and evaluations, even those conducted at the national and international level.

Annex F to the Stockholm Convention goes even further and says that the parties will consider a series of cost considerations in considering a new listings. These include the cost of possible control measures in meeting the risk reduction goals, the cost of alternative products and processes, the positive or negative impact on society, the control measures and even the costs of waste and disposal implications for those POPs.

In short, the agreements adopt a risk based science justified approach to listing new substances supported by cost benefit information. That international process is intended to achieve a decision that balances environmental health, social and economic impacts. The process adopted in the agreements is exactly the same process adopted in the draft legislation that has been put before the subcommittee.

Decisions under the Stockholm Convention, as various members had mentioned, are to be taken in a precautionary manner. But even that precautionary approach referred to in the convention anticipates a similar balancing of social, economic, environmental and health considerations.

In short, Mr. Chairman, this approach is consistent not only with the agreements but also with longstanding U.S. law and practice. It allows for an independent U.S. judgment on proposed additions and provides a basis for risk-based regulatory decisions.

Mr. Chairman, I will conclude my remarks there and will be happy to answer any questions later.

Thank you.

[The prepared statement of Michael P. Walls follows:]

PREPARED STATEMENT OF MICHAEL P. WALLS, AMERICAN CHEMISTRY COUNCIL

I. INTRODUCTION

The American Chemistry Council (ACC) has been a consistent supporter of the three international agreements that are the subject of this hearing: the Stockholm Convention on Persistent Organic Pollutants (POPs), the U.N. Economic Commission for Europe's POPs Protocol to the Convention on Long-Range Transboundary Air Pollution (LRTAP POPs Protocol) and the Rotterdam Convention on Prior Informed Consent (PIC). ACC and its members believe that the Subcommittee's draft amendment to the Toxic Substances Control Act (TSCA) represents an important step forward in assuring that the United States can continue its international leadership role under these agreements. We urge the Subcommittee to act on the draft legislation as soon as possible.

ACC is the national trade association whose member companies represent more than 90 percent of the productive capacity for basic industrial chemicals in the United States. ACC members represent an industry on the cutting-edge of technological innovation and progress, whose products provide significant benefits to every sector of the global economy. The chemical industry has been engaged in the international discussions on POPs and PIC for many years. The three agreements currently under consideration are an important step in achieving appropriate, harmonized controls on the small set of chemicals that pose potential global health and environmental risks.

The chemical industry's support for the agreements and their reasonable implementation into U.S. law is based on some fundamental considerations.

- The industry's commitment to product stewardship, including the goal of preventing health and environmental damage in the manufacture and use of chemical products. Our industry's product stewardship commitment is an integral part of our Responsible Care® program, which is now being implemented by the chemical industry in more than 42 countries.
- The agreements adopt processes for additions to the list of covered chemicals that are grounded in science, risk, and cost-benefit considerations. These are approaches that are entirely consistent with long-standing U.S. law and practice, and that will lead to appropriate global controls on priority chemicals.
- The participation of the United States is essential in assuring the effective and efficient implementation of the agreements at the international level.

II. THE CHEMICAL INDUSTRY SUPPORTS THE AGREEMENTS AND THEIR REASONABLE IMPLEMENTATION INTO U.S. LAW.

The U.S. chemical industry's work on the POPs issue began shortly after the Rio Summit on Environment and Development, in 1992. We worked with the Intergovernmental Forum on Chemical Safety (IFCS) in its effort to map the best approaches to dealing with POPs, particularly in discussions on criteria for identifying potential POPs substances and the decision-making process on those substances. The industry was a visible and positive contributor to the negotiations on the LRTAP POPs Protocol and the Stockholm Convention. Similarly, the industry worked closely with the U.N. Environment Programme to develop and implement the international program for government information exchange that ultimately led to the adoption of the Rotterdam PIC Convention.

As the Subcommittee is aware, the LRTAP POPs Protocol, the Stockholm Convention and the PIC Convention are all in force. The first meeting of the Parties under the Rotterdam Convention will be held in September 2004, the first meeting of the Parties under the Stockholm Convention is scheduled for May 2005, and the first formal meeting of the Parties to the POPs Protocol will be held in December 2005. At these meetings, decisions critical to the future implementation of the agreements will be taken. For example, the Stockholm Parties will consider the rules of procedure for the review committees that will consider candidate POPs substances. Parties to the LRTAP POPs Protocol will make initial decisions concerning additional chemicals. The ability of the United States to lead and appropriately influence the decisions that have long-term consequences for the operation of the agreements is significantly reduced when our government is not a Party.

The United States cannot be a full Party, however, until the Senate provides advice and consent to ratification. Although there is precedent for Senate action on a treaty before the Congress has addressed the necessary implementing legislation, the clear preference is that the legislation comes before the treaty vote. In the case of the POPs, LRTAP POPs and PIC agreements, amendments to the Toxic Sub-

stances Control Act (TSCA) and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) are necessary in order to assure that the United States can meet its obligations. In ACC's view, the TSCA amendment outlined in Mr. Gillmor's draft legislation ensures full and effective implementation of all U.S. obligations under the treaties.

III. THE SUBCOMMITTEE'S DRAFT ADDRESSES ALL OBLIGATIONS OF THE UNITED STATES UNDER THE AGREEMENTS.

Mr. Gillmor's draft implementing legislation addresses all of the necessary changes to TSCA required to ensure that the United States can meet its obligations under the treaties. The modest statutory changes required include:

- Extending EPA authority to prohibit export of current POPs substances for purposes prohibited by the Convention.
- Imposing certification requirements for exports to countries not party to the POPs agreements.
- Codifying the treaty exemptions in TSCA.
- Integrating the Rotterdam PIC export notification provisions into existing TSCA export notification requirements.

In ACC's view, there is no real disagreement that these elements must be addressed in implementing legislation.

Although the POPs agreements do not obligate the Parties to establish mechanisms to address treaty amendments, the treaties contemplate the possibility that chemicals will be added to the list of covered substances in the future. ACC believes it is prudent to recognize the possibility of amendments in the implementing legislation, and establish a domestic process and EPA authority to prohibit or restrict the manufacture, use, or export of POPs substances listed by future decisions under the treaties.

Under the Stockholm Convention, for example, a new chemical will be added to the list through the following process:

1. A Party nominates a chemical for consideration as a POP substance.
2. The treaty Secretariat reviews the nomination to ensure that it meets the minimum criteria established in Annex D (e.g., that the nomination includes information on the persistent, bioaccumulative, and toxic properties of the substances, and the propensity for long-range transport). If the nomination meets the criteria, it is forwarded to the POPs Review Committee (POPRC).
3. The POPRC reviews the nomination, and if further consideration is warranted, the Committee requests information necessary to prepare a Risk Profile on the substance pursuant to Annex E.
4. The POPRC reviews the Risk Profile. If the POPRC decides that further consideration is warranted because long-range transport of the substance will lead to significant health or environmental impacts such that global action is necessary, the Committee requests information to prepare a risk management evaluation, including information on the socio-economic benefit and alternatives to the nominated substance, pursuant to Annex F.
5. On the basis of the risk management evaluation, the POPRC makes a recommendation to the Conference of the Parties (COP) whether the chemical should be listed in Annex A, B or C of the treaty.

Mr. Gillmor's draft legislation requires EPA to provide public notice and an opportunity to comment at each decision point in this process—upon the nomination of a substance, the preparation of the risk profile and risk management evaluation, and the recommendation to the COP. The process will provide ample public notice of activities under the treaties, and it will assure that U.S. representatives in the POPRC and the COP have all relevant information before them at each stage of the international process.

It is important to note that the international agreements adopt a flexible approach to risk management measures. For example, elimination of a substance is not a legal requirement for a POP substance, but constitutes one option to manage the risks of a POPs release. As the treaty provisions and annexes make clear, risk and cost/benefit considerations are not trumped by the need for precaution. Rather, those considerations give substance to the precautionary decisions made through the treaty process.

Mr. Gillmor's draft addresses the issue of future amendments by establishing a domestic regulatory process for new POPs substances that mirrors the procedural and substantive decisions under the Stockholm Convention and the LRTAP POPs Protocol. When EPA regulates newly listed substances, it is to regulate "to the extent necessary to protect human health and the environment in a manner that

achieves a reasonable balance of social, environmental, and economic costs and benefits." In reaching its regulatory decision, EPA is to consider:

- The effects and magnitude of the effects of the substance on health or the environment.
- The benefits of the substance and the availability, risks and economic consequences of alternatives to the substance.
- The economic consequences of the proposed risk management requirement.
- The domestic and international consequences likely to arise as a result of the domestic regulatory action.
- Additional information in the domestic or international record.

The decision-making standard and the first three required elements in EPA's regulatory considerations provide the necessary domestic counterpart to the process outlined in the POPs agreements. The treaties ensure that relevant social, economic, environmental and health information is considered in reaching a decision to list a new chemical; the draft legislation ensures that the same information is considered in reaching a domestic decision. Between the notice and comment requirements and the international process, EPA will have a robust record to consider in reaching a domestic regulatory decision—and a sufficient opportunity to ensure that the record supports its subsequent decisions. The bottom line is that a domestic regulatory decision is necessary to implement any new treaty obligations for added chemicals, particularly to outline permitted uses or exemptions.

The international agreements adopt a risk/benefit approach in implementing appropriate regulatory controls on listed chemicals, and in considering chemicals nominated as potential POPs. The agreements rely on technical and economic considerations to ensure that priority pollutants are targeted and meaningful control actions taken on a global basis.

Mr. Gillmor's draft legislation does no less, and provides the means by which the United States can address future amendments to the treaties. ACC and its members believe it is critical to assure that science and risk considerations inform decisions. The risk-based, science-justified standard adopted in the draft legislation is consistent with the Safe Drinking Water Act, the report of the President's Commission on Risk Assessment and Risk Management, and the efforts of both the Clinton and Bush Administrations (contained in Executive Order 12866, for example) to support the use of analytical tools such as risk assessment and cost/benefit analysis.

Section 6 of TSCA already provides EPA the necessary authority to prohibit or restrict the manufacture, processing, use, distribution or disposal of a chemical substance. Due to the special global considerations that apply to substances nominated as POPs, the chemical industry has been willing to consider an appropriately narrow modification to the approach used in TSCA Section 6. For example, the draft legislation imposes no requirement on EPA to demonstrate that a substance poses an "unreasonable risk" to health or the environment, does not require EPA to demonstrate that its preferred risk management approach is the "least burdensome regulatory alternative," and imposes none of the procedural elements of Section 6, such as the informal hearings required for proposals under that section.

The regulatory authority established in Mr. Gillmor's draft is narrowly drawn for the purpose of implementing U.S. obligations under the Stockholm Convention and LRTAP POPs Protocol. Even so, the authority to prohibit or restrict the manufacture, processing, use, distribution or disposal of a substance is very broad. In ACC's view, that broad grant of authority must be exercised very carefully—and the careful exercise of that authority warrants EPA consideration of scientific evidence, risk considerations and cost/benefit analyses.

Notably, Mr. Gillmor's draft does not prevent EPA from regulating POPs substances under its existing statutory authority, including TSCA. The United States regulated the existing POPs long before the international agreements were drafted, employing a regulatory process that considered scientific evidence, risks to health and the environment, and socio-economic consequences. The domestic POPs process established in the draft simply adapts existing requirements in a manner that ensures the United States can meets its international obligations.

Mr. Gillmor's draft relies on existing provisions of TSCA to complement the treaty-specific provisions. TSCA Section 19 is expanded to ensure that all persons have the right to seek review of EPA's decisions on treaty-related matters. EPA's enforcement and seizure authority under TSCA Sections 11, 15 and 17 are extended to include possible violations of the POPs and PIC agreements. The export notification requirements of TSCA Section 12 are amended to include export notices required under the PIC Convention, and where appropriate, integrated to ensure that export notices to importing countries have their intended effect.

In ACC's view, Mr. Gillmor's draft appropriately establishes a requirement that the Executive Branch consult with Congress as amendments to the treaty obliga-

tions are considered. This provision constitutes no restriction on the President's power to conduct foreign policy, and ensures that Congress is made aware of significant developments in the future implementation of the agreements.

IV. CONCLUSION

The American Chemistry Council believes that the Stockholm Convention, LRTAP Protocol, and Rotterdam Convention are significant steps in securing international action on chemicals that pose priority global risks. The agreements establish a harmonized approach for action on listed chemicals, and should produce meaningful improvements in public health and environmental protection. The United States should become a Party to the agreements as soon as possible.

The draft legislation before the Subcommittee fully implements U.S. obligations under the three agreements into TSCA. The draft complements EPA's existing regulatory authority, provides proper public notice and an opportunity to comment at all stages of the international process, and ensures that the United States can cooperate with the international community in addressing global risks.

ACC strongly supports the draft legislation. We urge the Subcommittee to take quick action to ensure that the United States can become a Party to the agreements.

Mr. GILLMOR. Thank you very much, Mr. Walls.

And we will go to Mr. Goldberg.

STATEMENT OF STEVEN GOLDBERG

Mr. GOLDBERG. Thank you, Mr. Chairman, members of the subcommittee. Again, I am Steve Goldberg. I am Vice President, Associate General Counsel for Product and Trade Regulation at BASF Corporation. And I am here today representing CropLife America.

CropLife America is the trade association representing developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the United States. Our members companies develop, produce, distribute and sell virtually all of the crop protection and biotechnology products used by American farmers.

CropLife America and its members support the POPs and PIC international agreements. Our member companies are committed to the spirit and letter of those agreements and welcome the opportunity to make recommendations about their integration into U.S. law. The United States has the strongest and most emulated pesticide regulatory system in the world through the Federal Insecticide, Fungicide and Rodenticide Act, FIFRA, and the Food Quality Protection Act Congress has provided for an increasingly comprehensive pesticide regulatory system as the basis for EPA pesticide decisions.

For example, FIFRA's strict provisions for bringing pesticides to market require registrants to perform up to 120 separate scientific safety tests to ensure that a product when used properly does not present health or environmental concerns.

FQPA and the recently enacted Pesticide Registration Improvement Act are designed to ensure that EPA in fact reviews new and old pesticides to ensure that they meet the rigorous scientific standards that EPA imposes.

We commend subcommittee Chair Gillmor and the entire Committee on Energy and Commerce for providing leadership on this complex issue. And we support the discussion draft bill as a positive step toward implementing the POP and PIC agreements.

At the same time, however, we believe there are some provisions that blur the jurisdictional lines between TSCA and FIFRA. We believe that FIFRA provides the necessary statutory framework to

implement the conventions without adding pesticide provisions to TSCA. We believe, in fact, that is the subcommittee's intent to maintain that jurisdictional split, and we look forward to working with the committee to ensure that this separation is clear.

FIFRA with its protective health and safety provisions should be the basis for U.S. pesticide provisions under implementing legislation for POPs and PIC. At the same time we support the provisions in this proposal that provide notice and comment after each step in the international decisionmaking process regarding proposals for listing additional chemicals.

Consultation with stakeholders and soliciting broad stakeholder input will ensure full consideration of potential impacts of the proposed listing and provide broad input into EPA decisionmaking.

Ultimately the POPs Convention recognizes that beneficial uses of POPs chemical still exist. For example, with regard to developing countries. Those are reflected in specific exemptions and annexes to both POPs and PIC agreements. Thus, with regard to domestic use exemptions, any change should be effectuated through FIFRA section 6 process.

The draft legislation implements these provisions where the POPs treaty had called for a reasonable evaluation of risks, including uses and benefits of the chemicals listed. Thus, we support the provisions of this bill that ensure that the U.S. Government will use and consider the best scientific information available.

Our industry is concerned with the timing of passage of legislation implementing the POPs and PIC treaties. Expeditious U.S. ratification and implementation of these treaties is vital. Prior witnesses have talked about the various meetings upcoming. And all of these meetings will impact the U.S. including U.S. business. And it is imperative that the U.S. have a seat at the table. The U.S. cannot participate in a meaningful way unless ratification is complete and implementing legislation is signed into law before the end of this legislative session.

In conclusion, we support this legislation with clarifications that FIFRA remains the sole statute under which crop protection products are regulated. We urge the committee and Congress to enable the U.S. to have an active presence before the international bodies making important decisions. This can only be accomplished by passing implementing legislation before the close of this session.

We thank you for the opportunity to share our views with the committee, and we look forward to working the Chairman and members to ensure that POPs and PIC are properly implemented to meet the global health and environmental goals set forth in this agreement.

And we will take questions when appropriate.

[The prepared statement of Steven Goldberg follows:]

PREPARED STATEMENT OF STEVEN GOLDBERG ON BEHALF OF CROPLIFE AMERICA

INTRODUCTION

Mr. Chairman and Members of the Subcommittee: I am Steven Goldberg, counsel to BASF Corporation and here today representing CropLife America. CropLife America is the national trade association representing the developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the United States. Our member companies develop, produce, sell and distribute virtually all the crop protection and biotechnology products used by

American farmers. Our mission is to foster the interests of the general public and CropLife member companies by promoting innovation and the environmentally sound discovery, manufacture, distribution and use of crop protection and production technologies for safe, high quality, affordable, abundant food, fiber and other crops.

We commend Subcommittee Chairman Gillmor and the entire Committee on Energy and Commerce for providing leadership on this complex issue. I appreciate the opportunity to testify before you this morning on the legislative proposal for implementing the Stockholm Convention on POPs and the Long-Range Transboundary Air Pollution (LRTAP) Protocol on POPs, as well as the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC).

CropLife America supports the POPs and PIC international environmental agreements. The crop protection industry acknowledges its role and responsibility in protecting human health and the environment in the manufacture, distribution and use of pesticides. Our member companies are committed to the spirit and letter of these agreements, and we welcome the opportunity to make recommendations about their integration into U.S. law. We also recognize the importance of including a process in the legislation to address U.S. decisionmaking on pesticides proposed for future inclusion in the international POPs listing.

It may seem obvious, but our industry's products provide many benefits to people and the environment. Our products have an enormous impact on the availability of abundant and affordable food and fiber while also protecting people, animals, and our homes and businesses from disease-carrying pests. Pesticides control outbreaks of crop-damaging fungus, insect infestation and noxious weeds to enhance U.S. food and fiber production. Pesticides are also used to combat damaging and health-threatening pests and insects. Pesticides control and eliminate vector borne illness caused by rats, mosquitoes (West Nile virus and other encephalitis) and ticks (lyme disease), among others. They combat cockroaches and mold/mildew in housing, restrooms, cafeterias and elsewhere, reducing known allergens causing asthma and other disease. Other insects and plant pests, such as poison ivy, fire ants and spiders are controlled effectively by pesticides.

Using a sustainable approach, pesticides also contribute to producing an abundant food supply and combating world hunger and malnutrition. Sustainability using high-yield conservation helps meet growing demand for food, animal feed, timber and paper while protecting wildlife habitat and wild species from expansion of cropland production. Two Nobel Peace Prize laureates and the co-founder of Greenpeace have commented favorably on the relationship between high-yield agriculture and conservation. "Growing more crops and trees per acre leaves more land for nature," according to Nobel Peace Prize winner Norman Borlaug. Former U.S. Senator George McGovern agrees saying, "Modern, high-yield farming has been a significant environmental and humanitarian success . . ." And Patrick Moore, co-founder of Greenpeace, has said that "high-yield agriculture—is a solution." As you move forward with the implementing legislation, we urge you to keep these positive contributions in mind.

We believe the United States has the strongest and most emulated pesticide regulatory system in the world. Congress saw the need for a separate statute regulating pesticides in order to provide for extensive health and safety testing when it passed the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) in 1947. Through subsequent major revisions to FIFRA in 1972, 1975, 1978 and 1988, and the passage of the Food Quality and Protection Act (1996), Congress has provided for an increasingly comprehensive pesticide regulatory system as the basis for EPA pesticide decisions.

For example, under FIFRA's strict provisions the process of bringing pesticides to market by securing an EPA registration is complex and demanding, based on strong scientific principles and undertaken according to stringent government review and regulation. EPA requires up to 120 separate scientific safety tests to ensure that a product, when used properly, does not present health or environmental concerns. On average, only one in 20,000 chemicals makes it from the chemist's laboratory to the farmer's field. Pesticide development, testing and EPA approval takes eight to 10 years and costs manufacturers $75 million to $100 million for each product.

Given Congress' specific and recurrent decisions on pesticide law over the years, we believe FIFRA provides the necessary statutory framework to implement the conventions without adding pesticide provisions to the Toxic Substances Control Act. We believe it is this Subcommittee's intent to maintain the existing jurisdictional split between FIFRA and TSCA, and we look forward to working with the Committee to ensure this separation continues.

CropLife America supports the sovereign right of individual countries to decide which pesticides they will permit to be used domestically and allow to be brought into their country. Importantly, the POPs and PIC Conventions recognize this and include provisions providing for each nation's right to implement the agreements within their domestic regulatory framework. FIFRA, with its protective health and safety provisions, should be the basis for U.S. pesticide decisions under implementing legislation for POPs and PIC. Specifically, our industry urges that workable implementation legislation recognize the existing risk-benefit standards of FIFRA. The United States may become party to other international agreements, and POPs and PIC implementing legislation may serve as a precedent for the future. Health and environmental protections afforded by FIFRA's stringent scientific standards and U.S. law should be upheld when implementing such agreements.

EPA must play an active role in upholding the scientific integrity of the listing criteria and procedures in the POPs and PIC international agreements. We urge that implementing legislation not enable other countries to use these agreements to adversely impact the availability of U.S. registered pesticides that meet FIFRA standards used for agriculture, public health protection and other purposes. The agreements should not become vehicles to impose artificial barriers to trade, impose a competitive disadvantage on U.S. growers or adversely impact public health. We strongly support FIFRA as the basis for pesticide decisions by the U.S. government since it provides rigorous protection for human health and the environment.

We believe that the expedient U.S. ratification and implementation of these treaties is vital to protect our country's interests. There are several international meetings occurring in the near term where it will be important to have U.S. representation present in an active role: the first meeting of the Conference of the Parties to the Rotterdam Convention will be held in September, 2004; LRTAP POPs Protocol countries will be meeting in December 2004 regarding potential additions of eight chemicals; and in May 2005 the POPs Review Committee will meet to organize and complete guidance and requirement principles for specific industry sectors on management of POPs byproducts. All of these meetings will impact U.S. businesses and markets. It is imperative that the U.S. have a seat at the table and a voice in making these important decisions. The U.S. will be excluded from these meetings unless implementing legislation and ratification of the treaties is signed into law before the end of this legislative session.

LRTAP POPS PROTOCOL AND STOCKHOLM POPS CONVENTION

CropLife America actively supported the inter-governmental negotiations that led to the U.S. signing of both the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants and Stockholm POPs Convention. Our support of both agreements is based on established policies and procedures in the POPs agreements for:

1. Identifying new POPs chemicals within a transparent, science-based, risk/benefit assessment process. Final determination of the POPs status for a pesticide is based on a consideration of socio-economic benefits and risks.
2. Recognizing the sovereignty of each nation to undertake mitigation requirements for POPs or to "opt-in" or "opt-out" of the international POPs listing based on their domestic risk management conclusions.
3. Contemplating the process for developing national regulatory programs for countries that do not have a regulatory framework in place, while recognizing the sovereignty of existing regulatory programs.

Our industry believes that if a pesticide use is contemplated for international POPS listing, then any alternatives—if they exist—synthetic pesticide or otherwise, should be subject to the same risk-benefit analysis and process to ensure that appropriate alternatives exist.

We agree with the findings of the Conventions regarding POPs pesticides, and recognize that beneficial uses still exist, for example in developing countries, as reflected in the specific exemptions in annexes of both agreements.

Companies represented by CropLife International, our industry's global association, have been working with the United Nations Food and Agriculture Organization on the safe collection and disposal of obsolete crop protection product stocks in Africa, Asia and Latin America. Through partnering and cost-share arrangements with donor agencies, governments and other stakeholders, this effort has resulted in the disposal of over 3,000 tons of obsolete pesticide stocks, including 800 tons of POPs pesticides. In 2003 alone, 1500 tons of obsolete pesticides were incinerated in Ethiopia and approximately 307 tons were successfully retrieved from Senegal. Our commitment and work on such disposal projects will continue.

ROTTERDAM CONVENTION ON PRIOR INFORMED CONSENT

CropLife America supports the Rotterdam Convention on Prior Informed Consent. The PIC Convention is first and foremost an information exchange mechanism to assist decision-making in developing countries. It makes an important contribution to developing countries' ability to make informed judgments in their national interest. Furthermore, PIC affirms the right of each government to make regulatory decisions that take into account the benefits of product use to agriculture and the public good. We are pleased with the balanced distribution of obligations between importing and exporting countries. The obligations in PIC are consistent with our industry's product stewardship efforts to ensure the safe use of our products.

Our industry has actively supported the voluntary PIC procedure first established in the late 1980's as part of the FAO Code of Conduct, and we participated as a non-governmental organization in the intergovernmental negotiations that led to the current Convention. We look forward to continuing this tradition of cooperation with the Committee. In particular, we support the provisions in this legislative proposal that direct the Administration to provide notice and comment after each step in the international decision-making process regarding proposals for listing additional chemicals. Consulting with stakeholders and soliciting broad stakeholder input will ensure full consideration of potential impacts of a proposed listing and provide broad input into EPA decision-making. It is important that these provisions remain through any further alterations to the bill

RECOMMENDATIONS FOR POPS AND PIC IMPLEMENTING LEGISLATION

Our industry looks forward to the opportunity to fully support implementing legislation to accompany the POPs and PIC agreements. We are committed to work with this Subcommittee to ensure that these agreements are fully implemented, without unintended consequences, and offer the following recommendations:

EPA

- We support EPA as the pre-eminent pesticide regulatory agency that recognizes the risks of pesticides and the beneficial role pesticides play in protecting human health and the environment and providing for a safe and abundant food supply. FIFRA is the only appropriate statute through which U.S. decisions on POPs and PIC pesticides should be made.
- With regards to modifying existing domestic use exemptions for banned pesticides, any change must be effectuated through the existing FIFRA Section 6 process.

SUMMARY

Our industry is committed to the improvement and building of regulatory capacity, especially in the developing world. We have been active participants in the OECD and NAFTA international forums to harmonize pesticide registration processes for the past 10 years. We are also committed to a transparent, science-based process for implementing the Conventions and we believe that current statutory framework under FIFRA is ample, with appropriate adjustments, to successfully implement U.S. industry's obligations.

This hearing is an important step towards U.S. participation in these treaties. This is a complicated issue, and I commend the Chairman and the Subcommittee for the progress that has been made towards crafting implementing legislation.

Thank you again for the opportunity to share our views with the Committee. We look forward to working with the Chairman and other Committee members to ensure that POPs and PIC are properly implemented to meet the global human health and environmental goals set forth in the three international agreements.

Mr. GILLMOR. Thank you very much, Mr. Goldberg.

We will now go to Dr. Lynn Goldman of the Bloomberg School of Public Health at Johns Hopkins University.

STATEMENT OF LYNN R. GOLDMAN

Ms. GOLDMAN. Mr. Chairman and members of the subcommittee, it is an honor to testify before you today on draft legislation.

I am going to summarize my written comments, which have been submitted to you for the record with your consent.

As you know, I served between 1993 and 1998 as Assistant Administrator for Prevention, Pesticides and Toxic Substances at the U.S. EPA. But the views I present today are my own.

I am going to first talk a little bit about PIC. Obviously, while trade in chemicals is associated with great economic progress worldwide, there can be serious adverse consequences. In most of the countries in the world today there is no system in place for regulating the commerce in chemicals. And, in fact, most governments do not even know which chemicals are on the market in their countries. And so the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade does fill a gap that is very important for developing countries. And so it is quite urgent that Congress should enact domestic implementing legislation that would give EPA clear authority to carry out all of the provisions of the PIC in a prompt and expeditious manner, including that the United States may want to notify the international authority that we do not want to receive a particular PIC listed chemical. Unfortunately, the June 17 discussion draft does not do this, nor have we seen any sign from the administration that they asking for that particular authority.

When it comes to POPs, I know that you are aware that these are persistent chemicals that are very toxic and can be associated with numerous types of health problems, especially for children. As a pediatrician I am most aware of how these chemicals are passed from the mother to the fetus in utero, and to the baby via breast milk. And I think of the POPs Convention as a convention that is there for protecting the fetus and protecting infants globally.

The LRTAP POPs is a very important regional agreement. I think it is especially important as kind of a breeding ground, if you may, for policies that end up being perhaps exported into the global POPs Convention.

The Stockholm Convention on Persistent Organic Pollutants initially targets 12 POPs, but of course it does have a provision for adding new POPs and opt-in or opt-out provisions. The convention, it is important to recognize, did enter into force on May 17 of this year.

I have reviewed the June 17 discussion draft and find that it does fall short in a number of ways. And I should say that these comments are intended to be offered in a constructive manner. Even though I am critical, I am very hopeful as well that there is an openness to the feedback that we have.

First, I think that the bill needs to be a clean bill. As currently drafted it imposes new standards on the EPA, standards that EPA would opt-in only "to the extent necessary to prevent protecting and helping the environment in a manner that achieves a reasonable balance of social, environmental and economic costs and benefits."

In addition, the discussion draft contains new "sound science" requirements that I think are problematic.

Second, the discussion draft does not presume that the EPA will implement the POPs conventions. I think that instead of a burden on EPA to prove that a listed chemical should be further regulated, there needs to be a burden on EPA for why we don't take a POPs

listing seriously and implement it. In other words, there should be a presumption that we will adopt the decision of the conventions.

Third, the discussion draft does undermine the U.S. leadership role that we have held for decades in this area. It states that EPA should not take action that is more stringent than the action that is prescribed in the convention. It actually encourages a practice that is very much against our best interests, which would be the export of POPs chemicals that we have determined to be too risky in the U.S. It also specifies that every single available exemption would be taken by us. I do not understand why we would want any of those provisions, quite frankly.

Fourth, the decision standard in the discussion craft is not in alignment with the current standard in the POPs convention, which is "to protect against significant adverse human health and environmental effects associated with the chemical substance or mixture."

And there is weak authority for information collection. I think it is very important that there is transparency and opportunity for notice and comment. Such an opportunity should be front loaded into the process, not after an action is taken globally. Because regardless of whether we opt-in or opt-out, we are affected by the actions that are taken by the rest of the world.

I should conclude by saying in numerous places that I have mentioned this proposed language is actually weaker than the provisions of the current law, and I think would render the EPA's efforts ineffective.

In conclusion, the U.S. should assume its share of the responsibility to assuring global chemical safety. As draft legislation is considered we must keep foremost the purpose of such legislation, which is the protection of health and the environment from highly toxic and persistent chemicals. I am encouraged to hear that the Chairman and committee members are open to our comments about this discussion draft, and I hope that you will receive these comments in the constructive spirit in which they are intended.

Thank you very much.

[The prepared statement of Lynn R. Goldman follows:]

PREPARED STATEMENT OF LYNN R. GOLDMAN, PROFESSOR, ENVIRONMENTAL HEALTH SCIENCES, JOHNS HOPKINS UNIVERSITY, BLOOMBERG SCHOOL OF PUBLIC HEALTH

Mr. Chairman and members of the Subcommittee on Environmental and Hazardous Materials, it is my honor to testify today on proposed legislation to implement the POPs, PIC, and LRTAP agreements. I am a board-certified pediatrician and an environmental epidemiologist. Between 1985 and 1993 I served in various positions in the California Department of Health Services, most recently as Chief of the Division of Environmental and Occupational Disease Control. From 1993-98, I served as Assistant Administrator for Prevention, Pesticides and Toxic Substances at the U.S. Environmental Protection Agency (EPA). While serving in that position I was involved with the regulation of chemicals and pesticides and with efforts related to the development of the POPs, PIC and LRTAP PIC agreements. In January 1999 I left the EPA and joined the Johns Hopkins University where I presently am a Professor of Environmental Health Sciences at the Bloomberg School of Public Health. This testimony reflects my views and not necessarily those of any of the above organizations.

As a physician and an advocate for public health protection, I firmly support U.S. ratification of these three agreements coupled with domestic implementation that is faithful to the letter and spirit of the underlying agreements. As a former federal regulator, I believe that it is in the long-term interest of the United States, its citizens and environment, its industry, and the entire global community for the United

States to be a full participant in these important international processes. That said, I believe that implementing legislation must be developed carefully and not considered hastily. With my testimony today I will present some important background information for Congress to consider. I will also present with my views on a set of principles that should guide the development of sound implementing legislation, and why I believe that the current draft bill circulating in this subcommittee does not meet this test.

INTERNATIONAL CONTEXT FOR CHEMICALS CONVENTIONS

In 1992 the United States and other countries met for the United Nations Conference on Environment and Development (UNCED) and developed a document called Agenda 21, which is a blueprint for protection of the global environment. Agenda 21 Chapter 19, "Environmentally Sound Management of Toxic Chemicals, Including Prevention of Illegal International Traffic in Toxic and Dangerous Products" established an ambitious international agenda for industrial chemicals. Six program areas were established, with a number of specific targets under each area: (1) expanding and accelerating the international assessment of chemical risks; (2) harmonizing classification and labeling of chemicals; (3) increasing information exchange on toxic chemicals and chemical risks; (4) establishing new risk reduction programs; (5) strengthening national capabilities and capacities for management of chemicals; and (6) preventing illegal international traffic in toxic and dangerous products. Together, the three intergovernmental agreements we are discussing today represent a major step forward toward these goals.

It must be said that the United States is a long-time leader in international chemicals policy and regulation. Most chemicals in the world are manufactured by large multinational corporations based in the U.S. and other industrialized nations. The U.S. is arguably home to the strongest and most advanced cadre of toxicology, chemical engineering, and industrial science expertise in the world, providing the technical capacity needed to achieve international goals. So it should come as no surprise to Congress that the United States has been very involved in international chemicals policy efforts. However, self interest is involved as well. Pollution can cross boundaries, whether via air and water or via products. The health of our people and the health of the environment can be negatively impacted by transboundary pollution. Less obviously, the U.S. has a national economic interest in being a major player, in that global actions will likely have an affect on commerce and trade while the chemical and pesticide industry continues to play a key role in the U.S. economy. Thus, there are many reasons for the U.S. to be a participant in the development of global approaches to chemical management, and very little reason to sit on the sidelines.

THE TOXIC SUBSTANCES CONTROL ACT

Historically in the U.S., regulation of chemicals lagged significantly behind the growth and development of the industry. Until 1976, there were no laws in the United States specifically related to the introduction of chemicals into commerce and the control of hazards of existing chemicals. Up to that point regulation of chemicals was limited to food additives, cosmetics, and pharmaceuticals by the Food and Drug Administration (FDA) and pesticides (initially by the USDA and the FDA and in 1972 by the newly created EPA). By 1976, it is estimated that there were 60,000 chemical substances in commerce in the U.S.; however, the government did not have an inventory of chemicals manufactured and imported into the country. Congress identified a need for a comprehensive framework for the prevention of risks that might be posed by those chemicals. In 1976, Congress enacted the TSCA to address three major concerns:[1]

- Those who manufacture and process chemical substances and mixtures should develop adequate data with respect to the effect of chemical substances and mixtures on health and the environment;
- The government should have adequate authority to regulate chemical substances and mixtures which present "an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards"; and
- Government's authority over chemical substances and mixtures should be exercised "in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation" while assuring that such substances

[1] Toxic Substances Control Act, in U.S.C. 1976.

and mixtures do not present "an unreasonable risk of injury to health or the environment."

Further, Congress made clear its intention that government "shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter." Most of the regulatory authority for TSCA is delegated to the EPA's Office of Prevention, Pesticides and Toxic Substances, the office I led during my years at the EPA. Over the years, the core 1976 TSCA legislation has never been reauthorized or amended, but new titles have been added to specifically regulate asbestos (1986, Title II), radon (1988, Title III), and lead (1992, Title IV) and the original legislation contained specific requirements with regards to polychlorinated biphenyls (PCBs). The radon program is located in EPA's Office of Air and Radiation.

TSCA provides the authority for EPA to assess and control chemicals in commerce or new chemicals. These provisions broadly direct the EPA to assure that the public will be protected from "unreasonable risks" to health and the environment. The statute did not clearly define "unreasonable risk", however, this has come to be interpreted as including aspects of both risk analysis (the severity and magnitude of health and environmental effects) and economic analysis (the economic benefits of the use of the substance as well as the availability and costs of switching to alternatives.) In the case of PCBs, asbestos, radon and lead, Congress saw fit to identify that unreasonable risks did indeed exist and gave the EPA very specific direction for how to address those risks. In essence, the TSCA framework treats existing and new chemicals very differently. The presumption for an existing chemical is that it is safe unless EPA makes a regulatory finding to the contrary. However, new chemicals must be reviewed by EPA prior to manufacture. Although this review is not very extensive, it nonetheless provides some additional safety for new chemicals.

Regulation of existing chemicals under TSCA has been modest, to say the least. The GAO in 1994 concluded that the EPA regulates few chemicals under TSCA, listing only five (PCBs, chlorofluorocarbons, dioxin, asbestos and hexavalent chromium) and noted that the act itself required the regulation of one of the five, PCBs. In only two cases, for PCBs and asbestos, did the EPA take a comprehensive approach to the regulation of chemicals and in one of these cases, asbestos, the rule was essentially overturned by the courts.[2]. The failure of EPA to prevail in the asbestos phase-out has been widely recognized as a clear indication that the heavy burden imposed on the EPA to prove that asbestos would meet the TSCA standard of "an unreasonable risk of injury to health and environment" is too onerous to provide an effective means for the EPA to regulate any chemicals, including POPs. If the EPA cannot make such a finding for asbestos, a known human carcinogen which has caused at least 200,000 deaths in the U.S., then the situation for other agents is impossible as well. The case of PCBs is instructive because this is the only class of chemicals named in the 1976 law for which Congress specified that manufacture shall cease, imports and exports banned (with a provision for exceptions by rule making), and continued use be carefully controlled. So in the case of PCBs EPA was not required to make any finding of "unreasonable risk" and in consequence more protective actions have been taken. Yet, compared with developing countries, the United States has made remarkable progress.

ROTTERDAM CONVENTION ON PRIOR INFORMED CONSENT (PIC)

As should be clear from the proceeding, in my opinion TSCA is an outdated statute that does not give the EPA sufficient authority in a number of areas. Yet, compared with developing countries, the U.S. has made remarkable progress. Under TSCA we have an inventory of chemicals that have been manufactured in the U.S. while all "new" chemicals since TSCA's enactment have been allowed on the market only after filing of a Premanufacture Notice (PMN). By contrast, in most countries, no one knows which chemicals are on the market and which are not. At the same time, a myriad of chemicals and pesticides have been marketed (or donated) to developing countries. Most often this commerce has helped to advance economic progress since chemicals are at the core of most industrial processes. Unfortunately, at times, there have been serious adverse consequences.

In the 1980s, it became clear that there was a need for international information exchange from chemical exporters to importers for certain highly hazardous chemicals. Initially established as a voluntary procedure, the principle of prior informed consent is quite simple. Exporting countries should notify importing countries prior to shipping a chemical that is "banned or severely restricted." In the 1990s, developing countries pressured for a legally binding convention on prior informed con-

[2] *Corrosion Proof Fittings v. EPA.* 1991, 5th Circuit. p. 1201.

sent. They believed that such a convention would not only provide needed information exchange but also strengthen their national capacities and provide a means of legal enforcement of making such notices mandatory. Given that the voluntary system appeared to be workable, the U.S. and other nations directed UNEP to form a process to develop such a convention.

The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was signed in 1998, two years before the target date in Chapter 19 of Agenda 21. The Convention requires that chemicals and pesticides that have been added to the convention because they are banned or severely restricted in at least one country in each of two regions shall not be exported unless explicitly agreed by the importing country. The PIC list also includes certain pesticide formulations that are too dangerous to be used in countries where high-level protective equipment may not be available; these are considered to be "severely restricted" when approved for use in the U.S. The Convention came into force in February 2004 and the first Conference of Parties will be held this September. Until the U.S. ratifies this convention, decisions about adding further chemicals to the list will be made without a U.S. vote. Clearly, the U.S. should promptly step forward to ratify the PIC so that it can be a full participant in this important effort. Just as clearly ratification of the PIC convention should be a straightforward process. The U.S. ratification should follow the enactment of domestic implementing legislation which should give EPA clear authority to carry out all the provisions of PIC in a prompt and expeditious manner, including notifying the international authority that the U.S. does not wish a particular PIC listed chemical to be imported into the U.S. As obvious as this should seem, at this point there seem to be no plans by the U.S. government to put such a process in place.

PERSISTENT ORGANIC POLLUTANTS

Persistent organic pollutants (POPs) are chemical substances that possess characteristics of persistence in the environment, bioaccumulation in organisms, and toxicity. POPs is a category of substances that includes chemicals and pesticides like dioxin, PCBs, and DDT. Each of these substances is associated with an array of health effects, including cancer, neurological, developmental and reproductive effects. Once released into the environment, POPs can cause harm to health and the environment thousands of miles away. They accumulate and magnify in the food chain; we are exposed when we eat foods near the top of the food chain (mostly animal products). Food is usually an innocent carrier of POPs that are present in the general environment but there have been incidents where the POPs were introduced via contaminated animal feeds. In consequence of food contamination by POPs, all of us have many of these chemicals in our bodies. POPs are transferred from a mother to her fetus through the placenta, and later to the infant via breast milk. This is of particular concern because the fetus and infant are most susceptible to many of the known adverse health effects of POPs. Breast milk is the best food for young infants and the American Academy of Pediatrics recommends that, whenever possible, infants be breastfed for at least the first six months of life. Control of POPs therefore is about protecting our food supply, protecting the fetus and protecting the safety of breast milk for infants. Clearly, POPs are among the substances that are of most concern on a global basis. Additionally, POPs are among the areas where Chapter 19 of Agenda 21 called for specific attention to risk reduction.

In addition to actions taken on individual POP chemicals and pesticides, the EPA has established some general policies to address POPs. In 1998, EPA published a final policy under TSCA for PBT chemicals that established a practice of placing controls or bans on chemicals that are above certain thresholds for persistence and bioaccumulative potential, pending further testing to prove that the chemicals are safe for humans and ecosystems.[3] In 2000, the EPA received 1,650 Premanufacture Notices. Of these, the EPA identified 53 with potential PBT characteristics, of which seven were dropped from review after further scrutiny. Among the remaining 46, production was banned for 11 pending further testing and 35 were regulated to control their release into the environment.[4] The EPA also developed and tested a software program they call the "PBT Profiler", which is used to predict whether new chemical structures are above thresholds for PBT chemicals. EPA made this soft-

[3] U.S. Environmental Protection Agency, *Persistent Bioaccumulative Toxic Chemicals: Lowering of Reporting Thresholds for Certain PBT Chemicals; Addition of Certain PBT Chemicals; Amendments to Proposed Addition of Dioxin and Dioxin-like Compounds Category; Toxic Chemical Release Reporting; Chemical Right-to-Know: EPA 49 CFR Part 372, Final Rule.* Federal Register, 1999. **64**(209): p. 58666-58753.

[4] U.S. Environmental Protection Agency, *2000 PBT Accomplishments. 2001,* EPA: Washington, DC. p. 28.

ware available to industry so they can predict in advance whether chemicals are likely to trigger concerns under this policy.

In 1999, EPA also lowered the reporting threshold for several of the most persistent bioaccumulative chemicals under the Toxics Release Inventory (TRI): aldrin, benzo (a) pyrene, chlordane, dioxins and furans, heptachlor, hexachlorobenzene, isodrin, lead and lead compounds, mercury and mercury compounds, methoxychlor, octachlorostyrene, pendimethalin, pentachlorobenzene, polycyclic aromatic compounds, PCBs, tetrabromobisphenol A, camphechlor (toxaphene) and Trifluralin.[5] This rule also created a new category of dioxin and dioxin-like compounds under TRI and set a low reporting threshold (0.1 grams) for this category. These lower thresholds for reporting were in effect as of calendar year 2000, except for lead and lead compounds, which began in calendar year 2001, after a decision in February 2001 to delay the effective date of the rule[6]. Thus, EPA has taken steps to increase the public access to information on PBTs in the U.S.

Unfortunately, EPA's efforts under TSCA and TRI have not prevented the discovery of new persistent toxic chemicals among the chemicals that are already on the market. In the 1990's, two new classes of persistent substances have risen to greater levels of concern, namely polybrominated diphenyl ethers or PBDEs (flame retardants) and perfluorinated chemicals (PFCs), which are used in many products including stain repellants and coatings. In October 2000 EPA proposed a "significant new use rule" to limit the introduction of new uses of PFCs; this rule has not been made final. It is evident that, although most of the chemicals in commerce are probably safe, there are new categories of persistent chemicals that we are still discovering.

On the international front, the U.S. Government first took multilateral action on POPs in the context of the North American region. One vitally important environmental resource is the Great Lakes. Shared by the U.S. and Canada, the Great Lakes system contains one-fifth of the world's supply of fresh water. To protect the shared resource, the U.S. and Canada established the Boundary Waters Agreement of 1909; in 1978 the two countries signed the first agreement to rid the lakes of "persistent toxic substances." In 1997, Canada and the U.S. signed an agreement called the "Great Lakes Binational Toxics Strategy", which aimed for "virtual elimination" of releases to the Great Lakes of a number of POPs: aldrin/dieldrin, benzo(a)pyrene, chlordane, DDT, hexachlorobenzene, alkyl-lead, mercury and compounds, mirex, octachlorostyrene, PCBs, dioxins and furans, and toxaphene In 1993, the U.S. signed the North American Free Trade Agreement (NAFTA); under the "environmental side agreement" to NAFTA the North American Commission for Environmental Cooperation (CEC) was formed. One of the activities under the CEC is called "Sound Management of Chemicals" (SMOC) and it should come as no surprise that an early priority for joint efforts by the U.S., Canada and Mexico was POPs. In 1998 the EPA issued an action plan for twelve of the most toxic persistent chemicals: aldrin/dieldrin, alkyl lead, benzo (a) pyrene, camphechlor (toxaphene), DDT (Dichlorodiphenyltrichloroethane) and DDD/DDE, dioxins/furans, hexachlorobenzene, mercury and mercury compounds, mirex, octachlorostyrene, and PCB's.[7] These action plans were issued in alignment with both the Binational Toxics Strategy and the CEC action plans.

LRTAP AND STOCKHOLM POPS AGREEMENTS

The LRTAP (Convention on Long-range Transboundary Air Pollution) POPs agreement came next. In place since 1983, the LRTAP is under the UN Economic Commission for Europe and has been ratified by virtually every nation in Europe, the U.S., Canada, and the European Commission. The LRTAP includes protocols on a number of pollutants and adopted the POPs protocol in 1998. The LRTAP POPs protocol initially targets 16 POPs, banning the production and use of aldrin, chlordane, chlordecone, dieldrin, endrin, hexabromobiphenyl, mirex and toxaphene; phasing out production of DDT, heptachlor, hexaclorobenzene, and PCBs; severely

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[5] U.S. Environmental Protection Agency, *Persistent Bioaccumulative Toxic Chemicals: Lowering of Reporting Thresholds for Certain PBT Chemicals; Addition of Certain PBT Chemicals; Amendments to Proposed Addition of Dioxin and Dioxin-like Compounds Category; Toxic Chemical Release Reporting; Chemical Right-to-Know: EPA 49 CFR Part 372, Final Rule.* Federal Register, 1999. **64**(209): p. 58666-58753. U.S. Environmental Protection Agency, *Lead and Lead Compounds; Lowering of Reporting Thresholds; Community Right-to-Know Toxic Chemical Release Reporting, 40 CFR Part 372; Final Rule.* Federal Register, 2001. **66**(11): p. 4500-4577.

[6] U.S. Environmental Protection Agency, *Lead and Lead Compounds; Lowering of Reporting Thresholds; Community Right-to-Know Toxic Chemical Release Reporting: Delay of Effective Date.* Federal Register, 2001. **66**(33): p. 10585.

[7] U.S. Environmental Protection Agency, *Draft Multimedia Strategy for Priority Persistent, Bioaccumulative, and Toxic (PBT) Pollutants.* 1998, EPA: Washington, DC. p. 29.

restricting the use of DDT, HCH (including lindane) and PCBs; reducing emissions of dioxins, furans, PAHs and HCB; and setting limit values for emissions from municipal, hazardous, and medical waste incinerators. This protocol came into force in October 2003, but the United States has not yet been ratified by the U.S. (although we have ratified the overarching LRTAP convention). Actions taken by countries in the LRTAP POPs context are important regionally and as a precedent for actions under the global POPs convention.

Negotiated between 1998 and late 2000, the Stockholm Convention on Persistent Organic Pollutants (POPs) was signed by a number of nations including the United States in May 2001. The treaty initially targets 12 POPs, eliminating the pesticides aldrin, chlordane, dieldrin, endrin, heptachlor, hexachlorobenzene (HCB), mirex and toxaphene, as well as the industrial chemical polychlorinated biphenyls (PCBs); restricting of use of the pesticide DDT to disease vector control until safe, affordable, and effective alternatives are in place; mandating removal of PCB equipment; and encouraging minimization of unintentional release of dioxins and furans. Importantly, like the LRTAP POPs protocol, it includes provisions to consider and add other POPs to the treaty and prevent the introduction of new POPs into commerce. It also provides for technical and financial assistance to developing countries and countries with economies in transition.

For adding new chemicals, an international committee of government-appointed scientists will decide whether the required criteria of persistence, bio-accumulation, potential for long-range transport, and adverse effects to human health or the environment are met, and therefore whether to recommend that the Conference of the Parties consider adding the chemical to the treaty. Assuming the United States takes advantage of the treaty's so-called "opt-in" provision upon ratification (which is expected given that the U.S. was the primary advocate for this provision), an amendment to add a chemical to the Stockholm Convention can only apply to the United States only if our government affirmatively opts in. Alternatively, the U.S. can choose to "opt out" of a POPs chemical listing. It is important to note that the universe of potential additional POPs is not large, and the Bush Administration estimates that it will typically take about five years for a chemical to be nominated, clear the science-based review process, and be added to the Convention. This is enough time to involve industry and the public in a deliberative process and to assure that the outcome is not a surprise to anyone.

After achieving the necessary 50 ratifications last February, the Stockholm Convention entered into force on May 17, 2004, and the first Conference of the Parties will meet in May 2005. This agreement is expected to address one of the risk reduction actions of Chapter 19 of Agenda 21.

PRINCIPLES FOR IMPLEMENTING LEGISLATION

The problem today is that while the U.S. has delayed ratification of the Rotterdam PIC, LRTAP POPs and Stockholm POPs conventions, these agreements are coming into force, and work will continue internationally without the direct involvement of the U.S. government. While the parties to these agreements will certainly provide a forum for the U.S. to give input to the ongoing work, the fact remains that the U.S. will not be a full voting member unless and until it ratifies these conventions. Further, whether or not the U.S. participates, our environment and our industry will be affected in profound ways by decisions that are made by this convention. But ratification requires that EPA be given the appropriate regulatory authority to fully and faithfully implement these agreements.

While the three agreements have been bundled legislatively, it is clear that there are few controversies standing in the way of U.S. ratification of the PIC convention. Certainly there is a need to harmonize the approaches for the PIC and the POPs conventions. However, the Congress could choose to ratify PIC first and hold off the ratification of the POPs agreements while continuing to develop legislative approaches.

With regard to the POPs and LRTAP POPs agreements, there are a number of principles that I believe must serve as a framework for any sound implementing legislation:

1. **"Clean bill":** First and foremost, the legislation must respect the negotiation process that occurred in the context of the Stockholm POPs Convention in particular. Both the State Department and EPA utilized open and transparent processes that brought in industry, health and environmental groups to assure that the language in the POPs convention would be widely supported in the U.S. U.S. negotiators won large concessions from other countries to accept scientific risk assessment as a guiding principle for adding new chemicals to the Convention, as well as full consideration of "risk-risk" tradeoffs, socioeconomic

considerations, and other factors (see Annex F of the convention). Therefore, implementing legislation should be "clean" and should not attempt to impose new layers of standards onto domestic implementation of the POPs agreements.

2. **Open, transparent processes:** Any enabling legislation needs to guarantee that there will be open and transparent processes for development of U.S. positions within the POPs agreements. Such processes need to include notices in the federal register and open meetings with stakeholders as well as with the EPA and the State Department.
3. **Meaningful public involvement:** Whenever possible, public participation in the deliberations of the Stockholm convention needs to occur prior to the expert meetings, negotiations and decision making by the convention. This is particularly critical since, whether or not the U.S. chooses to "opt in" to a listing under the Convention, there are likely to be major consequences internationally for any decisions that are made.
4. **Presumption of implementation:** Congress needs to establish a presumption that the EPA will implement decisions made by the Stockholm Convention, including amendments adding chemicals. Presumably, the U.S. Government will agree with most of the decisions of the convention if it has fully participated in the process and for that reason it is preferable for the Congress to give the EPA the option either to take the "opt out" or the "opt in" road for implementation. To facilitate the decision with regards to listing decisions with which the U.S. might disagree, the Congress can establish a mechanism for parties to provide information to the EPA (or for the EPA itself) to rebut the presumption of implementation. This kind of rebuttable presumption will provide a safety mechanism such that the U.S. government would not be required to implement any decisions with which it disagrees. At the same time, the rebuttable presumption shifts the burden to the EPA to establish why not to further control a newly listed POPs chemical rather than burdening the EPA, in every case, with making a case for control of the chemical. Congress should also give EPA clear statutory deadlines for rulemaking or for a decision to opt out.
5. **U.S. leadership:** As it has in the past, the U.S. government needs to continue to lead the way toward identifying and eliminating persistent toxic chemicals from the environment, and from the bodies of infants and children. Where exemptions are available, the U.S. generally should be reluctant to take advantage of them. In fact, in every case possible, the U.S. should strive to go beyond the lowest common denominator for the world, given the relative advantage we hold with superior technology and the most innovative chemical industry in the world. Where the U.S. has banned or severely restricted POPs substances already, we should do what we can to prevent U.S. companies from manufacturing and exporting those substances to other countries, even when they have exemptions. This is because the use of such substances anywhere will contaminate the global environment, including ours. Likewise, implementing legislation for PIC should give EPA clear authority to carry out all the provisions of PIC in a prompt and expeditious manner, including notifying the international authority that the U.S. does not wish a particular PIC listed chemical to be imported into the U.S. The US should use the opportunity these conventions provide to assert our position as producer of the best and safest technologies in the world; this is what gives us a competitive advantage in the world market for chemicals. It is also because the U.S. needs to maintain its competitive advantage in the world market as a producer of the best and safest technologies in the world, rather than losing that position to other countries, who are more willing to lead in this arena.
6. **Consistent and health protective decision standard:** It is critical that the decision standard for implementation of the Stockholm and LRTAP agreements be protective of the environment and health, especially the health of vulnerable populations and age groups like infants and children. In this regard, the existing TSCA section 6 "unreasonable risk" standard is ineffective, as was demonstrated in the court decision which threw out EPA's attempt at regulation of asbestos, and should not be used as the standard for attempting to regulate POPs or that attempt will be doomed to failure. It is also important that the standard be consistent with the language negotiated in the POPs conventions, that is, to "protect against significant adverse human health and environmental effects associated with the chemical substance or mixture." Further, the bill should not be loaded down with prescriptive language regarding "sound science" and various kinds of risk-analytical determinations in vogue today, which are certain to contribute nothing of value beyond the expert process of the convention, but rather to increase the burden to EPA as well as opening opportunities for litigation over the minor process issues.

7. **Full package of information for deliberations:** Currently, under TSCA, EPA has the authority to require those who manufacture, process or otherwise use chemicals to report information about those chemicals. In practice these provisions are overly burdensome for EPA to utilize and would not be workable in the context of a real-time negotiation within the Stockholm Convention. To be truly competitive in such a process, the EPA needs to be required to issue a call in for core data items that will be necessary to fulfill the criteria for listing under the convention (see especially annexes E "Risk Profile" and F "Socio-economic Considerations" of the Stockholm convention.) It is the U.S. government (informed by industry) which insisted on such science-based and information-intensive criteria for decision makers. We cannot expect that our negotiators will be able to do a good job in the first place unless they have a full set of information to inform decisions under these annexes. And, as noted earlier, it is important that a full set of information be made available to the U.S. EPA prior to negotiations, and not just at the time of an "opt in" decision. Congress can assure this by including a mandate for information collection.

JUNE 17, 2004 DISCUSSION DRAFT

Having established some principles for implementing legislation it is useful to examine current drafts that are under discussion. I have carefully reviewed the June 17, 2004 discussion draft and find that it falls short in a number of ways.

- First, the discussion draft is not "clean". It would impose a new standard under which EPA would decide to "opt in" only "to the extent necessary to protect human health and the environment in a manner that achieves a reasonable balance of social, environmental, and economic costs and benefits." In addition the discussion draft contains new "sound science" requirements that really are invitations to litigation and would not provide any improvement of scientific processes. These proposed standards are actually worse than the provisions of current law and would render the EPA's efforts completely ineffective.
- Second, although the discussion draft provides for a number of opportunities for open and transparent processes, these processes need to be front-loaded. It is important to assure a full range of involvement before a new substance is listed by the convention.
- Third, the discussion draft does not presume that the EPA will actually implement of the Stockholm and LRTAP conventions nor does it fully implement the PIC convention. The burden should be placed on the EPA to show why a listed chemical should not be controlled by the U.S., rather than the reverse. The language in this regards is worse than current law and again would render EPA ineffective.
- Fourth, the discussion draft does not promote U.S. leadership. It ties the hands of the EPA when it comes to taking action more stringent or in advance of action taken under the Conventions. It specifies that the U.S. will take advantage of every single exemption that is available to every single country in the world. Again, these provisions are much worse than current law. Further, it is completely against our interest, in terms of protection of health and the environment, to allow the export POPs chemicals that we have determined to be too risky to use in the U.S. Also, in terms of protecting the health and environment of the U.S., the PIC implementation legislation does not provide authority for the U.S. to reject the importation of PIC chemicals.
- Fifth, the decision standard in the discussion draft is not in alignment with the standard that we agreed to in the POPs Convention. It is worse than current law and is an additional provision that would make EPA implementation ineffective. Finally, the draft does not include any provision for collection of information to support negotiation and "opt in" decisions. Given the weak authority for information collection under TSCA, it is incumbent on Congress to require that the EPA collect such information.

CONCLUSION

In closing, the U.S. needs to step up to the plate to assume its share of the responsibilities for assuring global chemical safety. The U.S. could ratify the PIC convention today. In the best of all possible worlds we would be a member of the LRTAP POPs and Stockholm Conventions from the beginning. As draft legislation is considered, we must keep foremost the purpose of such legislation, which is protection of health and the environment from toxic chemicals.

Mr. GILLMOR. Thank you, Dr. Goldman.

And we will go to Brooks Yeager, who is Vice President of Global Threats for the World Wildlife Fund.

STATEMENT OF BROOKS B. YEAGER

Mr. YEAGER. Thank you, Mr. Chairman and Congresswoman Solis. I am honored to be invited to testify before you today.

My name is Brooks Yeager. You have given my title. I will not repeat it. I hope that my longer testimony can be included for the record.

Mr. GILLMOR. Without objection it will be.

Mr. YEAGER. Let me just say, before joining WWF 3½ years ago I served in the position that Ms. McMurray now holds at the State Department as Deputy Assistant Secretary for Environment and Development. And in that capacity I was the head of delegation and the lead negotiator for the Stockholm POPs Convention.

The focus of my testimony today will be the international process for adding new chemicals to the convention and the corresponding U.S. regulatory process set out in the implementing legislation. I think other witnesses, and the statements have covered many of the important aspects of the convention and the desirability of having it ratified.

The point I would like to make is that many protections for the U.S. national interest were written into the convention at the insistence of the U.S. delegation itself, and that at least in my view they make many of the further extraordinary regulatory protections in some of the legislative efforts somewhat superfluous and perhaps unnecessary.

WWF supports U.S. ratification of the treaty, Mr. Chairman. We think it is very important for the reasons stated by many here today, and we urge the administration to become a party. But we cannot support ratification at the expense of defective implementing legislation that may set unfortunate precedents for U.S. environmental regulation in the future.

Mr. Chairman, this treaty reflects a careful balance of interests achieved through negotiation and compromise. The fundamental U.S. interest as we articulated during the negotiations was to achieve an ambitious treaty that would address the global environmental damage caused by POPs but do so in a way that would be practical, implementable, financially efficient and consistent with the fundamental structure of a national approach to chemical regulation.

We felt at the end of that process that we had achieved that result. The process of balancing interests and finding a unified way forward was critical in particular to developing a consensus as to how add POPs chemicals to the treaty over time. All parties clearly recognized that the convention could not be successful if it were limited solely to the 12 conventions already on the list. All parties recognized and stated that the convention was intended to be dynamic rather than static.

For the United States it was critical that this process be scientifically driven and not subject to political whim. For some in EU countries and elsewhere, it was critical that the process for adding chemicals not be subject to endless procedural roadblocks. This concern reflected an anxiety that effected industries or governments

might use procedural challenges to block the addition of chemicals that will legitimately qualify for the list on scientific grounds.

The procedure for adding new chemicals that was finally adopted is a genuine compromise but which fully protects the U.S. interests.

First, it requires scientific criteria according to which a nominated chemical would be evaluated. And these criteria are contained in Annex D.

Second, we negotiated a process through which these criteria would be applied by a scientific screening committee.

Finally, we negotiated the terms under which the POPs Review Committee would review the recommendations of the scientific group.

It is worth noting, Mr. Chairman, that at each stage of this process the agreement sets a high standard for the addition of chemicals. The chemical must meet the scientific screening criteria for bioaccumulation, potential for long range transport and adverse effects. It must be found by the review committee to fit the risk profile in Annex E, that is that it is likely as a result of its long range environmental transport to lead to significant adverse human health and/or environmental effects even to be recommended. And based on the scientific review conducted by the review committee, which the United States fully intends to be a member of, we believe, the conference of the parties must act preferably by consensus or at the very least by a three-quarters majority to add the chemicals to the list. And even at that point, individual parties including the United States can prevent the entry into force of the new obligation by opting out or refusing to opt-in, as stated by Deputy Assistant Secretary McMurray.

The point that we would like to make or that I would like to make, Mr. Chairman, is that given these protections written for the U.S. into the treaty, we need to balance those careful protections against the clear intent of all the governments who negotiated the convention to assure that chemicals meeting the POPs criteria are regulated with great precaution. This is the point that Congresswoman Capps was making so eloquently.

Once chemicals have been deemed to warrant global action under the convention, the clear intent is that they be eliminated or at the very least highly restricted by all the parties to the convention. And considering how this balance should be reflected in U.S. implementing legislation, we believe we should look very carefully at the standards set in the regulatory process in the U.S. for achieving that balance.

I would only echo here, because my time is coming to an end, but the points made by Ms. Goldman and others that will be made later that we believe the standards in the draft legislative draft are problematical in that respect. The legislation sets up a new standard that has no presumption that the EPA would regulate a newly listed POP, even if the United States supported the listing. But if EPA decided to regulate, it would do so only to achieve a reasonable balance of social, environmental and economical costs and benefits. In our view this standard fails to reflect the intent of the Stockholm Convention that new chemicals found to have the char-

acteristics of POPs and to warrant global action and global concern be regulated with great precaution.

Mr. Chairman, I have made a number of other points in my testimony regarding the draft. I would be glad to discuss them in a question and answer period.

I see that my time is at an end. And I want to thank you very much for the opportunity to testify.

If in fact, I can offer the committee members any assistance in understanding the negotiating setting of the treaty, I would be happy to do that. I think we as WWF would be pleased to work with the committee staff to see if we can, in fact, achieve an implementing language that tracks the convention process, supports the precautionary intent of the convention and allows the U.S. to achieve its responsibilities without setting unfortunate precedents for domestic law.

Thank you.

[The prepared statement of Brooks B. Yeager follows:]

PREPARED STATEMENT OF BROOKS B. YEAGER, VICE PRESIDENT FOR GLOBAL THREATS, WORLD WILDLIFE FUND

Mr. Chairman and Members of the Committee: On behalf of World Wildlife Fund's 1.2 million members, thank you for the opportunity to testify on the implementing legislation for the Stockholm Convention on Persistent Organic Pollutants (POPs). Known worldwide by its panda logo, World Wildlife Fund (WWF) is dedicated to protecting the rich biological diversity on which the prosperity and survival of human societies depends. As the leading privately supported international conservation organization in the world, WWF has sponsored a wide range of conservation activities in more than 100 countries since 1961.

For the record, I am Brooks Yeager, Vice President for Global Threats at WWF, where I supervise programs to conserve global forest and ocean resources, to avert damage to the global environment from climate change and toxic pollution, and to ensure the environmental sustainability of global commerce. Before joining WWF, I served as Deputy Assistant Secretary for Environment and Development at the U.S. State Department. At State I was responsible for the development and negotiation of U.S. Government policy in a range of bilateral and global environmental discussions and undertakings.

In my capacity at State, I served as the United States' lead negotiator for the Stockholm POPs Convention. We are here today to discuss the implementing legislation for this ground-breaking treaty. I hope I can offer insights today both from my position as U.S. lead negotiator and in my current role at WWF. The focus of my testimony, which has been at the center of the Committee's interest, is the international process for adding new chemicals to the Convention, and the corresponding U.S. regulatory process set out in the implementing legislation.

First I would like to offer some background on the treaty itself. The Stockholm POPs Convention represents the most important effort by the global community, to date, to rein in and ultimately halt the proliferation of toxic chemicals of global concern. It's an agreement that is at once ambitious, comprehensive, and realistic. The treaty targets some of the world's most dangerous chemicals—POPs include pesticides such as chlordane, industrial chemicals such as PCBs, and by-products such as dioxins.

POPs pose a particular hazard because of four characteristics: they are toxic; they are persistent, resisting normal processes that break down contaminants; they accumulate in the body fat of people, marine mammals, and other animals and are passed from mother to fetus; and they can travel great distances on wind and water currents. Even small quantities of POPs can wreak havoc in human and animal tissue, causing nervous system damage, diseases of the immune system, reproductive and developmental disorders, and cancers.

Persistent organic pollutants are a threat to human health, wildlife, and marine and terrestrial ecosystems in the United States and around the world. From Alaska to the Great Lakes to Florida, Americans face an insidious but largely invisible threat from POPs chemicals. Despite more than two decades of U.S. efforts to control domestic sources of POPs pollution, POPs used and released in other countries—often thousands of miles from our borders—continue to contaminate our lands

and waterways, the food we eat, and the air we breathe. WWF's recent report, "Causes for Concern: Chemicals and Wildlife" (January 2004), highlights a number of these emerging chemical threats, some of which may be candidates for Stockholm Convention annexes in the future. (http://www.panda.org/detox).

Our government made a concerted effort, starting not long after the publication of Rachel Carson's pathbreaking Silent Spring, to eliminate the production and use of known POPs chemicals in the United States—yet we are still vulnerable to POPs pollution. Our environment, wildlife, and human health continue to be affected by POPs from unremediated contaminated sites at home and the production and use of POPs elsewhere in the world. This last fact is central to understanding the United States' strong national interest in the success of this global effort to reduce and eliminate POPs. POPs' mobility in air and water currents, for example, makes possible their presence along with metals and other particulates in incursions of Saharan dust into the continental United States. African dust is the dominant aerosol constituent in southern Florida's dense summer hazes. Similarly, one potential source of DDT in some salmon returns to Alaska rivers is its extensive use in Asian agriculture. A global mechanism to reduce these "chemical travelers without passports" is urgent, and very much in our national interest.

The Stockholm POPs Convention was negotiated by more than one hundred and twenty governments over a four-year period, from 1998 to 2001. As the head of the U.S. delegation, I was responsible for developing the United States' negotiating objectives and strategies, and for assuring that our national interest, positions, and requirements were reflected in the final text. Development of the U.S. position was accomplished through a thorough, not to say exhaustive, domestic process involving regular consultations with seven domestic agencies, industry, the environmental and public health communities, Native American representatives, and various interested state governments, including the State of Alaska.

This careful process of developing the U.S. negotiating position is one of the reasons, I believe, that President Bush's decision to sign the Stockholm Convention in April 2001 received such broad support. WWF and many others—including the chemical industry, environmental and public health organizations and members of Congress on both sides of the aisle—applauded the President's Rose Garden announcement. We were pleased that the President had decided to send the treaty package to the Senate for ratification.

In fact, both industry and environmental representatives made important contributions to the final product. I would like to note in particular the constructive roles played by Mr. Michael Walls and Mr. Paul Hagen of the American Chemistry Council (ACC). A letter to Governor Whitman on February 26, 2002, from Mr. Frederick Webber, ACC's President and CEO at that time, noted that,

> ACC strongly recommends that the Administration seek the U.S. Senate's advice and consent to ratification as soon as possible. We believe it is important for the United States to continue its leadership role in the global effort to address the risks posed by POPs emissions, and believe that the United States should make every effort to be among the first 50 countries ratifying the Convention.

Seventy countries have now ratified the Convention, but the United States has not, due to the complexity of the negotiations on implementing legislation in the Congress and, I believe the Bush Administration's repeated efforts to use proposed implementing legislation for the treaty as a vehicle to advance its overall effort to weaken domestic environmental, health, and safety protections. WWF supports U.S. ratification of this important treaty and we urge the Administration to become a party as soon as possible. But we do not support ratification at the expense of defective implementing legislation that sets U.S. environmental law on the wrong track, as we will discuss shortly.

The POPs treaty represents a significant and innovative breakthrough in global chemicals management, calling for concrete steps to restrict or phase out dangerous chemicals rather than relying on expensive, end-of-pipe measures such as pollution scrubbers and filters. The treaty's ambitious control obligations were developed with enough flexibility that they can be accomplished largely within the established U.S. statutory and regulatory structure. Only limited adjustments are needed to the Toxic Substances Control Act (TSCA) and to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to allow full U.S. implementation.

Overview of the Stockholm POPs Convention

Before delving into the specifics of the proposed implementing legislation, a brief overview of the structure and mechanisms of the Stockholm POPs Convention may be in order. The POPs treaty is designed to eliminate or severely restrict production and use of POPs pesticides and industrial chemicals; ensure environmentally sound

management and chemical transformation of POPs waste; and avert the development of new chemicals with POPs-like characteristics.

Eliminating intentionally produced POPs. The agreement targets chemicals that are detrimental to human health and the environment globally, starting with a list of 12 POPs that includes formerly used pesticides, dioxins, and PCBs. Most of the pesticides are slated for immediate bans once the treaty takes effect. A longer phase-out (until 2025) is planned for certain PCB uses. With regard to DDT, the agreement sets the goal of ultimate elimination, with a timeline determined by the availability of cost-effective alternatives for malaria prevention. The agreement limits use in the interim to disease vector control in accordance with World Health Organization guidelines, and calls for research, development, and implementation of safe, effective, and affordable alternatives to DDT.

Ultimately eliminating byproduct POPs. For dioxins, furans, and hexachlorobenzene, parties are called on to reduce total releases with the goal of their continuing minimization and, where feasible, ultimate elimination. The treaty urges the use of substitute or modified materials, products, and processes to prevent the formation and release of by-product POPs.

Incorporating precaution. Precaution, including transparency and public participation, is a guiding approach throughout the treaty, with explicit references in the preamble, objective, provisions for adding POPs, and determination of best available technologies.

Disposing of POPs wastes. The treaty includes provisions for the environmentally sound management and disposal of POPs wastes (including stockpiles, products, articles in use, and materials contaminated with POPs). The POP content in waste is to be destroyed, irreversibly transformed, or, in very limited situations, otherwise disposed of in an environmentally sound manner in coordination with Basel Convention requirements.

Controlling POPs trade. Trade in POPs is allowed only for the purpose of environmentally sound disposal or in other very limited circumstances where the importing State provides certification of its environmental and human health commitments and its compliance with the POPs treaty's waste provisions.

Allowing limited and transparent exemptions. Most exemptions to the treaty requirements are chemical-and country-specific. There are also broader exceptions for use in laboratory-scale research; for small quantities in the possession of an end-user; and for quantities occurring as unintentional trace contaminants in products. Notification procedures and other conditions apply to exemptions for POPs as constituents of manufactured articles and for certain closed-system site-limited intermediates.

Funding commitments enabling all countries to participate. The ability of all countries to fulfill their obligations will be integral to the treaty's success. The treaty contains a sensible and realistic financial mechanism, utilizing the Global Environment Facility (GEF), through which donor countries have committed to assisting developing countries and transitional economies in meeting their obligations under the treaty. Adequacy, predictability, and timely flow of funds are essential. The treaty calls for regular review by the Conference of Parties of both the level of funding and the effectiveness of performance of the institutions entrusted with the treaty's financial operations.

The POPs Treaty as a Careful Balance of Interests

In my view, Mr. Chairman, this is a solid and carefully crafted treaty. But it is also a treaty that reflects a careful balance of interests achieved through negotiation and compromise. The U.S. interest, as we articulated it during the negotiations, was to achieve an ambitious treaty that would address the global environmental damage caused by POPs, but do so in a way that would be practical, implementable, financially efficient, and consistent with the fundamental structure of our national approach to chemical regulation.

Other countries had different interests, some similar, some at variance with ours. The developing countries were neither willing nor able to invest in what to them was a new environmental priority such as POPs control and remediation without financial and technical assistance from the developed world. The G-77 negotiators insisted throughout the negotiation on a new financial mechanism, specific to the Convention, with mandatory assessments. The establishment of the GEF as the Convention's interim financial mechanism represents a genuine compromise in which the donor countries committed to provide additional financial resources, but through a channel with a proven track record and one over which donor countries exert significant control.

Similarly, the EU and a number of other countries insisted early in the negotiations on a framework for regulating byproducts such as dioxins based on quan-

titative baselines and mandatory percentage reductions. The United States and some developing countries considered this unrealistically rigid, in view of the highly varying levels of knowledge regarding dioxin sources in various national contexts and the even higher variation among countries in the capacity to address such sources. The framework for dioxin regulation which emerged sets an ambitious goal of "ultimate elimination . . . where feasible," but seeks to reach this goal through a nationally-driven process of inventory, planning, and appropriate regulation, under guidance from the Convention. This too was a genuine compromise that should produce real progress in dioxin source reduction in the coming years.

The process of balancing interests and finding a unified way forward was critical to developing a consensus as to how to add new POPs chemicals to the treaty over time. All parties clearly recognized that the Convention could not be successful if it were limited solely to the 12 chemicals already on the POPs list. All parties recognized, and stated, that the Convention was intended to be dynamic rather than static. But the question of what scientific and institutional process to use in adding chemicals to the list was fraught with difficulties and misunderstandings.

For the United States, it was critical that this process be scientifically-driven and not subject to political whim. Some in the U.S. feared that other countries might be almost cavalier in adding chemicals to the list, and that such an approach would distort the treaty and distract parties from the strong efforts needed to deal with the chemicals already on the list.

For some in the EU and elsewhere, it was critical that the process for adding chemicals not be subject to endless procedural roadblocks. This concern reflected an anxiety that the affected industries or governments might use procedural challenges to block the addition of chemicals that would legitimately qualify for the list on scientific grounds, and that this approach would impede the effectiveness of the Convention over time.

The procedure for adding new chemicals which was finally adopted is, once again, a genuine compromise, but one which, in my view, successfully protects the U.S. interest in every respect. It may be useful to give a short account of the negotiations on this important issue.

First, the U.S. negotiating team insisted on, and successfully negotiated, the scientific criteria according to which a nominated chemical would be evaluated. These criteria are contained in Annex D of the Convention. Then we negotiated the process through which these criteria should be applied, by a scientific screening committee (the so-called POPs Review Committee or "POPRC"), working under the supervision of the Conference of the Parties (the COP). Finally, we negotiated the terms under which the COP would review the recommendations of this scientific group, the conditions under which the COP could make a decision to add or reject a chemical, and the procedures for party governments to accept or reject the COP's decision.

The process which emerged is described in more detail in our substantive discussion of the new chemicals provisions. Let me just say here that the final agreement offers the United States the safeguards of rigorous science, a careful review procedure, a high institutional threshold for COP decisions to add chemicals, and the right to reject the addition of a new chemical, if appropriate. In addition, this compromise also successfully resolved, at least in this context, the long-running controversy between the United States and the European Union on the subject of precaution, and did so in a way which may have useful applications in the future.

Congressional Action Needed to Implement the Stockholm Convention

The Congressional action necessary to implement the POPs treaty must come in two areas—implementing legislation and financial support of the Global Environment Facility, the treaty's financial mechanism. In today's discussion I focus on the need for sound implementing legislation.

In so doing, I would like to note that WWF appreciates the efforts of Chairman Gillmor and staff in developing and distributing a discussion draft bill in mid-June. Chairman Gillmor's "Stockholm and Rotterdam Toxics Treaty Act of 2004" would amend the Toxics Substances Control Act (the first amendments to TSCA since its enactment in 1976) to implement the Stockholm POPs Convention as well as the Protocol on POPs to the Convention on Long-Range Transboundary Air Pollution (LRTAP POPs Protocol) and the Rotterdam Convention for trade in hazardous chemicals. My comments will address primarily the implementing legislation for the Stockholm Convention.

Before I go into specific aspects of the bill, I'd like to offer a few further background points about the way in which the negotiators considered these issues. The international community envisioned a dynamic instrument that could take into account emerging scientific knowledge about chemicals beyond the initial 12. Integral to the treaty is a process for nomination, science-based assessment (including risk

profiles and risk assessments), and decision-making that involves both the subsidiary POPs Review Committee and the Conference of Parties before a substance can be added to the treaty's annexes. Unless this element of the treaty is considered to be self-executing, the legal mechanism to eliminate the production, use, and export of new POPs must be reflected in the implementing legislation.

In our view, as I have already mentioned, the Convention as negotiated provides the U.S. with a great deal of flexibility in deciding whether and how to take domestic action against future POPs:

- *The international selection process involves input from all countries that are Parties to the Convention:* Article 8 of the Convention provides for the evaluation and addition of chemicals beyond the initial 12. Upon entry into force, the Conference of the Parties (COP) will establish a Persistent Organic Pollutants Review Committee (POPRC). Parties will submit chemical nominations to the POPRC, which will evaluate them based on agreed scientific criteria including persistence, bioaccumulation, long-range transport, and toxicity. The POPRC must prepare a draft risk profile in accordance with Annex E, to be made available for input from all Parties and observers. The POPRC will then make recommendations that must be approved by the entire Conference of the Parties before a nominated chemical can be added to the treaty as a binding amendment.
- *The Convention does not automatically obligate the U.S. to eliminate each new POP that is added internationally:* Under Article 22(3) of the Convention, COP-agreed amendments to add new chemicals become binding upon all Parties, subject to the opportunity to "opt out" of such obligations within one year. However, there exists another safeguard under Article 25(4), which was proposed by the U.S., allowing a Party to declare when ratifying the Convention that it will be bound by new chemical amendments only if it affirmatively "opts in" via a separate, subsequent ratification process. The State Department has indicated that the U.S. will take advantage of the "opt in" provision, enabling the Senate to give its advice and consent to the addition of each new POP in the future.

Including these and other safeguards in the POPs treaty was a major objective of U.S. negotiators, one which I believe was fully achieved. At the end of the long, hard concluding week of negotiations in Johannesburg in December 2000, I can say that the U.S. negotiators felt extremely pleased with the balance of the treaty, and were fully satisfied with the particular provisions for the addition of new chemicals.

I would also like to reference the views that national environmental and public health organizations have developed on this issue. The perspectives of WWF and 17 other national environmental and public health organizations were recently summarized in a letter stating three core principles to the Chair and Ranking Members of the House and Senate Agriculture Committees.[1] While the focus of the agriculture committees is the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), rather than the Toxic Substances Control Act (TSCA) which this Committee oversees, the principles for effective implementing legislation are essentially the same. I am re-stating those principles here in the context of TSCA:

- The implementing legislation must require EPA to use an environment/health based standard to regulate POPs and other persistent, bio-accumulative, toxic substances. This approach would ensure consistency with the Convention's Article 8(7)(a) mandate that candidate substances be put forward for listing by the Parties if their long-range environmental transport is likely to lead to "significant adverse human health and/or environmental effects such that global action is warranted."
- The Stockholm Convention decisions supported by the United States should provide the starting point for domestic regulation of POPs—there is no need to start from scratch. Because the international process to ban additional POPs will be a painstaking, multi-year, science-based one in which the United States will fully participate, decisions by the Stockholm Conference of the Parties to ban or severely restrict additional POPs should provide the initial basis for U.S. domestic regulation; and
- The U.S. regulatory process must parallel the international decision-making process. The TSCA amendments should facilitate transparency and public participation in the international listing process. They should give EPA a clear mandate

[1] The 18 organizations are: American Rivers, Center for International Environmental Law, Defenders of Wildlife, Environmental Defense, Environmental Working Group, Friends of the Earth, Greenpeace, League of Conservation Voters, National Environmental Trust, National Wildlife Federation, Natural Resources Council, Oceana, The Ocean Conservancy, Pesticide Action Network North America, Physicians for Social Responsibility, Sierra Club, U.S. Public Interest Research Group, and World Wildlife Fund.

to obtain information at key stages of the international process, and to solicit public comments on proposed international actions and their possible implications for domestic policy.

Chairman Gillmor's Draft Bill

I would like to mention that in certain respects, such as the tracking of international regulatory steps, Chairman Gillmor's draft does a solid job, although we believe these information input provisions should be mandatory rather than voluntary. Making those linkages with the Convention's requirements for considering new POPs is very important.

Unfortunately, WWF believes that the draft as currently presented includes several major shortcomings that would make it extremely difficult to regulate POPs in the United States. It is also our view that the inclusion of these seriously flawed provisions would jeopardize U.S. participation in the Convention and injure the credibility of the United States in this context. It would establish standards which dissociate the domestic legislative process from the painstaking, multi-year international process to review and list a new POPs chemical, even though the U.S. was a principal architect of that meticulous science-based process and will remain a key player in those deliberations as a party to the Convention. Finally, it would set damaging and unacceptable precedents for domestic management of chemicals.

Over the past couple of weeks, WWF, CIEL, Physicians for Social Responsibility, U.S. PIRG, Oceana, National Environmental Trust, and other environmental and public health groups put together a brief outline of some of the key concerns with Chairman Gillmor's draft bill. Restated here, in part, six issues deserve further attention:

1. The proposed regulatory standard for considering additional POPs is not acceptable and would set troubling precedents.

- Under the Discussion Draft, EPA would have complete discretion to decide whether or not it should prohibit or restrict an additional POP. But if it decided to regulate, it could do so only "to the extent necessary to protect human health and the environment in a manner that achieves a reasonable balance of social, environmental, and economic costs and benefits," a new term of art bound to result in years of litigation and judicial interpretation.
- By contrast, under the Stockholm Convention, governments (including the United States) must decide upon additional POPs "in a precautionary manner." Yet the Discussion Draft would prohibit EPA from regulating with anything remotely resembling a precautionary manner. Instead of acting to guard human health, EPA would have to strike a "reasonable balance" between the costs of the regulation to chemical companies, and the benefits of protecting women, children, Native Americans, and others from some of the world's most dangerous chemicals.
- The language implies a requirement for the strict application of cost-benefit analysis, a tool which, in the view of many analysts, nearly always results in an overvaluation of the costs of regulation and a dramatic under-valuation of the benefits, most of which (e.g., good health, children whose development is not impaired by toxic chemicals, etc.) cannot be realistically or fully valued in monetary terms.

2. In weighing scientific information, EPA would have to apply new, onerous "sound science"-type requirements that would, in practice provide litigation fodder rather than improve the quality of EPA's decision making.

- The modern regulatory catch phrase of "sound science" was developed by the tobacco companies as a way to confuse the public, thwart attempts at regulation, and obfuscate the fact that their products are among the most dangerous items legally sold. Under the guise of "sound science," industry groups have systematically tried to discredit or cull high quality research in an effort to roll back environmental and public health protections. The "sound science"-type provisions in the discussion draft offer unnecessary, new opportunities for industry to challenge the scientific basis for decision-making., and, again, would likely result in years of litigation.

3. While the Discussion Draft would make it very difficult or impossible for EPA to implement a Stockholm Convention new listing decision, the Draft would simultaneously establish a regulatory ceiling by prohibiting EPA from regulating more strictly than minimum Convention standards.

- Even if EPA decided to regulate an additional POP, the Discussion Draft would prohibit it from regulating any production or use of the substance if an exemption were available under the Convention. Although the Convention's exemptions process was designed to take account of a variety of national circumstances, the basic idea of these exemptions is that developing countries needing flexibility can phase out a prohibited chemical over time. For our law to *require* us to take these exemptions—whether or not they are justified in the U.S. context—would represent a perverse abdication of U.S. leadership in international chemicals management.
- EPA could be prohibited from using its existing authority under TSCA § 6(e) to strengthen the regulation of PCBs, because the Discussion Draft would allow EPA to do so only as "necessary for the United States to comply with its obligations under the POPs Convention."

4. The Discussion Draft decouples the international process and the domestic regulatory process.

- Although the Discussion Draft tracks the international process rather well, it contains no requirement that EPA do anything after an international decision to add a POP to the Convention, even if the United States supports the international decision.
- There is no timeline within which EPA must act (or declare its intention not to act).
- There is no requirement(similar to what is already found in TSCA § 5(for EPA to publish a statement of reasons for its inaction.
- There is no citizens petition process(similar to what is already found in TSCA § 21(to challenge EPA to act if it fails to do so.

5. The Draft would require EPA to undergo unnecessary and duplicative analysis in the event it chooses to regulate.

- As a party to the Stockholm Convention, the United States will participate in a thorough scientific investigation of additional POPs before they are added to the Convention.
- Yet the Discussion Draft would all but ignore the results of this international investigation, and would instead require EPA to undertake additional, duplicative, time-consuming assessments before it could issue a rule in response to a new-listing decision.

6. The Discussion Draft oversteps by attempting to constrain the President's constitutional power to conduct international negotiations.

- Despite multiple safeguards that ensure U.S. decision-making autonomy, the Discussion Draft would *require* the United States to take the Stockholm Convention "opt in" election, which provides that an additional chemical amendment will only bind the United States if it affirmatively "opts in" to it. We do not believe it is appropriate for the Congress to legislate a requirement as to which option the President may choose.

In summary, the Chairman's draft adds considerable regulatory baggage, including cost benefit and "sound science" requirements, to a piece of domestic environmental legislation that is already anemic and largely ineffectual (TSCA has not even been able to regulate asbestos), virtually ensuring that no chemical will surmount the bureaucratic hurdles. Even though this small subset of chemicals have been determined to be among the world's most dangerous, the draft applies an economic cost-benefit standard instead of one centered on protecting human health and the environment. At the same time, the draft bill goes out of its way to divorce domestic regulatory action from the international treaty process, and there is no requirement that EPA do anything after an international decision to add a POP to the Convention, even when the United States supports the international decision. From the point of view of one who negotiated the treaty, these provisions appear ill-advised and unnecessary. From the point of view of their broader and precedential impact on U.S. chemical regulation, they are unacceptable.

LRTAP POPs Protocol

WWF also supports the inclusion of implementing legislation for the Economic Commission for Europe's Long-Range Transboundary Air Pollution (LRTAP) POPs Protocol. An outgrowth of scientific findings linking sulfur emissions in continental

Europe to acid deposition in Scandinavian lakes, LRTAP was the first legally-binding agreement to address air pollution problems on a broad regional basis. Parties to LRTAP include the United States, Canada, and Western and Eastern European countries including Russia.

The LRTAP POPs Protocol—the first legally-binding multi-lateral instrument on POPs—was added in 1998. It targets 16 substances including the 12 POPs chemicals plus chlordecone, hexabromobiphenyl, and hexachlorocyclohexane (including lindane). It also includes obligations to reduce emissions of polycyclic aromatic hydrocarbons (PAHs) which—as with other byproduct chemicals—do not require changes to TSCA or FIFRA. Although the LRTAP POPs Protocol includes more chemicals than the POPs treaty, it is not a replacement. LRTAP deals with transmission of POPs through only a single medium (air); confines its reach to northern, largely European countries; and does not address many of the issues involving developing countries.

To date, twenty countries have ratified the LRTAP POPs Protocol, which entered into force on October 23, 2003. WWF would welcome U.S. participation in these regional efforts. Given POPs' global reach, however, a realistic and comprehensive solution needs to include developing countries as well. The United States and other donor countries must assist the developing world in coming to grips with the POPs problem—and the global POPs treaty is the ideal vehicle through which to do this.

Rotterdam Convention on Prior Informed Consent

We are pleased to see that Chairman Gillmor's draft has bundled the Rotterdam PIC Convention in its implementing legislation alongside the POPs treaty and the LRTAP POPs Protocol. The PIC treaty alerts governments as to what chemicals are banned or severely restricted, by which governments, and for what reasons. The cornerstone of the treaty is prior informed consent, a procedure that enables Parties to review basic health and environmental data on specified chemicals and to permit or refuse any incoming shipments of those chemicals. Each Party's decisions are disseminated widely, allowing those countries with less advanced regulatory systems to benefit from the assessments of those with more sophisticated facilities. Instituting PIC is a critical first step in the process of improving chemical management capacity. The Rotterdam Convention replaces the voluntary PIC procedure, which has been operated by UNEP and FAO since 1989.

The PIC treaty includes provisions for:

- alerting countries when there is an impending import of a chemical which has been banned or severely restricted in the exporting country;
- labeling hazards to human health or the environment; and
- exchanging information about toxicological findings and domestic regulatory action.

The Rotterdam Convention entered into force on 24 February 2004 and by now has 73 Parties. The treaty makes an important contribution to global chemicals management by drawing attention to those substances causing the greatest harm, disseminating that information, and facilitating national decision-making on chemical imports.

Many of the POPs-, LRTAP-, and PIC-related legislative provisions are inter-related. WWF would be happy to work with Energy and Commerce staff to help ensure that the implementing legislation facilitates rather than hinders the efficient working of U.S. environmental laws.

In closing, we wish to thank the subcommittee Members and staff for the hard work and initiative that went into preparing the draft bill. More work, though, is needed to strike an effective balance between our domestic and international responsibilities. Full implementation of the POPs, PIC, and LRTAP agreements is essential to protecting the American people and the global community from the threat of POPs and other toxic substances.

Thank you for the opportunity to testify today. I would be happy to answer any questions.

Mr. GILLMOR. Thank you very much.

And we will go to Lisa Heinzerling, Professor of Law, Georgetown University Law Center.

STATEMENT OF LISA HEINZERLING

Ms. HEINZERLING. Thank you. And thank you for the opportunity to testify before you today. In these remarks I wish to make two basic points. As currently interpreted the Toxic Substances Control

Act is not an adequate mechanism for regulating toxic substances in this country. Thus, the implementation of international agreements on POPs is of critical importance in ensuring the adequacy of future controls on toxic substances.

Second, the analytical procedures contemplated by the so called discussion draft would virtually guarantee that no new toxic substances would be added to the list of substances regulated by international agreements on POPs.

The Toxic Substances Control Act or TSCA appears to hold great promise in controlling toxic substances. Section 6 of the statute provides the EPA with broad authority to control toxic substances. Unfortunately, however, the first and only judicial interpretation of EPA's authority to ban a substance under section 5 severely limited EPA's authority under this provision.

Among other things, the court held that in examining costs and benefits of regulatory action under TSCA, EPA was required to discount benefits as well as costs which in effect means treating regulatory benefits such as human lives saved as if they were a financial investment on which interest accrues. Discounting benefits in the context of toxic chemical controls places a large thumb on the scale against regulation.

A second part of the holding was that EPA may not use unquantified benefits to justify regulating a harmful chemical except in so called close cases. But it is hard to identify a close case where by definition some benefits are quantified and some are not.

Another part of the court's holding was that EPA may not exceed undefined limits on how much money it requires industry to spend to save a human life.

Each of these elements of the court's decision has a stultifying effect on EPA's power to regulate persistent organic pollutants under TSCA. However, the discussion draft threatens to be even more paralyzing to the process of toxic substance control than this decision has been. If Congress wanted to ensure that no new harmful substances would ever be regulated by the U.S. under the international agreements on POPs, it could hardly do better than to pass the discussion draft bill now circulating in the House. Merely duplicating the already ineffective requirements of TSCA as prerequisites for regulating new POPs would be bad enough. The discussion draft goes even further and offers whole new obstacles to meaningful toxic substance control.

Despite the thorough science-based review proceeding the international listing process, the discussion draft would require EPA essentially to start all over again, if it acts at all, in response to international recommendations.

I discuss numerous problems with the discussion draft in my written statement. Here I'll focus on the shortcomings of cost benefit balancing.

The discuss draft directs EPA to regulate a newly listed POP only if doing so achieves a so called reasonable balance of social, environmental and economic costs and benefits. The draft affords no clue, however, as to how a reasonable balance is to be identified.

In addition, cost benefit analysis is notoriously and systematically biased against environmental protection. It is particularly skewed against environmental protection that targets pollutants

like the persistent organic pollutants; pollutants with large but insidious and sometimes subtle effects spread over a vast population and reaching into the distant future.

Cost benefit analysis is skewed in the following specific ways:

Many of the benefits of reducing these pollutants cannot be qualified. In many cases avoiding cancer is the only benefit that can be quantified. This leaves all other causes of death plus all nonfatal illnesses avoided and all ecological effects left out of the numerical tally of costs and benefits.

Two, the costs of regulating environmental risks are often overstated and often by a large amount.

Three, even when benefits can be quantified, the process of fitting values like human lives and health into a cost benefit balance is fraught with difficulty. Attaching monetary values to benefits such as human lives is a process that is filled with questionable assumptions and rests on an exceptionally problematic premise; that is that human life can be meaningfully translated into dollar terms.

Five, the technique of discounting belittles desires to protect this and future generations against long term and persistent risk, yet protection of the future for our generation, our children's generation and generations yet to come is one of the basic principles animating a document like the POPs treaty.

Thank you.

[The prepared statement of Lisa Heinzerling follows:]

PREPARED STATEMENT OF LISA HEINZERLING, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, MEMBER SCHOLAR, CENTER FOR PROGRESSIVE REGULATION

Thank you for the opportunity to testify before you today. My name is Lisa Heinzerling. I am a Professor of Law at the Georgetown University Law Center. I have also been a visiting professor at the Harvard and Yale Law Schools. I am a graduate of the University of Chicago Law School, where I served as editor-in-chief of the University of Chicago Law Review. After law school I clerked for Judge Richard Posner on the U.S. Court of Appeals for the Seventh Circuit, and then for Justice William Brennan of the U.S. Supreme Court. I was an Assistant Attorney General in the Environmental Protection Division of the Massachusetts Attorney General's Office for three years before coming to Georgetown in 1993. My expertise is in environmental and administrative law. I am also a Member Scholar of the Center for Progressive Regulation.

The Center for Progressive Regulation is a nonprofit research and educational organization of university-affiliated academics with expertise in the legal, economic, and scientific issues related to regulation of health, safety, and the environment. CPR supports regulatory action to protect health, safety, and the environment, and rejects the conservative view that government's only function is to increase the economic efficiency of private markets. Through research and commentary, CPR seeks to inform policy debates, critique anti-regulatory research, enhance public understanding of the issues, and open the regulatory process to public scrutiny.

My testimony today concerns U.S. legislation designed to implement international conventions on persistent organic pollutants ("POPs"). I will make three basic points in this testimony:

1. As currently interpreted, the Toxic Substances Control Act is not an adequate mechanism for regulating toxic substances. Thus the implementation of international agreements on POPs is of critical importance in ensuring the adequacy of future controls on toxic substances.
2. The paralyzing procedures contemplated by the "Gillmor Discussion Draft" [hereinafter "Discussion Draft"] circulating in the House would virtually guarantee that no new toxic substances would be added to the list of substances regulated by international agreements on POPs.
3. Recent assertions by the Executive Branch concerning supposed constitutional limits on using international decisions to trigger domestic obligations, and on

requiring public notice-and-comment procedures based on such international decisions, are without merit.

I. THE INADEQUACY OF THE TOXIC SUBSTANCES CONTROL ACT IN REGULATING TOXIC SUBSTANCES

The Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.,* appears to hold great promise in controlling toxic substances. However, in reality, TSCA has delivered very little in the way of such control. As explained below, one problematic but influential appeals court decision significantly narrowed the scope of TSCA's most ambitious program for regulating toxic substances.

Section 6 of TSCA provides the Environmental Protection Agency (EPA) with broad authority to control the manufacture, processing, distribution in commerce, use, and disposal of chemical substances and mixtures. Section 6(a) gives the agency a wide-ranging menu of options for controlling harmful chemicals, including everything from requiring labeling for such chemicals to banning them altogether. Section 6(a) of TSCA *requires* EPA—through the use of the mandatory "shall"—to regulate a chemical substance when the agency finds there is a "reasonable basis" to conclude that it poses an "unreasonable risk of injury" to human health or the environment. 15 U.S.C. § 2605(a). This provision requires the agency to regulate such a substance "to the extent necessary to protect adequately against such risk using the least burdensome requirements." Id. Section 6(c)(1) instructs the agency, when issuing a rule under section 6(a), to "consider and publish a statement with respect to" the effects of a chemical on human health and the environment, the magnitude of exposures to such chemical, the benefits of the chemical for "various uses and the availability of substitutes for such uses," and "the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health." 15 U.S.C. § 2605(c)(1).

TSCA's section 6 is unique among the federal environmental laws in the extent to which it allows EPA to regulate harmful substances across exposure contexts (e.g., workplace and environmental) and across whole industries, thus giving the agency the opportunity to control essentially all of the important risks from a harmful chemical at once. As noted, moreover, the statute also provides the agency with a virtual smorgasbord of regulatory options for controlling harmful chemicals. As enacted, therefore, TSCA's section 6 offered a good deal of promise in the ongoing effort to reduce the harmful effects of chemicals in our society. Ultimately, however, the law's rather vague injunction to protect against "unreasonable risks," and its directive to EPA to undertake a cost-benefit balancing under section 6, contributed to a judicial decision which all but doomed the law to oblivion.

The first and only judicial interpretation of EPA's authority to ban a substance under section 6(a) so limited EPA's authority under this provision that section 6 has not played a significant role in limiting toxic chemicals in this country. The interpretation came in the context of a challenge to EPA's ban on virtually all manufacturing, processing, distribution in commerce, and use of asbestos, the agency's first and only such ban under TSCA.

In 1979, EPA began looking into the possibility of banning asbestos under section 6 of TSCA.[1] The agency acted in response to increasing concerns about the harms to human health caused by asbestos. Ten years and a 45,000-page record later,[2] EPA produced a final rule banning virtually all uses of asbestos in several phases.[3] The agency found that asbestos posed an unreasonable risk to human health in all stages of its production and use, and that the substance was thus an appropriate candidate for the kind of comprehensive regulation offered by TSCA's section 6.[4]

The inevitable legal challenge ensued, and in 1991, the U.S. Court of Appeals for the Fifth Circuit struck down EPA's ban on asbestos in what remains the only judicial treatment of the basic parameters of section 6(a) of TSCA. The court's decision in *Corrosion Proof Fittings v. EPA,* 947 F.2d 1201 (5th Cir. 1991), included, among others, the following holdings:

1. In order to regulate under section 6(a) of TSCA, EPA must begin by examining the least intrusive regulatory alternative (such as labeling), considering the costs and benefits of such alternative. EPA may consider a more intrusive regu-

[1] Commercial and Industrial Use of Asbestos Fibers, 44 Fed. Reg. 60,061.

[2] PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY AT 409 (Aspen, 4th ed. 2003).

[3] EPA, Asbestos: Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions, 54 Fed. Reg. 29,460 (1989).

[4] *Id.* at 29,461.

latory option only if "unreasonable risks" are predicted to remain under the less onerous alternative. In order to justify a ban—like the asbestos ban—EPA would have to examine the costs and benefits of numerous less onerous regulatory alternatives, and conclude that each would allow unreasonable risks to remain unaddressed.

2. In examining costs and benefits under section 6(c) of TSCA, EPA was required to "discount" benefits as well as costs—which, in effect, means treating regulatory benefits such as lives saved as if they were a financial investment. Discounting benefits in the context of toxic chemical control places a large thumb on the scale—against regulation.
3. EPA may not use unquantified benefits to justify regulating a harmful chemical, except in close cases.
4. EPA may not exceed undefined limits on how much money it requires industry to spend to save a human life.

I examine each of these elements of the court's decision, and its paralyzing effect on EPA's power to regulate persistent organic pollutants under TSCA's section 6, in turn.

Detailed Analysis of Less Burdensome Alternatives

In deciding to ban virtually all uses of asbestos, EPA had concluded that less onerous regulation would not eliminate the unreasonable risks of asbestos. The agency considered several regulatory alternatives short of a ban, but concluded that these options would not adequately reduce the relevant risks. The agency did not conduct a separate analysis of costs and benefits for each of the less restrictive alternatives it considered.

The court of appeals hearing the challenge to EPA's rule held that EPA should have considered each regulatory alternative in detail, beginning with the least burdensome one and continuing on to more burdensome alternatives only if, at any given stage, the alternative under consideration did not reduce risks to a reasonable level. At each stage, moreover, the agency was required to assess the costs and benefits of the option under consideration. As the court put it:

> Upon an initial showing of product danger, the proper course for the EPA to follow is to consider each regulatory option, beginning with the least burdensome, and the costs and benefits of regulation under each option. The EPA cannot simply skip several rungs, as it did in this case, for in doing so, it may skip a less-burdensome alternative mandated by TSCA. Here, although the EPA mentions the problems posed by intermediate levels of regulation, it takes no steps to calculate the costs and benefits of these intermediate levels. Without doing this it is impossible, both for the EPA and for this court on review, to know that none of these alternatives was less burdensome than the ban in fact chosen by the agency.

947 F.2d at 1217 (citation omitted). The court justified the imposition of this heavy procedural burden on the agency by reference to the language of TSCA, which, the court concluded, offered regulatory options in an order proceeding from most to least stringent. Id. at 1215-16. In fact, however, the regulatory options identified in TSCA § 6 are not arranged in the tidy order the court perceived.[5] Moreover, even if they were, nothing in TSCA suggests that EPA is bound to follow the rigid and onerous procedure required by the court in *Corrosion Proof Fittings.* Indeed, where, as EPA did with respect to asbestos, the agency finds that a substance poses unreasonable risks throughout its industrial life cycle, then the agency is bound by the terms of the statute to protect against "such risk." 15 U.S.C. § 2605(a). In those circumstances, a product ban happens to be the "least burdensome" method available to protect against "such risk."

Nevertheless, unless the decision is overturned by either the courts or Congress, *Corrosion Proof Fittings* remains the definitive statement of what is required to ban a substance under TSCA. And what is required is unreasonably and unrealistically onerous. In banning asbestos, as I have mentioned, EPA spent ten years and produced a 45,000-page record. Yet it compiled detailed cost and benefit information only on the alternative of banning asbestos. Imagine the time, resources, and analysis required under the court of appeals' approach, which requires EPA to conduct a detailed cost-benefit analysis of every regulatory option available under TSCA section 6.

Such a process is not merely onerous; it may well be impossible. In analyzing the costs and benefits of a ban of asbestos, EPA was faced with the difficult but not

[5] For a critique of the court of appeals' decision on this ground and others, see Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld,* 75 Tex. L. Rev. 525, 541-49 (1997).

impossible task of trying to identify the risks that would be avoided if asbestos were no longer used or produced (with very limited exceptions). Even so, the task was complicated and time-consuming, and many of the benefits of EPA's ban—including the prevention of nonfatal illnesses associated with asbestos, and the prevention of death from any disease other than cancer—remained unquantified by the agency. Under the court of appeals' approach, however, EPA would be forced to figure out how many lives would be saved by, for example, a particular labeling requirement; how many saved by a particular disposal requirement; and so forth. The analytical demands imposed by the court of appeals' decision are positively paralyzing.

Discounting Benefits

In evaluating the costs and benefits of banning asbestos, EPA did not engage in formal cost-benefit analysis, which would have involved translating regulatory benefits—such as human lives saved—into monetary terms. Instead, EPA estimated the economic costs and life-saving benefits of the rule, and compared the costs and benefits without use of the common metric of dollars. However, EPA did employ a separate technique distinctive to formal cost-benefit analysis: it "discounted" the future life-saving benefits of its rule by 3 percent per year from the year in which the benefits would accrue. EPA thought that the regulatory benefits of its rule would accrue as soon as the risks from asbestos were reduced, and so it discounted these benefits from the (quite near-term) date on which exposures to asbestos would be reduced.

The court of appeals upheld EPA's choice of a discount rate, but disagreed with EPA's choice of a date from which to discount. The court thought EPA should have discounted life-saving benefits from the time when a life-threatening illness would materialize, rather than from the time when exposures would be reduced. 947 F.2d at 1218. For diseases with long latency periods, such as the cancers caused by asbestos and prevented by EPA's rule, the court of appeals' approach means discounting future benefits for years or, more likely, decades longer than EPA's preferred approach would have required. Discounting future benefits over many years greatly reduces their apparent magnitude. To take one famous example, the deaths of 1 billion people 500 years from now, if discounted to "present value" at a rate of 5 percent, become equivalent to the death of less than one person today.

The court in *Corrosion Proof Fittings* held, moreover, that EPA had no choice but to discount future benefits. Since EPA had chosen to discount the future monetary costs imposed by its rule, the court stated that the agency was required to discount the future benefits as well. Citing only an article from *The Economist* magazine, the court reasoned that discounting benefits was required to maintain an "apples-to-apples" comparison between costs and benefits. 947 F.2d at 1218.

On the matter of discounting, too, the court of appeals' opinion in *Corrosion Proof Fittings* is deeply problematic. In an ordinary case, one would expect a court to defer to the agency's determination that benefits accrued as soon as the risk from asbestos was reduced. In everyday life, after all, we regard the removal of a risk as a benefit as soon as it happens; we don't ordinarily react to the removal of a carcinogen in our environment, for example, by announcing that we will hold off feeling relieved until the date when we might have developed cancer had the carcinogen not been taken away.

Moreover, nothing in TSCA requires the discounting of future non-monetary benefits such as lives saved. And, since under EPA's mode of cost-benefit balancing, lives were not translated into dollars, EPA was *already* comparing apples and oranges by considering economic costs on the one hand and human lives on the other. Nothing in TSCA forbids EPA to make such a comparison.

Indeed, a large and growing literature challenges the notion that one must compare monetary costs and human lives on common terms—such as dollars—in order to make coherent regulatory policy. This literature argues, to put it simply, that to compare money and lives is *necessarily* to compare apples and oranges, no matter how elaborate the economic theory underlying the effort to transform lives into dollars.[6] This literature also criticizes the technique of discounting itself, which renders future regulatory benefits trivial over any substantial discounting interval.[7]

The international agreements on POPs are aimed at phasing out pollutants that, among other things, cause long-latency human diseases such as cancer. The agreements are also aimed at phasing out pollutants that persist in the environment over long periods of time and thus pose risks to future generations. The benefits produced by the treaty are the very kinds of benefits trivialized through the use of dis-

[6] *See, e.g.,* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (The New Press 2004).

[7] *Id.,* ch. 8.

counting, as required by the court in *Corrosion Proof Fittings.* TSCA, as currently interpreted, is thus not an effective mechanism for controlling these substances.

Limited Role for Unquantified Benefits

In seeking to ban virtually all uses of asbestos, EPA had justified its decision based partly on unquantified benefits. For example, the agency used a 13-year time horizon in its analysis of costs and benefits, but emphasized that the benefits of the rule—though unquantified beyond the 13-year horizon—would continue to occur even past its analytical horizon. 54 Fed. Reg. at 29,486-88. In addition, although the agency was able to quantify only the benefits of saving lives due to cancers averted, the agency also cited many other, unquantifiable benefits in support of its rule—including nonfatal illnesses, fatalities due to causes other than cancer, and ecological effects. *Id.* at 29,479, 29,498.

The court in *Corrosion Proof Fittings* chastised EPA for relying too heavily on unquantified benefits. The court stated, cryptically, that while EPA could use unquantified benefits to justify a rule in close cases, it could not use unquantified benefits to "effect a wholesale shift on the balance beam." 947 F.2d at 1219.

The court's ruling, again, is problematic. Where some benefits are unquantifiable, how can one even determine whether the quantified part of the case for a rule is "close"? Again, moreover, the court cites nothing in TSCA itself that requires the agency to give more respectful attention to quantified values than to unquantified ones.

And, once more, the court's interpretation of TSCA makes this statute an especially weak tool in the context of persistent pollutants. The benefits of reducing such pollutants are notoriously difficult to quantify. In many cases, the one benefit that can be quantified with any precision—as in *Corrosion Proof Fittings* itself—is the prevention of death from cancer. Many other serious adverse effects—such as endocrine disruption, neurological impairment, immune system impairment, ecological damage, and so forth—are not amenable to precise quantification at this time, in most cases. The court of appeals' dismissal of the importance of unquantified benefits—except in the ill-defined "close cases" category—renders TSCA an ineffective means of addressing the harms of POPs.

How Much to Spend to Save a Human Life

One last aspect of the decision in *Corrosion Proof Fittings* that renders TSCA's § 6 a weak mechanism for controlling toxic substances is the court's holding that EPA had, with the asbestos ban, required industry to spend too much to save a human life. The court pointed to cost figures per life saved, disaggregated by industry. These figures showed how much it would cost to save a life in, for example, the asbestos pipes industry vs. the asbestos shingles industry vs. the asbestos brakes industry. In some industries, the cost per life saved, when lives were discounted at 3 percent per year, reached into the tens of millions of dollars. 947 F.2d at 1218, 1222.

The court thought that EPA's decision to require the asbestos industry to spend this much to save human lives meant that its review of the costs of the asbestos rule was deeply flawed: "The EPA's willingness to argue that spending $ 23.7 million to save less than one-third of a life reveals that its economic review of its regulations, as required by TSCA, was meaningless." 947 F.2d at 1223. Thus the court overturned the rule on this ground as well.

Legal scholars have expressed alarm at the court's aggressive review of EPA's asbestos ban.[8] One example of the court's aggressiveness is, of course, the court's intrusion into the agency's basic policy choice of how much to spend to save a life. The court cited no statutory authority (other than the general injunction to consider costs) in coming to its decision, nor did it explain why disaggregating costs, industry by industry, was the only way to look at the cost imposed by the rule. Notice, for example, that at an estimated expense of approximately $460 million, and a savings in lives of at least 202, the lives "cost" approximately $2.3 million apiece—not a bad bargain as these things go. In addition, recall that many of the benefits of the rule could not be quantified. Or, to describe the asbestos rule another way, it would have cost approximately 14 cents for each person in the U.S.[9] Described in ways other than the one way chosen by the court of appeals, the asbestos rule seems like quite a reasonable expenditure for the amount of good it would have done.

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[8] *See, e.g.,* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld,* 75 Tex. L. Rev. 525 (1997).

[9] *See* Lisa Heinzerling, *Political Science,* 62 U. Chi. L. Rev. 449, 463-64 (1995) (reviewing STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (Harvard 1993)).

TSCA Today

Despite the promise suggested by the text of TSCA section 6(a), that promise has remained unfulfilled in the years since *Corrosion Proof Fittings* was decided. For here was a case in which the agency had spent a decade compiling a thorough and careful record of the harms caused by one of the hazardous substances about which we know the most, and yet the court overturned the agency's rule and required the agency to conduct almost impossibly detailed analysis before attempting to ban another substance under the statute. Perhaps it goes without saying that the agency has not tried again.

TSCA's transformation from potentially powerful tool against toxic substances into an ineffective law is well illustrated by the next action EPA proposed under section 6(a): a ban on lead fishing sinkers used by fishermen. EPA, Lead Fishing Sinkers, 59 Fed. Reg. 11122 (Mar. 9, 1994). Even this rather small action—in comparison to the nationwide, staged ban on asbestos—never became final. Likewise, EPA's recent suggestion that it would use TSCA § 6 to ban the fuel additive MTBE, after MTBE had contaminated groundwater supplies all over the country, was dropped without ceremony by the Bush Administration. *See* Pete Yost, *How the White House Shelved MTBE BAN,* ASSOCIATED PRESS, Feb. 16, 2004.

The plain fact is that TSCA § 6 is not now a viable mechanism for meaningfully reducing the risks of toxic substances in this country. This is why effective implementation of the international agreements on POPs is so important. However, as I next discuss, current proposals for such implementation threaten to be even more paralyzing to the process of toxic substance control than the *Corrosion Proof Fittings* decision has been.

II. THE PARALYZING REQUIREMENTS OF THE "DISCUSSION DRAFT"

If Congress wanted to ensure that no new harmful substances would ever be regulated by the U.S. under the international agreements on POPs, it could hardly do better than to pass the "Discussion Draft" bill now circulating in the House. Merely duplicating the already-ineffective requirements of TSCA as prerequisites for regulating new POPs would be bad enough; the Discussion Draft goes even further and offers whole new obstacles to meaningful toxic substance control. Better, in truth, to have no mechanism at all for adding new substances to the list—the route originally preferred by the current Administration [10]—than to offer this charade in place of a meaningful listing process.

Before delving into the details of the Discussion Draft, it is worth bearing in mind the context in which EPA action under the POPs implementing legislation will occur. The domestic listing process contemplated in the Discussion Draft begins only *after* international panels have engaged in a thorough, science-based process of review and have concluded that a new substance warrants regulation under the international agreements for POPs.[11]

This process includes scientific findings by the so-called Persistent Organic Pollutants Review Committee, a group of experts in risk analysis designated by parties to the POPs treaty and chosen for their expertise and with equitable geographical distribution in mind. Stockholm Convention art. 19(6)(a). The Committee reviews chemicals for possible inclusion on the POPs list through evaluation of the chemicals in light of several screening criteria. *Id.,* art. 8(3). If the Conference of the Parties decides that a chemical is a good candidate for listing, then the Committee goes back to work and conducts a detailed risk profile of the chemical in question. If, based on this analysis, the Committee determines that a chemical "is likely, as a result of its long-range environmental transport, to lead to significant adverse human health and/or environmental effects such that global action is warranted," *id.,* art. 8(7)(a), then the matter returns to the Conference of the Parties, which decides whether to list the chemical based on an assessment of the scientific evidence and analysis of possible control measures for the chemical. *Id.,* Annex F.

The POPs treaty explicitly takes a protective, precautionary approach to regulating POPs. The preamble states: "Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants." Stockholm Convention, art. 1. Article 8(7)(a) of the Convention specifically states that "[l]ack of full scientific certainty shall not pre-

[10] Eric Pianin, *White House Move on Toxic-Chemicals Pact Assailed,* WASHINGTON POST, Apr. 12, 2002, at A13.

[11] For a concise and helpful discussion of the background and requirements of the POPs treaty, see Joel A. Mintz, *Two Cheers for POPs: A Summary and Assessment of the Stockholm Convention on Persistent Organic Pollutants,* 14 Geo. Int'l Envtl. L. Rev. 319 (2001).

vent the proposal [to list a new chemical] from proceeding," and Article 8(9) provides that the Conference of the Parties, "taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical." In the fierce current debates over precautionary approaches to environmental policy, therefore, the POPs treaty comes down firmly on the side of precaution.[12]

Despite the thorough, science-based review preceding the international listing process, the Discussion Draft would require EPA essentially to start all over again, if it acts at all in response to the international recommendations. The problems with the Discussion Draft's approach to listing new POPs include the following: excessive discretion on the part of EPA; duplication of scientific effort; unnecessary and problematic injunctions to the agency to use "sound science"; and biased and paralyzing directives to undertake cost-benefit balancing and to give economic costs particularly close attention. I discuss each of these problems in turn.

EPA discretion

The Discussion Draft does not require EPA to act at all in response to international recommendations on listing new POPs. Instead, it simply states that EPA "may" regulate in response to such recommendations. § 502(e)(1)(A). In addition, after international bodies have undertaken painstaking review of the harms caused by substances that are candidates for regulation, EPA has discretion whether even to consider those bodies' recommendations; here, too, the permissive "may" is used in the Discussion Draft. § 502(e)(3). So little, apparently, do the Discussion Draft's authors think of the international scientific review process, that the findings from this process are labeled merely "additional considerations" in the Draft. *Id.*

Moreover, even if EPA does act in response to the international recommendations, there is no deadline in the Discussion Draft for a conclusion to be reached and a regulation to issue. Finally, if EPA does not act, there is no "action-forcing" mechanism, such as the citizen petition process contained in TSCA § 21, which would bring pressure to bear on EPA for its failure to act.

The Discussion Draft, in short, leaves the decision whether to do *anything* in response to international recommendations on regulation of new substances completely up to EPA.

Duplication of scientific effort

As discussed, the international scientific review committee on POPs will conduct a detailed analysis of the scientific case for adding a new chemical to the list under the POPs treaty. Remarkably, however, the Discussion Draft not only, as noted above, gives EPA discretion in deciding whether even to consider the international recommendations on new POPs listings, it also directs EPA to conduct entirely new scientific analyses of candidate chemicals. EPA is, according to the Discussion Draft, required to consider a scientific assessment of the effects of candidate chemicals on health and the environment, and to consider the magnitude of exposures of these chemicals experienced by humans and the environment. § 502(e)(2)(A-B). It is unclear what is expected to be gained by this duplicative scientific review. Compounding the problem is, as I discuss next, the Discussion Draft's cryptic and troubling invocations of "sound science."

"Sound science"

The Discussion Draft provides:

> In assessing risks and effects, the Administrator shall use sound and objective scientific practices, and shall determine the weight of the scientific evidence concerning such risks or effects based on the best available scientific information, including peer-reviewed studies, in the rulemaking record.

§ 502(e)(4).

It is hard to know quite what to make of this provision. On the one hand, it is not unusual for federal laws regulating risks to direct the relevant agencies to use the "best available evidence" in coming to their decisions. *See, e.g.*, 29 U.S.C. § 655(b)(5) (regarding health standards under Occupational Safety and Health Act). Viewed in that light, the provision is a rather benign reminder to EPA to use good science in deciding whether to regulate additional POPs—a reminder that merely duplicates the Administrative Procedure Act's injunction against arbitrary and capricious agency decision making.

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[12] *See generally* Pep Fuller & Thomas O. McGarity, *Beyond the Dirty Dozen: The Bush Administration's Cautious Approach to Listing New Persistent Organic Pollutants and the Future of the POPs Convention,* 28 Wm. & Mary Envtl. L. & Pol. Rev. 1 (2003).

On the other hand, "sound . . . scientific practices," or "sound science," has, in conservative circles, become a buzzword for skepticism about findings of risk to humans and the environment due to chemicals, products, industrial pollution, etc. The movement for "sound science," in fact, began with the tobacco industry's efforts to counter scientific evidence of the harms of their products. Thus the presence in this bill of references to the ill-begotten "sound science" theme raises the troubling possibility that this provision will be used not merely to duplicate the APA's salutary injunction against arbitrary and capricious agency decisions, but instead will be used somehow to block important scientific information from being considered in the process of deciding whether to regulate additional POPs.

The Discussion Draft's reference to "peer-reviewed studies" raises similar possibilities. On the one hand, the bill does not limit EPA's consideration only to peer-reviewed studies, and thus the bill may be taken to mean simply that EPA should include peer-reviewed studies, where possible, in its scientific examinations—something the agency does routinely in any event. On the other hand, "peer review," like "sound science," has become a kind of rallying cry for industry and regulatory skeptics within the Administration, and sometimes has come to mean review by "peers" within industry is favored over review by other scientific experts. Here, too, therefore, the meaning of the provision on science is unclear, but portents of mischief abound.

Cost-benefit analysis

The Discussion Draft would weigh down the process for listing new POPs with stultifying, time-consuming, resource-intensive, and systematically biased analytical requirements. I discuss these requirements below. But first, it is important to note that nothing in the Discussion Draft requires EPA even to publish the results of its detailed analysis. Whereas TSCA itself explicitly states the EPA must "consider and publish a statement with respect to" costs, benefits, and potential substitute substances, 15 U.S.C. § 2605(c)(1), the Discussion Draft merely requires EPA to "consider" the listed factors. § 502(e)(2). The contrast between TSCA and the Discussion Draft is striking particularly because the language regarding publishing a statement comes from the part of TSCA that is otherwise quoted quite closely in the Discussion Draft.

If EPA decided not to regulate a POP newly listed pursuant to the POPs treaty, therefore, there is no guarantee that EPA would even be forced to explain why it decided not to do so. This is especially so since the Discussion Draft provides no process for citizen petitions calling upon the agency to act when it has failed to act. If EPA decided to regulate a newly listed POPs, however, it would of course have to explain its decision under the APA. Thus the Discussion Draft in this way, too, contains an internal bias against listing new POPs.

The problems go deeper still. The Discussion Draft allows EPA to regulate a newly listed POP only "to the extent necessary to protect human health and the environment that achieves a reasonable balance of social, environmental, and economic costs and benefits." § 502(e)(1)(A). The Draft affords no clue, however, as to how a "reasonable balance" is to be identified. Although the Draft does provide a laundry list of factors EPA is to consider in coming to a decision, § 502(e)(2)(A-E), it does not give EPA guidance as to how to figure out what a "reasonable balance" of costs and benefits is. Here, too, therefore, the Discussion Draft affords EPA a huge amount of discretion in making decisions on newly listed POPs. Moreover, given the precedent of *Corrosion Proof Fittings,* one must worry about the courts' ultimate role in policing exactly which regulatory measures afford a "reasonable balance" between costs and benefits and which do not.

Quite apart from the large amount of discretion afforded by the ill-defined "reasonable balance" standard is the internal bias against regulation embedded in that standard. Cost-benefit balancing is notoriously, and systematically, biased against environmental regulation. It is particularly skewed against environmental regulation that targets pollutants like the POPs—pollutants with large but insidious and sometimes subtle effects, spread over a vast population (in this case, the whole world) and reaching into the distant future.[13]

Here are some of the basic features of cost-benefit balancing that systematically bias it against environmental protection, particularly protection against pollutants like POPs:[14]

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[13] *See generally* Lisa Heinzerling, *Environmental Law and the Present Future,* 87 Geo. L.J. 2025 (1999).

[14] These arguments are elaborated in FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (The New Press 2004).

- Many of the benefits of reducing these pollutants cannot be quantified. In many cases, avoiding cancer is the only benefit that can be quantified. This leaves all other causes of death, plus all nonfatal illnesses avoided and all ecological effects, left out of the numerical tally of costs and benefits. When a benefit is not quantified, its worth is typically treated as if it were zero in a cost-benefit balancing.
- The costs of regulating environmental risks are often overstated, and often by a large amount.[15]
- Even when benefits can be quantified, the process of fitting values like human lives and health into a cost-benefit balance is fraught with difficulty. Sometimes, monetary values are attached to benefits such as human lives. These values are generally based on the amount of extra income male workers in the 1970s were willing to accept in exchange for increased workplace risks. The monetary values arising from this context not only tell us little about these workers' own values (there is no evidence they actually knew the precise risks they faced, or could afford to turn down a risky job even if they did know), but tell us even less about the monetary values one might attached to risks of cancer, risks that are involuntarily imposed, risks to future generations, and so forth. They tell us little, in other words, about the value of controlling the risks of POPs.
- The technique of discounting—required by the court in *Corrosion Proof Fittings* despite the absence of a statutory mandate for it—belittles desires to protect this and future generations against long-term and persistent risks. Discounting would easily trivialize the benefits of regulating POPs. Yet protection of the future—for our own generation, our children's generation, and generations yet to come—is one of the basic principles animating a document like the POPs treaty. Discounting, through an arcane and seemingly technical process, silently undermines this animating principle.[16]
- Cost-benefit balancing typically relies on a starkly impoverished view of what matters when it comes to risk. Frequently, cost-benefit analysis looks solely at the probability and magnitude of harm, in numerical terms, rather than also at the cultural and moral context in which that harm might be inflicted. Thus cost-benefit analysis most often ignores the kinds of considerations—an aversion to involuntary and uncontrollable risks, a preference for an equitable distribution of risk, a desire to avoid consequences that threaten whole communities—that most people take into account in judging risk.

These are, in brief, some of the most fundamental reasons why cost-benefit balancing is a bad idea in the context of environmental protection. Its use in the POPs implementing legislation would virtually ensure that no new POPs will be regulated in this country pursuant to the international agreements on POPs. If this is what the authors of the Discussion Draft desire, they should say so directly, and not hide behind the seemingly objective face of cost-benefit balancing.

Even if cost-benefit balancing were not systematically biased against regulation of POPs, the analytical requirements imposed by the Discussion Draft would nevertheless paralyze any effort to regulate POPs. The Discussion Draft goes beyond TSCA § 6—which, you will recall, has been buried under the onerous analytical requirements ladled into it by the court in *Corrosion Proof Fittings*—and adds even more factors for EPA to consider in deciding whether to regulate POPs. In addition to all of the factors listed in TSCA's § 6, the Discussion Draft would also require EPA to consider the risks and economic consequences of, plus a laundry list of other factors relating to, substitutes for chemical substances. § 502(e)(2)(C). In addition, the Draft would require EPA to consider not only the costs, benefits, effects on the national economy, etc., of a regulatory decision, but also "the degree to which the manufacture, processing, distribution in commerce for export, use, or disposal of the chemical substance or mixture is necessary to prevent significant harm to an important sector of the economy. § 502(e)(2)(D). In other words, even if the cost-benefit profile tilted in the direction of regulation, EPA must nevertheless go on to consider whether an industry would be too hard-hit by a regulation to proceed. Finally, EPA must, according to the Discussion Draft, also consider not only the national, but also the international, consequences of a regulatory action. § 502(e)(2)(E).

This is a research agenda and analytical program to fill several lifetimes. Even under the relatively "streamlined," pre-*Corrosion Proof Fittings* version of TSCA, it took EPA ten years and 45,000 pages to justify its asbestos ban. And even then the

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[15] *See, e.g.,* Thomas O. McGarity and Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation,* 80 Texas L. Rev. 1197 (2002).

[16] For more detailed discussion, see Lisa Heinzerling, *Discounting Our Future,* 34 Land & Water L. Rev. 39 (1999).

court overturned the rule for lack of sufficient analysis. The Discussion Draft dumps even more analytical requirements on EPA, with the likely result that no rule would ever see the light of day under this framework.

III. THE ADMINISTRATION'S CONSTITUTIONAL ARGUMENTS REGARDING IMPLEMENTATION OF THE POPS CONVENTIONS ARE WITHOUT MERIT

The Bush Administration has recently voiced two different kinds of arguments implicating Congress's authority to enact legislation implementing the international agreements on POPs. Both arguments are without merit.

First, the Department of Justice has argued, in a letter to Senator Tom Harkin dated March 25, 2004, that mandatory notice-and-comment procedures in POPs implementing legislation (there, the Department was discussing amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)), would "raise constitutional concerns." Letter from William Moschella, Assistant Attorney General, Office of Legislative Affairs, to The Honorable Tom Harkin (March 25, 2004). It appears that the Department was under the impression that merely seeking out the views of the public, while international proceedings on whether to add pollutants to the list of POPs were ongoing, would interfere with the Executive's treaty-making powers. The letter is exceedingly thin on legal authority, and even thinner on common sense: it provides no sensible reason to think that merely requiring notice and an opportunity for comment, without any obligation to change one's international negotiating position, interferes with the Executive's prerogatives. The letter is of a piece with the Administration's other recent, extravagant claims of Executive prerogatives, offered in contexts ranging from its refusal to make public information concerning Vice-President Cheney's Energy Task Force, to its arguments concerning the treatment of detainees in Cuba, to its alarming claims, in memoranda on the treatment of prisoners in the ongoing "war on terror," regarding the Executive's immunity from the requirements of the Geneva Convention. A detailed and persuasive refutation of the Department's analysis is attached to CIEL senior attorney Glenn Wiser's written testimony for today's hearing. Although the Discussion Draft does indeed provide an opportunity for public notice and comment, the rebuttal to the Department of Justice's constitutional arguments is important to keep in mind if future implementing bills do not require notice and comment early in the international process.

A second constitutional argument that has attended discussions of POPs implementing legislation has to do with what is sometimes known as the "international nondelegation doctrine." The idea is that if Congress obligates the Executive branch to act in response to the decision of an international body, that is an unconstitutional delegation of legislative authority.

To understand this claim, it is helpful to understand the exact context in which it might arise. Under the POPs treaty, new POPs may be added only by consensus of the parties or, failing consensus, by a three-quarters majority of the parties. Stockholm Convention, arts. 22(4), 21(1-3). Parties may, in individual cases, decide not to accept a new POPs listing. Id., arts. 22(3)(b), 22(4). Or, in the alternative, parties may, at the time of ratifying the treaty itself, select the "opt-in" alternative, which means that they will not be bound by any new pollutant listing unless they affirmatively indicate their intention to be bound. *Id.*, art. 25(4).

Thus, with respect to deciding whether to accept new pollutant listings under the POPs treaty, the U.S. has three options: (1) it can accept a decision of the Conference of the Parties to regulate a new pollutant; (2) it can, on a case-by-case basis, decide not to accept the new listing; or (3) it can, in ratifying the treaty, elect the opt-in provision, thus requiring affirmative action to regulate a new pollutant in every case of a new listing.

If the Executive chooses not to take the last route—that is, it does not select the opt-in option—then there would seem to no meritorious constitutional complaint about being bound by international decisions on new POPs. The Executive's assent to such decisions would be embedded in the original treaty itself. Likewise, if Congress embodied this assent in implementing legislation which required EPA to take action to control newly listed chemicals, there would be no constitutional problem. Indeed, many laws implementing international obligations take this general form. The Montreal Protocol on ozone-depleting substances, for example, provides that the original standards of the Protocol may be strengthened by a majority vote of the parties, and that vote is binding on the parties. The Clean Air Act implements this agreement by requiring EPA to take the actions required by the stricter standards. 42 U.S.C. § 7671e(a)(3). Similarly, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") provides for international decisions adding endangered species to the list of protected species, and the Endangered

Species Act prohibits trade in internationally listed species. 16 U.S.C. § 1538(c). Other examples may be found in the memorandum attached to Glenn Wiser's written testimony for this hearing.

I am aware of no case law disputing the proposition that agencies may be obligated to act in response to decisions of international bodies where a treaty and statute require them to do so. Indeed, the case law I am aware of supports this proposition. In *George E. Warren Corp. v. EPA,* 159 F.3d 616 (D.C. Cir. 1998), the D.C. Circuit held that EPA was, in setting new rules for reformulated gasoline, justified in taking into account a WTO ruling against EPA's previous rule. Although the Clean Air Act did not specifically give EPA the authority to take this ruling into account in establishing its rule, the court expressed a desire to avoid any confrontation with U.S. treaty obligations, and upheld EPA's consideration of the WTO ruling. The case would have been even easier for EPA had the statute explicitly allowed consideration of the international body's decision in setting domestic regulatory policy.

Thus, it appears that the U.S. could, without any constitutional problem, choose the "opt-out" option of the POPs treaty, meaning that it would be required to regulate any newly listed pollutants unless it affirmatively indicated its desire not to accept the listing of such pollutants.

The other context in which the constitutional arguments that have floated about these issues might arise is if the U.S. selected the "opt-in" option under the POPs treaty. In that case, an affirmative act by the U.S. would be required for any new POPs to be regulated here. This is the situation in which we find ourselves today, as the Administration has indicated that this is the option it will choose when the treaty is ratified.

In this situation, the question becomes whether Congress could, in the legislation implementing the POPs treaty, *require* EPA to act in response to a new listing decision by the Conference of the Parties. Suppose, for example, that the legislation simply required EPA to make a decision as to whether to regulate a newly listed POP. The international decision to list the POP would be the trigger for requiring EPA to come to a decision about whether to regulate the new POP. This kind of regime would pose no constitutional problem. Congress often requires agencies to act when certain conditions are met. Indeed, the more precise the conditions that trigger agency action, the less Congress's actions even come close to running afoul of the constitutional prohibition reflected in the nondelegation doctrine (which, it must be noted, has not been found by the Supreme Court to have been violated in almost 70 years). Whether the trigger for agency consideration of a problem is an agency factual finding, a state decision, or an international decision, the conclusion remains the same: Congress is entitled to require agency action based on satisfaction of a condition precedent identified by Congress.

Mr. GILLMOR. Thank you very much.

We will go to Glenn Wiser, who is Senior Attorney, Center for International and Environmental Law.

STATEMENT OF GLENN M. WISER

Mr. WISER. Thank you, Mr. Chairman.

My organization, CIEL, has played a leading role in the efforts of environmental and health organizations in the United States who are working for effective U.S. implementing legislation for the POPs convention. The views I will express today have been endorsed by a number of these organizations. Their names are listed in my written testimony.

My colleagues have asked me to provide you with a summary of the environmental and health community's views on the June 17 discussion draft. My comments will focus on those aspects of the draft that deal with the Stockholm POPs Convention.

My colleagues have asked me to clearly convey this message: U.S. environmental and health organizations believe the approach in the discussion draft is fundamentally flawed and we will work very hard to ensure that the approach is never enacted into law.

My colleagues have also asked me to suggest legislative alternatives that we believe would more faithfully reflect the requirements of the Stockholm Convention.

I would like to make one important point before I speak specifically about the discussion draft. We believe that the key to U.S. POPs legislation is that it must give EPA sufficient legal authority to implement quickly and effectively a Stockholm Convention decision to add a POP to the treaty. That said, we recognize that the terms of this treaty can never force the United States to regulate an additional chemical against its will. That is a very important point, we believe. It is the job of Congress through this legislation to tell EPA how to respond to a Stockholm new listing decision. No international body will have the power to make domestic U.S. law. Our groups understand this important distinction and we hope everyone else who is involved in this legislation understands it, too.

Now, to the discussion draft. While the purpose of this legislation is to implement the POPs Convention, the draft seems to have a unifying theme that would do exactly the opposite. It seems to be intended to divorce any relationship between the international listing process and the domestic regulatory process, and to ensure that future administrations will never be able to implement Stockholm amendments to control additional POPs. There are many reasons why we conclude this, but we are going to focus on three right now.

First, the discussion draft contains no requirement that EPA do anything after an international decision to add a POP to the convention even when the United States fully supports the international decision. There is no time line within which EPA must act or declare its intention not to act. There is no requirement for EPA to publish a statement of reasons for its inaction. And there is no provision such as a citizens petition process that would prod EPA to act if it fails to do so. We believe that a better approach would be for Congress to require EPA to decide within a fixed time after an international listing decision is made whether EPA will regulate the POP or not.

Two: The proposed regulatory standard for considering additional POPs is not acceptable because it would result in EPA never being able to regulate an additional POP. If EPA decided under it's complete discretion to regulate, it could do so only "to the extent necessary to protect human health and the environment in a manner that achieves a reasonable balance of social, environmental and economic costs and benefits. That's a mouthful.

As Professor Heinzerling and others have demonstrated this kind of cost benefit balancing nearly always results in an over valuation of the cost of regulation and a dramatic under valuation of the benefits, most of which cannot be realistically or fully valued in monetary terms. This applies especially to the kinds of problems that POPs cause.

Cost benefit balancing rigs the system against protective regulation. And this standard that is in the discussion draft would all but insure that future administrations could never implement Stockholm amendments because EPA's regulatory authority would be too weak to do so.

We believe that a better approach would be to use the regulatory standard that is already in the Convention. The law should require

EPA to implement the control measures specified in the convention in a manner that protects against significant adverse human health or environmental effects. But if EPA concluded that despite the international decision to list a POP, the chemical was not likely to lead to significant adverse human health or environmental effects, then EPA would be required to issue a decision not to regulate.

The third and final point I would like to make. The draft would require EPA to undergo unnecessary and duplicative analyses if it chose to regulate. As a party to the Stockholm Convention the United States will have already participated in a thorough scientific investigation of additional POPs before they are added to the convention. Yet the discussion draft would all but ignore the results of this international investigation and would instead require EPA to undertake additional duplicative, time consuming assessments before it could issue a rule in response to a new listing decision. We believe that a better approach would be for Congress not to require EPA to reinvent the wheel when conducting a rulemaking on an additional POP in light of the extensive scientific risk assessment and socio-economic analyses that were mentioned by my colleague Mike Walls and that are already required under the convention. We believe that implementing legislation should not shackle EPA's authority by itemizing additional criteria it must consider during the rulemaking.

In closing, the environmental and health community enthusiastically supports the Stockholm Convention and hopes that the United States will soon be a party. However, we do not, and I repeat we do not wish to see U.S. ratification of this important treaty serve as a mean to introduce a radical regressive reshaping of that law. We believe that the approach taken in the June 17 discussion draft would do just that, and we respectfully call on this subcommittee to reject it in favor of an approach that will faithfully reflect the spirit and letter of the convention.

Thanks, and I will be happy to answer any questions you might have.

[The prepared statement of Glenn M. Wiser follows:]

PREPARED STATEMENT OF GLENN M. WISER, SENIOR ATTORNEY, THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW ON BEHALF OF NATIONAL ENVIRONMENTAL TRUST, OCEANA, PESTICIDE ACTION NETWORK NORTH AMERICA, PHYSICIANS FOR SOCIAL RESPONSIBILITY, SIERRA CLUB, AND U.S. PUBLIC INTEREST RESEARCH GROUP

I. INTRODUCTION

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to testify on behalf of my organization, the Center for International Environmental Law (CIEL), and on behalf of our partners, including National Environmental Trust, Oceana, Pesticide Action Network North America, Physicians for Social Responsibility, Sierra Club, and U.S. Public Interest Research Group, on draft legislation to implement the Stockholm Convention on Persistent Organic Pollutants (POPs). CIEL is a public interest, not-for-profit environmental law firm founded in 1989 to strengthen international and comparative environmental law and policy around the world.

Much of my work at CIEL has focused on the development and implementation of multilateral treaties such as the Climate Convention, the Framework Convention on Tobacco Control, and the Stockholm POPs Convention. Since May, 2001, I have worked closely with numerous environmental and health organizations to help develop legally sound, environmentally responsible legislation that will permit the

United States to ratify and participate fully and effectively in the Stockholm Convention. My organization also coordinates a network of grassroots and activist organizations located throughout the country who work on issues related to chemicals management and safety, and who strongly support the Stockholm Convention.

A core group of public interest organizations, including CIEL, National Environmental Trust, Oceana, Physicians for Social Responsibility, the U.S. Public Interest Research Group, and the World Wildlife Fund, has worked with Congress over the last two years to help develop the implementing legislation for the Stockholm Convention. At the request of the Senate Environment and Public Works Committee (EPW), this group consulted extensively with industry representatives and EPW staff on amendments to the Toxic Substances Control Act (TSCA), which were eventually approved by EPW in July 2003 as the POPs, LRTAP POPs, and PIC Implementation Act of 2003, S. 1486. We have also participated in lengthy consultations with members of the Senate Committee on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture to educate and assist them in the development of POPs implementing bills that would amend the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

While our core group does not have a formal leadership structure, we consistently speak with a unified voice. I have frequently been the group's spokesman and adviser. In that capacity I have led the majority of our discussions(and served as our main contact(with several key congressional staff and representatives of the Bush Administration. I have also led in the preparation of our analyses and responses to the various draft bills that have been proposed, in the research for and formulation of our core group's positions and strategies, and in the coordination of the broader environmental and health community's responses to the pending legislation. For example, in April of this year, I coordinated the preparation of a letter to members of the Senate from CEOs of 18 of America's most prominent environmental organizations, which expressed our deep concern about POPs implementing amendments that had been proposed for FIFRA. [Please see attached CEO letter to Senators Cochran, Harkin, Goodlatte, and Stenholm dated April 19, 2004.]

In short, I have been heavily involved in all aspects of the public interest campaign for U.S. ratification of the Stockholm Convention, and my organization has been privileged to enjoy the confidence of our partners that has allowed us to work on their behalf.

Today, I would like to provide you with a summary of the environmental and health community's views on draft legislation that would amend TSCA to implement the Stockholm POPs Convention, the LRTAP POPs Protocol, and the Rotterdam PIC Convention. But first, I would like to very briefly describe persistent organic pollutants, the Stockholm POPs Convention, and one of its most important provisions: the "adding mechanism" for evaluating and adding other POPs to the treaty.

Second, I will comment specifically on the Discussion Draft that the Majority circulated among members of this Subcommittee on June 17, 2004. I will concentrate on those aspects of the Draft that deal with the Stockholm Convention. However, many of my comments will also be relevant to the Draft's LRTAP POPs Protocol sections, which generally are similar to the Stockholm sections. I will also suggest alternative legislative approaches that the environmental and health community believe would more faithfully reflect the requirements of the Stockholm Convention than the June 17 Draft does.

Finally, I will discuss claims by the Bush Administration that the U.S. Constitution should be interpreted to prohibit Congress from implementing the Convention in certain ways.

II. PERSISTENT ORGANIC POLLUTANTS AND THE STOCKHOLM CONVENTION

1. Persistent Organic Pollutants (POPs). POPs are exceedingly toxic chemicals that take years or decades to break down in the environment, travel long distances on wind and water currents, and concentrate up the food chain to accumulate in our bodies. They include chemicals and pesticides like dioxin, PCBs, and DDT. They can cause cancer, neurological and learning disabilities, and subtle changes to human reproductive and immune systems. POPs used in the United States can harm people and wildlife thousands of miles away; similarly, POPs used in foreign countries can hurt Americans here at home. All of us have some or many of these chemicals in our bodies. We get them primarily through our food. Babies get them before birth through the placenta and later, from their mother's breast milk.

2. The Stockholm POPs Convention. The Stockholm Convention bans or severely restricts 12 of the most hazardous POPs, and establishes an international, science-based process for adding other POPs to the treaty. The Convention entered into force on May 17, 2004. The Convention's first "Conference of the Parties" will

meet in May, 2005 to adopt rules of procedure and guidelines for many of the treaty processes and institutions, including the committee that will make recommendations on additional POPs. The United States can attend the first Conference of the Parties as an official party only if it ratifies the treaty no later than early February 2005 (90 days before the Conference). Nevertheless, it can attend that meeting as an observer, and may join as a full party if it ratifies at a later date.

3. The Stockholm "adding mechanism." Because the United States has already banned all of the intentionally produced "dirty dozen," the most important part of the treaty to protect public health in our country is the part dealing with identifying and adding other POPs. At the insistence of U.S. negotiators, the treaty contains a rigorous, science-based process under which governments may nominate suspected POPs. An international committee of government-appointed scientists will decide whether the required criteria of persistence, bio-accumulation, potential for long-range transport, and adverse effects to human health or the environment are met. If the committee decides they are, it may recommend that the Conference of the Parties consider adding the chemical to the treaty. Assuming the United States takes the election provided in the Stockholm Convention's Article 25.4, an amendment to add a chemical to the Convention can only apply to the United States if we decide to "opt in" to it. *We can never be bound by a new listing decision against our will. The environmental and health community believes that the key to U.S. POPs legislation is that it give EPA sufficient legal authority to implement a Stockholm new listing decision quickly and effectively.*

III. THE JUNE 17, 2004 DISCUSSION DRAFT

U.S. environmental and health organizations enthusiastically support the Stockholm POPs Convention. We are proud of the important role we believe our groups played in the development of this treaty, and we look forward to the day when America joins the 70 other countries that have already ratified it.[1] We are convinced that U.S. participation and leadership in the Convention will be essential for achieving our vision of elimination of persistent organic pollutants and other persistent toxic substances from the world's environment.

Yet our organizations are also devoted to preserving and improving the integrity of U.S. environmental and health law, and we do not wish to see U.S. ratification of this groundbreaking treaty serve as a means to introduce a radical, regressive reshaping of that law. Regrettably, we have concluded that the June 17 Discussion Draft would do just that. We believe that the approach in the Draft is fatally flawed and should be rejected, even if that means a delay in our country's ratification of the POPs Convention.

The problems identified below stand out among the Draft's many faults.

1. The Discussion Draft appears to go out of its way to decouple the international process and the domestic regulatory process. Over the last three years, aggressive unilateralism in U.S. international relations has seriously undermined the reputation of our country abroad. Congress should define implementation of the Stockholm Convention in a manner that helps return the United States to a responsible path of international leadership and cooperation, not in a way that institutionalizes the appearance of U.S. unilateralism.

A. The Discussion Draft contains no requirement that EPA do anything after an international decision to add a POP to the Convention, even when the United States supports the international decision.

- There is no timeline within which EPA must act (or declare its intention not to act).
- There is no requirement(similar to what is already found in TSCA § 5(for EPA to publish a statement of reasons for its inaction.
- There is no citizens petition process(similar to what is already found in TSCA § 21(to challenge EPA to act if it fails to do so.

A Better Approach: Congress should require EPA to decide, within a fixed time after an international listing decision is made, whether it will regulate the POP or not. Because such a duty would be non-discretionary, the citizens' civil actions provisions of TSCA § 20 could apply, providing a safeguard in case EPA failed to act within the prescribed time.

[1] Number of ratifications and accessions as of July 9, 2004. See Stockholm Convention secretariat's website at http://www.pops.int/documents/signature/signstatus.htm.

B. The Draft would require EPA to undergo unnecessary and duplicative analysis in the event it chooses to regulate.

- As a party to the Stockholm Convention, the United States will participate in a thorough scientific investigation of additional POPs before they are added to the Convention.
- Yet the Discussion Draft would all but ignore the results of this international investigation, and would instead require EPA to undertake additional, duplicative, time-consuming assessments before it could issue a rule in response to a new-listing decision.

A Better Approach: Congress should avoid trying to micro-manage the information that EPA may or may not consider when conducting a rulemaking on an additional POP. If EPA's statutory authority is overly complicated, it will likely prove unworkable. Considering the extensive scientific, risk assessment, and socio-economic analyses that are already required under the Convention (and which are there significantly due to U.S. insistence), we believe the implementing legislation should not itemize the criteria that EPA must consider during the rulemaking.

C. The Discussion Draft oversteps by attempting to constrain the President's constitutional power to conduct international negotiations.

- Despite multiple safeguards that ensure U.S. decision-making autonomy, the Discussion Draft would *require* the United States to take the Stockholm Convention "opt in" election, which provides that an additional chemical amendment will only bind the United States if it affirmatively "opts in" to it. Yet it is not within the scope of this Subcommittee's powers to condition the President's international negotiating powers in this way.

A Better Approach: Of the 70 countries that have ratified the Stockholm Convention to date, 64 have chosen the traditional "opt-out" approach to additional POPs listings, while only six have taken the "opt-in" election. We acknowledge that the United States will likely take the opt-in election. But we reject the Discussion Draft's provisions that would purport to make that decision. Language requiring the opt-in should be excluded from the bill, and the decision should be left to the President, contingent on the advice and consent of the Senate.

2. The Discussion Draft would favor short-term corporate interests at the expense of public health and the environment.

A. The proposed regulatory standard for considering additional POPs is not acceptable.

- Under the Discussion Draft, EPA would have complete discretion to decide whether or not it should prohibit or restrict an additional POP. But if it decided to regulate, it could do so only "to the extent necessary to protect human health and the environment in a manner that achieves a reasonable balance of social, environmental, and economic costs and benefits."
- By contrast, under the Stockholm Convention, governments (including the United States) must decide upon additional POPs "in a precautionary manner."[2] Yet the Discussion Draft would prohibit EPA from regulating with anything remotely resembling a precautionary manner. Instead of acting to guard human health, EPA would have to strike a "reasonable balance" between the costs of the regulation to chemical companies, and the benefits of protecting Americans from the world's most dangerous chemicals.
- As recent studies have demonstrated, the strict application of cost-benefit balancing nearly always results in an overvaluation of the costs of regulation and a dramatic under-valuation of the benefits, most of which (e.g., good health, children whose development is not impaired by toxic chemicals, etc.) cannot be realistically or fully valued in monetary terms.[3]
- The main beneficiary of the Discussion Draft's cost benefit standard would be the regulated industry, which would receive a potent litigation tool. The standard would all but ensure that future administrations could never implement Stockholm amendments because EPA's regulatory authority would be too weak.

A Better Approach: Congress should avoid a complex, de novo regulatory standard, and it should wholly reject a cost-benefit standard that may have the effect of making it impossible for the United States to concur with international decisions to address additional POPs. The most sensible standard to use in the legislation would be based upon the Convention, and would require EPA to implement the control measures specified in the Convention in a manner that protects against "significant

[2] Stockholm Convention, art. 8, ¶ 9.

[3] See, e.g., FRANK ACKERMAN AND LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (New York: The New Press, 2004).

adverse human health or environmental effects." If, despite the international decision to list a POP, EPA concluded that the chemical was not likely to lead to significant adverse human health or environmental effects, then EPA could issue a decision not to regulate.

B. In weighing scientific information, EPA would have to apply new, onerous "sound science" requirements that will provide grist for litigation rather than improve the quality of EPA's decision making.

- The environmental and health community believes that high quality, objective scientific research and analysis should provide the foundation for the evaluation and management of POPs and other persistent toxic substances.
- The modern regulatory catch phrase of "sound science" was developed by the tobacco companies as a way to confuse the public, thwart attempts at regulation, and obfuscate the fact that their products are among the most harmful products legally sold. The concept has been described as "an effort to inject . . . politics into the world of science and to use the uncertainty that inevitably surrounds science as an excuse to delay new rules . . ."[4] It has been roundly criticized in a recent letter to the Bush Administration from 18 Nobel laureates, National Medal of Science Recipients, and other leading researchers.[5]
- Under the Discussion Draft, the sound science requirement would help give chemical companies one of big tobacco's most effective anti-health, anti-regulatory tools, while doing little, if anything, to improve the quality of scientific analysis in a POPs rulemaking.

A Better Approach: In briefings on the POPs legislation, EPA has assured us that they already have rigorous, well-established practices for evaluating the quality of scientific information. In light of that, and the likelihood that "sound science" requirements in the Discussion Draft could be used to establish a politically motivated "scientific certainty" test in a POPs rulemaking, we urge Congress to omit references to sound science or the quality of scientific information from this legislation.

C. While the Discussion Draft would make it very difficult or impossible for EPA to implement a Stockholm Convention new listing decision, the Draft would simultaneously establish a regulatory ceiling by prohibiting EPA from regulating more strictly than minimum Convention standards.

- Even if EPA decided to regulate an additional POP, the Discussion Draft would prohibit it from regulating any production or use of the substance if an exemption were available under the Convention. The idea of these exemptions is that developing countries that need flexibility can phase out a prohibited chemical over time. For our law to *require* us to take these exemptions would represent a perverse abdication of U.S. leadership in international chemicals management.

A Better Approach: Language that would have the effect of requiring the United States to take an exemption should not be included in the legislation. Instead, there should be a clear statement that "nothing in this title shall be construed to require the United States to register for any specific exemption or acceptable purpose available to the United States under Annex A or B to the POPs Convention."

IV. BUSH ADMINISTRATION ARGUMENTS AGAINST IMPLEMENTATION OF THE POPS CONVENTION

During the course of our environmental and health groups' work on POPs implementing legislation, the Bush Administration has repeatedly raised objections, based on constitutional grounds, to some of the options that have been proposed. These include objections based on the separation of powers doctrine and on a putative "international non-delegation doctrine." I would like to respond to these assertions, for the record, so that Congress will not be misled on this matter now or in subsequent development of the POPs legislation.

1. The separation of powers argument. In a letter dated March 25, 2004 from William Moschella, Assistant Attorney General, to Senator Tom Harkin, the Department of Justice claimed that mandatory notice and comment provisions tied to the international listing process of the Stockholm Convention would unconstitutionally infringe upon the President's treaty making powers. Independent analyses of that letter by the Congressional Research Service and by my organization, CIEL, dem-

[4] Rick Weiss, "Peer Review Plan Draws Criticism: Under Bush Proposal, OMB Would Evaluate Science Before New Rules Take Effect," Wash. Post, Jan. 15, 2004, at A19.

[5] See "Preeminent Scientists Protest Bush Administration's Misuse of Science: Nobel Laureates, National Medal of Science Recipients, and Other Leading Researchers Call for End to Scientific Abuses," available at http://www.ucsusa.org/news/press—release.cfm?newsID=381.

onstrated that the Administration's legal theory had no foundation in U.S. law and was without merit. [Please see attached CIEL Memorandum dated April 5, 2004.]

We note now that the Majority's June 17 Discussion Draft contains *mandatory* notice and comment provisions, despite DOJ's opinion.[6] Thus, we conclude either that the Bush Administration has withdrawn this objection, or the Subcommittee Majority does not accept it. While there are numerous aspects of the Discussion Draft's notice and comment provisions to which we strongly object, we support the fact that most of those provisions would be mandatory, not discretionary.

2. The nondelegation doctrine applied to international relations. Early in the discussions between industry representatives, environmental and health NGOs, and Senate Environment and Public Works Committee staff regarding the Senate POPs amendments, we learned that the Bush Administration objected to the notion that Congress could require EPA to regulate a newly-listed POP on the grounds that such a requirement would impermissibly delegate lawmaking powers to international bodies and thus violate an "international nondelegation doctrine." President Bush referred to such a doctrine in his signing statement for the Clean Diamonds Trade Act, H.R. 1584, Pub. L. No. 108-19 (2003), when he said, "If section 15 [of the Act] imposed a mandatory duty on the President to certify to the Congress whether either of the two specified events has occurred and whether either remains in effect, *a serious question would exist as to whether section 15 unconstitutionally delegated legislative power to international bodies.*" (emphasis added).[7]

This theory is premised on the assumption that when Congress delegates responsibilities to the Executive Branch and makes the exercise of those responsibilities contingent on the occurrence of an international event, then Congress has unconstitutionally given lawmaking powers to whatever international institution is responsible for the event. But the theory is fatally flawed because it confuses who is exercising legislative power when the United States implements treaties in this fashion. While decisions by the international body may trigger the Executive Branch's responsibility to implement the law, that is so only because Congress decided that the law would be contingent on such a decision. Congress alone has established what the law will be, and it has delegated the responsibility to implement the law to the Executive Branch. The international body has no role in either of these functions.

U.S. courts have long held that such contingent delegations by Congress are constitutionally acceptable, so long as Congress provides an "intelligible principle" that "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."[8]

We are aware of no instance in which a U.S. court has overturned any U.S. law on the basis of an international nondelegation doctrine. In fact, the U.S. Code contains numerous examples in which Congress requires the Executive Branch to act in response to the decision or action of an international body. These include, inter alia:

- Clean Air Act, 42 U.S.C. § 7671e, implementing the Montreal Protocol on Substances that Deplete the Ozone Layer (providing that in the event "the Montreal Protocol is modified to . . . control or reduce . . . any substance more rapidly [than otherwise provided by law]," the Administrator shall promulgate regulations to establish a more stringent phase-out schedule).
- Tariff Act, 19 U.S.C. § 1516(a)(g)(4)(A), implementing Chapter 19 of the North American Free Trade Agreement (NAFTA) (providing that when a Chapter 19 arbitration panel decides to refer a challenged matter on anti-dumping or countervailing duties back to the International Trade Commission, the ITC is bound by statute to "take action not inconsistent with the decision" of the panel).
- Chemical Weapons Convention Implementation Act, 22 U.S.C. § 6725, implementing the Chemical Weapons Convention (requiring the United States Government (through the State Department acting as the U.S. National Authority) to seek the issuance of a search warrant in response to a demand from the Organization for the Prohibition of Chemical Weapons (OPCW) to engage in a challenge inspection of a public or private facility).

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[6] See, e.g., June 17 Discussion Draft at page 9, line 16 (stating "Not later than 60 days after a decision [by the POPs Review Committee] is made . . . the Administrator *shall* . . . publish in the Federal Register a notice of the decision . . . (emphasis added)).

[7] President's Statement on Signing the Clean Diamond Trade Act, 39 WEEKLY COMP. PRES. DOC. 491 (April 25, 2003).

[8] *Yakus v. United States,* 321 U.S. 414, 425 (1944); see also *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928) (applying "intelligible principle" test to sustain contingent delegation under the Tariff Act of 1922), CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 85-86 (Johnny H. Killian & George A. Costello eds., 1996) (discussing constitutional basis of contingent delegations).

- Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 811(d), implementing the Convention on Psychotropic Substances (providing that whenever the Secretary of State receives notification from the World Health Organization that a listing schedule will change, Secretary of Health, Education, and Welfare (now Health and Human Services) must publish the notice in the Federal Register, invite comment, and prepare medical and scientific evaluations).
- Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 346a(b)(4) (providing that the Administrator, in establishing a tolerance for a pesticide chemical residue in or on a food, shall determine whether a maximum residue level for the pesticide chemical has been established by the Codex Alimentarius Commission; if a Codex maximum residue level has been established for the pesticide chemical and the Administrator does not propose to adopt the Codex level, the Administrator shall publish for public comment a notice explaining the reasons for departing from the Codex level).

Based on our evaluation of relevant case law and the U.S. Code, we conclude that nothing in the domestic laws of the United States prevents the United States Congress from using treaty text as a basis for explaining to an administrative agency what Congress's policies and goals are, from requiring administrative agencies to implement international standards in a U.S. regulatory context, or from using a treaty obligation as the basis for a domestic regulation.

The Majority's Discussion Draft would give EPA *discretionary* (and exceedingly limited) authority to regulate a POP in response to a listing decision by the Stockholm Convention. Hence, the Draft does not raise the question of an "international delegation." However, as I stated earlier, we believe that implementing legislation should contain a *mandatory* duty for EPA to decide, within a specific time after a Stockholm listing decision, whether to take action or not. Because we anticipate that our proposal may raise objections from the Bush Administration based on its international non-delegation theory, I have included this section of my remarks to demonstrate that such objections would be without merit as a matter of law.

V. CONCLUSION

In closing, I would like to reiterate the environmental and health community's enthusiastic support for the Stockholm POPs Convention, and our hope that the United States will soon be a party to it. Yet our organizations are also devoted to preserving and improving the integrity of U.S. environmental and health law, and we do not wish to see U.S. ratification of this groundbreaking treaty serve as a means to introduce a radical, regressive reshaping of that law. We believe the approach taken in the June 17 Discussion Draft would do just that, and we respectfully call on this Subcommittee to reject it in favor of an approach that will faithfully reflect the spirit and letter of the Convention.

Mr. GILLMOR. Thank you.

Scott Slesinger, Vice President Government Affairs Environmental Technology Council.

STATEMENT OF SCOTT SLESINGER

Mr. SLESINGER. Thank you, Mr. Chairman, Congresswoman Solis.

Our council represents the environmental service companies that dispose, destroy and recycle hazardous waste.

The draft bill before the committee implements a treaty for all but one of the chemicals listed in Annex A, PCBs. We ask the committee to amend the draft bill to follow the treaty language and intent and allow imports of PCBs for safe destruction as it allows for the other POPs chemicals. Allowing such PCB destruction will improve the environment in North American and elsewhere, help American business and assist developing countries to destroy their dangerous U.S. made PCBs.

There are two ways that PCBs enter the United States. Today they enter through air deposition generally from the tropics. PCBs are semi-volatile that makes them rise into the atmosphere in the warm air and drop down in cooler clims. That is why despite a 28

year PCB ban in Canada and the U.S., the Great Lakes continue to increases their PCB load. EPA reports that up to 89 percent of the current PCB loadings for Lake Superior occurs through air deposition, most of it from thousands of miles away.

The other way they could enter the U.S. is by shipment for proper disposal.

Any waste: nuclear, biological or chemical can be imported into the United States for proper disposal except for PCBs. Section 60 of the TSCA requires a full rulemaking before PCBs can be imported for manufacture or use. In 1996 the Clinton Administration issued a final rule to allow PCBs into the U.S. for proper disposal without going through this burdensome process. EPA found that the safe disposal of PCBs in approved U.S. facilities poses less risk of injury to health or the environment in the U.S. than their continued presence of these PCBs in other countries. However, the Ninth Circuit vacated the rule when it interpreted the term in the statute "manufacture" to include import for disposal.

Therefore, before PCBs can be brought into the country for use or disposal requires a full rulemaking. Such a process takes at least 3 years, even if it could get on EPA's regulatory agenda. The volume of PCBs that could enter the country and any possible profit would be overshadowed by the costs and risks of going through this administrative procedure. No company has ever been approved for importing PCBs, although the Department of Defense was allowed to bring in PCBs for disposal in January 2003. The current regulatory process is clearly an insurmountable trade barrier.

The U.S. has permitted facilities under TSCA to destroy or dispose of PCBs consistent with the world standard required by the treaty. The PCBs are under 12,000 parts per million, they are chemically changed so they are no longer toxic. In a higher concentration, EPA requires incineration that is 99.99999 percent effective, and those standards were just accepted in the conference for the parties to the POPs treaty.

Those that suggest that we could export our technology ignore several facts. First, most countries, such as Mexico, do not have the volume of PCBs to justify the very expensive investment required to properly destroy PCBs. If a developing country tried to build such a facility, local critics and NGO's would be frightened that such facility would lead to that country being a dumping ground for first world waste. Approval for such facility is all but impossible.

Mobile technologies can handle only small volumes, but are also similarly difficult to site.

Mr. Chairman, most of the PCBs in the world are manufactured in the United States, put it products and exported. Now we consider these PCBs foreign and banned in importation. Not exactly an example of product stewardship.

Under the current system our exported PCBs on developing countries, particularly in Latin America with no realistic hope of proper disposal unless these PCBs are shipped back to our country. As the treaty states, these chemicals are persistent and organic. Putting chemicals and annex and banning their manufacturer or use does not stop the environmental threat. These chemicals in-

cluding PCBs must be irreversibly changed or destroyed or they will continue to adversely effect public health and the environment.

Mr. Chairman, PCBs are coming to the United States. They will poison our food supply in the Great Lakes with air deposition unless the PCB waste can be brought back into the United States for proper destruction or disposal. The decision is in Congress' hands.

Thank you. And I look forward to answering any questions you may have.

[The prepared statement of Scott Slesinger follows:]

PREPARED STATEMENT OF SCOTT SLESINGER, VICE PRESIDENT FOR GOVERNMENTAL AFFAIRS, THE ENVIRONMENTAL TECHNOLOGY COUNCIL

My name is Scott Slesinger. I am Vice-President for Governmental Affairs of the Environmental Technology Council. Our council represents environmental service companies that dispose, destroy and recycle hazardous waste. The legislation before the Committee implements the Stockholm Persistent Organic Pollutant Treaty for 12 of the 13 chemicals listed in Annex A of the Treaty. The implementing language does not implement all the requirements of the treaty concerning one of the listed chemicals, PCBs. We ask the Committee to implement the entire treaty for all the Annex A chemicals. Such a change in the legislation will improve the environment, help American business and assist developing countries destroy their dangerous U.S.-made PCB wastes.

Our trade association represents several companies that have Toxic Substances Control Act (TSCA) permits for destruction and disposal of PCBs. Many of our companies hold Resource Conservation and Recovery Act (RCRA) permits for proper destruction and disposal of the other POPs Annex A chemicals.

SUMMARY

There are two ways that PCBs enter the United States. The first way, the way they enter the United States today, is through air deposition, generally from the tropics. PCBs are semi volatile that makes them rise into the atmosphere in the temperate zone and drop down in cooler climes. That is why despite a 28-year PCB ban in Canada and the United States, the Great Lakes continue to increase their PCB loads. EPA reports that up to 89% of the current PCB loading for Lake Superior occurs through air deposition, much of it from sources thousands of miles away. The second and preferable way PCBs should enter the United States is shipped on a regulated common carrier for disposal and destruction consistent with the world-class standards in the treaty and federal law. Congress has an opportunity to support the status quo or modify TSCA to allow U.S exported PCBs back into the United States for proper disposal consistent with the language and intent of the Stockholm agreement.

We ask you to support the latter alternative.

THE INTENT OF THE TREATY

The treaty is concerned with the environmental threat of organic persistent organic pollutants. As the Treaty notes, ending the manufacturing and use of these chemicals does not solve the problem. The chemicals must be chemically or molecularly changed so they no longer have the dangerous characteristics, particularly of persistence and toxicity. Because the technology to properly dispose and destroy is expensive, complex and dangerous in unskilled hands, few countries have the volume of these chemicals to justify the costs to construct facilities to meet the Treaty's standards for proper disposal. In recognition of this, the treaty bans imports and exports except for proper disposal.

DOMESTIC LAW

Any waste, nuclear, biological or chemical, can be imported into the United States for proper disposal except for PCBs. Section 6(e) of TSCA, requires a full rulemaking on a per shipment basis before PCBs can be manufactured or used in the United States. In 1996, EPA Administrator Carol Browner issued a final rule to allow PCBs into the United States for disposal without going through this rulemaking process. The preamble to that rule stated:

> ...EPA believes that the safe disposal of PCBs in approved U.S. facilities poses less risk of injury to health or the environment in the United States than the continued presence of PCBs in other countries, since proper disposal in this

country provides protection against possible hazards from improper disposal elsewhere." 61 Federal Register 11099 (March 18, 1996)

However, the Ninth Circuit vacated the rule when it interpreted the term in the statute "manufacture" to include "import for disposal." Private entities have tried unsuccessfully to import PCBs for disposal but have found the legal costs of going through a multi-year rulemaking process far outweighs the financial revenue such import would justify.[1]

WHERE DO PCBS COME FROM?

Ironically, most the PCBs that are banned for importation for disposal were manufactured in the United States. The vast majority of PCBs in the world, 700,000 tons, were manufactured in the United States between 1927 and 197.[2] Before the risks of PCBs were known, American companies exported equipment that used PCBs as an insulator. Despite PCBs' special legislative treatment, they are not the most dangerous chemical in the world. In fact, EPA lists PCBs as only a "suspected carcinogen" rather than a carcinogen, although it is one of the most studied toxic chemicals in the world. Because of § 6(e) of TSCA, those American-made PCBs, even those owned by American companies, are now considered "foreign" and cannot be imported back into the United States for destruction. Imagine if the French manufactured a product that was shipped to the United States, later found out to be toxic, and then France banned its export back into France.

PROPER TREATMENT AND DISPOSAL

The United States, through both TSCA and the Resource Conservation and Recovery Act (RCRA) have world class standards for PCB disposal and destruction that meets the Treaty's requirements for proper disposal. Chemical dechlorination is an effective non-thermal technology for PCBs at lower concentrations. Chemical dechlorination separates the chlorine molecule from the PCBs to form salts. This chemical treatment is 100% effective in destroying PCBs that are in concentrations below 12,000 parts per million but it is not appropriate at higher concentrations. Most of the PCBs, including all 1,500 tons that are now being imported by the Department of Defense are in concentrations of less that 12,000 parts per million. Incineration is the necessary treatment with higher concentrations. Under TSCA, incinerators are required to have an efficiency of PCB destruction of 99.9999%. Liquid PCBs at any level or banned from land disposal, although solid PCBs in soils may be disposed in some RCRA Subtitle C landfills that also have TSCA permits. These are consistent with world-class requirements in Article 6 of the Treaty.

Those who oppose the importation of PCBs argue that dioxin emissions will increase from hazardous waste incinerators. Under the Clean Air Act, incinerators that burn PCBs must meet the most protective emission standards of any industrial source in the U.S. that include specific technologies to control dioxin. As the EPA data in Appendix A shows, hazardous waste combustors are a very minor emitter of dioxin compared to wood burning stoves, municipal incinerators and most sources of dioxin in the United States. Because of more recent air pollution standards, newer data would drop hazardous waste incinerators even lower on the list.

Critics of our position believe that exporting technology is the answer to destruction of foreign-based PCBs. However, such exports are a chimera. Those who suggest that we could export our technology ignore several facts. First most developing countries do not have the volume to justify the costs of the technology. If a developing country tried to build such facilities, local critics and NGOs would be frightened that such facility would lead to the country being a dumping ground for first world waste. Hence, any attempt to export technologies to destroy U.S.-made PCBs is seen in that light. Clearly, exporting such technology is not politically practical.

In addition, we must remember that the technology to properly dispose of these chemicals is highly capital intensive. EPA noted in court documents that "Mexico does not have disposal facilities for PCBs and based on the volume in the country,

[1] In 28 years, EPA has approved only one 6(e) exemption. That was in January of last year for the only entity with the resources and volume of PCBs to justify going through the process—The Department of Defense. No environmental group or individual commented against the proposal. 68 Federal Register 4934 (January 31, 2003) In 2003, EPA allowed the Maritime Administration to export PCBs in ships being disposed overseas by writing an "enforcement discretion letter" saying it would not prosecute MARAD under Section 6(e) if it exported the ships. Sierra Club won a temporary restraining order against the export of most of the ships. Our companies have the expertise and facilities to handle this ships domestically.

[2] "Status of PCB Management in the United States, Ross and Associates, Prepared for the Commission for Environmental Cooperation, Montreal, Canada, August 24, 1995. The volume eventually exported is estimated by Ross to be 75,000 tons

there is no economic justification to build a facility to properly handle the PCBs in the country." (Letter to EPA from the National Institute of Ecology cited in Brief of Respondent Sierra Club v. Environmental Protection Agency (9th Circuit) July 17, 1996 at page 5.) And Mexico has more PCBs than any Latin American country.

As President Bush stated at the Treaty signing:

> "...This treaty takes into account understandable concerns of less-developed nations. When these chemicals are used, they pose a health and environmental threat, no matter where in the world they are allowed to spread. But some nations with fewer resources have a harder time addressing these threats, and this treaty promises to lend them a hand."

If we do not allow imports for proper disposal, unused equipment, contaminated with PCBs will continue to be improperly disposed or stored indefinitely until they leak and enter the environment. These conditions pose a continuing threat to health and the environment in those countries and in the United States.

WHAT DOES THE TREATY REQUIRE?

Article 3 Section 2.(a) states "Each Party shall take measures to ensure that a chemical listed in Annex A is imported only for the purpose of environmentally sound disposal as set forth in paragraph 1(d) of Article 6

Some argue that a three-year rulemaking process before allowing a shipment of PCBs into the United States is consistent with the Treaty. We believe such a trade barrier is not only inconsistent with this treaty but with virtually all our trading agreements such as NAFTA. As I noted, most countries do not have the volumes of PCBs to justify the sophisticated technology to properly dispose or destroy their domestic supplies of PCBs. Keeping the present regulatory barrier at the border is clearly contrary to the Treaty's preamble to "protect human health and the environment through measures which will reduce and/or eliminate emissions and discharges of persistent organic pollutants."

Mr. Chairman, PCBs are coming to the United States. They will poison our land and Great Lakes through air deposition unless the PCB waste can be brought back to the U.S. for proper destruction or disposal. The decision is in your hands.

Thank you and I look forward to answering any questions you may have.

Appendix A

Inventory of Sources of Dixoin-Like Compounds in the United States-1987 and 1995

Source	1987 Emissions(g TEQdf-WHO98/yr)	1995 Emissions(g TEQdf-WHO98/yr)	Percent Reduction 1987-1995
Municipal Solid Waste Incineration, air	8877	1250	86%
Backyard Refuse Barrel Burning, air	604	628	-4%
Medical Waste Incineration, air	2590	488	81%
Secondary Copper Smelting, air	983	271	72%
Cement Kilns (hazardous waste burning), air	117.8	156.1	-33%
Sewage Sludge/land applied, land	76.6	76.6	0%
Residential Wood Burning, air	89.6	62.8	30%
Coal-fired Utilities, air	50.8	60.1	-18%
Diesel Trucks, air	27.8	35.5	-28%
Secondary Aluminum Smelting, air	16.3	29.1	-79%
2,4-D, land	33.4	28.9	13%
Iron Ore Sintering, air	32.7	28	14%
Industrial Wood Burning, air	26.4	27.6	-5%
Bleached Pulp and Paper Mills, water	356	19.5	95%
Cement Kilns (non-hazardous waste burning)	13.7	17.8	-30%
Sewage Sludge Incineration, air	6.1	14.8	-143%
EDC/Vinyl chloride, air	NA	11.2	NA
Oil-fired Utilities, air	17.8	10.7	40%
Crematoria, air	5.5	9.1	-65%
Unleaded Gasoline, air	3.6	5.6	-56%
Hazardous Waste Incineration, air	5	5.8	-16%
Lightweight ag kilns, haz waste, air	2.4	3.3	-38%
Commercially Marketed Sewage Sludge, land	2.6	2.6	0%
Kraft Black Liquor Boilers, air	2	2.3	-15%
Petrol Refine Catalyst Reg., air	2.24	2.21	1%
Leaded Gasoline, air	37.5	2	95%
Secondary Lead Smelting, air	1.29	1.72	-33%

Appendix A—Continued

Inventory of Sources of Dixoin-Like Compounds in the United States-1987 and 1995

Source	1987 Emissions(g TEQdf-WHO98/yr)	1995 Emissions(g TEQdf-WHO98/yr)	Percent Reduction 1987-1995
Paper Mill Sludge, land	14.1	1.4	90%
Cigarette Smoke, air	1	0.8	20%
EDC/Vinyl chloride, land	NA	0.73	NA
Primary Copper, air	0.5	0.5	0%
EDC/Vinyl chloride, water	NA	0.43	NA
Boiler/industrial furnaces	0.78	0.39	50%
Tire Combustion, air	0.11	0.11	0%
Drum Reclamation, air	0.1	0.1	0%
Carbon Reactivation Furnace, air	0.08	0.06	25%
TOTALS	**13,998**	**3,255**	**77%**
Percent Reduction from 1987 to 1995			77%

NA=Not Available; (+)=reduction from 1987 to 1995; (-)=increase from 1987 to 1995; (0)=no change from 1987 to 1995.
Citation for Chart. Inventory of Sources of Dioxin-Like Compounds in the United States. Version 3.0 for the Reference Year 1987 and 1995 National Center for Environmental Assessment, EPA. http://cfpub.epa.gov/ncea/cfm/dioxindb.cfm?actType+default

Mr. GILLMOR. Thank you very much.

And we will go to Jim Roewer, Executive Director of the Utility Solid Wastes Activities Group. And I hope I pronounced that right.

STATEMENT OF JAMES R. ROEWER

Mr. ROEWER. Thank you, Mr. Chairman, Ms. Solis. I am pleased to present this statement on behalf of the Edison Electric Institute or EEI and the Utility Solid Wastes Activities Group or USWA regarding implementation of the Stockholm POPs Convention.

The utility industry has a substantial interest in the development of POPs legislation because, among other reasons, polychlorinated biphenyls or PCBs are one of the 12 POPs identified in the convention. As this subcommittee is aware, and other previous speakers have noted, PCBs are singled out for comprehensive regulation under section 6(e) of the Toxic Substance Control Act and authorized for limited use in specified equipment such as transforms and capacitors in accordance with exacting requirements insuring that their use will not pose an unreasonable risk of injury to health or the environment. The United States PCB regulatory program, which has been in place for over a quarter of a century, is among the most comprehensive and effective in the world and is the product of considerable regulatory scrutiny. In fact, our PCB problem is the standard against which the PCB programs of other countries are measured.

With that being said, we share the view of others in this room that it is important for the United States to continue to play a leading role regarding the implementation and future strategic decisions involving the convention. We must be careful, however, that the final implementing legislation incorporates the proper statutory framework for the United States to meet its convention obligations. The Stockholm Convention is a commitment between nations to take certain actions and does not, in and of itself, directly regulate individuals within those nations. Therefore, a key goal is ensuring that the legislation not supersede U.S. law already regulating POPs or cede decisionmaking authority to an international body. Rather the purpose of the implementing legislation should be allow

Congress to exercise its authority to establish how the United States through existing domestic laws will meet its convention obligations. This will ensure that decisions regarding how the United States implements its convention obligations remain within the sovereign jurisdiction of the United States.

The committee's discussion draft does this. The model for POPs legislation should involve nothing more than identifying the United States commitments under the convention and then determining whether existing U.S. laws allow the United States to meet those commitments. To the extent there are any gaps, implementing legislation should fill those gaps through targeted amendments to TSCA and/or FIFRA. This is also the appropriate framework to use in evaluating whether and how to regulate new POPs chemicals that could be added to the convention in the future.

This framework is fully consistent with the messages of both President Bush in his letter transmitting the POPs to the Senate for ratification and of Secretary of State Powell in his letter transmitting the convention to the President. The President's transmittal letter observes that the convention obligates parties to take significant steps similar to those already taken by the United States to address POPs. Implicit in this message is the fact that the United States is one of the world's leaders in regulating POPs, and that a key fundamental purpose of the convention is for other countries to upgrade their POPs regulations to the level already achieved by the United States.

Of particular relevance to this hearing is the Secretary's comprehensive analysis of the convention obligations and how existing U.S. laws match up to those obligations. This analysis is a road map for how the United States should develop implementing legislation to meet its convention obligations with respect to the 12 POPs chemicals including PCBs.

The Secretary concluded that the United States could implement nearly all convention obligations under existing authorities. And with regard to PCBs, noted explicitly that the United States has already taken strict measures to regulate PCBs and that existing statutory authority allows the United States to implement its convention obligations under existing PCB regulations. The only exception where the Secretary notes that additional regulation with respect to PCBs may be necessary concerns meeting the convention's prohibition on PCB exports. Thus, neither the President nor the Secretary of State contemplated whole changes to the existing laws regulating POPs in this country. Rather, they envisioned a deliberate and thoughtful analysis regarding whether existing U.S. laws will allow the United States to meet its convention obligations and to the extent such laws are deficient, enacting targeted legislative amendments to fill such gaps.

The draft appropriately directs that for purposes of complying with the POPs convention, EPA may issue or amend rules applicable to PCBs if the Administrator of the EPA concludes through notice and comment rulemaking and with the concurrence of the Secretary of States that such additional rules or amendments are necessary to comply with the convention. This approach leaves open the means for EPA to shore up such gaps if and when any are identified, while preserving the integrity and stability of existing U.S.

law. This is an imminently reasonable and thoughtful framework for implementing the United States convention obligations.

I would like to thank the subcommittee for this opportunity to present our views of implementing the Stockholm Convention. We are looking forward to working with you the subcommittee staff on POPs legislation. And I would be happy to answer any questions that you may have.

[The prepared statement of James R. Roewer follows:]

PREPARED STATEMENT OF JAMES R. ROEWER FOR THE UTILITY SOLID WASTE ACTIVITIES GROUP AND EDISON ELECTRIC INSTITUTE

Good afternoon. My name is James R. Roewer. I am the Executive Director of the Utility Solid Waste Activities Group (or "USWAG") and I am pleased to present this statement on behalf of the Edison Electric Institute ("EEI") and USWAG regarding the important issue of the development of draft legislation to implement the United States' obligations as a party to the Stockholm POPs Convention, LRTAP POPs Protocol, and Rotterdam PIC Convention (which I refer to collectively as the "Stockholm" or "POPs" Convention).

EEI is an association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide. EEI's U.S. members serve roughly 90 percent of the ultimate customers in the shareholder-owned segment of the industry, nearly 70 percent of all electric utility ultimate customers in the nation, and generate nearly 70 percent of the electricity produced in the United States.

USWAG is a consortium of EEI, the American Public Power Association ("APPA"), the National Rural Electric Cooperative Association ("NRECA"), the American Gas Association ("AGA"), and approximately 80 electric utility operating companies located throughout the country. APPA is the national association of publicly-owned electric utilities. NRECA is the national association of rural electric cooperatives, many of which are small businesses. AGA is the national association of natural gas utilities. Together, USWAG members represent more than 85 percent of the total electric generating capacity of the United States and service more than 95 percent of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

The utility industry has a substantial interest in the development of the POPs implementing legislation because, among other reasons, polychlorinated biphenyls or PCBs are one of the twelve POPs identified in the Convention. As this Subcommittee is aware, PCBs are singled out for comprehensive regulation under section 6(e) of the Toxic Substances Control Act ("TSCA") and are authorized for limited use in specified equipment, such as transformers and capacitors, in accordance with exacting requirements ensuring that their use will not pose an unreasonable risk of injury to health or the environment. The United States' PCB regulatory program, which has been in place for over a quarter of a century, is among the most comprehensive and effective in the world and is the product of considerable regulatory scrutiny and development. I feel confident in saying that our PCB program is the standard against which the PCB programs of other countries are measured.

With that being said, let me commend the Subcommittee for holding this hearing. EEI and USWAG recognize and support the leading role that the United States has played in helping to forge the Stockholm Convention, and we share the view of others in this room that it is extremely important for the United States to continue to play a leading role regarding the implementation and future strategic decisions involving the Convention. For that to happen, it is essential for the United States to both ratify the Convention and enact implementing legislation.

At the same time, we must be careful that the final implementing legislation incorporates the proper statutory framework under which the United States can assess and meet its Convention obligations. As we all know, Treaties are commitments between nations to take certain actions and do not, in and of themselves, directly regulate individuals within those nations. Therefore, we believe a key goal to keep in mind during this process is ensuring that the legislation not supercede U.S. law already regulating POP chemicals or cede to one of the many international committees established under the Convention direct decision-making authority regarding the domestic regulation of POP chemicals. Rather, the purpose of the implementing legislation should be to allow Congress to exercise *its* authority to establish how the United States, *through our existing domestic laws,* will meet the international obligations of the United States as a Party to the Convention. This will ensure that decisions regarding how the United States implements its Convention obligations re-

main with the sovereign jurisdiction of the United States and are determined by the Congress and the Executive Branch.

With these objectives in mind, we are concerned that the POPs legislation pending in the Senate—S. 1486—could be construed as replacing U.S. law with the text of the POPs Convention and result in the decisions of international bodies with respect to the regulation of POP chemicals being directly binding on U.S. entities. We do not think this would be in keeping with the structure or purpose of the Convention or the intent of the United States in becoming a party to the Convention.

It is for that reason that we believe that the Committee's Discussion Draft of June 17, 2004, establishes the appropriate statutory framework for implementing the United States' Convention obligations. In fact, we respectfully suggest that the model for developing implementing legislation for the POP chemicals should involve nothing more than a relatively straightforward two-step process. The first step involves identifying the United States' commitments under the Convention and then determining whether existing U.S. laws applicable to POPs chemicals allow for the United States to meet those commitments. To the extent that there are any "gaps" in existing U.S. laws, the implementing legislation should fill those gaps through targeted and focused amendments to TSCA and/or FIFRA. This approach would enable the United States to fulfill its Convention obligations with respect to the twelve POPs currently subject to the Convention while, at the same time, preserving the sovereign role of the United States in enacting domestic laws applicable to its citizens. We also believe this is the appropriate framework to use in evaluating whether and how to regulate new POP chemicals added to the Convention in the future.

This "framework" should not come as a surprise to anyone, as it is fully consistent with the messages of both President Bush in his letter transmitting the POPs Convention to the Senate for ratification, and of Secretary of State Powell in his letter transmitting the Convention to the President. *See Message from the President of the United States Transmitting Stockholm Convention on Persistent Organic Pollutants, With Annexes, Done at Stockholm, May 22-23, 2001,* Treaty Doc. 107-5, 107th Congress, 2d Session (Attached). In fact, the President's transmittal letter observes that the Convention obligates parties to the Convention to take "significant steps, *similar to those already taken by the United States*," to address POPs. Id. at III (emphasis added). Implicit in the President's message is the fact that the United States is one of the world's leaders in regulating POP chemicals and that a key fundamental purpose of the Convention is for other participating countries to "upgrade" their POP regulations to the level already achieved by the United States.

The Secretary of State's transmittal letter also observes that the Convention will commit *other* countries to take actions similar to those *already taken* by the United States to eliminate or restrict the production, use and release of POP chemicals. *Id.* at V. Of particular relevance to this hearing, however, is the Secretary's comprehensive section-by-section analysis of the obligations set forth in the Convention and how existing U.S. laws regulating POP chemicals match up to those obligations. *Id.* at VI-XXII. I respectfully suggest that the Secretary's analysis is a road map for how the United States should develop implementing legislation to meet its Convention obligations with respect to the 12 POP chemicals, including PCBs.

Given that the United States already is one of the world's leaders in this area, it is not remarkable that the Secretary concludes that "the United States *could implement nearly all Convention obligations under existing [U.S.] authorities*" with the exception of certain gaps that can be addressed by targeted legislative amendments to TSCA and FIFRA. *Id*. at XXII (emphasis added). Of special relevance to USWAG and EEI is the Secretary's findings with respect to the Convention's obligations regarding PCBs, where he concludes that "[t]he United States has already taken strict measures to regulate PCBs" and that "[e]xisting statutory authority allows the United States to implement each of these obligations [applicable to PCBs], nearly all of which are currently addressed under existing PCB regulations." *Id.* at XX. The only exception where the Secretary notes that additional regulation with respect to PCB may be necessary concerns meeting the Convention's prohibition on PCB exports.

Thus, neither the President nor the Secretary of State contemplated whole changes to the existing laws regulating POP chemicals in this country. Rather, they envisioned a deliberate and thoughtful analysis regarding whether existing U.S. laws allow the United States to meet its Convention obligations and, to the extent that such laws are deficient in any particular area, implementing legislation consisting of targeted amendments to fill such gaps.

Again, in our view, this is the approach reflected in the House Discussion Draft of June 17, 2004, and is reflected in the Draft's treatment of PCBs. For those subject areas where the drafters identified statutory gaps in existing law that did not provide EPA with adequate statutory authority to fulfill a Convention commitment

with respect to PCBs—such as authority under TSCA to prohibit PCB exports—the Draft legislation specifically fills that gap. *See* Section 3 of the Discussion Draft amending TSCA Section 6(e) to prohibit PCB exports except for environmentally sound disposal (pp. 40-41 of Draft). The Draft also fills a perceived statutory gap with respect to PCBs by amending TSCA to require PCB variances to conform to the variance provisions in the Convention. *Id.*

With respect to all other aspects of the U.S. PCB regulatory program, the Draft appropriately assumes, consistent with Secretary of State's findings, that there are no other identifiable shortfalls between what the POPs Convention contemplates with respect to PCBs and what already is provided for under existing U.S. law. The Draft, therefore, appropriately directs that, *for purposes of complying with the POPs Convention,* EPA may only issue or amend rules applicable to PCBs *if* the Administrator of EPA concludes, through notice and comment rulemaking and with the concurrence of the Secretary of State, that such additional rules or amendments are necessary to comply with the Convention. This approach leaves open the means for EPA to shore up such gaps if and when any are identified, while preserving the integrity and stability of existing U.S. law. This is an eminently reasonable and thoughtful framework for implementing the United States' Convention obligations.

As a final note on this subject, I would like to point out that, contrary to certain reports in the trade press, the House Draft does not in any way preclude EPA from imposing additional regulatory controls on PCBs under TSCA section 6(e) or any other applicable federal law for any reasons unrelated to the POPs Convention. The conditions set forth in the House Draft for issuing or amending rules applicable to PCBs are applicable *only* in the context of EPA taking action for purposes of complying with the POPs Convention. This is a narrow and discrete provision and in no way alters EPA's existing authority under TSCA section 6(e) to regulate PCBs.

I would like to thank the Subcommittee for the opportunity to present the views of EEI and USWAG on draft legislation for implementing the Stockholm Convention. I would be glad to answer any questions you have concerning my testimony.

Mr. GILLMOR. Thank you, Mr. Roewer.

We will now go to a round of questions. Let me begin with Mr. Walls. Talking about the opt-in procedure that is part of Article 25 section 4 of the POPs convention. Why was this feature an important safeguard for the treaty? And according to your testimony, a major objective of U.S. negotiators?

Mr. WALLS. Well, Mr. Chairman, I would be happy to answer that question from the perspective of the chemical industry. Mr. Yeager may have a perspective based on his role as the former negotiator.

Mr. GILLMOR. Yes.

Mr. WALLS. But in our view Article 25(4) confirms the need or recognizes the opportunity for countries to make an independent judgment about domestic implementation of the decisions taken at the international level.

Mr. GILLMOR. Mr. Yeager, you were negotiating basically for the Clinton Administration. Would you agree with that assessment that that feature was a major objective of U.S. negotiators?

Mr. YEAGER. It was certainly an objective to make sure that the United States retained the right in the case of any new addition to seek the advice and consent of Congress or to approve through an executive mechanism the addition.

I just would point out that there are actually two ways to do that in the convention. One is to recognizing the right of any country to opt-out of a newly added chemical. But the second was introduced, actually, at the U.S. request which was a process from the decertification which allowed any country to declare that it would opt-out unless it opted-in to a new chemical, essentially.

Mr. GILLMOR. Run that one by me again.

Mr. YEAGER. Well, a little complex. But there are two ways a country can respond to a newly added chemical under the convention. It can wait until the chemical has been added by the convention and then within a period of time say that it opts-out of that addition and will not join the convention for that purpose. Or, it can declare upon its ratification that it will opt-out of all new additions until and unless it says it opts-in.

Mr. GILLMOR. Okay. Thank you.

Let me go to Mr. Wiser. And you testified that we ought not use a de novo regulatory standard, instead use a controlled measures specified in the convention. Could you be some more specific as to what those controlled measures are in the convention and what you mean by the term "de novo regulatory standard"?

Mr. WISER. When I referred to de novo regulatory standard, I was referring to the standard that is in the discussion draft. I am not aware of that balancing standard appearing in any other environmental or health laws that we have. So, I do believe that that's a de novo standard.

Now the control measure that would be specified in the Convention. Under the Convention currently the control measures are either banning a chemical or severely restricting it, and then these bans and severe restrictions are subject, in most cases, to specific exemptions the countries may register for if they desire.

Now, we do not know precisely what the control measures on a given chemical will be that has not been added yet, because presumably that will be the product of negotiations by all the governments. But if we look at the provisions that exist in the convention at this time, the control measures will generally be banning the chemical outright or in some cases restricting its use or production subject to specific exemptions that are time bound and may be obtained by countries if they request them.

Mr. GILLMOR. Let me ask you, Mr. Walls or Mr. Roewer or Mr. Goldberg want to comment on that subject matter?

Mr. WALLS. Thank you, Mr. Chairman, yes. A number of comments. One, we believe that the standard, the balancing standard contained in your draft legislation reflects exactly what's going on under the convention. The convention says in effect that the parties should balance the risks, costs and benefits of regulation and achieving a decision in a precautionary manner. What does a precautionary manner in this case? The convention specifically cites to the Rio Declaration on environment and development. And that says simply where there is threats of serious and irreversible damage, the lack of scientific certainty shall not be used a reason for postponing cost effective measures to prevent environmental or health degradation in this case.

Now, that to me sounds a lot like a balancing standard. To suggest otherwise means that we are somehow reading all that information in the treaty out of the convention, that we suddenly will not take account of Annex D, Annex E and Annex F; the very information on which the parties are to base their decision.

Mr. GOLDBERG. If I may, Mr. Chairman.

Mr. GILLMOR. Dr. Goldberg.

Mr. GOLDBERG. If I could also add that, of course, from our standpoint we are concerned with the implementation of this con-

vention and FIFRA. And FIFRA is, in fact, that very type of statute that looks like risks, that looks at benefits, the use of pesticide chemicals, the subsequent impact on farmers and the ability to create a safe and abundant food supply. So, in fact, there is a statutory scheme and one that will need to be amended to implement this convention that has those concepts built in.

Mr. GILLMOR. Thank you.

My time has—well, Mr. Yeager, did you have any comment on that?

My time has expired. Let me turn to Ms. Solis for questions.

Ms. SOLIS. Thank you, Mr. Chairman.

Mr. Walls, you made an interesting comment there. It sounds to me as though you gave a little bit more information than the previous speaker representing EPA regarding what actually would be restricted or would be looked at, what that balance would be.

And my question is actually to Ms. Goldman as a former EPA officer there, how do you view this interpretation?

Ms. GOLDMAN. Well——

Ms. SOLIS. In the bill, the bill that is currently being discussed here.

Ms. GOLDMAN. In the bill what I see is a lot of language that has never appeared before in U.S. environmental statutes. And having been responsible for both TSCA and FIFRA during the time I served as Assistant Administrator at EPA, I would tell you that these provisions would have to be interpreted by the executive branch and by the courts.

And unfortunately sometimes there is a considerable amount of litigation before people understand what it is that Congress intended.

And so, one of the problems with a legal standard that has never been in an environmental statute before is that nobody's going to know what it really means. Why do that when there is very clear language that was negotiated within the convention and which, as Mr. Wall said, is language that the industry is comfortable with? I was there and can tell you that a lot of time and attention went to consulting with industry groups, environmental groups, and stakeholders about what the process should look like. So why invent new language and new sets of processes that can be litigated? That is a recipe for gridlock and, at the end of the day, none of the decisions of the convention being implementable in the United States.

Ms. SOLIS. So in other words it would actually take us a step further away from achieving the intent of the treaties?

Ms. GOLDMAN. I believe that it is worse than current law. I think that it actually would make for more delay and more difficulty than what we have today with TSCA and FIFRA.

Ms. SOLIS. You said something in your statement earlier about the burden should be placed with EPA. Can you go into further detail about that?

Ms. GOLDMAN. What I think would be workable, from my experience and the years that I was at EPA, is that if the convention lists a chemical for action, that EPA will move that forward with that action unless they can make a regulatory finding that action is not required in the United States either because they do not agree with

the scientific bases for the listing; or because we have other ways of controlling the chemical. But you should expect from them within date certain that they either will take action or that they will give a regulatory finding for why not. That is what I believe would be the way to assure effective action from EPA.

Ms. SOLIS. Thank you.

My question next to Ms. Heinzerling. Sorry if I mispronounce that.

Ms. HEINZERLING. That is all right.

Ms. SOLIS. Can you go into a little bit more detail about the cost benefit, human benefit as opposed to financial in terms of how we go about applying the methodology that is included in this bill in terms of adverse effects that that might have and, you know, talk a little bit about that?

Ms. HEINZERLING. Yes. Cost benefit analysis has proved a very effective way of shutting down regulation. And so if you want a bill that does not do much to protect the environment, one of the good ways to do it is to enact a cost benefit requirement. And the reason for that result is that in many cases cost benefit analysis really favors numerical results, numbers, quantified estimates of costs and benefits. And, as I said, many of the benefits of environmental policy cannot even be quantified, much less translated into dollar terms.

And so in many cases we know that a chemical causes particular harms, but it is very hard to figure out exactly how many people will get sick, how many people will die, how many ecosystems will be threatened and so forth. And so we do not even have a number to attach to those effects.

And the second problem is then we have to try to figure out what those are worth in dollars, and that becomes really tricky. The reigning method, and Representative Allen referred to this before in his opening statement, for figuring out how much increased risk is worth is to look at what people in workplaces are willing to take in extra wages for extra work. Those data come mainly from the 1970's. They are almost exclusively for male workers, exclusively from immediate risks, not risks of cancer. And so there are lots of problems even in getting to that $6.4 million figure that you mentioned, Representative Allen. There are a lot of problems getting to that number. And as we speak, the Office of Management and Budget is busily trying to reduce that number. So, they have been hard at work on it for a number of years. Now we are down to the lower part of the range, as low as a million dollars in recent OMB reports.

And so it is difficult to quantify, it is difficult to monetize. And then at the end of the day cost benefit analysis also often requires discounting future benefits. And in the case of persistent pollutants that is a disaster. Because what we are talking about, as I said, is we are protecting for the long term, we are trying to protect against cases or diseases like cancer that take a long time to manifest themselves. And so cost benefit analyses can be paralyzing.

Ms. SOLIS. Thank you.

Just one quick question for Mr. Yeager. Having your previous experience on this issue, what is your opinion of the current Senate legislation, that is if you have one?

Mr. YEAGER. Well, I actually testified on that, and I would be glad to give you the testimony that we provided and any further comments that WWF has made with regard to that legislation.

Ms. SOLIS. I am assuming you supported the legislation?

Mr. YEAGER. Well, we were supportive of aspects of it. We were concerned about other aspects, I think I would have to say.

Ms. SOLIS. Okay. Thank you. Thank you very much.

Thank you, Mr. Chairman.

Mr. GILLMOR. The gentleman from Michigan, Mr. Rogers?

Mr. ROGERS. Thank you, Mr. Chairman.

It is certainly difficult and it seems complicated to get to the root of this.

Dr. Goldman, if I may, I am from Michigan. PCBs are obviously a huge problem in Michigan. And when we look at Lake Superior, 89 percent of the current PCB loading occurs from air deposition. So it is actually coming external to the continental United States into the United States and being dropped in the water. And I know at one time when you were serving with the EPA you were looking to import PCBs into the United States. And I want to understand that. Is that a bad thing? Is that a good thing? Obviously that is something beyond our control if it is coming in external to the United States by air.

Ms. GOLDMAN. Let me tell you what was going on at that time. We had recently signed the NAFTA agreement, and under that was an environmental side agreement between Mexico, the U.S. and Canada. And under that we developed a PCB action plan for attempting to deal with the problem that you are talking about, which is the movement between countries of PCBs in the air, which as you correctly note, can then wind up in places like the Great Lakes or in the Arctic and places far away from where they are generated.

And Mexico did an inventory where they found a lot of PCBs that were still in use that needed to be destroyed but they did not have adequate destruction technology.

And so we did make an effort to say that those PCBs could be destroyed through agreements in the United States. And we utterly failed.

And I think I learned a lesson from that as well. And that is, one: Even though this is something that may have seemed like a correct thing to do, politically it was absolutely a nonstarter. There is not a community in this country with an incinerator that can destroy PCBs or a PCB disposal facility that wants to receive PCBs from other countries into their facility. So it is a complete nonstarter from that standpoint.

And second, that fortunately in terms of the Mexican situation there are other countries were there is the ability to do this. And so, for example, they have been able to find they can take those PCB wastes to Canada and destroy them. Believe it or not, they can take them to Holland and destroy them. And so basically our efforts were stopped by the court. We decided to not go down that route anymore. And there were members of Congress as well who did not want to see that happen, members who have those facilities in their districts.

So that is pretty much where it ended in terms of our efforts.

Mr. ROGERS. Mr. Yeager, obviously it seems to me that at least from my understanding and my reading that PCBs, at least the production of them, is happening in primarily Third World countries at this point. It is either there in large quantity or not being dealt with. I mean, is there—what is your organization doing to try to address those source points of PCBs?

Mr. YEAGER. We actually have not taken specific action as World Wildlife Fund that I am aware of with regard to PCB residues. We actually have taken a large interest in obsolete residues of pesticides that are all over Africa. And your earlier witness mentioned the African stockpiles program, which is an effort that we actually initiated that has been joined by the FAO and the GEF, and a number of other facilities including UNEP to address obsolete stockpiles of pesticides in Africa.

My impression, which is not based on a lot of current knowledge of the PCB situation, is that most PCBs were actually produced in the United States, as Mr. Slesinger indicated, and exported often in electrical equipment. And that there are serious residue problems and remedial action needs, not mostly in developing countries although there may be some, but including in countries like Russia. And I am not aware of the EPA, what current programs they have in that regard.

Ms. GOLDMAN. I should add that Russia produced them, too. They were the last to stop production.

Mr. ROEWER. If I may, Mr. Rogers?

Mr. ROGERS. Yes, please.

Mr. ROEWER. There was a substantial piece of the production capability in the Soviet Union. And I do know that the U.S. EPA has engaged in quite a bit of capacity building with countries around the world, countries working for UNEP and GEF are attempting to assist countries in their management of all POPs including PCBs. UNEP really has an ongoing program to try to assist—continue with the leadership that this country has shown in environmental protection to assist those countries manage their PCB and POPs issues.

Mr. ROGERS. I think we can all agree that they are something we ought to deal with. I mean, obviously, those are the same residue effects that are obviously getting in the air and coming to the United States. So it may not be politically tenable but we need to find some solutions on that source pollution of PCB that has been either sent overseas and coming back to get us in another way; we all agree it is dangerous, bad, awful, ugly stuff and we need to do something. Huge problem in Michigan.

Mr. Yeager, just quickly, I am a little confused at your position in opposition to the bill. I mean, the 12 chemicals that we have listed that we all agree are bad, the 90 plus signatories that have agreed bad stuff, but your opposition is gee, if there is something that happens in the future of which a chemical we do not understand today or we have no knowledge of today, we are going to be in opposition in the sense that we do not believe that we ought to have some at least due process here for regulatory relief and cost benefit analysis and other things. Do I understand this correctly?

Mr. YEAGER. I do not think you have quite characterized my position the way I would characterize it. But that is, but that is your freedom as a member.

Mr. ROGERS. Well, that is why I wanted to mention it.

Mr. YEAGER. No. I do not think that is our position. Our position is that we very much are supportive of the treaty and of the obligations of the treaty. We recognize that for the first 12 chemicals for the most part, and I think almost universally, the United States has ceased production and use of those chemicals. But we think it is very important from the U.S. national interest to have production and use of those chemicals also eliminated to the extent that the treaty requires it in all other countries, including in developing countries for the reason that you mentioned. That even if some of these chemicals like chlordane are being used in Africa or in China, they travel through the atmosphere and appear in bloodstream of people in Arctic and people who fish in the Great Lakes.

So we think that the fundamental purpose of the treaty is very important to see accomplished.

Mr. ROGERS. I know I see my time is running out here. I just want to follow up on that point.

So your argument is not necessarily the United States and the fact that we have been pretty good stewards, we have identified it and said opps this is bad stuff, we need to do something about it. Our regulatory practices are a part of those considerations. Do you not think it is important that we keep that sovereignty versus your worrying about Third World nations who we know are violating in some cases, in almost all the cases, those chemicals that are listed there today?

Mr. YEAGER. I appreciate the point, but I do not think the treaty in any way infringes on U.S. sovereignty, as the point of my testimony was to point out the many protections that we negotiated into the treaty so that the U.S. interest would be in fact protected and the U.S. discretion with regard to its own way of regulating would be protected.

Our concern is that with the legislation that has been proposed so far and in particular with the draft on which we are testifying today, that the standards under which the U.S. would regulate are new, and give rise to potentially a lot of litigation, make it very hard to actually regulate for a chemical that is added to the treaty list, even when scientifically the United States agrees that the chemical should be added to the list and should be acted on as a chemical of global concern.

And so I think those problems could be solved, but I think the way that the current draft is written it makes it very difficult to imagine that we would, in fact, act on a future chemical.

Mr. WALLS. Mr. Rogers, may I quickly weigh in here?

Mr. ROGERS. Sure.

Mr. WALLS. With respect to the standard established in the draft legislation, as I have tried to state that standard tracks very closely the very same decisionmaking approach taken under the convention.

More important, in our view the draft recognizes that this subset of chemicals is special. They pose special risks, pose special global risks that warrant a different approach. This draft does not say

take the existing TSCA section 6 process, in fact it does not require EPA to establish that a substances poses an unreasonable risk. It does not require EPA to establish that its preferred risk management approach is the least burdensome regulatory alternative. And it in fact, it imposes none of the procedural barriers that have contributed, I think, wrongly to the perception that section 6 does not work. So the draft in our view sets out a system that should enable EPA to act quickly and expeditiously to implement an international decision.

Mr. ROGERS. Interesting.

I see my time is long past due, Mr. Chairman. I relinquish the microphone.

Thank you, sir.

Mr. GILLMOR. Thank you, Mr. Rogers.

The gentleman from Maine.

Mr. ALLEN. Thank you, Mr. Chairman.

Mr. Goldberg, in a June 3, 2004 press release CropLife International noted that the industry is working "to ensure that national and international interpretation is consistent with the articles of the convention including risk management procedures in determining future POPs."

So my question is does CropLife support the international process to regulate that is established in the convention in Article 8?

Mr. GOLDBERG. Yes. If I may add one point consistent with the comments from my colleague and friends, Mr. Walls. We believe that those standards are consistent with the standards that are expressed from the chemical side in the discussion draft and from the pesticide side in the statutory provisions of FIFRA and the Food Quality Protection Act.

Mr. ALLEN. Let me address then to both of you, because Mr. Walls said earlier—had said a couple of times, that the convention says—it says we should balance risk, cost and benefits in a precautionary matters. You know, all these words have different interpretations.

My sense is from that particularly in Europe the precautionary principle is seen as a way of not having to prove to the last comma that there is harm, but it reflects an understanding that the world is better off to try to prevent pollution degradation before it occurs, even if the science is not complete. And particularly with respect to climate change, it is a principle that is evoked all the time because the science may get to 95 percent, but it will not get to 100 percent.

Ms. Heinzerling said, and I would tend to agree, that often in this country cost benefit analysis, formal cost benefit analysis has been an obstacle to regulation. Are you saying in your opinion that would not be the case here? Do you understand the statement she is making, the risk that some of us see in getting into numbers and trying to quantify things that may be ultimately not qualifiable?

Mr. WALLS. Well, Mr. Allen, I will try and respond this way. I mean, you are absolutely right. We are talking about an international agreement and we are talking about a lexicon that has developed around this negotiation with words like precaution. And we are trying to grapple with what that means in a regulatory context. But what we are talking about here is fundamentally the imple-

mentation of an international obligation of the United States. And the struggle here to give effect to the very provisions of the treaty in a way that makes sense.

Now, with all due respect to Ms. Heinzerling, I have to say I do not believe that any negotiator of the Stockholm POPs convention contemplated that we would be engaged in a series of long quantitative analyses of the cost benefit analyses in making decisions here. The treaty is very clear. Cost and benefit considerations are to be taken into account. There may be analyses out there with respect to any particular chemical that is relevant and must be taken into account. So we see the draft as taking the convention language and implementing it in a way that makes sense.

Mr. GOLDBERG. Very quickly. Remember with respect to a number of these chemicals that are on the list, they are pesticides. Pesticides have important public health uses. And the process of balancing those risks of losing chemicals that have important public health uses is always compared to the risk of the products themselves.

Mr. ALLEN. The question is how it is done.

I want to turn to Mr. Yeager, because when you negotiated the treaty, when you were negotiating the treaty how did you expect the domestic regulatory process would work after an international decision by the conference of parties to list a new chemical? Did you have something in mind when you were negotiating, and more specifically did you think there would be new language, this reasonable balance language that would be offered?

Mr. YEAGER. That is a difficult question, Representative Allen.

We consulted with EPA about every aspect of the treaty, and knowing that EPA was the primary regulator in the United States. We attempted to negotiate terms of reference in the treaty that were as close as possible to the U.S. regulatory system. And, in fact, that was a fundamental negotiating objective.

I think our objective was to ensure that we would not require wholly new standards in U.S. regulation in order to implement the treaty. And, in fact, that to some extent I suspect we were hopeful that we would be able to rely on the thresholds established in the treaty when interpreting the U.S. regulatory context.

I think that the difficulty that we have, with due respect to my colleagues, is that the treaty does require some consideration of socio-economic considerations and therefore of costs. But it assumes that once a chemical has been given—has passed the risk profile and the Annex D criteria, if it is assumed to be a POPs, it will be regulated. And in fact it will be regulated strenuously because that is the whole purpose of the treaty. That is how precaution is embedded in the treaty.

So here we have a proposal that says well once that decision has been made and the U.S. has participated in it, formed the scientific review, and in fact probably formed part of the scientific committee, that then we will have a new process in the United States to decide whether or not to regulate it. There is no presumption that we will regulate.

Mr. ALLEN. And if I may, Mr. Chairman, just one last.

I take, Mr. Yeager, that that is your response to Mr. Walls' suggestion that reasonable balance in the implementing legislation re-

flects the language of the convention itself? I mean, I think I hear both of you, your arguments clearly. I just want to make sure that they're——

Mr. YEAGER. Yes. I do see a difference. If you look at the structure of the treaty where and when socio-economic considerations to be brought in, you will find that once a chemical has passed the scientific thresholds and the conference of the party lists it, it is expected that it will be regulated. The question is how.

Mr. ALLEN. I thank you.

Thank you, Mr. Chairman.

Mr. GILLMOR. Let us go to one more round of questions. And let me start directing this to Ms Goldman and Mr. Walls.

I want to give a statement of a principle and ask you to respond whether you agree with it or not. And the administration principles state in determining whether the domestic regulatory measures are necessary and adequate, the United States should compare the international decision to measures that are more and less stringent, thereby facilitating a risk management decision as to which measure provide the most reasonable balance of benefits, risks and costs for specific uses. Could you both comment on that principle?

Ms. GOLDMAN. I would not have stated it quite that way, but I do think that it well could be that a chemical might be listed in the convention with a set of risk management options that are put forward and that the U.S. may decide to do it differently, to either be more stringent or less stringent.

For example, take DDT which under the POPs convention continues to be used for public health use in developing countries for malaria, whereas we have not required it for that use for more than 20 years. And so we may look at an exemption that has been put forth or a risk management option that has been put forth and decide that in our situation it does not make sense because, say, we do not have malaria here.

So, that is one of the reasons why I think it was important that the convention preserve the sovereignty of nations to go their own way in terms of having flexibility about how these things would be managed.

Mr. WALLS. We agree with the principle.

Mr. GILLMOR. Let me state another administration principles. In weighing benefits, risks and costs the United States should consider domestic production, export and use of the chemical and any national and international consequences that are likely to arise as a result of domestic regulatory action including consequences that cannot be quantified and including consideration of the possible consequences of using likely substitute chemicals.

Could you comment on that?

Ms. GOLDMAN. I could go first on that one. That principle is actually 2 or 3 different things embedded together. I find that to be a very complicated statement coming from the administration.

Mr. GILLMOR. I thought it was a little complicated myself.

Ms. GOLDMAN. Yes.

Mr. GILLMOR. But you are the expert, so I wanted to ask you.

Ms. GOLDMAN. Well, I am going to do that but I will apologize if I have not teased it apart completely.

But No. 1, I do think that the fundamental principle of the convention, which is that whether the chemicals meet certain criteria about persistence in toxicity, and if they do they should be managed, that that needs to be adhered to by the United States regardless of the economic benefits. This is because we know that once these persistent toxics are in the environment, we cannot get them out again. We are still cleaning up DDT and PCBs from decades ago.

So that piece of it, which I think is implied in the first part, I would not agree with.

I do think that we need to put into the mix at the outset gathering of information about production, import, usage. That is information our negotiators need to have the first time they go to the table to talk about a chemical. And, in fact, I said in my written testimony that I felt that Congress should require that EPA collect that information, including the usage information, so that our negotiators are there with a full deck of cards right at the beginning.

With due respect to my colleagues who have suggested to you that there is plenty of authority in TSCA, the information collection provisions of TSCA do not give EPA the authority to collect that information in a timely fashion. You need to give them that authority, because if the information comes in after the negotiation has been accomplished, they will not be able to really represent the U.S. situation well.

Mr. WALLS. Mr. Chairman, we not only agree with the principle, but also believe that the draft legislation incorporates that principle.

We also agree with Ms. Goldman that U.S. negotiators and the review committee should play with a full deck.

Mr. GILLMOR. Thank you.

Let me direct my question to Mr. Wiser. Your testimony states that implementing legislation should require a clear statement that the United States should not register for any specific exemptions under the POPs treaty. Now the POPs treaty does call for countries to do that, but by doing so would you not in effect be opposing research on those chemicals and inject manufacturing regulatory possibilities for trace contaminants.

Mr. WISER. In all due respect, Mr. Chairman, I do not recall putting it exactly that way. In my testimony my recollection is that what I objected to was the provision in the discussion draft that would appear to prohibit EPA from regulating if an exemption were available to the United States under the convention. And the point that I hoped to make, and I apologize if I did not make it clearly, was that in our view the legislation should not require EPA to try to take an exemption. In other words, the legislation should not prohibit EPA to regulate if an exemption is available. Instead, it should be up to EPA to decide, well, when looking at all these various factors, is it appropriate for us to request an exemption? And that would be something that would have to be done with the Executive.

But we do not believe that the legislation should prohibit EPA from regulating if an exemption is available, because as Dr. Goldman pointed out, in most cases the United States will not want to take one of the exemptions. Most of these exemptions are intended,

at least in terms of the dirty dozen, the 12 chemicals that are already regulated in the convention, most of these exemptions are intended for developing countries that for one reason or another need a transition time. And we do not believe that that kind of situation should be forced on EPA. Instead, we should be able to evaluate the situation, determine is it appropriate for us to take an exemption. We should not prohibit EPA from regulating if an exemption is available.

Mr. GILLMOR. My time has expired.

Ms. Solis?

Ms. SOLIS. Mr. Wiser, thank you for being here.

You mentioned in your testimony that there were other organizations that you represented that were also not in support of the current discussion draft legislation. Can you name any of those groups?

Mr. WISER. Yes, I can. As I did mention, the views that I expressed in my testimony have been endorsed by a number of organizations, and they are listed in my written testimony. They include the National Environmental Trust, Physicians for Social Responsibility, Oceania, United States Public Interest Research Group, the Sierra Club and Pesticide Action Network North America. I would also add that World Wildlife Fund is one of the organizations that we have worked very, very closely with. WWF has been absolutely essential in our efforts. We did not think it was appropriate to try to have them endorse my testimony considering Mr. Yeager is giving his own testimony.

But these organizations have been among the core of groups that have been working very actively on this legislation. And we have uniformly and consistently shared our views. We have the same view, we have the same objection to this legislation.

And then the other thing I would like to add is that we are also working very closely with organizations, particularly grassroots organizations throughout the country. So it is not just beltway groups or Washington, DC groups. We are in close contact with a number of different organizations. And I think I can say with confidence that these organizations are uniform in their objection to this approach that is in the discussion draft.

Ms. SOLIS. So you have a position on the current Senate legislation?

Mr. WISER. Well, as Mr. Yeager sort of—I think I will say he fudged a little bit. I may fudge a little bit myself. But I will try to be as direct as I can to you.

We were involved very heavily in the development of that legislation. We were invited by then-Senator Smith to work with industry and to work with staff of the Environment and Public Works Committee on it, and we did that. We worked very hard.

In the end I think we can say that there were some aspects of Senate 1486 that we liked and there are some aspects that we do not like. And in fairness to Senator Chafee who was key in developing this, he said he was going to try to split the difference between many of the different interest groups and the administration. And the result was he upset a lot of people in doing that. But it is a mixed bag, quite frankly.

Ms. SOLIS. Do you think there is an urgency to move forward as quickly as this proposed legislation might have us move?

Mr. WISER. I think it would be very good for the United States to be an active participant in the Stockholm Convention. As we have heard from many of our witnesses, the United States provides very important leadership in this issue. We have technical abilities that are simply unparalleled. It is important for us to be a party to the convention. And it is important for us to join in a multilateral process, important for us to give guidance to others and to demonstrate that we can do things, we can address these kinds of chemicals together, not just unilaterally but together.

That said, I think that it is essential, and I also speak on behalf of my colleagues in this respect, that it is absolutely essential for us to get it right here. Let us not rush if the result is severely flawed legislation that we will be stuck with for years and years and years. And we believe that the approach in the discussion draft is that kind of severely flawed approach.

Ms. SOLIS. Thank you.

Mr. Yeager I had a question for you as a former EPA representative. I am sorry, Dr. Goldman. Excuse me. Dr. Goldman, regarding California, the State that I come from, we have some of the more stringent environmental laws in the country. If the draft legislation were to be implemented, what are some of the things that might happen with a State like mine where we do have much more rigorous review of chemicals and their use?

Ms. GOLDMAN. Well, first and foremost, I believe that the draft legislation would preempt efforts by the State of California to set its own regulations. And I think that that is very important.

I used to work for the State of California as an official for the California Department of Health Services. And we often needed to take action in advance of the Federal Government because of the unique environment of California and the need to protect that. And I think that there should not be preemption of State action in this bill.

Ms. SOLIS. Thank you.

Mr. GILLMOR. The gentleman from Michigan.

Mr. ROGERS. Thank you, Mr. Chairman.

I am still trying to understand this, the best I know how.

But Mr. Walls, is it my understanding that the convention does call for a cost benefit analysis?

Mr. WALLS. That is correct, Congressman. Once the review committee reviews the sufficiency of the nomination vis-à-vis the criteria in the convention itself, and once they have reviewed a risk profile and determine that some action is warranted, there is a process to consider the costs and benefits of regulation.

Mr. ROGERS. So the bill as drafted does not add anything new to the convention in that regard? They already recognize the cost benefit analysis model?

Mr. WALLS. That is our position, Congressman. Yes.

Mr. ROGERS. I see a shaking of the head, a stick up finger and a nod, all down the row there. So why do we not just work our way down.

Ms. GOLDMAN. Well, I will just tell you my view, which is that I believe and the way I would view it as a regulator, and that is

that the convention requires consideration of a number of cost issues and social issues, many, many considerations I think you would take into account in managing risks. But it does not involve a formal cost benefit analysis as an exercise. By saying balance the draft bill does lead you down that path of doing a quantitative modeling effort. And I think that that is the difference.

Mr. ROGERS. But in fact the convention does state that. As a matter of fact, I think Mr. Yeager used the "socio-economic."

Ms. GOLDMAN. It says that those considerations should be assessed and evaluated, but it does not have language that says quantified, weighing it and doing the kind of formal, formal cost benefit analysis. That is my opinion.

Mr. YEAGER. I guess if I could just try to clarify my own view with regard to the convention and maybe the difference.

It appears to me at least, and I think to us on reading the draft, that the cost benefit balancing that is required in the draft which would, as Ms. Goldman stated, require a cost benefit analysis that has the flaws that Ms. Heinzerling points out, is linked to the decision of whether or not to regulate a chemical after it has been listed by the convention.

The convention actually presupposes a process that I try to describe in my testimony, but starts with a screening for the chemical, determines whether the chemical fits a series of science characteristic that make it a POP, then has a risk profile for the chemical that—again no economics so far—that determines whether the chemical presents a risk that warrants global concern, that's Annex E. So you have gone through Annex D and E. Only then at that point does Annex F consider what kinds of control measures should be taken. And in that consideration there is not, as Ms. Goldman states, a cost benefit analysis as such but it does require a look at the efficacy and efficiency of possible control measures. And then under alternatives a look at technical feasibility and costs including an environmental and health costs.

But those are not part of an equation in which you determine whether or not to regulate at that point. They're part of a consideration of how you should regulate.

Mr. WALLS. Mr. Rogers, I would perhaps add a clarification from our perspective.

The decision taken under the convention with respect to costs and benefits is a decision taken at the international level. That decision may ignore for all practical purposes the relevant costs and benefit consideration that apply to regulation in the United States. The draft legislation provides a process to insure that those costs and benefits are articulated as the agency considers to regulate the chemical.

Mr. ROGERS. Sure. And obviously the signatories believes it was important enough to mention it, just like as we mention paragraphs in a bill that need further clarification when it gets to rulemaking.

We are really nothing more than the rulemaking body of the convention as it relates to the United States verses the other signatories of the convention. I guess I am confused why we are arguing about the point.

Ms. HEINZERLING. May I just add. It would be easy enough to say that if that is all you meant was to duplicate what went on at the international level and that is all that Mr. Walls believes this legislation does. It would be easy to simply replicate that standard in this legislation. That is not what is happening. The legislation adds whole new language that is not even present in the international context.

Mr. ROGERS. You mean clarifying language like we do in rulemaking? That is exactly what we do when we make rules; we clarify the language. The intent was they obviously believe it was important for a cost benefit analysis to some degree, and it is up to us to determine what that is, is that not right?

Ms. HEINZERLING. I do not see that that is the case. And in fact——

Mr. ROGERS. I mean, you are saying we do not want any. And we are saying you probably ought to have some.

Ms. HEINZERLING. I think that Mr. Yeager's point is fundamental, which is that the international context takes it as a given that once you go through the science-based process there will be regulation. The question is what form it will take. Whereas, under cost benefit analysis such as the reasonable balance standard in the discussion draft, the question is will there be regulation at all.

Mr. ROGERS. Well, you are saying that only because there is a presumption, I think. You are nervous that there is only a presumption that there would be regulation?

Ms. HEINZERLING. Well, there is also the addition of the language that is quite cryptic in the current draft having to do with sound scientific evidence, peer reviewed studies and so forth that is added and is not present in the treaty language. And so that there is a lot of language that if it merely is intended to duplicate what the treaty does, then is very confusing.

Mr. ROGERS. You oppose peer reviewed science?

Ms. HEINZERLING. Nothing I have said suggests that.

Mr. ROGERS. Well——

Ms. HEINZERLING. No, I do not.

Mr. ROGERS. Okay. Just for clarification. So you do not oppose those on the face of getting the good science? I mean, I think we are arguing semantics here.

Ms. HEINZERLING. Well, usually when your legislation, the legislation you pass here goes to courts, courts assume that you meant something new when you add new language. They are just funny that way. They take the language and they assume that if you add language, then you must have meant something. And so you must mean something different from the Administrative Procedure Act's requirements against arbitrary action for example. And so if you only mean that, if you only mean what the agencies are already doing, which is often relying on peer reviewed science, then you do not need to say anything.

And so courts will become confused when they see new language and they think what do they have in mind, because they try to take you seriously when you say something.

Mr. ROGERS. Really? That is new.

Mr. Yeager, did you have a point to that?

Well, I see I am over my time again.

Mr. Chairman, I hope we can get something going. I think you are absolutely on the right track, and I think the semantics arguing about may keep us from doing something pretty powerful for something that we all agree on. And I think everyone in the panel agrees on are some pretty bad actors out there. And I would encourage your leadership on this so that we do in fact become a part of that success story on getting this stuff out of there.

Sometimes I think we argue for the sheer sake of justifying our organization, and that is unfortunate when you are talking about the threat that I think these chemicals and other things may pose to the future health of America.

Thank you, Mr. Chairman.

Mr. GILLMOR. Thank you, Mr. Rogers.

One of the purposes of a discussion draft is to stimulate discussion, and we were imminently successful in doing that.

Let me also ask if the members of the panel would be willing to respond to written questions from members, if they would want to submit them later and all the members have indicated that they would.

And I want to thank all of you for coming and testifying for what has been a fairly long afternoon. But we appreciate it.

Meeting adjourned.

[Whereupon, the subcommittee was adjourned at 5:03 p.m.]

[Additional material submitted for the record:]

RESPONSE OF BROOKS YEAGER, VICE PRESIDENT, GLOBAL THREATS, WWF-US, FOR THE RECORD

1. Discretion to Regulate: A key question which I would like to address first is whether or not the treaty includes any standard for POPs regulation. A strong argument can be made that there is, in the Stockholm Convention, an implicit set of standards for the regulation of POP chemicals by parties.

In contrast to instruments of broad application, such as a number of U.S. chemical regulatory statutes, which are intended to provide for the regulation of broad classes of chemicals (such as all "hazardous chemicals"), with a wide latitude as to the type of management appropriate, the POPs treaty is intended to affect a rather narrow class of chemicals, which are assessed to have properties of toxicity, bio-accumulative potential, transportability, and persistence such that they must be controlled, and if possible eliminated, at the global level. For this group of chemicals, the treaty assumes a very stringent level of regulation, and sets implicit standards for such regulation in the language of the regulatory goals for each of the annexes in which new chemicals could be listed. The discrimination among the basic regulatory standards is not based primarily on a balancing of health, environment, and other benefits, but rather on the type of chemical being regulated, and in particular on whether it is produced intentionally (Annex A) or unintentionally (Annex C). The only exception among the existing 12 chemicals is DDT, which is placed in its own annex (Annex B), in which the control strategies explicitly recognize the importance of maintaining, in the absence of substitutes, its critical public health uses.

For example, if a newly listed POP is an unintentional byproduct, such as dioxin, it would be listed in Annex C, and parties would be obligated to take regulatory measures consistent with the guidance outlined in the annex, including general prevention measures and "best available techniques," to meet the regulatory goal of "continuing minimization, and, where feasible, ultimate elimination," as stated in Article 5. If a newly listed chemical is an intentionally-produced product, and unless it serves critical public health functions as does DDT, it would be listed in Annex A, and parties would be obligated to "prohibit and/or take the legal and administrative measures necessary to eliminate" its production and use, import and export. These basic goals are, of course, modified by any country-specific exceptions registered, but they act as a fundamental regulatory standard nonetheless.

The question of how the considerations of Annex F play into all this is an interesting one, but a careful reading provides little support for any suggestion that Annex F invites a cost-benefit consideration of whether to regulate. Instead, it com-

prises a set of factors to be used by the POPs Review Committee in the preparation of "a risk management evaluation," that would include "an analysis of possible control measures for the chemical." This information would be provide to parties, and might assist some parties in devising control strategies necessary to meet the implicit standards for each type of chemical.

2. Legislation w/o Adding Mechanism: WWF strongly disagrees with the observation that it would be acceptable to enact legislation that focuses solely on "the provisions of the discussion draft to fill the gaps for U.S. compliance with treaty obligations for currently listed chemicals," i.e., to leave out "a statutory process for U.S. consideration of additional chemicals or even new rulemaking authority." Adding new chemicals to the POPs treaty is one of the most critical elements of the treaty, and legislative authority would be incomplete and unacceptable without such matters addressed. Moreover, existing domestic authority for chemicals, especially under TSCA and FIFRA, is rarely amended, and it would be very difficult to do so on a chemical-by-chemical basis as new chemicals are added. In addition, ratification without the benefit of legislative guidance in relation to the "adding mechanism" would result in the U.S participation in COPs with inadequate guidance with respect to such matters as terms of reference for the POP Review Committee, and consideration of new chemicals, among other matters.

3. State Preemption: While we agree that states should not be allowed to regulate less stringently than Federal government standards, WWF's preference would be to amend TSCA 18(b) to allow states to regulate chemicals more stringently than federal law, without the EPA Administrator's oversight or approval.

4. PCBs: The intent of WWF's testimony is to support the enactment legislation that is needed to effectively implement the Stockholm POPs Convention, and in that context there is no need to change EPA's current practice of disallowing the import of PCBs into the US.

5. Requiring the U.S. to "opt in": As per WWF's testimony (bottom of page 10/top of page 11), the discussion draft oversteps by attempting to constrain the President's constitutional power to conduct international negotiations by requiring the US to declare the "opt in" election. It is inappropriate for the Congress to legislate a requirement as to which option the President may choose with regard to treaty adherence

6. Costs and Benefits: Regarding the "all witnesses" question , top of page 7, WWF agrees with the view that the treaty relies on countries to choose the appropriate means of implementation. However, we also believe that the POPs treaty provides excellent compliance-related guidance under Article 8(7)(a) with its threshold for advancing a new chemical proposal based on whether or not "the chemical is likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects such that global action is warranted." With regard to the follow-on "all other witnesses" question a few lines later, see the response in section 1, above, especially the concluding paragraph. (The same response is appropriate in relation to your "Protection Standards" comments at bottom of page 9/top of page 10.) Relationship between new and existing authority (page 8): See WWF's testimony (numbered items 3, 4 and 5 on page 10).

7. Exemptions: WWF's testimony (also at page 10) regarding exemptions is focused on chemical and country specific exemptions for which a Register has been established pursuant to Article 4 of the Stockholm Convention.

8. Sound Science: See WWF's testimony (bottom half of page 9).

The above responses address those points where WWF was specifically asked to do so—either specifically or as a general request to all witnesses—as well as stating views on some other commentary points. Our silence as to other commentary should not be treated as reflecting agreement or disagreement therewith. Thanks for the opportunity to respond to the additional questions posed on behalf of the Committee's Majority Members.

AMERICAN CHEMICAL COUNCIL
September 10, 2004

The Honorable PAUL E. GILLMOR
Chairman
House Subcommittee on Environment And Hazardous Materials
2125 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515-6115

DEAR MR. CHAIRMAN: Thank you for your letter of August 31, 2004 concerning the Committee's further commentary and questions regarding the Stockholm Con-

vention on Persistent Organic Pollutants and the Rotterdam Convention on Prior Informed Consent.

I have attached the further responses of the American Chemistry Council for the Committee's information.

ACC very much appreciates the opportunity to testify on the Subcommittee's discussion draft of the necessary implementing legislation, and we look forward to continue working with you and your staff on this important issue.

If we can provide any additional information regarding ACC's positions, please let me know.

Sincerely,

MICHAEL P. WALLS
Managing Director, Health, Products and Science Policy

Attachment

RESPONSE OF THE AMERICAN CHEMISTRY COUNCIL TO SUPPLEMENTAL QUESTIONS ON LEGISLATION TO IMPLEMENT THE STOCKHOLM (POPS) AND ROTTERDAM (PIC) CONVENTIONS

September 10, 2004

1. Draft Provisions to Fill the Gaps for U.S. Compliance with Treaty Obligations for Currently Listed Chemicals

ACC agrees with the statement that if Mr. Gillmor's draft legislation was enacted, and the Senate provided advice and consent to ratification of the Stockholm POPs and Rotterdam PIC Conventions, "the U.S. could sit at the upcoming meetings [of the Parties] as full partners." The statement correctly notes that nothing in the treaties compels the Congress to establish a statutory program to consider chemicals added to the treaties by subsequent decision of the Parties. ACC's preference for an implementation package that addressed additions is based on our interest in legislative economy and our interest in addressing uncertainties about the process, standard, and impacts of the additions process set forth in the LRTAP POPs Protocol and the Stockholm Convention under U.S. law. If the Subcommittee were to enact legislation addressing only the currently listed POPs and the PIC provisions, ACC would support that effort as the next best step to assuring the United States can participate as a full Party to the agreements.

2. Federal-State Provision

ACC agrees that the Subcommittee's draft does not affect State authority under Section 18(a)(2) of the Toxic Substances Control Act. The draft retains the ability of a State government to regulate a chemical substance more stringently than the federal government, subject to the existing petition procedures in Section 18(b) of TSCA. As the Subcommittee is no doubt aware, EPA can regulate POPs substances under existing TSCA authority, which could affect certain State laws pursuant to Section 18(a)(2). The Subcommittee's draft legislation would make no change from current law.

3. The Relationship of PCB Provision to Existing TSCA Section 6(e)

ACC agrees with the Subcommittee's interpretation of the effect of the draft legislation on EPA's authority under Section 6(e) of TSCA.

4. Compliance with the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

ACC believes the provisions of the Subcommittee's draft provide for full implementation of the Rotterdam PIC Convention in U.S. law. Under the Rotterdam Convention, governments retain the discretion to respond to a PIC notice. Pursuant to Article 10 of the Rotterdam Convention, Parties are to "implement appropriate legislative or administrative measures to ensure timely decisions with respect to the import" of PIC chemicals. Nothing in the draft legislation further restricts the ability of the United States to: 1) notify importers that it is restricting the entry of any particular substance; or 2) participate as a full Party to the Convention. ACC notes that the United States has been participating in the voluntary PIC procedure (the voluntary government to government process that mirrors the Rotterdam Convention procedure), with the full support of the chemical industry, since its inception in 1989, suggesting that the United States has had appropriate "administrative measures" with respects to imports.

5. Provisions Concerning the United States Process for Opting into the Treaty for Additional Chemicals

ACC agrees with the Subcommittee's interpretation of the draft provisions regarding additions to the list of POPs substances. In fact, ACC's strong support for the Subcommittee's version was based in large part on a similar reading of the draft.

The Stockholm Convention requires only that Parties "take the necessary legal and administrative measures" to prohibit or restrict the production, use, export or import of POPs chemicals. See Stockholm Convention, Article 3. No provision of the treaty delineates the specific "necessary legal and administrative measures," to be taken and no provision of the treaty requires implementation by any specific branch or agency of a national government.

The Rotterdam Convention similarly requires Parties to implement "appropriate legislative and administrative measures" with respect to imports and exports of PIC chemicals, but does not identify any specific legal or procedural means by which those measures are to be accomplished.

ACC believes the draft legislation has no practical or legal effect on the Executive Branch's ability to "opt-in" on new chemicals. If the U.S. exercises its preference to "opt-in" for chemical additions, current practice suggests that the only prerequisite would be that the U.S. government have adequate legal authorities to discharge any U.S. obligations with respect to the newly added POP. At a minimum, the notice-and-comment process outlined in the draft for chemicals under consideration as additions under the treaty should help inform the opt-in decision.

6. Requirements on the Executive Branch Related to Opting-In

This issue raises a significant number of complex legal and political issues. In general, ACC is of the view that the Executive Branch has the constitutional power to "make treaties," and that the power to agree to amendments to treaties remains wholly within the Executive Branch. ACC is aware of no legal precedent in which a United States Court has compelled the Executive Branch to make a treaty (or make an amendment to a treaty).

The issue of compelling a regulatory decision with a time certain is another matter, however. Once the decision to opt-in to a new chemical addition has been made, it may be reasonable to require the Executive Branch to provide appropriate notice to the public on its subsequent plans to implement the decision.

7. Listing Decisions versus U.S. Determination of Protective Measures

The Stockholm Convention does not specify a rulemaking standard to be adopted by Parties in their national legal or administrative implementing measures. ACC is very concerned that the interpretation of several other witnesses at the hearing, notably Mr. Wiser and Dr. Goldman, would rewrite a very carefully negotiated text for a purpose not contemplated by the negotiating governments.

That the Stockholm Convention specifies no specific risk management measures and no specific standard for national implementing measures is no accident. Annex F of the Convention acknowledges that "the full range" of risk management measures should be available to the Parties in deciding whether to restrict the use or production of a chemical under the Convention. The Convention also carefully balanced the desire for collective national action on a listed POP with a Party's ability to: 1) seek appropriate exemptions; or 2) decide not to "opt-in" to a listing. The negotiating governments recognized the need for flexibility on chemicals for which "global action" is warranted, and simply declined to complicate the process by mandating that Parties adopt a particular decision standard as a matter of domestic law.

The lack of a clear decision standard in the Convention makes it all the more important that the U.S. implementing legislation contains a reasonable, defensible standard for domestic regulatory decisions to address new chemicals listings under the treaty. In our view, the Subcommittee's draft adopts a risk-based standard that is entirely appropriate—a standard that has ample precedent under TSCA and that complements EPA's existing TSCA authorities.

8. Costs and Benefits under the Treaties

It is abundantly clear that the Stockholm and Rotterdam Conventions do not directly regulate persons, both as a matter of U.S. and international law, and based on the plain language of the treaty.

Both treaties speak only to the obligations of Parties—national governments—to take the necessary control measures. Those domestic implementing measures, in turn, are expected to bind the actions of legal persons.

In ACC's view, the Administration properly established principles for domestic implementation of the treaties that rely on risk and cost/benefit considerations. The entire statutory framework for chemical control in the United States is based on

those considerations, and it would have been highly unusual for the Administration to depart from that approach in suggesting implementing approaches. Risk and cost/benefit considerations are not prohibited by the treaties, but in fact are inherent in the approach adopted by the negotiating governments. Together, Annexes D, E and F of the Stockholm Convention develop the very hazard, risk and cost/benefit information necessary to take decisions consistent with the Administration principles. Notably, Article 8 of the Convention requires the Parties to take that information into account in deciding *whether* to list a chemical as a POP. The Subcommittee's draft, which incorporates risk and cost/benefit considerations in the domestic regulatory process following a decision to list a chemical, is similarly consistent with the Administration's principles. The process outlined in the discussion draft is not duplicative of the treaty process, but appropriately leverages the treaty process for the purposes of domestic decision-making.

9. Discretion to Regulate

In ACC's view, it is essential that the United States retain a certain degree of flexibility in implementing the treaty obligations. We do not support the idea that rulemaking authority should be mandatory based solely on a decision by the Parties to list a chemical under one of the agreements at the international level. It is also important to clarify that while an internal Executive Branch decision to "opt-in" may trigger a domestic rulemaking process, the final manifestation of an opt-in decision by the U.S. is the deposit of an appropriate instrument indicating that the U.S. agrees to be bound to the amendment (i.e., addition) as a matter of international law. To this end, the effective date of any regulation should be linked to the effective date of any new U.S. obligations that arise from U.S. acceptance of a new listing. As a historical matter, the United States was often the first to regulate the current 12 POPs substances, an indication that existing law has provided ample authority for the government to act against a particular substance. Moreover, there may well be instances where U.S. regulation under another authority—the Clean Air Act's Hazardous Air Pollutants (HAPs) authority, for example—may prove sufficient to address any U.S. obligations with respect to a listed chemical. Further, in those instances where a treaty exemption applies to the United States, there must be regulatory authority that recognizes that different risk management measures may be applied to meet the treaties' obligations.

10. Alleged Duplication of International Body Decision

ACC is at a loss to explain how some witnesses believe that the Subcommittee draft ignores the international investigation into a proposed chemical listing or duplicates the international process. The draft legislation makes clear that EPA is to develop a domestic rulemaking record that includes all the information developed in the international listing process. As the treaties do not dictate the rulemaking standard to be applied in the domestic regulatory process, the suggestion that the legislation "should not itemize the criteria that EPA must consider during the rulemaking" is tantamount to abdicating U.S. responsibility for a decision to an international body.

ACC agrees with the Subcommittee's assessment that listing decisions under the Stockholm Convention will not address country-specific circumstances, legal systems and procedures, health or economic impacts. Those are considerations the Convention leaves entirely to individual Parties, and for which the Subcommittee's draft provides a reasonable and transparent process.

11. Relationship of Proposed New Regulatory Authority to Existing Regulatory Authority

ACC believes the Subcommittee draft has been carefully crafted to avoid creating "unnecessary regulatory baggage" or inconsistencies with current authority. Indeed, ACC is perplexed that other witnesses characterized the draft language as "worse than current law," even while they acknowledge that current law has already provided sufficient authority to implement U.S. obligations under the treaties for the currently-listed substances. It is clear that the Subcommittee's draft legislation does not interfere with the operation of TSCA Section 6, does not require compliance with TSCA Section 6(a), and only in the wildest stretch of the imagination could it have any effect on existing regulatory authority under TSCA or any other statute.

12. Protection Standards versus Means and Measures

ACC believes there is no merit in the contention of some other witnesses that the Subcommittee's draft legislation allows the protection of human health to be simply traded off for other considerations. ACC believes that EPA has established a long record of making decisions under numerous statutes that protect human health and the environment while balancing risks, costs and benefits. There is simply no basis

for arguing that EPA has no ability (or prior experience) in finding a "reasonable balance" of costs and benefits. Moreover, this balancing process tracks the Convention listing process, and provides an important mechanism for determining not only whether but how the U.S. government can best address a newly-listed substance.

13. Exemptions

ACC believes that a statement clarifying the availability of exemptions for the United States is not necessary. The Subcommittee's draft is clear that the United States is not forced to take advantage of every available exemption. ACC's primary concern in this area is the availability of country-specific exemptions, not the broader exemptions provided in the treaties. ACC believes that any future issues will likely arise in the context of proposals for new chemical listings.The nature of those issues will be largely fact-specific. There may be instances when there are significant market impacts from a proposed listing that may require significant government consideration of the available treaty exemptions, or there may be critical public health and other uses that warrant an exemption. For example, it is not out of the realm of possibility that a listing nomination could be made simply to provide a significant market advantage to an alternative product. Indeed, the availability of exemptions under the treaty reinforces the need for a robust domestic process and decision criteria that supports those decisions.

14. Sound and Objective Science

ACC was particularly pleased to hear of the strong support of the environmental and health community for high-quality scientific information and analysis as the foundation for decisions on the evaluation and management of POPs risks. It is abundantly clear that the Stockholm POPs Convention relies on such scientific information to reach decisions on whether to list a new chemical. In ACC's view, it is entirely appropriate that the same high standard of quality and objectivity should apply to domestic decisions on how to regulate a POPs substance. The environmental and health community certainly cannot be supporting a lower standard of quality and objectivity, or no standard at all. ACC is aware of no circumstance in which a standard for quality and objectivity for scientific information operated as a barrier to EPA action. Perhaps most importantly, high quality scientific information will help reinforce an Executive Branch decision to "opt-in" to a new chemical listing.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF PREVENTION, PESTICIDES AND TOXIC SUBSTANCES

September 10, 2004

The Honorable JOHN D. DINGELL
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

DEAR CONGRESSMAN DINGELL: Thank you for your letter of August 12, 2004, requesting responses to two additional questions as followup to the July 13, 2004, 4eariiig. I am responding on behalf of myself and Claudia McMurray, Deputy Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs. We appreciate the opportunity to offer further clarification on the Stockholm Convention for Persistent Organic Pollutants (POPs), and the legislation necessary for the United States to become a party to that agreement, as well as to the Protocol on Persistent Organic Pollutants to the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP) and the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

Enclosed are responses to your two questions, which we hope you will find helpful. We would like to take this opportunity to reiterate that enacting legislation this year is an important priority for the Administration, as we are fully committed to ratifying the global POPs Convention, the PIC Convention, and the LRTAP POPs Protocol. It is important that the United States continue to have an active and influential role in multilateral negotiations related to POPS, PIC, and LRTAP. In order to enable the United States to be effective at the first meeting of the Conference of the Parties to the POPs Convention, and at the next meeting of the LRTAP POPs Protocol in December of 2004, the United States needs to be able to function fully as a Party to both agreements.

Again, thank you for your letter. We look forward to working with you and other members of Congress in the weeks ahead hi a united effort to enable the United

States to join these important agreements. If you have any further questions, please contact me or your staff may contact Betsy Henry in EPA's Office of Congressional Relations at (202) 564-7222, or Teresa Hobgood in State's Bureau of Oceans and International Environmental and Scientific Affairs at (202) 647-3550.

Sincerely,

SUSAN B. HAZEN
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF PREVENTION, PESTICIDES AND TOXIC SUBSTANCES

September 10, 2004

The Honorable HILDA SOLIS
Ranking Member
Subcommittee on Environment and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

DEAR CONGRESSWOMAN SOLIS: Thank you for your letter of August 12, 2004, requesting responses to two additional questions as followup to the July 13, 2004, hearing. I am responding on behalf of myself and Claudia McMurray, Deputy Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs. We appreciate the opportunity to offer further clarification on the Stockholm Convention for Persistent Organic Pollutants (POPs), and the legislation necessary for the United States to become a party to that agreement, as well as to the Protocol on Persistent Organic Pollutants to the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP) and the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

Enclosed are responses to your two questions, which we hope you will find helpful. We would like to take this opportunity to reiterate that enacting legislation this year is an important priority for the Administration, as we are firmly committed to ratifying the global POPs Convention, the PIC Convention, and the LRTAP POPs Protocol. It is important that the United States continue to have an active and influential role in multilateral negotiations related to POPS, PIC, and LRTAP. In order to enable the United States to be effective at the first meeting of the Conference of the Parties to the POPs Convention, and at the next meeting of the LRTAP POPs Protocol in December of 2004, the United States needs to be able to function fully as a Party to both agreements.

Again, thank you for your letter. We look forward to working with you and other Members of Congress in the weeks ahead in a united effort to enable the United States to join these important agreements. If you have any further questions, please contact me or your staff may contact Betsy Henry in EPA's Office of Congressional Relations at (202) 564-7222, or Teresa Hobgood in State's Bureau of Oceans and International Environmental and Scientific Affairs at (202) 647-3550.

Sincerely,

SUSAN B. HAZEN
Acting Assistant Administrator

ENCLOSURE

U.S. ENVIRONMENTAL PROTECTION AGENCY AND U.S. DEPARTMENT OF STATE RESPONSES TO QUESTIONS FROM THE HONORABLE JOHN D. DINGELL AND THE HONORABLE HILDA L. SOLIS REGARDING THE JULY 13, 2004, SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS HEARING "POPS, PIC, LRTAP: THE ROLE OF THE UNITED STATES AND DRAFT LEGISLATION TO IMPLEMENT THESE INTERNATIONAL CONVENTIONS"

Question 1: As you are aware, legislation designed to implement the Stockholm Convention for Persistent Organic Pollutants (POPs) has been reported from the Senate Environment and Public Works Committee (S. 1486). In the House of Representatives, Subcommittee Chairman Gillmor has released a "discussion draft," which was the subject of the hearing held on July 13, 2004. Both S.1486 and the Gillmor discussion draft state that no person may "manufacture, process, distribute in commerce for export, use or dispose of" any listed POPs chemical substance or mixture. (S. 1486, section 502(a); Gillmor discussion draft, section 502(a)).

Similar language, designed to prohibit "distribution in commerce for export" and implement the general prohibition is found throughout both bills. In a previous Ad-

ministration bill, however, introduced upon request by Chairman Gillmor in the 107th Congress (H.R. 4935), the same prohibition applied to the "distribution in commerce" of POPs substances or mixtures, as opposed to the "distribution in commerce for export" of such substances.

With regard to this difference, please indicate whether there is any "distribution in commerce" of such substances (except distribution in commerce for export) that is currently either allowed or taking place that would not be prohibited under the prohibition applicable to "manufacturing, processing, use or disposal." Please indicate whether there is, to the agency's knowledge, any such "distribution in commerce" of POPs substances taking place. For any and all examples of such activities, please indicate the particular circumstances of such distribution in commerce and the specific chemicals and specific amounts.

Response: The Stockholm Convention does not address domestic distribution in commerce of listed substances. In other words, it does not require parties to prohibit or restrict domestic distribution in commerce [1] of any listed substance. Likewise, the POPs Protocol to the Convention on Long- Range Transboundary Air Pollution (the LRTAP POPs Protocol) does not restrict or prohibit domestic distribution of substances that it covers. The POPs Convention does, however, restrict, and in certain circumstances prohibit, export of listed substances. A prohibition applicable to "manufacturing, processing, use, or disposal" would not prohibit distribution in commerce, including distribution in commerce for export.

With regard to PCBs, TSCA generally prohibits their distribution in commerce, with certain exceptions. For example, TSCA and EPA regulations allow for the distribution in commerce of PCBs in a totally enclosed manner where the PCBs were "sold for purposes other than resale before two and one half years after October 11, 1976." In addition, TSCA allows EPA to authorize the distribution in commerce of PCBs where, among other things, EPA finds that the distribution will not pose an unreasonable risk of injury to health or the environment. Given these types of circumstances, certain use and distribution in commerce of PCBs continues to be legal in the United States and PCBs are currently distributed in commerce for disposal and for other reasons such as those described above.

Aldrin, Chlordane, Dieldrin, Endrin, Heptachlor, and Toxaphene have never been listed on the TSCA Inventory; nor has EPA ever otherwise authorized their manufacture as chemical substances. Thus, based on all available information, the Administration is not aware of situations where any of these substances are being distributed in commerce in the United States as chemical substances or mixtures. The Administration, however, can't say categorically that these substances are not manufactured and distributed in commerce in the United States as TSCA section 5 allows certain manufacture of chemical substances without notification to EPA.

Hexachlorobenzene (HCB) and DDT are listed in the TSCA Inventory and can legally be manufactured in and imported into the United States. The Administration, however, has no knowledge of any distribution in commerce of DDT for domestic use. Regarding HCB, during negotiation of the Stockholm Convention, one company informed the U.S. negotiators that it imported the substance into the United States for use as a chemical intermediate. The Administration, however, does not know whether the company already has stopped such import in anticipation of U.S. ratification of the Convention. If not, there may be current distribution in commerce (after its import) of HCB in the United States.

Mirex is not listed on the TSCA Inventory, but in 1993, EPA granted a low volume exemption (LVE) pursuant to regulations at 40 C.F.R. section 723.50, that authorized a company to manufacture the substance. EPA has been unable to contact the company and, based on available information, believes that it is no longer in business and that Mirex is not manufactured or distributed in commerce in the United States at this time.

In addition, all of the substances listed on Annex A and B of the POPs Convention have been registered pesticides in the United States. Thus, in the past, they have been distributed or sold as pesticides. (None are now registered in the United States.) As pesticides, stockpiles of or articles containing these substances may continue to be distributed for disposal or other purposes.

Question 2: Section 12 of the Toxic Substances Control Act (TSCA) applies to the export of chemical substances or mixtures. EPA has promulgated rules imple-

[1] TSCA defines "distribute in commerce" and "distribution in commerce" when used to describe an action taken with respect to a chemical substance or mixture or article containing a substance or mixture to "mean to sell, or the sale of, the substance, mixture, or article in commerce; to introduce or deliver for introduction into commerce, or the introduction or delivery for introduction into commerce of, the substance, mixture, or article; or to hold, or the holding of, the substance, mixture, or article after its introduction into commerce.

menting this section for PCBs at 40 C.F.R. Part 761 (including 761.20). Has EPA reviewed these rules with regard to their consistency with the Stockholm Convention and the LRTAP POPs Protocol? In particular, are these regulations in compliance with the provisions of the Convention and the Protocol that prohibit export of PCBs except for the purpose of environmentally sound disposal? If not, please indicate any specific provisions or aspects of these regulations that would need to be amended in order for such regulations to be fully consistent with the treaty.

Response: EPA has reviewed the rules promulgated at 40 C.F.R Part 761 with regard to their consistency with the Stockholm Convention and LRTAP POPs Protocol. (EPA notes that 40 C.F.R. Part 761 was promulgated principally under the authority of section 6 of TSCA, not section 12.) In particular, EPA has reviewed these regulations to determine whether they are consistent with the provision of the Stockholm Convention that prohibits the export of PCBs except for the purpose of environmentally sound disposal. The LRTAP POPs Protocol does not contain a similar prohibition. EPA has determined that these regulations would allow distributions in commerce that are not in compliance with this provision of the Stockholm Convention. Indeed, as explained in the response to question 1, because TSCA does not prohibit all distribution in commerce (which includes export) of PCBs, the Administration has determined that, in this respect, TSCA allows distributions in commerce that are not in compliance with these provisions of the Convention.

In particular, 40 C.F.R 761.20 and 761.20(c) allow distribution in commerce (including export) of certain PCBs and PCBs items. For example, 40 C.F.R. 761.20(c)(1) allows PCBs and PCB items that were sold before July 1, 1979 for purposes other than resale to be distributed in commerce in a totally enclosed manner. Such PCBs or PCB items could include, for example, intact, non-leaking electrical equipment such as transformers and capacitors. (See 40 C.F.R. 761.20). There are also regulations at 40 C.F.R. 707.60(c) requiring notice of export of PCB articles exported for purposes other than disposal. Thus, before the United States ratifies the Convention, the Administration believes that this gap in authority, which could prevent the United States from meeting the obligation in the Convention to prohibit export of PCBs except for environmentally sound disposal, must be closed. Indeed, toward this end, the Administration worked with majority staff of the House Energy and Commerce Committee to develop language to close this gap. This language is included in Representative Gillmor's discussion draft at section 3, which amends section 6(e)(3) of TSCA. (See page 40, line 23 through page 41, line 6 of the July 17, 2004 draft).

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW
September 13, 2004

PAUL E. GILLMOR
Chairman
Subcommittee on Environment and Hazardous Materials
Washington, DC 20515-6115

Re: Notes and Questions from July 13, 2004 Hearing on POPs, PIC, and LRTAP: The Role of the U.S. and Draft Legislation to Implement These International Conventions

DEAR CHAIRMAN GILLMOR: Thank you for your request for responses to your additional notes and questions stemming from my testimony at the July 13 Subcommittee hearing on POPs. All of my responses below are provided within the context of the Stockholm Convention on Persistent Organic Pollutants (POPs).

Throughout the Notes and Questions, there are many conclusions and opinions that are expressed as being those of the "Subcommittee." I found this confusing, because many of those conclusions and opinions run counter to views that minority members of the Subcommittee expressed at the hearing. Moreover, I am not aware of any vote or agreement having taken place that has resulted in a consolidated view on this subject among the Subcommittee members. For clarity's sake, therefore, I have taken the liberty of referring to the Notes and Questions as the work of the Chair, rather than the Subcommittee.

With the exception of my response to Question 12, my responses are limited to those questions to which you specifically asked me to reply. My silence on other parts of your Notes and Questions should not be construed as approval or disapproval of their contents.

Sincerely,

GLENN WISER

Question 3 (Wiser): What if the Executive Branch responded that they are not ready to support opting in at this time but might within 6 months? Would this be an impermissible answer under your proposal? If not permissible, what is the sanction that would apply and how would it be enforced? If permissible, is there much of a difference between your proposal and simple deference to the executive branch?

Response: Page 3 of the Chair's Notes and Questions correctly states that "The decision to opt-in and the manner in which the U.S. chooses to regulate are two different occurrences." Despite the clarity in that sentence, the Chair's Question 3 and the comments preceding it confuse these two things, and thus erroneously suggest that mandatory rulemaking authority for EPA would somehow be synonymous with a congressional requirement that the Executive Branch "opt in" to a Stockholm new-listing amendment.

The Executive Branch's authority to decide whether or not to opt in to an additional treaty requirement stems from its foreign affairs/treaty making powers. It is not dependent on a delegation from Congress. Unlike the Chair's June 17 Discussion Draft, which impermissibly attempts to constrain Executive Branch prerogatives by requiring the President to make an Article 25.4 opt-in declaration, we believe the question of whether and when the Executive Branch consents to be bound by a Convention amendment is not one that should be addressed by this bill, because the Constitution does not give the Congress a role in that decision. (We do not voice an opinion here about the separate question of the Senate's role under its advice and consent powers.) Similarly, it would be inappropriate for the Congress to attempt to empower the courts to force the Executive Branch to exercise its foreign affairs/treaty making powers in this context.

The question this legislation needs to address is whether and how Congress will authorize EPA to regulate a POP when the Stockholm Conference of the Parties (COP) adds one to the Convention. Congress' constitutional power to do this is not contingent on whether or when the United States decides to opt in to a new-listing amendment or, for that matter, whether the amendment has entered into force for the United States. Yet Congress can effectively prevent the Executive Branch from exercising its treaty making powers by failing to give EPA adequate authority to ban or restrict the newly listed POP. Because of the constitutional separation of powers, the Executive Branch traditionally does not bind the United States to a treaty until it is confident that we will be able to comply with it. In the POPs context, that will require passage by the Congress of adequate implementing authority, unless such authority already exists. It would undercut the negotiating posture of the United States if, during a Stockholm new-listing discussion, the Executive Branch could not confidently predict whether it would obtain the implementing authority needed to allow the United States to regulate the chemical and thus opt-in to the new-listing amendment. Hence, the POPs implementing legislation must provide adequate implementing authority for future, additional POPs listings.

The most straightforward and reliable way to accomplish that would be for Congress to require EPA to regulate, or decide not to, within a specific time after the Conference listing decision. The statutory language pertaining to a decision not to regulate could be drafted in such a way as to respond to some of the questions raised in this Notes and Questions. For example, a decision not to regulate under Title V could be made because EPA had concluded that the chemical is not a POP as defined under the Convention or because EPA already had exercised sufficient regulatory authority under a different statute.

Question 5 (Wiser): Doesn't paragraph 7a within Article 8's reference to considerations in Annex F apply to international guidance for control measures under the treaty, and therefore is part of the relevant guidance in the treaty for parties? In your proposed rulemaking standard, why did you ignore the proposed rulemaking standards in Annex F? Are you stating that any guidance from the international body should be mandatory as US regulations?

Response: Stockholm Article 8.7(a) does articulate a standard by which the Convention's Persistent Organic Pollutants Review Committee (POPRC) shall determine whether a chemical is a POP and thus, global action is warranted; and the Convention does not specifically define a methodology by which parties will determine the control measures for a new POPs listing. Annex F provides a non-exclusive list of items that the POPRC should consider when preparing its analysis of possible control measures for an additional POP. Neither Annex F nor the body of the Convention, however, specifically define how the items must be considered. Rather, Article 3 establishes the fundamental standard for POPs that are listed in the Convention: National control measures must be whatever "legal and administrative measures [are] necessary to eliminate" production, use, import, and export of the chemical.

The Convention does not establish a fixed methodology for determining control measures. The negotiating parties recognized that, given the tremendous disparity

of implications different POPs may have for health, environment, and global, national, and local economies (e.g., compare the respective uses and control measures for DDT with those for PCBs), it would not be realistic or desirable to try to devise a single, fixed methodology for determining what the control measures will be for every POP that may be added to the Convention, because a "one size fits all" methodology could very well prove inappropriate or unworkable for a future POP listing. Instead, the parties agreed to the broad guidance contained in Art. 8.9: "The Conference of the Parties, taking due account of the recommendations of the [POPs Review] Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical, and specify its related control measures . . ."

A Conference listing decision will establish requirements, not mere "guidance," for control measures. The guidance to the Conference of the Parties (COP) contained in Article 8.9 pertains to how the COP will render its decision on an additional POP. It should not be construed (as Question 5 erroneously does) to suggest that the COP decision will provide mere "guidance from the international body" on how a party may or may not control a listed POP. While the United States will have the option of deciding whether or not it will be bound by an amendment to add a POP to the Convention, it will not have the option (if it accepts a new-listing amendment) to devise control measures that are less stringent than those required under the treaty, because doing so would put the United States in violation of its treaty commitments. This misunderstanding—that a new-listing amendment will contain only guidance about control measures, rather than the control measures themselves—may be why the June 17 Discussion Draft proposes a regulatory standard that would likely not provide EPA with sufficient authority to ensure that the United States could comply with a new listing decision under the Stockholm Convention if it decided to "opt in" with respect to one.

Annex F outlines informational considerations; it does not contain a rulemaking standard. Confusion about the function of Annex F may be why the Chair seems to suggest or accept the argument that cost-benefit "balancing" is required by the Convention, and why it believes that statutory authority allowing EPA to regulate to an extent "that achieves a reasonable balance of social, environmental, and economic costs and benefits' would permit the United States to comply with a Stockholm new listing amendment. As we note in the first paragraph of this response, Annex F provides a non-exclusive list of items that the POPRC should consider when preparing its risk management evaluation of a chemical that may be added to the Convention. As such, it is basically a vehicle for the POPRC to gather and provide information to the parties regarding the comparative efficacy of various control strategies.

Annex F contains no guidance whatsoever on how the POPRC will recommend, or the parties will decide, what the control measures will be. Thus, Question 5 errs when it suggests that Annex F contains "proposed rulemaking standards." Moreover, nowhere does Annex F or the Convention body text contain an implicit or explicit suggestion that Convention parties must "balance" these items against each other when determining what the control measures for a POP should be. Indeed, a requirement to achieve a "balance" between these considerations could arguably conflict with the Art. 8.9 requirement that the Conference of the Parties must decide upon a proposed POP in "a precautionary manner."

The fundamental Convention standard for control measures is elimination. The core treaty terms of Article 3 establish the fundamental Convention standard for control measures. If a chemical is added to Annex A, the control measures must be whatever "legal and administrative measures [are] necessary to eliminate" production, use, import, and export of the chemical. Thus, for all of the intentionally produced POPs currently listed in the Convention (with the exception of DDT), the required control measure is elimination, which is to be accomplished by means available within each party's respective legal and administrative systems. We believe that a regulatory standard requiring cost-benefit balancing would be incapable of ensuring U.S. compliance with Stockholm Annex A amendments to which the United States desires to bind itself. Instead, when the United States agrees with the Conference decision that a chemical is a POP, the United States should take the "legal and administrative measures necessary to eliminate" production, use, import, and export of the chemical.

In very limited situations, the required control measure could be restriction. DDT is the only POP listed in Annex B, and thus the only intentionally produced POP that is subject to restriction, rather than elimination, under the Stockholm Convention. DDT is the sole exception to the elimination rule because of its unique public health role in malaria vector control, especially in Sub-Saharan Africa. We do not believe that the specific conditions leading to the treatment of DDT in Annex B are

especially relevant to the domestic regulatory situation in the United States; moreover, we do not anticipate that many, if indeed any, intentionally produced POPs will be added to Annex B in the future.

However, if an intentionally produced POP were added to Annex B, then we are confident that the United States would fully protect its interests during the international negotiations on the listing decision, so that the control measures contained in that decision would adequately reflect the public health needs of the United States. Given U.S. technical expertise and the advanced state—compared to most other countries in the world—of our health care, research and development, administrative, and other relevant capacities, we do not believe there is any realistic possibility that the global community would bind itself with Annex B control measures that were too strict for the United States to implement. Rather, the far more realistic scenario is that the United States will have to push many other countries to accept control measures that are stricter than they might otherwise prefer.

In conclusion, for new listing amendments to Stockholm Annexes A or B, we believe Congress should require EPA, within a fixed time, to initiate a rulemaking implementing the control measures required in the amendment, unless EPA concludes that the chemical is not a POP. We do not agree that EPA should be required to engage in de novo cost-benefit "balancing," because such balancing is not contained in the Convention and, due to the inherent shortcomings of cost-benefit balancing, it could prevent EPA from promulgating control measures that were strong enough to allow the United States to comply with the new-listing amendment.

Question 7(a) (All witnesses): Please state whether the treaties directly regulate persons or rather rely on individual countries to choose the appropriate means of compliance. Please state whether any of the treaties have a specific regulatory standard for individual nations to follow.

Response: The Stockholm Convention, like other multilateral environmental agreements of global scope, is an agreement among nations. It does not directly regulate persons.

The Convention—again like most other multilateral environmental agreements—leaves the decision of how best to implement specific treaty obligations up to individual parties. However, as noted in my response to Question 5, Stockholm Article 3 requires every party to "Prohibit and/or take the legal and administrative measures necessary to eliminate" its production, use, import, and export of POPs listed in Annex A; and to "Restrict its production and use of the chemicals listed in Annex B in accordance with the provisions of that Annex." Thus, if the purpose for enacting TSCA POPs amendments includes facilitating U.S. acceptance and compliance with a Stockholm new-listing amendment, then any regulatory standard in the bill must give EPA sufficient statutory authority to promulgate regulations that will ensure that the United States can comply with these requirements. A de novo cost-benefit balancing standard will not accomplish that.

Question 7(c) (All witnesses): Do you believe the above Administration principles are prohibited by or consistent with the treaties? If you believe them to be prohibited, please point to specific language prohibiting such consideration.

Response: Because the second quoted "Administration principle" is simply an elaboration of part of the first principle, this comment will refer only to the first quoted principle.

The Administration's principle states, in part, "the United States should compare the international decision to measures that are more and less stringent, thereby facilitating a risk-management decision as to which measure(s) provide(s) the most reasonable balance of benefits, risks and costs for specific uses."

This principle is neither prohibited nor consistent with the Stockholm Convention. One cannot say it is consistent, because the Convention contains no requirement (or even suggestion) that the POPRC or Conference will base their decisions on cost-benefit balancing. The principle simply adds an idea that is not present in the Convention.

Yet one cannot say that the Convention prohibits the principle, because the principle relates to domestic regulatory decisions about adding chemicals to the Convention. The principle necessarily contemplates making it impossible for the United States to comply with, and thus adopt, a new-listing amendment, because it would require EPA to consider regulatory measures that would be less stringent than those permitted under the amendment, and to chose the less stringent measures if they could be shown to provide a more "reasonable" result under the principle's cost-benefit balancing. However, because the Convention does not require parties to adopt new-listing amendments, a principle that could have the effect of preventing the United States from opting in to such an amendment would not contravene any legally binding obligation under the Convention.

By comparison, the principle would be prohibited under the Convention if it were applied to any of the chemicals presently listed in Annexes A or B, because all parties must agree to abide by the control measures contained in those annexes. Implementing control measures that were less strict—as envisioned under the principle—would violate that core treaty requirement.

Question 9 (all witnesses): Would it not be useful to use a current regulatory authority if it would provide for more cohesive U.S. law? Also are there not circumstances where existing law may be sufficient and no new regulation required?

Response: We agree that it would make sense for EPA to use current regulatory authority or existing law to deal with an additional POP under the Stockholm Convention whenever such authority or law were sufficient to ensure U.S. compliance with the new-listing amendment. That may well be the case for a POP added to Annex C, especially when unintentional production of the POP is caused by combustion and the release is to the air, and the Clean Air Act thus applies. The same may be said for measures related to releases of POPs listed in Annexes A, B, or C from stockpiles and wastes (where RCRA and CERCLA might apply). For POPs pesticides, EPA would presumably regulate under authority derived from amendments to FIFRA, which should be a discrete part of any POPs implementation bill that Congress adopts.

However, for industrial chemicals that have been added to Annex A (and whose production, use, import, and export have thus been prohibited), the only relevant statutory authority that is presently available to EPA is TSCA § 6(a). After EPA's proposed asbestos rule was overturned in the *Corrosion Proof Fittings* case, 947 F.2d 1201 (5th Cir. 1991), commentators generally concluded that the "least burdensome means" balancing test in § 6(a) does not give EPA effective authority to ban the production and use of industrial chemicals.[1]

Indeed, EPA has never finalized regulations for any other chemical under § 6(a) since *Corrosion Proof Fittings.* Thus, it would be unreasonable to presume that EPA could successfully implement a Stockholm Annex A amendment for an industrial chemical through its § 6(a) authority.

Question 11 (All witnesses): Are there concerns over any anticipated use of all of these treaty exemptions, including the broader exceptions?. . . Is the concern limited to the country-specific exemptions?

Response: The concern expressed in my testimony referred to the country-specific exemptions.

Question 12 (EPA): Do you have examples where the provisions of the Safe Drinking Water Act risk language or the science provisions of Executive Order 12866 adversely and inappropriately paralyzed the rulemaking procedure? If so, please provide specific examples.

Response: The introductory comments to Question 12 assert that the "sound science" language in the June 17 Discussion Draft is justified because the Safe Drinking Water Act Amendments of 1996 "were passed with broad bipartisan support and have worked very well," and because Executive Order 12866 is still in effect.

The environmental and health community objects to the presence of the "sound science" language in the Draft because it is superfluous and because it will provide entities that have a vested interest in continued production and use of POPs with an inappropriate litigation tool, which they may use to intimidate EPA in the rulemaking process.

The language is unnecessary because, as the comment notes, Executive Order 12866 already requires EPA to base its decisions on the best reasonably obtainable scientific information. Thus, it is not apparent how the additional "sound science" language in the Discussion Draft could improve the quality of EPA's decision-making.

A key difference between Executive Order 12866 and the Discussion Draft's language, however, is that private entities cannot base a judicial cause of action on an executive order. Under either the Administrative Procedure Act's arbitrary and capricious standard or TSCA's substantial evidence standard, agency rules that are not grounded in careful scientific analysis may be struck down by the courts. Thus, regulated entities will be fully protected under the TSCA POPs amendments from any potential misuse of science by EPA—without the Discussion Draft's "sound science" language.

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[1] *See, e.g.,* Testimony of Lisa Heinzerling, *POPs, PIC, and LRTAP: The Role of the U.S. in Draft Legislation to Implement These International Conventions: Hearing Before the Subcomm. on Environment and Hazardous Materials of the House Comm. on Energy and Commerce,* 108th Cong., at 2-11 (July 23, 2004).

Because the language is unnecessary, we conclude that its underlying purpose is to provide producers and users of POPs chemicals—or anyone else who wants to delay instituting a covered regulation protecting human health and the environment(with an additional opportunity to sue EPA, or to create a "chilling effect" that will lessen EPA's desire to initiate a POPs-related rulemaking. As we noted in our answer to Question 3 above, Congress can effectively prevent the Executive Branch from exercising its treaty making powers by failing to give EPA adequate authority to ban or restrict a newly listed POP. Congress can also accomplish that by expanding the opportunity for individuals to sue EPA over its implementing regulations. Because we do not believe that U.S. participation in the Stockholm Convention should so easily be held hostage to the interests of private entities that produce or use POPs, we believe it is inappropriate for superfluous and potentially pernicious "sound science" provisions to be included in this bill.

As to whether the sound science provisions of the 1996 Safe Drinking Water Act Amendments have stifled rulemaking or "worked very well," we point out that the only substance EPA has regulated under the Amendments is arsenic, which it was specifically required to do.

BLOOMBERG SCHOOL OF PUBLIC HEALTH,
JOHNS HOPKINS UNIVERSITY
September 14, 2004

Paul E. Gillmor, *Chairman*
Subcommittee on Environment and Hazardous Materials
Washington, DC 20515-6115

Re: Notes and Questions, July 13, 2004 Hearing on POPs, PIC, and LRTAP: The Role of the U.S. and Draft Legislation to Implement These International Conventions

DEAR CHAIRMAN GILLMOR: Thank you for your letter of August 31, 2004 requesting my responses to your notes and questions arising from the testimony that was given at the July 13 Subcommittee hearing on POPs, PIC and LRTAP. I am pleased to provide my views on these issues. I have addressed the issues raised in each section of the letter as well as your questions, many of which were not specifically directed to me.

Draft Provisions to Fill the Gaps for U.S. Compliance with Treaty Obligations for Currently Listed Chemicals

The ability to consider additional chemicals is a critical part of the POPs treaty. It would be a mistake to think that the United States will truly "sit at the upcoming meetings as full partner" based on implementing legislation that does not include a mechanism for adding future POPs. The international community will be looking for evidence that the United States intends to comply with the entire treaty, not just the control measures for the initial twelve POPs, which we have largely undertaken already. If the U.S. is to have credibility as a Party to the Stockholm Convention, Congress should enact enabling legislation that contains an adding mechanism.

Federal-State Provision

If it is the intention of the Committee to maintain the existing Federal-state relationship with respect to currently listed chemicals under TSCA, then this needs to be clarified as suggested in the Notes. I, too, was concerned that the language was ambiguous and could be interpreted to limit the ability of states to regulate substances more stringently than the federal government. Ultimately, it is my opinion that TSCA needs to be reformed to allow more state involvement and to grant states broad authority (without prior EPA approval) to regulate chemicals more stringently than the federal government.

The Relationship of PCB Provision to Existing TSCA 6(e)

Evidently it was not the intention of the draft legislation to alter TSCA 6(e). I concur that if that is the case, it should be clarified in the draft legislation.

Compliance with the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

If the U.S. EPA and State Department indicate in their responses to Question 1 that there is already a procedure under which the U.S. government may notify the international authority that the U.S. does not wish a particular PIC listed chemical to be imported into the U.S., then the Subcommittee may wish to ask them to clarify under which authority the U.S. would take this action.

Provisions Concerning the United States Process for Opting into the Treaty for Additional Chemicals

Question 2: *Please comment on this point. Does the draft restrict the U.S. ability to opt-in based on the rulemaking standard in 502(e)?*

Throughout this letter there is reference to the fact that "the decision to opt-in and the manner in which the U.S. chooses to regulate are two different occurrences." I would agree. However, in the case of rule-making, the language in 502(e) would nearly assure that no regulatory action is taken even when the U.S. decides to opt-in (or declines to opt-out).

Requirements on the Executive Branch Related to Opting-In

Question 3: *What if the Executive Branch responded that they are not ready to support opting in at this time but might within 6 months? Would this be an impermissible answer under your proposal? If not permissible, what is the sanction that would apply and how would it be enforced? If permissible, is there much of a difference between your proposal and simple deference to the executive branch?*

Question 4: *Do you believe a court should be able to compel the Executive Branch to opt in on behalf of the United States for any given chemical through enforcement of a statutory standard? If so, what should the standard be?*

Although these questions were not directed to me, I would like to address one point, with regards to the issue of a deadline for action. As the notes correctly indicate, the decision to opt-in (or to opt-out) and subsequent risk management decisions are two different issues.

However, in my testimony, and I believe in some of the other testimony that you heard, the suggestion for a deadline had to do with the subsequent risk management action for the POPs. The risk management provisions of TSCA are at this point in time an exercise in futility and will not serve the nation well in assuring protection from POPs. However, ratification of the POPs convention is an opportunity to establish a clear set of expectations that the EPA will take action to manage risks for chemicals that have been added to the POPs convention. Little to no risk management occurs under TSCA Section 6. One tool that Congress can use to establish clear expectations of action by the EPA is a statutory deadline. As you imply in your notes, statutory deadlines are indeed enforced by the Courts. That is what provides the incentive for EPA to take an action. From my experience at the EPA, while the Executive Branch dislikes (and usually opposes) statutory deadlines, it has a great deal of respect for them because they very clearly convey the intention of Congress. What is the alternative? One could undertake a more thorough-going reform of TSCA, to "fix" TSCA Section 6 which has not proven effective at all, for the reasons that I already laid out in my testimony. I think that such a major overhaul of TSCA is long overdue, however, I suspect that the Subcommittee would prefer to make only the corrections that are necessary to assure that the U.S. can be in compliance with the treaties.

Listing Decisions versus U.S. Determination of Protective Measures

Question 5: *Doesn't paragraph 7a within Article 8's reference to considerations in Annex F apply to international guidance for control measures under the treaty, and therefore is part of the relevant guidance in the treaty for parties? In your proposed rulemaking standard, why did you ignore the proposed rulemaking standards in Annex F? Are you stating that any guidance from the international body should be mandatory as US regulations?*

Question 6: *Does Annex F apply to international guidance for control measures under the treaty? Do you believe that any guidance from the international body should be mandatory as US regulation?*

It is my sense that the POPs convention contains provisions related both to risk assessment and risk management for POPs. As stated in Article 8.9: "The Conference of the Parties, taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical, and specify its related control measures . . ." In terms of risk assessment, the language in Article 8.7(a) does clearly articulate a standard by which the Convention's Persistent Organic Pollutants Review Committee (POPRC) shall determine whether a chemical is a POP and thus, global action is warranted. It is important to note that this decision to list is solely based on attributes of the substance related to its persistence and toxicity and does not include any considerations of economics and so forth. Were the U.S. government to adopt a different standard for such a determination (as I believe is proposed in the Draft Legislation) then the U.S. would not be in compliance with the treaty.

In terms of risk management, the Convention also provides a list of issues (Annex F) that are to be considered by the Parties in determining the control measures to

be specified for a newly listed POP. While the goal of the Convention is the elimination of POPs, the Convention recognizes that this is not always immediately achievable. For the initial 12 listed POPs, the Convention provides a public health exception for DDT use in malaria control and a reduction (rather than an elimination) strategy for certain POPs (dioxins and furans) that are produced inadvertently. In this way, Annex F allows the Parties to consider economic and other factors in making risk management decision. However, it is important to note that while Annex F lists a number of factors that should be considered, it does not require formal cost benefit analysis, or any other specific risk analysis tool be employed in that process.

In terms of your question 6, as agreed to in negotiations, nations will employ any "legal and administrative measures [are] necessary to eliminate" production, use, import, and export of the chemical. This means that the treaty would indeed bind the U.S. to take specific regulatory action to be in compliance with the decisions by the Conference of Parties for the initial set of POPs. However, the U.S. would do so under its own laws, utilizing the measures that are most appropriate in the U.S. The convention does not dictate these measures. In no way is the list in Annex F, or any other provision of the POPs accord, intended to create any "rulemaking standards" for the Parties to the Convention.

Costs and Benefits under the Treaties

Question 7: *Please state whether the treaties directly regulate persons or rather rely on individual countries to choose the appropriate means of compliance. Please state whether any of the treaties have a specific regulatory standard for individual nations to follow.*

Please explain how the two principles cited above are consistent with, or allowed under the treaties.

Do you believe the above Administration principles are prohibited by or consistent with the treaties? If you believe them to be prohibited, please point to specific language prohibiting such consideration.

It is my understanding that the treaties rely on individual Parties (countries) to choose the appropriate means of compliance. The Stockholm Convention does include very specific actions that nations must take to be in compliance with the agreement, such as, elimination of production, use, import, and export of certain chemicals. Should the U.S. opt-in (or decline to opt-out) to amendments adding future POPs, EPA will need regulatory authority to take action with regard to these chemicals. This is why I urge you to bring forward a bill that would give EPA sufficient statutory authority to promulgate regulations that will ensure that the United States can comply with these requirements. A de novo cost-benefit balancing standard will not accomplish that.

The Administration states that, "the United States should compare the international decision to measures that are more and less stringent, thereby facilitating a risk-management decision as to which measure(s) provide(s) the most reasonable balance of benefits, risks and costs for specific uses." It goes on to state that "In weighing benefits, risks and costs, the United States should consider domestic production, export and use of the chemical, and any national and international consequences that are likely to arise as a result of domestic regulatory action, including consequences that cannot be quantified and including consideration of the possible consequences of using substitute chemicals."

The Administration's principles are not consistent with the Stockholm Convention because of the clear implication that the United States will go its own way, regardless of international decisions in which the U.S. has participated, and based on a risk/benefit balancing process that is not included in the Convention. These principles also would require the EPA, in each case, to consider regulatory measures that would be less stringent than those specified in the Convention amendment, including no control measures at all. While these procedures would not be prohibited for new listings, they certainly are not consistent and would weaken the U.S. participation in the Convention.

Discretion to Regulate

Question 8: *Missing*

Question 9: *Would it not be useful to use a current regulatory authority if it would provide for more cohesive U.S. law? Also are there not circumstances where existing law may be sufficient and no new regulation required?*

I agree that it makes sense for EPA to use current regulatory authority or existing law to deal with an additional POPs under the Stockholm Convention whenever such authorities would be sufficient. As you state, there may be cases where the authority under the Resource Conservation and Recovery Act or the Federal Insecti-

cide Fungicide and Rodenticide Act may be more appropriate. Certainly FIFRA may in many cases provide adequate authority for the regulation of POPs pesticides and RCRA for POPs in waste disposal. TSCA is the weakest link in the chain and may need to be invoked in a number of circumstances. The most obvious is for industrial chemicals added to Annex A. Another example is POPs that are formed inadvertently in the production of other chemicals, e.g., the incidental production of dioxins and furans in the manufacture of other chemicals. In these cases the only statute that provides EPA with regulatory authority is TSCA § 6(a). Ever since the 1991 asbestos decision by the 5th Circuit Court (*Corrosion Proof Fittings*) EPA has had to meet the "least burdensome means" test, which has in turn led to no new risk management decisions under TSCA. This is the area in which existing law is completely insufficient. While a broader reform of TSCA is what is really needed, Congress should now act to grant EPA the authority to regulate new chemicals that are added to the Stockholm Convention over time, and to create an expectation that EPA will do so in most cases.

Alleged Duplication of International Body Decision

I would agree that "the decision to list a chemical or even to set out guidance on control measures is not the same as the promulgation of a U.S. regulation." However, I cannot support legislation that uses this idea as a justification for creating an elaborate process that would not add value and instead would make it more difficult for the EPA to take action to protect the public health and environment from POPs chemicals.

Relationship of Proposed New Regulatory Authority to Existing Regulatory Authority

Question 10: *Do you read the Gillmor draft as requiring compliance with the provisions of TSCA section 6(a)? If not, please outline the items of TSCA section 6 that you would not need to address under the Gillmor draft regulatory authority under the proposed section 503(e). Please also compare this language to FIFRA section 2, Definition (bb) and Section 6 (b) (2).*

In my view, the Subcommittee isn't asking the right questions. More relevant questions are: Would the proposed section 503(e) provide EPA with the tools that it needs to protect the U.S. as well as the global environment and public health from POPs chemicals under the POPs convention? Or, rather, will the language promote regulatory paralysis, litigation, and delay, thus depriving U.S. citizens of protection from POPs and undermining U.S. participation in this important global public health treaty?

Protection Standards versus Means and Measures

I would agree that there is a clear distinction between a legal standard for protection of human health and the environment and the means for achieving such a standard. Given that POPs are persistent, many of their effects on health and the environment are difficult if not impossible to reverse for years and years, and thus require very stringent risk management procedures. POPs are a special class of chemicals that deserve a health-based, precautionary approach to risk management. Indeed, this is the reason that nations negotiated a treaty to phase out the manufacture, use, import, and export of this entire class of chemicals. The problem with language such as "means of protection that reasonably balance costs and benefits" is that the calculation of such costs and benefits is likely to be driven by short-term, easily quantifiable considerations, thus leaving future generations with the burdens of disease, environmental devastation, and clean-up that are likely to result from such "balancing".

Exemptions

Question 11: *Are there concerns over any anticipated use of all of these treaty exemptions, including the broader exceptions? Do you envision the US overriding the broader exemptions for use in laboratory-scale research; for small quantities in the possession of an end-user, and for quantities occurring as unintentional trace contaminants in products? If so under what situations? Or the concern limited to the country-specific exemptions?*

In my testimony, I was referring to country-specific exemptions. I believe that this is another area in which the draft legislation needs clarification, because I still do read it to state that the United States must take advantage of each country-specific exemption available to every single country, and not just those which the U.S. reasonably needs, requests, and receives. This is inappropriate and would undermine U.S. leadership in this area. If it is not the intent of the draft legislation then it needs to be modified.

In terms of the general exemptions, in my opinion the U.S. would need exemptions in areas such as for laboratory-scale research (for example, research to quan-

tify the amounts of POPs in the environment and toxicology research). The other cases you give (possession of small amounts of the material and trace quantities in products) are difficult to address as a general matter since the circumstances could involve varying levels of risk. The US should be able to make decisions in these areas based on providing an adequate level of protection to health and the environment; Congress should not require that every general exception would be adopted by the U.S. government.

Sound and Objective Science

Question 12: *Do you have examples where the provisions of the Safe Drinking Water Act risk language or the science provisions of Executive Order 12866 adversely and inappropriately paralyzed the rulemaking procedure? If so, please provide specific examples.*

You have justified the use of the term "sound and objective scientific practices" by pointing to similar language in the Safe Drinking Water Act and language elsewhere that is not similar. It is not correct that the language in EO 12866 and in the President's Commission on Risk Assessment and Risk Management Report embraces the ridiculous dichotomy between "sound" and "unsound" science. Only the Safe Drinking Water Act includes this term. In considering whether this language has been useful in SDWA, you might want to ask the EPA to list every public health protective action it has taken under the SDWA using this language over the last eight years. For example, when will the EPA adopt a Maximum Contaminant Level (MCL) for MTBE or for perchlorate? I would argue that to date, this provision of the SDWA has not been particularly effective, and therefore does not stand as a model for future legislation, especially for chemicals as dangerous as POPs.

What is broken, that the Draft Legislation is trying to fix? Indeed, what is wrong with the very workable language in EO 12866 that already requires "best reasonably obtainable scientific, technical, or other information"? Legislative language with regards to "sound science" will not add value to the regulatory process, but it is likely to add to costs of transaction time, litigation, and delay. It should be opposed, even it is well-intentioned. However, generally the support for such provisions is from members of the regulated industry (and their expert consultants), who would be the sole beneficiaries of additional opportunities for litigation and delay.

In closing, I would hope that you have seriously considered the points that I have raised in response to your letter. Phasing out emissions of POPs to the environment is an important public health and environmental goal. The United States has an opportunity to play a key role in this process as a Party to the Stockholm Convention. I hope that, at the end of the day, Congress enacts legislation that will allow the U.S. to fully participate in all aspects of the Convention, including the ability to regulate newly added POPs chemicals.

Very truly yours,

LYNN R. GOLDMAN, M.D., M.P.H.
Professor, Environmental Health Sciences

GEORGETOWN UNIVERSITY LAW CENTER
September 14, 2004

PAUL E. GILLMOR
Chairman
Subcommittee on Environment and Hazardous Materials
Washington, DC 20515-6115

Re: "Notes and Questions from July 13, 2004 Hearing on POPs, PIC, and LRTAP: The Role of the U.S. and Draft Legislation to Implement These International Conventions"

DEAR CHAIRMAN GILLMOR: I am happy to respond to your additional questions relating to my testimony at the July 13 Subcommittee hearing on POPs. In addition to answering the specific questions directed at me (these are the questions you have addressed to "all witnesses"), I wish to note that I hold general views consistent with those expressed in the letters from Lynn Goldman, Glenn Wiser, and Brooks Yeager.

1. Question 7:

Please state whether the treaties directly regulate persons or rather rely on individual countries to choose the appropriate means of compliance. Please state whether any of the treaties have a specific regulatory standard for nations to follow.

I did not testify on matters related to these questions, but I will say that I agree with the views expressed in the letters from Lynn Goldman, Glenn Wiser, and

Brooks Yeager.*Do you believe the Administration principles are prohibited by or consistent with the treaties? If you believe them to be prohibited, please point to specific language prohibiting such considerations.*

Again, I did not testify on matters related to this question, but I will note again that I am in agreement with the responses submitted by the witnesses I have just mentioned.

2. Question 9:

Would it not be useful to use a current regulatory authority if it would provide for more cohesive U.S. law? Also are there not circumstances where existing law may be sufficient and no new regulation required?

It would be useful to use a current regulatory authority if it would provide for more cohesive and *adequate* U.S. law on POPs. As I testified at the hearing in July, however, certain aspects of current U.S. law—in particular, section 6(a) of the Toxic Substances Control Act—have proved inadequate for regulating POPs, and therefore it would not be advisable to rely on the kind of regulatory framework embodied in this statute for regulating POPs.

3. Question 11:

Are there concerns over any anticipated use of all of these treaty exemptions, including the broader exceptions? Do you envision the US overriding the broader exemptions for use in laboratory-scale research; for small quantities in the possession of an end-user; and for quantities occurring as unintentional trace contaminants in products? If so under what situations? Or is the concern limited to country-specific exemptions?

I did not testify on this issue, and thus I cannot attest to the nature of the concerns noted in this question.

Thank you for the opportunity to address these questions.

Sincerely,

LISA HEINZERLING
Professor of Law

UTILITY SOLID WASTE ACTIVITIES GROUP
September 10, 2004

Honorable PAUL E. GILLMOR
Chairman
Subcommittee on Environment and Hazardous Materials
U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

Re: Response To Follow-Up Commentary and Questions from July 13, 2004 Subcommittee Hearing on Implementing Legislation for POPS, PIC, and LRTAP Treaties

DEAR REPRESENTATIVE GILLMOR: The Utility Solid Waste Activities Group and the Edison Electric Institute (collectively "USWAG") are pleased to respond to the Subcommittee's additional commentary and questions regarding implementation of the POPs, PIC and LRTAP treaties (collectively "Treaties"). As an initial matter, USWAG would like to reiterate its support for the House Discussion Draft (dated June 17, 2004), as it represents a sound statutory framework for the United States to promptly implement its obligations under the above Treaties. It is important for the United States to enact implementing legislation as soon as possible to enable the United States to continue to play a leading role regarding the strategic implementation of the Treaties and to participate as a member of the Conference of the Parties ("COP") at the upcoming May 2005 COP-1.

1. *Federal-State Provision*

USWAG agrees with the Subcommittee's explanation of the Discussion Draft's provision regarding the relationship of federal-state laws regulating POP chemicals. It is important that implementing legislation provide a uniform and level-playing field across the country with respect to the regulation of POP chemicals, while preserving the ability of individual states to regulate POP chemicals more stringently in certain circumstances. The House Discussion Draft establishes this statutory framework, while preserving the ability of individual states to seek approval from EPA to regulate POP chemicals more stringently on a case-by-case basis pursuant to the procedures set forth in section 18(b) of TSCA.

2. *The Relationship of PCB Provision to Existing TSCA 6(e)*

USWAG agrees with the Subcommittee that nothing in the Discussion Draft precludes or in anyway alters EPA's *existing* statutory authorities to regulate POP chemicals, including PCBs. The conditions set forth in the Discussion Draft for issuing or amending rules applicable to PCBs are applicable *only* in the context of EPA taking action for purposes of complying with the POPs Convention. This is a narrow and discrete provision and in no way alters EPA's existing authority under TSCA section 6(e) to regulate PCBs or to otherwise amend the existing PCB regulations promulgated under TSCA section 6(e).

3. *Provisions Concerning the United States Process for Opting into the Treaty for Additional Chemicals*

USWAG agrees with the Subcommittee's interpretation that the Treaties themselves do not articulate or mandate any legal process or procedural mechanism to which the Parties must adhere for purposes of implementing their respective treaty obligations. Indeed, Article 7 of the POPs treaty directs the Parties to develop a plan for the implementation of the Party's respective treaty obligations. This makes clear that the POPs treaty contemplates individual Parties devising and implementing their own procedures for fulfilling their respective treaty obligations. Whether and how any particular country will respond to the listing of a new chemical or otherwise implement its Treaties obligations must remain within the sovereign jurisdiction of the participating country.

USWAG also agrees that nothing in the Discussion Draft ties the decision to "opt-in" to a decision to establish domestic regulations for a newly listed POP. As the Subcommittee correctly points out, the United States may determine to opt-in with respect to a newly listed POP and then determine that there is no need to develop additional regulatory controls because existing, domestic regulations already allow the United States to meet its Treaty obligations with respect to the POP.

4. *Requirements on the Executive Branch Related to Opting-In*

USWAG agrees that the decision of the United States whether or not to "Opt-In" should lie exclusively with the Executive Branch and should not be judicially reviewable. As a practical matter, the decision whether or not to agree to be bound by a decision of the COP is effectively a decision by the United States to agree to a new international treaty. Such decisions have historically resided within the domain of the Executive Branch and nothing in the Treaties warrants a departure from this precedent or warrants allowing the judicial branch to reverse the Executive Branch decision-making process with respect to whether to become a party to an international treaty.

USWAG also is extremely wary of legislation establishing a statutory timeframe by which the Executive Branch must decide whether to agree to a listing decision. Whether to opt-in with respect to any new listing decision will necessarily involve a host of unique factors for the Executive Branch to consider—some of which will require more evaluation, deliberation and study than others. Therefore, USWAG believes it is unwise to prejudge—through imposition of a statutory deadline—the length of time that the Executive Branch will need to evaluate and render a decision regarding whether to opt-in with respect to any future POP chemical. Such arbitrary deadlines can be the source of mischievous "statutory deadline" lawsuits that often produce results wholly unrelated to the underlying statutory deadline.

5. *Whether the Treaties Address Individual Persons or Countries*

As USWAG made clear in its testimony, there is little debate that the Treaties constitute commitments *between* nations to take certain actions and do not, in and of themselves, directly regulate individuals with those nations. The Treaties contemplate the individual participating countries selecting the appropriate means, through their respective implementing legislation, to set forth (as necessary) regulations to ensure that the participating country can meet its Treaty obligations. In the case of the United States, the purpose of the enabling legislation is to allow Congress to exercise its authority to establish how the U.S., though its domestic laws, will meet the international obligations of the U.S. as a Party to the Treaties. Citizens then comply with U.S. law established by Congress, as implemented by the Executive Branch and interpreted by the Judiciary. USWAG does not believe that the Treaties, in and of themselves, set forth "specific regulatory standard[s] for individual nations to follow," but rather set forth objectives that participating countries must ensure compliance with through their own implementing legislation.

6. *Whether the Administration's Principles Are Prohibited by or Consistent With the Treaties*

The Subcommittee points to certain of the Administration's principles set forth in its written testimony for implementing the Treaties—including risk-management and risk/cost issues—and asks whether these principles are inconsistent with or prohibited by the Treaties. These principles are neither prohibited by nor inconsistent with the Treaties. There is nothing in the Treaties that speak to what mechanism and/or procedures a Party should adhere to in deciding whether and how to control a POP. Put simply, the Parties are free to opt-in using their own internal criteria. Therefore, the Administration's principles, as outlined in its written testimony, are neither prohibited nor inconsistent with the Treaties.

7. *Discretion to Regulate*

As noted above, there is no mandatory requirement for EPA (or any other federal agency) to promulgate new regulations following a decision by the United States to opt-in with respect to a newly listed POP. As the Subcommittee correctly points out, the United States may already have in place adequate regulatory controls to fulfill its Treaty obligations with respect to the newly listed chemical. Indeed, this is the case with many of the existing POPs, such as PCBs, where EPA is effectively agreeing to opt-in with respect to these chemicals (*i.e.*, by becoming a Party to the Treaty), but at the same time recognizing that existing domestic regulations already fulfill most of the United State's Treaty obligations with respect to these chemicals. The bottom line is that EPA should only be promulgating additional regulations to fill regulatory gaps—*i.e.*, differences between existing domestic regulations and our obligations under the Treaties. The Agency must be afforded the discretion to make these decisions, as opposed to being required to promulgate new regulations simply as a result of an opt-in decision.

8. *Exemptions*

USWAG agrees with the Committee that there is nothing in the Discussion Draft compelling the United States to avail itself of any/or all exemptions. Therefore, there is no need for any further clarification on this point.

USWAG appreciates the opportunity to respond to the Subcommittee's follow-up commentary and looks forward to continuing to working with the Subcommittee to enact implementing legislation as soon as possible.

Very truly yours,

JAMES R. ROEWER

RESPONSE FOR THE RECORD BY STEVEN GOLDBERG ON BEHALF OF CROPLIFE AMERICA

As the national trade association representing the developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the United States, CropLife America appreciated the opportunity to testify before the Subcommittee on Environment and Hazardous Materials on draft legislation to implement the Stockholm (POPs), Long-range Transboundary Air Pollution (LRTAP POPs) and Rotterdam (PIC) Conventions. We support these Conventions, and strongly encourage Congress and the Administration to implement and ratify these important agreements as quickly as possible.

The United States has the strongest and most emulated pesticide regulatory system in the world. Congress saw the need for a separate statute regulating pesticides in order to provide for extensive health and safety testing when it passed the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) in 1947. Through four subsequent major revisions to FIFRA and the passage of the Food Quality and Protection Act (1996), Congress has provided for an increasingly comprehensive pesticide regulatory system as the basis for EPA pesticide decisions.

Given Congress' specific and recurrent decisions on pesticide law over the years, we believe FIFRA provides the necessary statutory framework to implement the conventions without adding pesticide provisions to the Toxic Substances Control Act. We understand that it is this Subcommittee's intent to maintain the existing jurisdictional split between FIFRA and TSCA, and we look forward to working with the Committee to ensure this separation continues.

We applaud Chairman Gillmor's leadership in drafting strong implementing legislation, holding a hearing with participation from a wide array of interested stakeholders, and continuing to work with all interested parties to fine tune this bill. We appreciate that our continued involvement in these efforts has been solicited through the Committee's Supplemental Questions and hope that our responses are constructive towards the swift passage of this legislation.

QUESTION 7

All witnesses: Please state whether the treaties directly regulate persons or rather rely on individual countries to choose the appropriate means of compliance. Please state whether any of the treaties have a specific regulatory standard for individual nations to follow.

The treaties are clearly binding to "Parties," meaning governing bodies, and not persons. The treaties on their faces indicate that measures to reduce or eliminate POPs chemical releases are to be determined and undertaken by said Parties. National governments are responsible for implementing control measures—consistent with each country's sovereign right to execute domestic environmental policies—to meet their obligations under the Conventions.

It is not our belief that the treaties establish a specific regulatory standard for individual nations to follow. The Treaties merely require that Parties be bound to implement bans or restrictions on the production or use of listed chemicals imposed by the Conventions. It is up to each of the country's specific regulatory scheme to accomplish those objectives.

However, in the context of U.S. laws and regulations, risk-cost/benefit standards are solidly established measures governing pesticide production and use. Specifically under FIFRA, the EPA is required to conduct a cost-benefit analysis when determining whether or not to register a pesticide. The treaties do not prohibit this approach; in fact, it is entirely consistent with the approach of the Stockholm Convention. Under the Convention, cost/benefit information must be taken into account in all decisions to list new POPs chemicals. The Administration has embraced these principles as sound measures for all chemical regulation. Risk and cost benefit considerations are consistent with the spirit of the treaties, and Chairman Gillmor's draft legislation supports this approach.

QUESTION 9

Would it not be useful to use a current regulatory authority if it would provide for more cohesive U.S. law? Also, are there not circumstances where existing law may be sufficient and no new regulation required?

From a pesticide policy perspective, the existing statutory authority and regulatory framework under FIFRA is the most useful and effective means for regulating all current pesticides, as well as pesticides potentially identified as POPs in the future. Any laws or regulations intended to affect pesticide use/production in the U.S. outside the FIFRA framework will threaten the cohesiveness of U.S. pesticide laws and regulations, causing confusion to registrants and users alike. Considering that nine of the twelve chemicals under the Stockholm Convention are pesticides which have already been banned under FIFRA, this statute as it stands is clearly sufficient for the domestic regulation of pesticides, consistent with POPs international agreements.

QUESTION 11

Are there any concerns over any anticipated use of all of these treaty exemptions, including the broader exceptions? Do you envision the U.S. overriding the broader exemptions for use in laboratory scale research; for small quantities in the possession of an end user; and for quantities occurring as unintentional trace contaminants in products? If so, under what situations? Or is the concern limited to the country-specific exemptions?

The exemptions provided in the Treaties are clear and sound. Any anticipated use of such exemptions should be the result of thorough consideration, analysis and vetting through each country's domestic regulatory process and decision-making at the international level.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND U.S. DEPARTMENT OF STATE RESPONSES TO QUESTIONS FROM THE HONORABLE PAUL E. GILLMOR, CHAIRMAN

Provisions to Fill the Gaps for U.S. Compliance with Treaty Obligations for Currently Listed Chemicals

One can divide the proposed implementing draft into discrete functions. The first function is implementation of the treaties' various obligations. The Gillmor draft seeks to fulfill U.S. compliance obligations with respect to the Aarhus Protocol, and the Rotterdam and Stockholm Conventions regarding the currently listed, banned or severely restricted chemicals. U.S. law already assures a great deal of compliance with existing Convention and Protocol requirements. Accordingly, the Gillmor draft fills any remaining gaps in current law without requiring EPA to take additional regulatory steps. These provisions, along with ratification of the POPs and PIC trea-

ties, would allow the United States to sit as full partners at the next set of international meetings.

At the Subcommittee hearing on July 13, 2004, the State Department and the Environmental Protection Agency's testimony stated that the Gillmor draft accomplishes the objective of meeting our treaty obligations with respect to existing chemicals. The EPA stated: "We believe that this draft bill would enable the United States to comply with the obligations in the POPs treaties to prohibit or restrict the production, use, import, export, or release of the substances covered by TSCA" (Toxic Substances Control Act). The State Department also testified that, "We believe that this proposal would accomplish this objective to provide the legal authority necessary for the United States to implement fully all of the Toxic Substances Control Act-related obligations of the three agreements." Mike Walls, on behalf of the American Chemistry Council, stated: "Mr. Gillmor's draft implementing legislation addresses all of the necessary changes to TSCA required to ensure that the United States can meet its obligations under the treaties." Also, Jim Rower, with the Utility Solid Waste Activities Group, stated the subcommittee discussion draft "establishes the appropriate statutory framework for implementing the United States Convention obligations."

The Subcommittee believes all other witnesses did not state any general disagreement on this point with respect to obligations for currently listed chemicals. Three potential exceptions are discussed below, concerning: (1) the federal-state provision, (2) the relationship of the Polychlorinated Biphenyls (PCB) provision, and (3) compliance with the PIC treaty. Therefore, as a general matter, based on the written testimony and witness discussion at the hearing, it appears we could have a broad agreement to pursue only the provisions of the discussion draft to fill the gaps for U.S. compliance with treaty obligations for currently listed chemicals, with minor modifications. This is significant because nothing in the treaties compel us to go further legislatively at this time. While many parties have previously expressed interest in an adding mechanism, nothing in the treaties compel the Subcommittee to set out a statutory process for U.S. consideration of additional chemicals or even new rulemaking authority. If the Subcommittee was to simply enact the provisions relating to current chemicals, and the Senate to ratify the POPs and PIC, the U.S. could sit at the upcoming meetings as full partners.

Federal-State Provision

At the hearing, Representative Capps raised a concern over a provision setting out the relationship of language in the bill and state law. She has sought the Administration's interpretation. The provision contains modifications to section 18(a)(2) of TSCA and is located in the "conforming amendments" section of the draft.

The Committee does not wish to alter the existing Federal-state relationship with respect to currently listed chemicals under TSCA. We note that while the discussion draft would amend TSCA Section 18(a)(2) to ensure that Federal and State laws are harmonized with our obligations under POPs and LRTAP POPs, the discussion draft does not amend TSCA section 18(b)—which provides the EPA Administrator with authority, in certain circumstances, to allow states (or political subdivisions) to regulate chemical substance or mixtures more stringently than the federal government. Therefore, under the discussion draft, a state maintains its ability to petition the EPA to regulate a POPs chemical substance or mixture more stringently than the federal government. In addition, the Gillmor discussion draft would preclude a state from acting less stringently than the Federal government.

The Relationship of PCB provision to existing TSCA 6(e)

Mr. Yeager's testimony states:

> "EPA could be prohibited from using its existing authority under TSCA § 6(e) to strengthen the regulation of PCBs, because the Discussion Draft would allow EPA to do so only as "necessary for the United States to comply with its obligations under the POPs Convention."

The Subcommittee believes Mr. Yeager's statement reflects a misunderstanding of the language of section 502(c). First, the provision does not apply at all where the rulemaking is for purposes other than compliance with provisions of the treaties. However, where the claim is that a change is necessary for compliance with the treaties for PCBs, such claim must be based on a finding that is in concurrence with the Secretary of State. This is the discussion draft's intent and can be clarified further by language or legislative history, if necessary.

Compliance with the Prior Informed Consent Procedure for Certain Hazardous Chemicals (PIC) and Pesticides in International Trade

Dr. Goldman stated in her written testimony:

"The U.S. ratification should follow the enactment of domestic implementing legislation which should give EPA clear authority to carry out all the provisions of PIC in a prompt and expeditious manner, including notifying the international authority that the U.S. does not wish a particular PIC listed chemical to be imported into the U.S. As obvious as this should seem, at this point there seem to be no plans by the U.S. government to put such a process in place."

The Subcommittee worked closely with the Administration to try to ensure the bill would fulfill obligations under PIC and believe the Administration's earlier statements concerning "full compliance" would apply to PIC as well. There is a discrepancy between witnesses on this point.

Question 1. EPA and State Department: Please respond to Dr. Goldman's point. Does the draft need to be modified to bring U.S. law into compliance with the PIC treaty?

EPA/State Response: The Administration believes that the Gillmor discussion draft gives us the authorities we need to meet the obligations of the PIC treaty. With respect to the particular provision Dr. Goldman points to, "including notifying the international authority that the United States does not wish a particular PIC listed chemical to be imported into the United States," TSCA and FIFRA do not place any restrictions or requirements on the United States with respect to providing information related to our domestic laws to an international body. We do not envision the need for additional authorities to respond to the notification provision referred to by Dr. Goldman for PIC listed chemicals or pesticides.

Provisions Concerning the United States Process for Opting into the Treaty for Additional Chemicals

The second function of the discussion draft seeks to address the process by which the United States would add new chemical substances or mixtures to the lists of banned or severely restricted chemicals. At the hearing, many of the witnesses' interpretations on the procedures for newly listed chemicals in the discussion draft were varied. The following commentary and questions are meant to further elaborate and explore the procedures used in the discussion draft for both opting-in and the regulatory process for additional chemical substances or mixtures.

The Subcommittee's interpretation is that the agreements themselves do not articulate the legal or procedural mechanisms by which each country takes steps to comply with the treaties. For example, nothing in the treaties require that any country spell out its process for considering whether it will opt-in for purposes of new chemicals under the Stockholm Convention. Nothing in the treaties requires that there be any rulemaking authority given to an Executive Branch agency. Nothing in the treaties require that there be a single rulemaking or other legal authority to address compliance with the treaty.

Dr. Goldman, in her testimony, argues that the discussion draft would impose a new standard under which EPA would decide to "opt-in" for new chemicals. She appears to argue that, under the draft, such a decision could only be done "to the extent necessary to protect human health and the environment in a manner that achieves a reasonable balance of social, environmental, and economic costs and benefits." The Committee's reading is that the draft does not require this. The decision to opt-in and the manner in which the U.S. chooses to regulate are two different occurrences. Section 502(e) is new rulemaking authority. It does not set standards for the decision to opt-in or not. It may, in fact, be that the U.S. already has rules in place and need not pursue any rulemaking following a decision to opt-in.

Question 2. EPA and State Department: Please comment on this point. Does the draft restrict the U.S. ability to opt-in based on the rulemaking standard in 502(e)?

EPA/State Response: We do not believe the draft explicitly restricts the ability of the United States to opt-in to an amendment. We agree with the Committee that the decision to opt-in and the process for regulation are two separate issues, and that the draft only addresses the latter issue. The outcome of a rulemaking, however, could play an important role in the Secretary of State's determination of whether to opt-in on an amendment because it could impact whether the United States would be capable of fulfilling its obligations under that amendment. Thus, to the extent that the draft impacts the outcome of future rulemakings, it could be relevant to the determination of whether the United States will opt-in to an amendment.

The Committee is also correct to note that there may be chemicals added to the Convention which do not involve any TSCA-related rulemaking whatsoever, for example in the case of an unintentional byproduct regulated under the Clean Air Act.

Requirements on the Executive Branch Related to Opting-In

Ms. Heinzerling's testimony discussed what is constitutionally permissible through legislative action in the context of binding a future U.S. position on the addition of new chemicals. Others made statements on this as well. The specific proposals involve restricting the actions of the Executive Branch or subjecting the Executive Branch to judicial scrutiny with respect to whether the United States would opt-in for purposes of additional chemicals. As a matter of policy, the Subcommittee believes the Executive Branch should be the initiator when it comes to further U.S. obligations for the addition of chemicals or other amendments to the treaties. The Subcommittee finds it troublesome to set up a system where someone can access and empower federal courts to countermand the decisions of the Executive Branch in this regard. If the Executive Branch does not want to bind the United States to further treaty obligations, we think the sole recourse of policy opponents should be at the ballot box. The notion of courts setting out orders to the Executive Branch for amendments to treaty discussions or decisions does not seem like a prudent one from the Subcommittee's perspective.

Related to this issue, Mr. Wiser also stated that implementing legislation should contain a mandatory timeframe and duty for EPA to decide, within a specific time after a Stockholm listing decision, whether to take action or not. The discussion draft does contain a mandatory process for public comment. It is true there is no specific deadline for a determination. It would seem reasonable that the Executive Branch would make a decision within a time that is related to international discussions and the mandatory public process. However, this issue raises further questions. What if the Executive Branch failed to meet the deadline? It is fair to assume a court would then compel a determination within a certain time.

Question 3. Mr. Wiser: What if the Executive Branch responded that they are not ready to support opting in at this time but might within 6 months? Would this be an impermissible answer under your proposal? If not permissible, what is the sanction that would apply and how would it be enforced? If permissible, is there much of a difference between your proposal and simple deference to the executive branch?

Question 4. EPA and State Department: Do you believe a court should be able to compel the Executive Branch to opt in on behalf of the United States for any given chemical through the enforcement of a statutory standard? If so, what standard should it be?

EPA/State Response: The statutory standard in question pertains to EPA's domestic regulatory authority, and judicial review, if appropriate, should relate to this authority. Moreover, the Executive is best-suited to determine the time-frame and appropriateness of opting into an amendment. The Constitution vests the President with the authority to make treaties (with the advice and consent of the Senate), and the courts have recognized that that the initiation of foreign policy is primarily the "province and responsibility" of the President. It would therefore be inappropriate to assign courts the purported ability to command the President to opt into a new amendment.

Listing Decisions versus U.S. Determination of Protective Measures

Dr. Goldman states, "...The decision standard in the discussion draft is not in alignment with the standard that we agreed to in the POPs Convention." She further states, "[i]t is also important that the standard be consistent with the language negotiated in the POPs conventions, that is, to protect against significant adverse human health and environmental effects associated with the chemical substance or mixture." This also seems to be similar to a claim from Mr. Wiser. He states:

> "The most sensible standard to use in the legislation would be based upon the Convention, and would require EPA to implement the control measures specified in the Convention in a manner that protects against 'significant adverse human health or environmental effects.'"

The Subcommittee, however, wishes to further evaluate these statements. The Stockholm Convention, in Article 8, uses the terms "significant adverse human health or environmental effects" as part of a decision whether to list the chemical and whether "global action is warranted." This language does not address what that action should be. Indeed, the very paragraph within Article 8—7(a)—that mentions these terms specifically refers to considerations specified in Annex F with respect to the analysis of possible control measures. Annex F of the Stockholm Convention includes considerations of risk, cost, and benefits. Nowhere does the POPs treaty use the combined terms "protect against significant adverse human health and environmental effects" as a standard for control measures, let alone the sole standard. Yet both Dr. Goldman and Mr. Wiser's points rely on the language of Annex F, while also treating the standard for listing as if it were the language applicable to the selection of control measures. Nothing the Subcommittee has observed in the

Secretary of State's transmittal document of the Stockholm Convention dated August 1, 2001, stated to ignore Annex F. The Executive Branch "agreed" to the "significant adverse human health or environmental effects language" precisely for its intended purpose—to determine whether to list a chemical.

The Subcommittee is having trouble identifying the actual language in the Stockholm Convention that specifies a rulemaking standard. In addition, we cannot find a single, clear mandate in the agreements as to what U.S. rulemaking standards must be. Finally, we really do not know what types of guidance we could expect from the international conference of the parties (COP) regarding a future control measure of a later chemical listing since, at this time with respect to control measures, the COP is not passing laws or regulations.

Question 5. Mr. Wiser: Doesn't paragraph 7a within Article 8's reference to considerations in Annex F apply to international guidance for control measures under the treaty, and therefore is part of the relevant guidance in the treaty for parties? In your proposed rulemaking standard, why did you ignore the proposed rulemaking standards in Annex F? Are you stating that any guidance from the international body should be mandatory as US regulations?

Question 6. EPA and State Department: Does Annex F apply to international guidance for control measures under the treaty? Do you believe that any guidance from the international body should be mandatory as U.S. regulations?

EPA/State Response: Annex F applies to the international process that will consider control measures under the Convention. The preambular language in Annex F of the Stockholm Convention makes that clear in stating "An evaluation should be undertaken regarding possible control measures under consideration for inclusion in this Convention . . . For this purpose, relevant information should be provided relating to socio-economic considerations associated with possible control measures to enable a decision to be taken by the Conference of the Parties."

We believe that decisions taken by the Stockholm Convention's Conference of the Parties (COP) to add a chemical, and the information that serves as a basis for such a decision, should be given appropriate consideration in EPA's rulemaking. We do not believe, however, that the guidance from the COP or from the POPs Review Committee should be mandatory as U.S. regulations. First, it is possible that the COP could take a decision with which the United States does not agree, and it may not be appropriate to mandate domestic implementation in such a case. Second, we believe that legislation should set out an appropriate process for decision-making that would allow the United States to consider the appropriate scope of regulations for a listed chemical.

Costs and Benefits under the Treaties

Mr. Wiser's written testimony says we should wholly reject a cost-benefit standard that he believes may have the effect of making it impossible for the United States to concur with international decisions to address additional POPs. Dr. Goldman and Ms. Heinzerling appear to state similar points.

Mr. Walls' testimony, on behalf of the American Chemistry Council, states that the Stockholm Convention adopts a risk/benefit approach in implementing appropriate regulatory controls on listed chemicals, and in considering chemicals nominated as potential POPs.

Mr. Goldberg, on behalf of CropLife America urges that the implementing legislation recognize existing risk-benefit standards of FIFRA. He further applauds the ". . . science-based, risk benefit assessment process . . ." of the POPs agreement.

The Subcommittee does not read the international agreements the Gillmor draft contemplates as ignoring costs or benefits. Annex C, Part V (B) of the POPS protocol specifically mentions costs and benefits. Annex F mentions costs, risks, and economic aspects as appropriate considerations regarding possible control measures. Annex V, Part 3, Paragraph 12 of the LRTAP POPs Protocol, states, in part:

> "POP emission reduction costs should also be considered within the framework of the overall process economics, e.g. the impact of control measures and costs of production."

Following that statement, all of the tables in Annex V outline costs and benefits of options. In addition, Article 8 of the LRTAP Pops Protocol asks parties to look for "methodologies permitting consideration of socio-economic factors in the evaluation of alternative control strategies."

In addition, the Administration's own principles, outlined in their written testimony, state among other items:

> "In determining whether the domestic regulatory measures are necessary and adequate, the United States should compare the international decision to measures that are more and less stringent, thereby facilitating a risk-management

decision as to which measure(s) provide(s) the most reasonable balance of benefits, risks and costs for specific uses."

The principles also state:

"In weighing benefits, risks and costs, the United States should consider domestic production, export and use of the chemical, and any national and international consequences that are likely to arise as a result of domestic regulatory action, including consequences that cannot be quantified and including consideration of the possible consequences of using likely substitute chemicals."

Question 7. All witnesses: Please state whether the treaties directly regulate persons or rather relies on individual countries to choose the appropriate means of compliance. Please state whether any of the treaties have a specific regulatory standard for individual nations to follow. Finally, for the EPA and State Department witnesses, please explain how the two principles cited above are consistent with, or allowed under the treaties. For all other witnesses: Do you believe the above Administration principles are prohibited by or consistent with the treaties? If you believe it to be prohibited, please point to specific language prohibiting such considerations.

EPA/State Response: The treaties do not directly regulate persons. Rather, it is countries that ratify the agreements and thereby affirmatively take on the obligations contained in the treaties. It is the responsibility of ratifying countries to implement their obligations under the treaties in a manner that is consistent with the language of the treaties. The treaties do not set out a specific regulatory standard that a country must follow with respect to their domestic regulations. Therefore, countries may undertake their obligations in a manner deemed by them to be most appropriate in their own circumstances and domestic regulatory context.

The principles cited in this question were designed as a framework of Administration views on the appropriate manner to implement the treaties. As we just noted, the treaties are not prescriptive in mandating the manner in which a Party implements its treaty obligations. Because the treaties do not mandate a particular domestic standard for the addition of new chemicals, and because the principles above speak to the Administration's views on the most appropriate manner in which the United States should set out its domestic regulatory measures, the principles are fully consistent with the treaties.

Discretion to Regulate

Several witnesses believed that the new rulemaking authority should be mandatory after a listing by the international body or after a U.S. decision to opt-in. The Subcommittee has further questions about this issue. What if the new rulemaking authority is not necessary or is not the best vehicle for that particular new addition? We already know that regulation of the current list of chemicals, sufficient to comply with treaty obligations, is already largely in place. It may be reasonable to assume the same might very well be true for a future chemical. It might also be that other rulemaking authorities such as those under the Resource Conservation and Recovery Act or the Federal Insecticide Fungicide and Rodenticide Act may be more appropriate authorities for a given circumstance. In these cases it would seem reasonable not to mandate a new rulemaking authority. Moreover, there may well be a phase-in of control measures. If there is a mandate to do a rulemaking, can we be sure what the appropriate time line is? The fact is, we can't predict what future amendments to the treaty would involve in this regard. Therefore, to remain in compliance, the Executive Branch has every reason to maintain its treaty obligations.

Question 9. All witnesses: Would it not be useful to use a current regulatory authority if it would provide for more cohesive U.S. law? Also are there not circumstances where existing law may be sufficient and no new regulation required?

EPA/State Response: The Administration believes that if there were regulatory authorities in current TSCA and FIFRA that allow the United States to meet the obligations of the treaties in question for substances listed on Annexes A or B of the POPs Convention or Annexes I or II of the LRTAP POPs Protocol, it would be useful to use such authorities when regulating these substances. For example, we think that the Clean Air Act currently provides the necessary authorities to address treaty obligations related to substances listed in Annex C of the POPs Convention and Annex III of the LRTAP POPs Protocol, and we have therefore not requested additional authorities to address those substances. With respect to whether there might be circumstances where existing law may provide sufficient authority for the United States to ratify adding new substances to the existing Annexes of the agreements in question, we are of the view that such a circumstance is only likely to occur with respect to amendments adding by-products (POPs Annex C or LRTAP Annex III substances).

Alleged Duplication of International Body Decision

Mr. Wiser states that the discussion draft "would all but ignore the results of this international investigation, and would instead require EPA to undertake additional, duplicative, time-consuming assessments before it could issue a rule in response to a new-listing decision." He further states, "Considering the extensive scientific, risk assessment, and socio-economic analyses that are already required under the Convention (and which are there significantly due to U.S. insistence), we believe the implementing legislation should not itemize the criteria that EPA must consider during the rulemaking."

The Subcommittee is concerned that the international decision to list a chemical or even set out guidance on control measures is not the same as the promulgation of a U.S. regulation. There is no duplication at all. Though they may look at the factors in Annex F of the Stockholm Convention, they are not looking specifically at the circumstances in the U.S. They will not evaluate what laws are already on the books in the U.S. They will not do a specific evaluation of U.S. businesses. They will not do a specific evaluation of the risks to health in the context of the U.S. Moreover, we cannot support deferring to the international body on its findings when it comes to U.S. regulations.

Relationship of Proposed New Regulatory Authority to Existing Regulatory Authority

As noted by Mr. Walls:

> "Notably, Mr. Gillmor's draft does not prevent EPA from regulating POPs substances under its existing statutory authority, including TSCA. The United States regulated the existing POPs long before the international agreements were drafted, employing a regulatory process that considered scientific evidence, risks to health and the environment, and socio-economic consequences.

Colin Powell, in his letter of transmittal for the Stockholm Convention dated August 1, 2001, stated that Annexes D, E, and F are consistent with the approach taken in existing U.S. pesticide and chemical regulations. The Subcommittee notes that considerations for taking action under FIFRA and TSCA include risk, costs, benefits and other societal factors.

However, some of the witnesses stated that the Gillmor draft adds "regulatory baggage," including cost-benefit and sound science requirements to a piece of domestic environmental legislation that is ineffectual. In effect, they seem to argue we are adding new hurdles to TSCA section 6. However, this is not the Committee's reading of the draft. We don't see where in the new rulemaking language it says EPA has to satisfy the conditions of TSCA section 6(a). Rather under section 503(e) one would not have to comply with the unreasonable risk standard of TSCA section 6, nor the requirement to choose the least burdensome alternative, nor the requirement for a hearing and cross-examinations, nor numerous other requirements under TSCA section 6.

Several witnesses were also concerned with the proposed additional regulatory authority. However, this is an authority that is clearly easier for EPA to use than existing authority under TSCA section 6. Moreover, the draft does not circumscribe any existing regulatory authority, nor does the draft add any requirement from the new regulatory authority to TSCA section 6 or vice versa. However, several of these points were misunderstood during the hearing.

Dr. Goldman stated, "It is worse than current law." She further states:

> "The burden should be placed on the EPA to show why a listed chemical should not be controlled by the U.S., rather than the reverse. The language in this regard is worse than current law and again would render EPA ineffective."

Ms. Heinzerling stated:

> "Merely duplicating the already-ineffective requirements of TSCA as prerequisites for regulating new POPs would be bad enough; the Discussion Draft goes even further and offers whole new obstacles to meaningful toxic substance control. Better, in truth, to have no mechanism at all for adding new substances to the list—the route originally preferred by the current Administration—than to offer this charade in place of a meaningful listing process."

Mr. Yeager stated:

> "I believe the Bush Administration's repeated efforts to use proposed implementing legislation for the treaty as a vehicle to advance its overall effort to weaken domestic environmental, health, and safety protections."

The Subcommittee wishes to re-emphasize that nothing in this draft circumscribes existing regulatory authority unrelated to implementation of the treaty. There is no weakening of domestic environmental, health and safety protections. Allusions to the contrary are incorrect. Providing additional regulatory authority, while maintaining existing regulatory authority, cannot result in something worse than current law from the perspective of those who want greater regulatory power for EPA. It

can result in something worse than current law for those who oppose expansion of bureaucratic authority. However, some of the testimony continued to confuse rulemaking authority and additions; erroneously suggesting that new rulemaking authority would make exercising existing authority more difficult.

Ms. Heinzerling accurately states the following:

> "Although the Draft does provide a laundry list of factors EPA is to consider in coming to a decision, § 502(e)(2)(A-E), it does not give EPA guidance as to how to figure out what a "reasonable balance" of costs and benefits is. Here, too, therefore, the Discussion Draft affords EPA a huge amount of discretion in making decisions on newly listed POPs."

We believe, in this case, such discretion is appropriate and is the same type of discretion afforded those providing guidance under Annex F of the Stockholm Convention. Where Congress does not further specify, courts must defer to agency interpretations of what is reasonable. Thus, we believe the discussion draft has a more deferential regulatory standard than the current "least burdensome" and other provisions of TSCA 6.

Question 10. EPA and State Department: Do you read the Gillmor draft as requiring compliance with the provisions of TSCA section 6(a)? If not, please outline the items of TSCA section 6 that you would not need to address under the Gillmor draft regulatory authority under proposed section 503(e). Please also compare this language to FIFRA section 2, Definition (bb) and Section 6 (b) (2).

EPA/State Response: No, the Administration does not read the Gillmor draft as requiring compliance with the provisions of TSCA section 6(a) when regulating additional chemical substances or mixtures listed on Annex A or B of the POPs Convention or I or II of the LRTAP POPs Protocol. Because the draft does not require compliance with TSCA section 6, none of TSCA section 6 would apply when regulating such chemical substances or mixtures. Thus, as the Committee points out, when regulating these chemical substances or mixtures, EPA would not be required to, *inter alia,* (1) apply the TSCA section 6 unreasonable risk standard, (2) choose the least burdensome regulatory alternative, or (3) hold hearings that allow for cross examination.

Gillmor draft section 503(e) provides the EPA Administrator with authority to "issue rules to prohibit or restrict the manufacture, processing, distribution in commerce for export, use or disposal of the additional chemical substances or mixture to the extent necessary to protect human health and the environment in a manner that achieves a reasonable balance of social, environmental, and economic costs and benefits." FIFRA section 2(bb) defines "unreasonable adverse effects on the environment" to mean, *inter alia,* "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of use of any pesticide." FIFRA Section 6(b) provides the EPA Administrator with authority, under certain circumstances, to cancel a pesticide registration if, *inter alia,* it appears to the Administrator that a pesticide when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment. (Section 6(b)(2) provides authority for the Administrator, if it appears to the Administrator that a pesticide, when used in accordance with widespread and commonly recognized practice, generally causes an adverse effect on the environment, to issue a notice of intent "to hold a hearing to determine whether or not its registration should be canceled or its classification changed.) Both the standard in Gillmor draft section 503(e) and the FIFRA unreasonable adverse effects standard (as applied to non-food use pesticides) are cost/benefit standards.

Protection Standards versus Means and Measures

The Subcommittee believes there is a distinction between the basic goal of the Stockholm Convention—protection of human health and the environment—and the assessment of appropriate means or measures to address this goal. As discussed above, this seems clear based on Annex F and other items in the treaty.

The discussion draft tries to carry a similar approach by setting the legal standard at the protection of human health and the environment, but choosing means of such protection that reasonably balance costs and benefits. Several allegations have been made about this proposed standard. On its face, the language does not trade protection of human health under a cost/benefit standard. The standard provides rulemaking authority "to the extent necessary to protect human health and the environment." The standard asks the Administrator to choose a manner of protecting human health and the environment that "achieves a reasonable balance of social, environmental, and economic costs and benefits." Therefore, the Committee finds some of the witnesses' arguments that protection of human health can be "traded" as simply inconsistent with the clear language.

Exemptions

Dr. Goldman states that the bill:

> "Ties the hands of the EPA when it comes to taking action more stringent or in advance of action taken under the Conventions. It specifies that the U.S. will take advantage of every single exemption that is available to every single country in the world."

The Subcommittee is trying to interpret this statement. We recognize there are different types of exemptions in the treaties. Some exemptions are chemical-and country-specific. There are also broader exceptions for use in laboratory-scale research; for small quantities in the possession of an end-user; and for quantities occurring as unintentional trace contaminants in products. Notification procedures and other conditions apply to exemptions for POPs as constituents of manufactured articles and for certain closed-system site-limited intermediates. The treaty contains numerous exemptions and we would like to know under what circumstances the witnesses are advocating regulating in these areas when the treaties provide for clear exemptions.

We have read Mr. Wiser's suggestion of a clarifying statement: "nothing in this title shall be construed to require the United States to register for any specific exemption or acceptable purpose available to the United States under Annex A or B to the POPs Convention."

We don't believe any language in the bill directs the U.S. to seek any exemptions. The exemption provision simply states that the prohibitions shall not apply to a production or use specific exemption available to the United States, not mandating that they must take advantage of each one and for every single country. However, we do not have a problem with the policy of the clarification. But if the U.S. is pursuing an exemption or has received such exemption, it does not make sense for this particular rulemaking authority to override that exemption.

Question 11. All witnesses except EPA and State Department: Are the concerns over any anticipated use of all of these treaty exemptions, including the broader exceptions? Do you envision the United States overriding the broader exemptions for use in laboratory-scale research; for small quantities in the possession of an end-user; and for quantities occurring as unintentional trace contaminants in products? If so, under what situations? Or is the concern limited to the country-specific exemptions?

Sound and Objective Science

Mr. Wiser states:

> "The environmental and health community believes that high quality, objective scientific research and analysis should provide the foundation for the evaluation and management of POPs and other persistent toxic substances."

Mr. Yeager states:

> "For the United States, it was critical that this process be scientifically-driven and not subject to political whim . . . the final agreement offers the United States the safeguards of rigorous science, a careful review procedure . . ."

Yet they, along with Dr. Goldman and Ms Heinzerling are highly critical of language in the draft that requires the EPA Administrator to use sound objective scientific practices when evaluating risk information. These are really a set of arguments that go back a long time. The same ones were used in 1996 prior to the use of similar language in the 1996 Safe Drinking Water Act Amendments.

The Safe Drinking Water Act Amendments of 1996 state that the ". . . the Administrator shall use—(1) the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices" It follows with a number of requirements for sound science. Some made claims that this language would stifle rulemaking. But these Amendments were passed with broad bipartisan support and have worked very well.

In addition, The Clinton Administration issued Executive Order 12866 and is still in effect. It states:

> "Each agency shall base its decision on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for and consequences of the intended regulations."

Finally, The President's Commission on Risk Assessment and Risk Management stated in their 1997 report:

"A good risk management decision . . ."

> "Is based on a careful analysis of the weight of scientific evidence that supports conclusions about a problem's potential risks to human health and the environment." [and]
>
> "Reduce or eliminate risks in ways that . . . [a]re based on the best available scientific, economic, and other technical information."

"[T]he Commission's Risk Management Framework is intended to:. . . [e]nsure that decisions about the use of risk assessment and economic analysis rely on the best scientific evidence and are made in the context of risk management alternatives.".

"Making judgements about risk on the basis of scientific information is called 'evaluating the weight of the evidence.'. . . It is important that risk assessors respect the objective scientific basis of risk and procedures for making inferences in the absence of adequate data."

Despite these precedents several witnesses suggested that similar language is inappropriate. The same claims were made with respect to these types of provisions. There is no evidence the SDWA language or EO 12866 have done anything described by these witnesses.

Question 12. EPA: Do you have examples where the provisions of the Safe Drinking Water Act risk language or the science provisions of Executive Order 12866 adversely and inappropriately paralyzed the rulemaking procedure? If so, please provide specific examples.

EPA Response: Keeping in mind that the provisions of the Safe Drinking Water Act were not designed to be and have not, to date, been applied in the development of regulations under TSCA or FIFRA, and that the Agency is not opining at this time on the appropriateness of doing so, EPA has found that the work undertaken either to comply with the provisions of the Safe Drinking Water Act or to develop balanced science-based public health standards that meet the requirements of E.O. 12866 has not been adversely or inappropriately paralyzed by the rulemaking procedure.

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