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LEGISLATION TO IMPLEMENT THE POPS, PIC, AND LRTAP POPS AGREEMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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LEGISLATION TO IMPLEMENT THE POPS, PIC, AND LRTAP POPS AGREEMENTS

THURSDAY, MARCH 2, 2006

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

The committee met, pursuant to notice, at 10:11 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Paul E. Gillmor (chairman) presiding.

Members present: Representatives Hall, Wilson, Bass, Pitts, Sullivan, Murphy, Solis, Pallone, Stupak, Wynn, Capps, Schakowsky, Inslee, Green, Baldwin, Dingell (ex officio), and Gillmor.

Staff present: Tom Hassenboehler, Counsel; Jerry Couri, Policy Coordinator; Peter Kielty, Legislative Clerk; Dick Frandsen, Minority Senior Counsel; and Lori Schmidt, Minority Counsel.

MR. HALL. [Presiding] Okay, we will get under way. This is a hearing of the House Subcommittee on Environmental and Hazardous Materials. This is a hearing that I will be reading Chairman Barton's opening statement in his absence. And at this time, I will recognize myself for that reading. It is as follows.

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. These agreements all center on the banning or severe restriction of chemicals known as persistent organic pollutants. These treaties have their genesis in the first Bush Administration, or were negotiated under the Clinton Administration, and finalized and signed on to by the current Bush Administration. While the Senate plays an important role in the ratification procedures, the House must pass implementing legislation to amend current laws to be in compliance with these agreements.

I thank Chairman Gillmor and the subcommittee for the leadership in calling this hearing and making efforts to move this process forward. I have long hoped that legislation on this issue could be bipartisan. I was glad Chairman Gillmor held hearings on draft legislation last year. I thought that was a great starting point for discussion. I did not expect a competing bill to be introduced by the Ranking Member and I hope that does not mean that we have rejected bipartisan work. I am hopeful that

their actions will be based on merit and not designed to slow down or complicate the process by seeking to address other issues such as the opening of the Toxic Substances Control Act or putting personal politics into the mix. These treaties are important living documents and decisions and proposals for additional chemicals currently are being debated and decided upon without full U.S. participation. So on that note, I am hopeful that all members of the committee and the subcommittee will be able to work towards an amicable solution to ensure our voice is heard when these critical decisions are being made.

That being said, I have several concerns over H.R. 4800 by Ms. Solis that I find to be troubling and dangerous precedents to set in American law. H.R. 4800 indicates that the U.N. determination to ban or limit future chemicals automatically becomes EPA's standard too. I believe that standard review gets it wrong because if the U.S. opts in, it should not be the U.N. that determines what is in the U.S. best interest without a proper domestic consideration by our own EPA. This consideration is especially important when we are considering adopting stringent control measures which could be as severe as a complete ban on manufacturing. This automatic standard in H.R. 4800 appears nowhere in current environmental law and will be ripe for judicial challenge and scrutiny.

Let me repeat, the rulemaking standard of the minority bill takes a standard from the treaty used to determine whether a chemical should be listed at all and supplants it into broad new EPA domestic rulemaking authority that could limit the production, use, or manufacturing of certain chemicals in this country in the future.

While I understand the chemicals that currently make up the treaties are the worst offenders and largely have ceased to be produced in the United States and pursuing control measures for the actual regulation of new and unknown future chemicals, information on social and economic considerations including cost, risk, and alternatives should be considered by our own Government. What is wrong in balancing costs, risk, and alternatives? It is arguable that every chemical in industrial society could lead to "significant adverse human health and our environmental effects," if you are exposed to mass quantities--I do not read too well from a printed page. Under Ms. Solis' bill standard in essence there is no determination on whether the chemical has any benefit for job considerations or even domestic security purposes. If a chemical proposed to be banned under the treaty on the Solis standard had potential uses for domestic security purposes under her bill, that could not be taken into consideration at all which is why the Gillmor standard and the safeguards in his bill are so vital.

We simply do not know what the international body will propose as its control measure in the future. Treaties are living bodies that evolve

over time and I believe it is for these reasons that it is critical to provide for a check and balance to occur that does not cede any authority to unelected, unaccountable, international bodies while at the same time allows for the U.S. to actively engage and participate in these Conventions and maintain its role as a world leader.

The Gillmor 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 treaties. Second, it addresses the process by which the United States participates in decisions involving the potential additions of new chemicals to the list of 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 obligation of the United States under the treaties.

With these assurances, it is my hope that the efforts of the subcommittee will allow this process to go forward. Once again, I thank all the witnesses for their participation and I look forward to hearing the testimony.

MR. HALL. The chair recognizes Ms. Solis for five minutes.

MS. SOLIS. Thank you.

Good morning everyone. We are here today to discuss the legislation to implement the Stockholm Convention on Persistent Organic Pollutants, known as POPs. I would like to thank all our witnesses for joining us today and would like to recognize a fellow Californian who is here, Deputy Attorney General Claudia Polsky, who is testifying on behalf of California Attorney General Bill Lockyer. Thank you for being here.

Persistent Organic Pollutants like DDT and PCBs, as you know, are chemical substances that remain in the environment, spread easily, accumulate in our bodies, lead to cancer, neurological and learning disabilities, and cause potential risks to immune and reproductive systems. Simply put, these are the worst of the worst chemicals.

The Stockholm Convention was created to protect public health around the world by limiting these substances. President Clinton's Administration negotiated this treaty which President Bush signed into law in a ceremony in 2001, showing our Nation's commitment to protect the public against significant adverse human health and environment effects of POPs. What we need now is a commitment to support action which effectively and efficiently allows implementation of the Stockholm Convention and further regulation of additional pollutants as agreed to by the United States. But despite multiple statements that ratification remains a top priority for the Bush Administration, there has been little effort to move us closer to that goal. Only once in the 107th

Congress did the Administration provide recommendations to amending existing law to offer the treaty's implementation. This subcommittee did not address the treaty until three years after the Bush Rose Garden Ceremony. And that hearing was in July of 2004, nearly 19 months ago. Since the end of 2004, the only contact on this matter has been a letter dated July 22, 2005, promising, and I quote, "to work closely on the issue." There has been no communication that I am aware of, and since July of 2005 of that letter, the Administration has made no effort to bridge the differences. Given the track record, I find the Administration's call to action simply disingenuous.

That is why I decided to introduce H.R. 4800. I believe the United States must continue to be a leader in the global effort to protect public health from the effects of harmful toxic chemicals known to humans. My legislation effectively and efficiently allows for implementation of the Stockholm Convention and further regulation of additional pollutants as agreed to by the United States. It has broadbased support by public health advocates, environmental organizations, and the United States chief negotiator for the Stockholm Convention. H.R. 4800, my bill, establishes a workable process to protect public health from the effects of POPs and preserving the U.S. opt in authority. It includes health-based standard to determine regulations to protect against significant adverse human health environmental effects of additional pollutants which is a standard President Clinton and President Bush committed when they agreed with the Stockholm Convention.

Additionally, the bill includes a provision which explicitly protects U.S. sovereignty, while stating a final rule to regulate POPs shall not take effect unless the United States has consented to be bound by that listing. And as the lead negotiator of the United States to the treaty stated in written testimony, H.R. 4800 puts forward a relatively straightforward process which would allow the U.S. to fully implement the Convention while retaining full discretion with regard to the regulation of any POP.

I am extremely concerned that the process established by H.R. 4591 will limit the rights of our States to use their authority to protect public health, and will effectively ensure that the U.S. takes no action to protect public health from additional pollutions. Simply put, it will worsen the already ineffective structure of the Toxic Substances Control Act. A statute which we know has failed to even regulate asbestos. Additionally, 12 bipartisan attorney generals pointed out that this legislation would preempt the right of States to act, action which Washington State's Attorney General Rob McKenna called counterproductive to our shared interest in protecting the health and welfare of our citizens.

I would like to insert into the record two letters from the attorney generals. And I would like to thank California Attorney General Bill Lockyer who pointed out that the goals of the Stockholm Convention must be achieved without undermining advances that States have made to help safeguard our public health and I agree with that. As a global leader, the United States should adopt legislation which would allow for effective, efficient implementation of the Stockholm Convention which protects the public health at home and abroad and which preserves U.S. sovereignty and the rights of our States. My legislation achieves these goals.

Thank you witnesses for being here and I yield back the balance of my time.

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February 28, 2006

The Honorable Joe Barton
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The Honorable John D. Dingell
Ranking Member, House Committee on Energy & Commerce
2328 Rayburn House Office Building
Washington, DC 20515

Re: HR 4591 - POPs Treaty Implementation Legislation

Dear Chairman Barton and Congressman Dingell:

We submit this letter on behalf of the undersigned Attorneys General. The United States joined the Stockholm Convention on Persistent Organic Pollutants, commonly known as the "POPs Treaty," in 2001. The treaty represents an important step toward protecting our nation's citizens and our global neighbors from the risks posed by certain especially toxic substances that accumulate in the global environment.

Unfortunately, HR 4591, a bill to implement the POPs Treaty and other related international agreements, recently introduced by Congressman Paul Gillmor, Chairman of the House Subcommittee on Environment and Hazardous Materials, includes unduly broad preemption language that could severely limit states' abilities to protect their citizens from these toxic chemicals.

HR 4591 includes the following language designed to preempt state authority to regulate substances that become subject to the Treaty:

> [N]o State or political subdivision may establish or continue in effect any requirement that is applicable to a POPs chemical substance or mixture or LRTAP POPs chemical substance or mixture . . . for which a listing under . . . the POPs Convention or . . . the LRTAP POPs Protocol has entered into force for the United States (except as permitted in section 116 of the Clean Air Act).

Although currently applicable federal law in this area does include some preemption of state authority, there is nothing equivalent to the sweeping impact of the proposed bill. Indeed, under the bill's language, state authority to regulate substances listed under the POPs Treaty could be preempted even if an exemption to the POPs Treaty allows continued use of a substance. We are especially concerned about such a possibility as we consider potentially toxic substances that states have already begun to regulate in the absence of federal regulation. A good example involves brominated flame retardants known as PBDEs that some states have already banned, and that many other states are considering banning. We urge you and other members of the Energy and Commerce Committee to ensure that this counterproductive preemption language does not become law.

The Gillmor bill also requires unacceptable EPA review procedures before any new POP would be regulated in the United States. Although the states recognize the value of EPA's additional analysis, the procedures set forth in the bill would duplicate the international review process and potentially delay important federal action. Under that process, the Persistent Organic Pollutant Review Committee, a group of experts in risk analysis chosen by the parties to the Treaty, including the United States, must conclude that a chemical needs to be regulated to protect human health and the environment before the substance is listed, a conclusion that is accorded very little weight in the review procedures under the bill.

As Georgetown University Law Professor Lisa Heinzerling highlighted in her testimony before the Committee on Rep. Gillmor's "discussion draft" of the bill, circulated on June 17, 2004, and in relevant respects identical to HR 4591, the bill does not require the United States to do anything in response to an international recommendation to list a new POP, or even impose a deadline for EPA to decide whether or not it will act. The bill also lacks any enforcement mechanism whatsoever to allow for challenges to EPA's decisions with respect to newly identified POPs that may later become subject to the treaty. This potential for sanctioned nonresponse to an international decision to list a new toxic substance as a POP is troubling.

In addition, HR 4591 includes an approach to cost-benefit balancing that Professor Heinzerling aptly describes as "systematically biased against environmental protection," particularly when it comes to protecting against pollutants like POPs. See Testimony of Georgetown Law Professor Lisa Heinzerling to the Subcommittee on Environment and Hazardous Materials, http://www.progressiveregulation.org/articles/Heinzerling_071504.pdf.

We believe that rather than erecting potentially insurmountable barriers against protecting people and the environment from the risks posed by POPs, as HR 4591 appears to do,

the implementing legislation should ensure both that states have the ability to protect themselves, and that EPA be required to act expeditiously when new substances are listed as POPs.

Very truly yours,

Thomas F. Reilly
Massachusetts Attorney General

Mike Hatch
Minnesota Attorney General

Bill Lockyer
California Attorney General

Zulima V. Farber
(as authorized)
Zulima V. Farber
New Jersey Attorney General

Richard Blumenthal
Connecticut Attorney General

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February 22, 2006

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The Honorable John D. Dingell
Ranking Member, House Committee on Energy & Commerce
2328 Rayburn House Office Building
Washington, DC 20515

RE: HR 4591 – POPs Treaty Implementation Legislation

Dear Chairman Barton and Congressman Dingell:

I write to request your assistance in opposing HR 4591 which was recently introduced by Congressman Paul Gillmor, Chairman of the House Subcommittee on Environment and Hazardous Materials. As you know, HR 4591 would implement the Stockholm Convention on Persistent Organic Pollutants, commonly known as the "POPs Treaty." The POPs Treaty signed in 2001, was designed to help the signatory nations protect their citizens from the health risks posed by certain especially toxic substances.

HR 4591 includes language designed to preempt state authority to regulate toxic substances that are or may become subject to the POPSs Treaty. The relevant language in HR 4591 states:

> [N]o State or political subdivision may establish or continue in effect any requirement that is applicable to a POPs chemical substance or mixture or LRTAP POPs chemical substance or mixture… for which a listing under … the POPs Convention or … the LRTAP POPs Protocol has entered into force for the United States (except as permitted in section 116 of the Clean Air Act.)

States must remain free to regulate in this area which so vitally and directly impacts the health and welfare of our citizens. The state of Washington is currently considering legislation that would regulate the use of PBDEs in order protect the health of Washington State citizens. Language in HR 4591 which would seek to preempt such state regulatory efforts goes well

ATTORNEY GENERAL OF WASHINGTON

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Congressman Dingell
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beyond that to well effectuate the POPs Treaty and is counter productive to our shared interest in protecting the health and welfare of our citizens. I strongly urge you and other members of the Energy and Commerce Committee to take whatever steps are necessary to ensure that HR 4591 does not become the law.

Sincerely,

ROB MCKENNA
Attorney General

RM:kw

MR. GILLMOR. Thank you, Ms. Solis, and I would also like to thank Chairman Hall for starting the meeting so we could stay on time. I was tied up in another meeting. I would like to request unanimous consent that all members have five days to submit statements for the record, and also unanimous consent to revise and extend my remarks, without objection.

Today our subcommittee is meeting to review two bills. One introduced by me, H.R. 4591, and provisions of which have been circulating around town for about 20 months, and H.R. 4800, legislation introduced by our Ranking Member about two weeks ago.

Let me make some brief comments about the legislation I introduced. I believe that H.R. 4591 reasonably implements the POPs and the PIC Conventions and the Long Range Transboundary Air Pollution protocol. My legislation is drafted based on certain principles embedded in its provisions, and I would like to point them out for the benefit of the members.

First, my bill is a targeted legislative fix that does what is needed and is important for us to become full partners in this agreement.

Second, I believe the U.S. official laws and standards, and not those of an unelected and non-accountable international body, should determine what specific control measures United States takes. Standards in America should be set by Americans, and I do not think Congress should give away its power and the power of the Federal Government to other countries over which we have no control.

Third, I believe that the public should be fully informed about actions being taken under those agreements, and Congress should be

informed when conflicts arise with existing environmental statutes. And fourth, I believe that sound, objective, and peer reviewed science should be at the core of any regulatory decisions made by the United States under these treaties.

The amendments that I am proposing to TSCA, the only Federal environmental statute that explicitly regulates manufacturing, extends additional authority to EPA only for chemical substances or mixtures added to these treaties. It does not provide for any general EPA regulatory authority, global manufacturing use, or distribution in the commerce of chemicals.

I would also like to comment about another subject which recently arose and that is the preemption of State environmental laws. Coming from the Ohio State Senate, I am very sensitive to protecting a State's prerogatives. When drafting my legislation, I wanted to ensure that we did not replace the existing relationship between States and the Federal Government--under which States can be more stringent than the Federal Government but not less stringent. I also wanted to ensure that the States could not lower standards that would place our country out of compliance with our obligations under the POPs Convention.

Now some of the State Attorneys General have put out a news release a couple of days ago claiming that the draft would somehow reduce States' ability to adopt more stringent standards. Let me point out, this bill has been around for 20 months; I am the principal sponsor of the bill; I am the Chairman of the Subcommittee. Not a single one of those attorneys general contacted me at any point about that subject, and I am happy that we have a representative of the California Attorney General's Office here; maybe she can explain to me why they did not do so and instead chose to regulate, or try to legislate, by news release. Interestingly, if they had contacted me earlier, we could have cleared up that confusion immediately. There is no intent and there never has been, to change the current law in that regard. In fact, EPA's interpretation of the language disagrees with the interpretation of the attorneys general. But I have said, to avoid any confusion, I would support adding language to clarify that that is in fact the case.

[The prepared statement of Hon. Paul E. Gillmor follows:]

PREPARED STATEMENT OF THE HON. PAUL GILLMOR, CHAIRMAN, SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS

The Subcommittee will now come to order.

The Chair would also like to request unanimous consent that all members have five (5) days to submit statements for the record and the chair wishes to ask unanimous consent to revise and extend his remarks for the record.

Today, our Subcommittee is meeting to review two bills, mine – H.R. 4591, provisions which have been circulating around town for 20 months – and H.R. 4800,

legislation introduced by our Ranking Member, Mrs. Solis, two weeks ago. Let me make some brief comments about the legislation.

I understand that H.R. 4591 reasonably implements the POPs and PIC Conventions and the LRTAP Protocol.

My legislation is drafted based on certain principles imbedded in its provisions and I would like to point them out for the benefit of the members.

First, my bill is a targeted legislative fix that does what is needed and important for us to become a full-partner in these agreements.

Second, I believe U.S. officials, laws, and standards – not those of an unelected and unaccountable international body – should determine what specific control measures the United States takes. Standards in America should be set by Americans, and Congress should not give away its power and the power of the Federal government to other countries over which we have no control.

Third, I believe that the public should be fully informed about actions being taken under these agreements and that Congress should be informed when conflicts with existing environmental statutes occur.

Fourth, I believe sound, objective, peer-reviewed science should be at the core of any regulatory decisions made by the United States under these treaties.

The amendments that I am proposing to TSCA – the only federal environmental statute that explicitly regulates manufacturing -- extend additional authority to EPA only for chemical substances or mixtures added to these treaties. It does not provide for any general expansion of EPA regulatory authority over manufacturing, use or distribution in commerce of chemicals.

I would like to comment about another subject which recently arose: pre-emption of state environmental laws.

Coming from the Ohio Senate, I am very sensitive to protecting state prerogatives. When drafting my legislation, I wanted to ensure that we did not replace the existing legal relation between states and the Federal government under which states could be more stringent than the Federal government, but not less stringent. I also wanted to ensure that states could not lower standards that would place our country out of compliance with our obligations under the POPs Convention.

Some State Attorneys General put out a news release a couple of days ago claiming my bill would somehow reduce the states ability to adopt more stringent standards. Interestingly, not a single one contacted me and if they had then it could have been cleared up immediately.

There is no intent to change the ability of the state to act more stringently. EPA has said that the language in H.R. 4591 does not make this change.

However, to avoid any confusion, I support adding language to clarify that that is the case.

The Chair now recognizes the gentlelady from California, Mrs. Solis for the purposes of making an opening statement.

MR. GILLMOR. I now recognize the gentleman from New Jersey for an opening statement.

MR. PALLONE. Thank you, Mr. Chairman.

I appreciate that we are finally starting to move forward on amending the Toxic Substances Controlled Act to implement these important international agreements concerning toxic chemicals, but we have two different approaches before us at this hearing and I think it is critical that we examine the serious differences and ensure that our implementing legislation is fully protective of human health and the environment.

I want to mention that the committee received a letter this week from 11 State Attorney Generals--including the New Jersey AG--who strongly object to several provisions of the Chairman's mark, H.R. 4591. Their concerns are mine and should be taken seriously by the subcommittee. First of all, I strongly disagree with the broad State preemption language in H.R. 4591. I strongly support the ability of individual States to go beyond Federal regulatory restrictions. New Jersey frequently leads the Nation in progressive environmental protections and I cannot support any effort to infringe on their right to do so. I fail to see how additional restrictions on States' rights could be adverse to U.S. interests in regulating POPs.

Next, I am deeply concerned about making adjustments to existing U.S. standards for accepting of new POPs. We should look to the international scientific health-based standard, one the U.S. had developed and incorporate only processes needed to comply with U.S. law. EPA must act within an appropriate timeframe to make a decision on any newly listed POPs. Excluding requirements for EPA action on new listings guts the main function of the agreements, which is to protect human health and the environment. The net effect would be to freeze U.S. protections to currently listed POPs which we already regulate or ban.

And finally, Mr. Chairman, there is no reason to adapt a completely different judicial review standard than the one found in existing environmental laws such as the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, and the Solid Waste Disposal Act. Our goal is to add protections, not processes. And I believe obviously that the Ranking Member, Ranking Member Solis's approach to implementing legislation is much more effective and in the spirit of the agreement signed by this country. I encourage the members of this subcommittee to carefully consider her bill and note the differences between it and H.R. 4591.

On a different note, Mr. Chairman, I just wanted to point out in the presence of our witnesses from the EPA that I think it is high time for us to have an oversight hearing on the EPA's budget. The full committee is holding a budget hearing with the Department of Energy, and over in Resources, my other committee, we are holding a hearing on the budgets for NOAA and the Fish and Wildlife Service and somehow the EPA with its dramatic cuts this year gets off scot-free. I really do not understand it. I think it has been too long since this subcommittee has exercised its oversight duties on the budget so I would ask that that happen, Mr. Chairman and again thank you.

MR. GILLMOR. Thank you.

The chair recognizes the gentleman from New Hampshire for an opening statement.

MR. BASS. No opening statement, Mr. Chairman.

MR. GILLMOR. Does the gentleman from Michigan have an opening statement? The gentleman, Mr. Stupak?

MR. STUPAK. I appreciate Mr. Bass yielding to me.

Thank you, Mr. Chairman and Ranking Member Solis. Thank you for holding today's hearing. I would like to welcome our witnesses to testify before our committee and who testified before back in 2004. I look forward to hearing from each of you again.

I would like to commend Ms. Solis for her leadership on this issue and echo my support for H.R. 4800 which I am a cosponsor of. I believe this bill is the right approach. This legislation better reflects the Convention's original intent by employing a health-based standard for implementing regulations against future POPs. It also protects States' ability to enact stricter standards if they deem them necessary.

In contrast, I have a concern about the potential for Mr. Gillmor's bill to adversely impact my home State of Michigan's foresight in enacting a ban on flame retardants called polybrominated diphenyl ethers, better known as PBDEs. Studies have shown that the presence of this chemical can cause liver and thyroid damage, as well as, developmental and reproductive problems. This chemical is one of five already set to be considered by the Convention in the future. Should the convention decide to add PBDEs to the list of POPs, I am concerned that under Mr. Gillmor's legislation, the Federal Government would not take the appropriate action in banning this chemical or worse would preempt Michigan's law, no longer allowing my State to effectively regulate its use. This would be a step backwards in the effort Michigan has taken to protect public health.

I am also concerned about the Administration's reluctance to implement treaties like the Stockholm Convention. Since signing this treaty, the Administration has not provided implementing legislation and has not worked with Congress to develop a bill capable of gaining the broad support of members and advocacy groups necessary.

Routinely, the Administration has failed to act on another important international agreement, the U.S. Canadian agreement concerning Transboundary Movement of Hazardous Waste. This bilateral agreement was made to protect the citizens of Michigan and other States from unwanted trash from Canada, however, the Administration has failed to act to implement this bill. Because the Administration has been unwilling to support or bring legislation to the Hill, Mr. Gillmor's bill, the International Solid Waste Importation and Management Act has been introduced to enforce this agreement. Even though this bill passed in this

committee unanimously with the support of both parties, the Administration continues to refuse to take a position on this legislation.

While I am encouraged that the Administration has come here today to provide their insight on implementation of the Stockholm Convention on organic pollutants, it is past due that this Administration lend their support for legislation to enforce the U.S. Canada bilateral that, as I said, has strong congressional backing and we hope they would back that legislation.

I look forward to hearing the testimony of our witnesses today.

Thank you, Mr. Chairman.

MR. GILLMOR. Thank you.

Does the gentleman from Pennsylvania have an opening statement?

MR. PITTS. No opening statement, Mr. Chairman.

MR. GILLMOR. The gentleman from Michigan, the distinguished Ranking Member of the full committee.

MR. DINGELL. Mr. Chairman, thank you. I commend you for this hearing and I thank you for your recognition.

Five years ago, the President announced that the United States would sign the Stockholm Convention on the Persistent Organic Pollutants called POPs which has been negotiated under his predecessor, President Clinton. The Administration has yet to submit in this or the previous Congress a legislative proposal for implementing the treaty with respect to these chemicals. Nor has any congressional committee reported any legislation this Congress. All the 12 POPs chemicals or pesticides 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, PCB, and dioxins. The POPs Convention created a science-based procedure that will govern the inclusion of additional chemicals into the Convention, and defines the criteria that must be met. These criteria focus on substances that are toxic, that build up in the body and that are resistant to natural breakdown, and that can be transported long distances.

The task before the Congress now is to provide the Environmental Protection Agency, with the rulemaking authority and a regulatory standard that allows it to properly implement the control measures recommended by the Conference of the Parties for a new chemical, sometimes call the "13th POP." The implementing legislation must allow EPA 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.

The ability of EPA to regulate additional extremely dangerous substances is unclear. We must be mindful of a recent example: EPA's

recent experience with asbestos, a known carcinogen. The Nation saw the EPA spend the decade--from 1979 to 1989--doing analyses and assessments to support the regulation to ban certain uses of asbestos under the Toxic Substances Control Act. I should note that the final rule was struck down by the courts. If we cannot regulate a substance as dangerous as asbestos under the Toxic Substances Control Act, our ability to regulate a 13th POP appears to be inadequate and should be the matter of not only bipartisan concern but serious discussions and consideration in the legislation.

Today's hearing focuses on two legislative proposals--H.R. 4591 introduced by the distinguished Subcommittee Chairman, Mr. Gillmor, and H.R. 4800 introduced by the Ranking Subcommittee Member, Hilda Solis. Chairman Gillmor's bill, H.R. 4591, incorporates the concept of the Toxic Substances Control Act and adds additional criteria. I have serious concerns that the rulemaking standard and the criteria contained in H.R. 4591 would not allow EPA to act in an efficient manner in a realistic and expeditious timeframe. Moreover, that standard appears nowhere in the treaty or in existing United States law. I find this standard problematic as it poses an opportunity for litigation and years of delay. It will also not properly account for public health benefits nor recognize the work of the science-based international processes.

In contrast, the bill introduced by my friend, Ms. Solis, H.R. 4800, would require EPA to use a health-based standard and would allow expeditious action. H.R. 4800 has preserved the United States sovereignty by providing that no regulation may go into effect until the President has exercised his opt-in authority. I commend Ms. Solis for her hard work and for an excellent bill.

This hearing also provides the Administration with the opportunity to clarify whether it believes the Senate must formally consent to each new chemical added by the Convention. Such a requirement would most likely lead to further delay in implementation of control measures adopted by the POPs Convention.

Mr. Chairman, the committee has a history of approaching successful environmental legislation in a bipartisan fashion. This approach in the past has offered a process satisfactory to all Members, to outside interests, and to the broad public interest. It is my hope that such an approach will be followed here and that we will be successful in that regard.

I thank the witnesses for appearing today. I thank you for your recognition and for the hearing and I look forward to the testimony of the witnesses. I yield back the balance of my time.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF THE HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Almost five years ago the President announced that the United States would sign the Stockholm Convention on Persistent Organic Pollutants called POPs, which had been negotiated under his predecessor, President Clinton. The Administration has yet to submit in this or the previous Congress a legislative proposal for implementing the treaty with respect to chemicals. Nor has any Congressional Committee reported any legislation this Congress.

All of 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 build up in the body and are resistant 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 it to promptly implement the control measures recommended by the Conference of the Parties for a new chemical, sometimes called "the 13th POP." The implementing legislation must allow the EPA 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.

The ability of EPA to regulate additional extremely dangerous substances is unclear. We must be mindful of a recent example: EPA's experience with asbestos, a known carcinogen. The Nation saw EPA spend a decade — from 1979 to 1989 — doing analyses and assessments to support regulation to ban certain uses of asbestos under the Toxic Substances Control Act. I should note that the final rule was struck down by the courts. If we cannot regulate a substance as dangerous as asbestos under the Toxic Substances Control Act, our ability to regulate a 13th POP also appears to be inadequate and should be the matter of bipartisan discussions and consideration in the legislation.

Today's Subcommittee hearing focuses on two legislative proposals — H.R. 4591 introduced by Subcommittee Chairman Gillmor and H.R. 4800 introduced by our Ranking Subcommittee Member Hilda Solis.

Chairman Gillmor's bill, H.R. 4591, incorporates the concepts of Toxic Substance Control Act and adds additional criteria. I have serious concerns that the rulemaking standard and the criteria contained in H.R. 4591 would not allow the EPA to act in an efficient manner in a realistic and expeditious timeframe. Moreover, that standard appears nowhere in the treaty or in existing United States law. I find this standard problematic as it poses an opportunity for litigation and years of delay. It also may not properly account for public health benefits nor recognize the work of the science-based international processes.

In contrast, the Solis bill, H.R. 4800, would require EPA to use a health-based standard and would allow expeditious action. H.R. 4800 is careful to preserve United States sovereignty by providing that no regulation may go into effect until the President has exercised his opt-in authority. I commend Ranking Member Solis for her hard work and for this excellent bill.

This hearing also provides the Administration with the opportunity to clarify whether it believes that the Senate must formally consent to each new chemical added by the Convention. Such a requirement would most likely lead to further delay in implementation of control measures adopted by the POPs Convention.

Mr. Chairman, this Committee has a history of approaching successful environmental legislation in a bipartisan fashion. This approach in the past has offered a process satisfactory to all Members, to outside interests, and to the broad public interest. It is my hope that such an approach will be followed here.

I thank the witnesses for appearing today, and I look forward to their testimony.

MR. GILLMOR. Thank you, Mr. Dingell and we will go to our first panel.

I beg your pardon, the gentlelady from Wisconsin, who should never be overlooked.

MS. BALDWIN. Thank you, Mr. Chairman. I am grateful to you, Mr. Chairman for holding this hearing today. And I am also grateful to you for allowing the subcommittee to discuss two bills, one Republican and one Democrat. The bipartisanship is noted and appreciated.

President Bush signed the U.S. on to the Stockholm Convention on Persistent Organic Pollutants or POPs in May 2001. And I am grateful for his leadership as POPs called dangerous environmental and health hazards across the globe. America is the one superpower in an increasingly interconnected world and I believe that along with that incredible responsibility and power comes responsibilities to humankind and the planet itself.

Our hearing today focuses on what role we want to play on improving the global environment and thus improving the health of humans and animals alike. We want other nations to work cooperatively to address our world's threats and challenges. We must do the same and we must lead by example. I am the cosponsor of Ranking Member Solis's legislation. Her bill like the Chairman's is comprehensive yet H.R. 4800 more closely parallels the Stockholm Convention, particularly Article 8. Specifically, H.R. 4800 contains a health-based standard that requires the Administration to act if a potential POP causes significant adverse human health and environmental effects. In contrast, this legislation is permissive not mandatory in allowing the Administration to take action on a potential POP. There are many occasions where the cost-benefit approach embraced by H.R. 4591 should determine whether our country should take action. But when you are dealing with chemicals that have been scientifically determined to cause so serious human health problems, we should move expeditiously to reduce exposure to that toxin. In the long run, if we act to prevent health and environmental problems by reducing exposure to potential POPs there will be a benefit for those costs. Worldwide chronic illnesses could be reduced, children protected from exposure would be healthier, and thus able to be more productive citizens wherever they may live.

Thank you, Mr. Chairman, I yield back my time.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF THE 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. These agreements all center on the banning or severe restriction of chemicals known as persistent organic pollutants.

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 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 calling this hearing and making efforts to move this process forward.

I have long hoped that legislation on this issue could be bipartisan. I was glad Chairman Gillmor had hearings on draft legislation last year, and I thought that was a great starting point for discussions. I did not expect a competing bill to be introduced by the Ranking Member, and I hope that doesn't mean they have rejected bipartisan work. I am hopeful that their actions will be based on merit and not designed to slow down or complicate the process by seeking to address other issues such as opening up the Toxic Substances Control Act or putting partisan politics into the mix.

These treaties are important living documents and decisions and proposals for additional chemicals currently are being debated and decided upon without full U.S. participation. So on that note, I am hopeful that all members of the Committee and Subcommittee will be able to work towards an amicable solution to ensure our voice is heard when these critical decisions are being made.

That being said, I have several concerns with HR 4800, by Ms. Solis, that I find to be troubling and dangerous precedents to set in American law. HR 4800 mandates that the U.N. determination to ban or limit future chemicals automatically becomes EPA's standard too. I believe that standard of review gets it wrong because if the U.S. opts in, it shouldn't be the U.N. that determines what is in the U.S. best interests without a proper domestic consideration by our own EPA. This consideration is especially important when we are considering adopting stringent control measures, which could be as severe as a complete ban on manufacturing. This automatic standard in HR 4800 appears nowhere in current environmental law and will be ripe for judicial challenge and scrutiny. Let me repeat, the rulemaking standard in the minority bill takes a standard from the treaty used to determine whether a chemical should be listed at all, and supplants it into broad new EPA domestic rulemaking authority that could limit the production, use, or manufacturing of certain chemicals in this country in the future. While I understand the chemicals that currently make up the treaties are the worst offenders and largely have ceased to be produced in the United States, in pursuing control measures for the actual regulation of new and unknown future chemicals, information on socio-economic considerations, including costs, risks and alternatives should be considered by our own government. What is wrong in balancing costs, risks and alternatives?

It is arguable that every chemical in industrial society could lead to "significant adverse human health and/or environmental effects," if you are exposed to mass quantities. Under this Solis bill standard, in essence, there is no determination on whether the chemical has any benefit for job considerations, or even domestic security purposes. If a chemical proposed to be banned under the Treaty and the Solis standard had potential uses for domestic security purposes, under her bill that could not be taken into consideration. At all. Which is why the Gillmor standard and the safeguards in his bill are so vital. We simply do not know what the international body will propose as its control measures in the future. Treaties are living bodies that evolve over time, and I believe it is for these reasons that it is critical to provide for a check and balance to occur that does

not cede any authority to unelected, unaccountable international bodies, while at the same time allows for the U.S. to actively engage and participate in these conventions and maintain its role as a world leader.

The Gillmor 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 treaties. 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. With these assurances, it is my 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.

PREPARED STATEMENT OF THE HON. LOIS CAPPS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you, Mr. Chairman.

I'm very pleased with the Subcommittee's continued interest in the POPs Treaty and implementing legislation. In signing this treaty, we recognized that POPs 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 the treaty, which has widespread support.

However, five years after signing, we have yet to act or consider implementing legislation on this historic treaty.

This treaty eliminates, or significantly reduces, the global production, use and release of the 12 worst POPs. It also establishes a science-based process for adding other POPs to the list in the future.

POPs persist for years in the environment, travel great distances on wind and water currents, and accumulate in food chains. Every day, Americans are exposed to POPs through fish and dairy products. And because they collect in body fat, women can transfer POPS to their fetuses during pregnancy and to infants during breast-feeding.

Even at extremely low levels, POPs can cause irreversible damage. Scientific evidence has linked POPs to decreased birth weights, cancers, and learning and reproductive disorders.

As a public health nurse, I value the giant step forward this treaty takes in reducing human exposure to these toxic substances. And that's why I strongly support H.R. 4800 – Congresswoman Solis' bill.

Her bill implements the letter and spirit of the POPs treaty.

Specifically, it gives EPA clear authority to take regulatory action when a new POP is added to the treaty. It adopts the treaty's health-based standard for regulating POPs. And, it respects state and local efforts to protect public health from POPs by specifically allowing stricter state standards.

Conversely, in H.R. 4591, Chairman Gillmor's bill, there is no requirement that EPA do anything after an international decision to add a new POP. There is no timeline for EPA to act, no obligation for them to say why not, and no citizens' petition process to challenge EPA.

His bill also abandons the treaty's public health goal. For example, if EPA decided to regulate, it could do so only if it finds a "reasonable balance" between human health and the economic costs of the regulation. We should be acting to guard human health, not profits.

Finally, H.R. 4591 would preempt all state and local POPs regulations and prohibit states from taking regulatory action in the future.

Mr. Chairman, reducing the effectiveness of the POPs treaty is no way to ratify.

H.R. 4800 is a better approach. It protects the spirit and intent of this treaty, with a forceful adding mechanism that allows prompt action by EPA on adding a new POP.

I hope we can move this bill, very soon, and legislation in the Agriculture Committee so we can move further along in protecting human health and the environment.

Thank you again for holding this legislative hearing. I look forward to our witnesses' testimony.

MR. GILLMOR. If there are no further opening statements, we will go to our first panel. Our first witness is Claudia McMurray, Assistant Secretary of United States Department of State. I want to thank her for being here because I know that she has a very full schedule today and really had to hustle to get in here. We appreciate you being here. Secretary McMurray.

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

MS. MCMURRAY. Thank you, Mr. Chairman.

And I would also like to thank the members of the subcommittee for holding this hearing on legislation to allow the United States to join three extremely important international agreements to control dangerous toxic chemicals and pesticides. The three agreements are the Stockholm Convention on Persistent Organic Pollutants, the Protocol on Persistent Organic Pollutants of the Convention on Long-Range Transboundary Air Pollution, what I will call LRTAP POPs, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, which I will shorten to the Rotterdam Convention. I have a longer statement that I would like to submit for the record with your permission.

Since 2001, the Administration has urged the Congress to make it possible to join these agreements and that the committee approve implementing legislation as soon as possible as was expressed in strong support for the Stockholm Convention in a Rose Garden ceremony in 2001. On that occasion, former 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 the field of persistent organic pollutants.

Over a few decades the U.S. 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 is continually sought by other countries in establishing 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 been in force for some time. The governing bodies of each of these agreements have already met at least once and later this year will convene again to make decisions on the future of their respective accords. As the recognized leader in the field of toxic chemicals management, it is vital that the United States participate in shaping the development of each of these agreements.

The Stockholm Convention which was completed in 2001 aims to protect human health and the environment from 12 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 both humans and animals. They are stable and resistant to natural breakdown and they can be transported over long distances through the atmosphere and the oceans. The Convention's Conference of Parties will make final decisions on whether to add new chemicals. Once the parties add a chemical through an amendment, countries can decide the conditions under which they will consent to an amendment. At the time of ratification, we in the U.S. intend to declare that any amendment shall enter into force for the United States fully upon our deposit of a U.S. instrument of ratification, acceptance, or approval. Legalization of this so called optimum option for adopted amendments will ensure that decisions made by the Convention parties do not prejudge our domestic decision-making process.

The Stockholm Convention which now has been ratified by 118 countries entered into force on May 17, 2004 and held its first Conference of the Parties in May 2005. At that meeting and I attended that meeting, the United States was neither able to participate fully in the important decisions taken there, nor able to intervene them on the key financial issue decided at the end of the meeting. The second Conference of the Parties will take place on May 1 through 5 of this year and will consider important issues related to compliance, the consideration of new chemicals, and guidance on best environmental practices for unintentionally and produced POPs.

H.R. 4591 would permit the United States to implement and become a party to two additional international agreements dealing with toxic

chemicals and pesticides. One agreement closely related to the Stockholm Convention is the LRTAP POPs agreement that I mentioned earlier. That is a regional agreement negotiated under the auspices of the United Nation's Economic Commission for Europe which includes the United States, Canada, Europe, and the former Soviet Republics. The obligations in LRTAP POPs are generally similar in nature and scope to those in the Stockholm Convention. One of the key differences is that LRTAP includes four substances not contained in the global accord reached in Stockholm.

LRTAP POPs entered into force on October 3, 2003, and has been ratified by 25 countries. The LRTAP executive body which serves as the governing body for all LRTAP protocols will hold its next meeting in December of 2006. The Executive Body will decide whether several substances currently being reviewed by the technical committee should be considered POPs and then discuss management options for two substances designated as POPs by the Executive Body in 2005. The Executive Body will also discuss options for improving the efficiency and effectiveness of the technical review of potential POPs.

The last agreement covered in H.R. 4591 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 the export of certain especially hazards chemicals, in particular those the use of which 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 agreements' provisions, in a discriminatory manner, thus ensuring a level playing field for countries engaged in trading these products. The Rotterdam Convention significantly enhances the 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 has to date been ratified by 104 countries and entered into force on February 24, 2004. The Convention's third Conference of the Parties will be held in October of this year and will also decide whether to formally add several substances to the list of chemicals already covered by the Convention.

In summary, Mr. Chairman, together these three agreements address a number of critical chemical management problems faced by the international community. These agreements enjoy broad support from the public, from environmental groups, from industry organizations, and also 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 ratified these agreements and all three are now in force. Their respective governing bodies will be meeting in the upcoming months and critical decisions will be made on the future course of each agreement. As the country with the world's most comprehensive risk management scheme for toxic chemicals, the U.S. should continue its leadership role as an active and influential participant, a seat not just at the table but at the head of the table. In short, this issue is just too important for the United States to sit on the side lines as an observer.

Mr. Chairman and members of the subcommittee, it is therefore urgent that this Congress pass implementing legislation that will allow us to join these agreements and participate as parties in these upcoming meetings. H.R. 4591 would allow the United States to implement obligations for all three of these important agreements which are a cornerstone of international efforts to foster environmentally sound management of chemicals. H.R. 4591 includes the elements the Administration believes are appropriate to take domestic action. It is fully consistent with the international process for the consideration of adding additional chemicals to the scope of these agreements. Passage of this legislation will confirm the strength of our commitment to protection of human health and the environment in the United States and around the world and with our allies to participate fully in the process by which these agreements will evolve over time. We strongly support Chairman Gillmor's efforts to move this bill forward. We have been working towards U.S. ratification of the Stockholm Convention since the U.S. signed it in May 2001. Next month will be the five year anniversary of the President's Rose Garden ceremony on POPs. U.S. ratification of this treaty remains a top priority for the Bush Administration.

I look forward to working with committee members on both sides of the aisle to expedite U.S. entry into these important agreements.

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

[The prepared statement of Hon. Claudia A. McMurray follows:]

PREPARED STATEMENT OF HON. CLAUDIA A. MCMURRAY, ASSISTANT SECRETARY FOR OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEPARTMENT OF STATE

Mr. Chairman, thank you for holding this hearing on implementing legislation to allow the United States to join three extremely important international agreements to control dangerous toxic chemicals and pesticides. The three agreements 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 POPs"), and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the "Rotterdam Convention"). Since 2001, the Administration has urged that Congress make it possible to join these agreements and that the Committee approves implementing legislation as soon as possible.

Mr. Chairman and members of the Subcommittee, I respectfully suggest to you that swift approval of implementing legislation would demonstrate strong U.S. support for these agreements and the benefits to public health and the environment that they provide. H.R. 4591 would allow the United States to implement obligations for all three of these important agreements, which are a cornerstone of international efforts to foster environmentally sound management of chemicals. The bill includes the elements the Administration believes are appropriate to take domestic action. It is fully consistent with the international process for the consideration of adding additional chemicals to the scope of these agreements. Passage of this legislation would confirm the strength of our commitment to protection of human health and the environment in the United States and across the world, and would allow us to participate fully in the processes by which these treaties will evolve over time. We strongly support Chairman Gillmor's efforts to move this bill forward.

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, former 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 among the first countries to begin addressing the human health and environmental threats posed by pesticides and other toxic substances. Our expertise is continually sought by other countries when establishing 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 been in force for some time. The governing bodies of each of these agreements have met at least once, and later this year will convene again to make decisions on the future of their respective accords. As a recognized leader in the field of toxic chemicals management, it is vital that the United States participate in shaping the development of each agreement.

The Stockholm Convention, which was completed in 2001, aims to protect human health and the environment from twelve types of 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 persistent organic pollutants ("POPs") initially covered by the treaty 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. While none of the twelve chemicals covered by the Stockholm Convention are now used or manufactured in the United States, there are still some uses in other parts of the world, particularly in developing countries. As a result, they can still 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, that tend to absorb and retain these chemicals. Some POPs, such as DDT, are known to have negative impacts on the wildlife species themselves. 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 and release 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 or restricts 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 need for developing countries to manage POPs, the Convention includes a flexible system of financial and technical assistance through which these countries can receive help to meet their obligations. In fact, the United States has already spent over $20 million assisting several developing countries in building capacity in this area.

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 the criteria for 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 the POPs Review Committee determines that a chemical is likely to lead to significant adverse effects, the Committee 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 information concerning management and a profile of risks, the Committee provides a recommendation on whether a chemical should be considered for addition to the Convention. Given our considerable technical expertise and our national interests related to the evolution of the Convention, we need to be full participants at these meetings as soon as possible.

The Convention's Conference of Parties (COP) will make final decisions on whether to add chemicals. Once the Parties add a chemical 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 such amendment shall enter into force for the United States only upon our deposit of a 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 118 countries, entered into force on May 17, 2004 and held its first COP in May 2005. At that meeting, the United States was neither able to participate fully in the important decisions taken there, nor able to intervene on a key financial issue decided at the end of the meeting. The second COP will take place May 1-5, 2006 and will consider important issues related to

compliance, the consideration of new chemicals, and guidance on best environmental practices for unintentionally produced POPs.

The implementing legislation would permit the United States to implement and become a Party to two additional international agreements dealing with toxic chemicals and pesticides. One agreement -- closely related to the Stockholm Convention -- is the POPs Protocol to the Convention on Long-Range Transboundary Air Pollution (LRTAP). 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 POPs 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 POPs entered into force on October 23, 2003 and has been ratified by 25 countries. The LRTAP Executive Body (EB), which serves as the governing body for all LRTAP Protocols, will hold its next meeting in December, 2006. The EB will decide whether several substances currently being reviewed by the technical committee should be considered POPs and discuss management options for two substances – perfluorooctane sulfonate (PFOS) and pentabromodiphenyl ether (PeBDE) – designated POPs by the Executive Body in 2005. The EB will also discuss options for improving the efficiency and effectiveness of the technical review of potential POPs.

The last agreement covered in H.R. 4591 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 listed in the Convention, 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 for countries engaged in trading these products. 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 of listed chemicals.

The Rotterdam Convention has to date been ratified by 104 countries, and entered into force on February 24, 2004. The Convention's third Conference of Parties (COP) will be held in October 2006, and will also decide whether to formally add several substances to the list of chemicals covered by the Convention.

In summary, Mr. Chairman, together these three agreements 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 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 the Congress pass implementing legislation that will allow us to join these agreements and

participate as Parties in these upcoming meetings. We have been working toward U.S. ratification of the Stockholm Convention since the United States signed it in May, 2001. Next month will be the five-year anniversary of the President's Rose Garden ceremony on POPs. U.S. ratification of the treaty remains a top priority for the Bush Administration.

I look forward to working with Committee members on both sides of the aisle to expedite U.S. entry into these important agreements.

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

MR. GILLMOR. Thank you very much.

And we would now like to welcome back to the subcommittee Susan Hazen, Principal Deputy Assistant Administrator, Office of Prevention, Pesticides, and Toxic Substances, U.S. EPA.

MS. HAZEN. Thank you very much, Mr. Chairman and the committee.

I have a longer statement which I would like to submit for the record.

Mr. Chairman and members of the committee, thank you for the invitation to appear before you today to discuss these three very important international environmental agreements that have already been identified by Ms. McMurray, the Stockholm Convention or the "POPs" Convention, the Rotterdam Convention, or the "PIC" Convention, and the LRTAP POPs Protocol. Becoming a party to these three agreements has been a priority for the Administration since the spring of 2001 when President Bush announced that the United States would sign the Stockholm Convention. We took part in the negotiation of each of these three agreements and we have been working steadily on legislation that would allow us to implement effectively their obligations. The time for finalizing legislation has now come and we are here to ask for your support in our ratification efforts.

These three agreements are now in full force. When I last appeared before this committee in July of 2004, these agreements were in their infancy. And at that time, I outlined in detail what the Administration saw as the value of these agreements and continues to see as the value, as they contribute, each in its own way, to a healthier global environment and to a healthy America by taking steps to address the production, use, releases, and trade in a number of substances that affect human health and the environment. The United States was an active player in the negotiation of each of these agreements, not only politically but technically, scientifically, and financially. But now, because of our non-treaty status, our participation is extremely limited. While we have attended all of the major meetings, we are no longer in a leadership role and our ability to influence decisions is steadily decreasing. We sit in the back of the room, at the very end of the row, behind the flag that says observers. And once all the parties in the room say what they want to

say, the United States may be, but is not always, recognized by the chair of those meetings.

Given a number of the new substances being continued for addition to these agreements, it is critical for the United States to have a real and equal voice at the table. There are five new substances proposed for listing under the POPs or Stockholm Convention. There are five new substances under LRTAP, the Long-Range Transport POPs Protocol, and nine new substances for consideration under the PIC or Prior Informed Consent. The United States will want to ensure that available scientific information is carefully considered during the decision-making process and the decisions made by the parties to these very agreements are grounded in sound science, consistent with the requirements of the Convention. The United States should be fully engaged and help shape such decisions based on both our domestic and international priorities.

To that end, our agencies have reviewed Chairman Gillmor's bill with an eye on the fundamental issue that I identified in July of 2004 which is: does the legislation provide the legal authority necessary for the United States to implement all of the Toxic Substance Control Act-related obligations of these agreements? We believe that this bill accomplishes this objective, filling in the gaps necessary in domestic law for the United States to fulfill the terms of these international agreements. The bill also provides a decision-making standard and approach that is generally consistent with that already applied by the U.S. Government when evaluating chemical substances and possible risk management actions. I would like to thank Chairman Gillmor and his staff for introducing a bill that would allow the United States to join these agreements which seek to promote the global reduction, if not elimination, of some of the world's most persistent and toxic substances. I applaud the Chairman for taking a leadership role.

The current legislative bill also 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. The legislation would also enable the United States to join future Convention amendments, if we choose, that are consistent with U.S. law and policy. This is a very important element of this legislation for the Administration. The United States has earned international credibility and respect for the strength of our scientific risk assessment and our regulatory decision-making. And, by our active participation in the international process, we want to continue to be in a position to implement such actions where they meet U.S. needs.

I would like now just to take a few minutes to discuss several events that have occurred in the context of these agreements that highlight the immediate consequences of our current non-party status, and why I think

it is in the best interest of the United States to be at the table. In the POPs Convention, the membership of the--it is called the POPRC, it is the POP Review Committee, the committee where chemicals are reviewed--the membership was chosen. Well, it sounds like a rock band. The POPRC is really the group of experts who review the chemicals that are nominated to be considered for addition to the treaty, a fundamentally influential activity and a significant committee. Despite the recognized depth of our scientific expertise and the significant role that the U.S. plays in the commercial aspects of the substances covered by these agreements, due to our non-party status, we were not able to be part of that POPs Review Committee decision-making process. The same scenario had occurred a few months earlier in the context of the Rotterdam or the Prior Informed Consent Convention.

On a similar note, at the first meeting of the POP Review Committee in 2005, we found that observer views, even when made by Governments, were given limited weight in the deliberations. A specific case in point was in the development of a procedure for the treatment and handling of confidential business information as allowed under the Convention. Our view is that it would be beneficial to the POPs Review Committee to have the capability to protect as confidential business information a broader array of information than was decided by the Review Committee, in order to encourage the provision of valuable information in the deliberations. This in turn would result in better informed decision-making by the Review Committee and, ultimately, the Conference of the Parties. Our views on this matter were not given any consideration at all and, clearly, if we had been parties, at a minimum a debate would have occurred. It is not in the interest of the United States to continue to be--

MR. GILLMOR. Can I ask you to wrap up? We are going significantly over time and I have a couple questions concerning some of the things you talked about.

MS. HAZEN. Sure.

MR. GILLMOR. Hopefully you can elaborate on that in the question.

MS. HAZEN. I would be happy to do that.

MR. GILLMOR. Okay.

MS. HAZEN. As I said, we just think this is very important and we thank you for the leadership that we have seen and I will close with that and be happy 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

Mr. Chairman and Members of the Committee, thank you for the invitation to appear before you today to discuss three very important international environmental agreements: the Stockholm Convention on Persistent Organic Pollutants (the Stockholm Convention), the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the Rotterdam Convention), and the Protocol on Persistent Organic Pollutants, negotiated under the United Nations Economic Commission for Europe's Convention on Long Range Transboundary Air Pollution (the LRTAP POPs Protocol). Becoming a Party to these three agreements has been a priority for the Administration since the spring of 2001, when President Bush announced that the United States would sign the Stockholm Convention. We took part in the negotiating of each of these three agreements, and we have been working steadily on legislation that would allow us to implement effectively their obligations. The time for finalizing legislation has now come, and we are here to ask for your support in our ratification efforts.

These three agreements are now in full force. When I last appeared before the Committee in July of 2004, these agreements were in their infancy. The Stockholm Convention had just gone into force a few months earlier. The Rotterdam Convention, although moving forward on a voluntary basis for years, had only been in force for six months, and the LRTAP POPs Protocol had been in force for nine months. At that time I outlined in detail what the Administration sees as the value of these agreements, as they contribute, each in its own way, to a healthier global environment and to a healthier America. The Stockholm Convention and the LRTAP POPs Protocol, for example, take steps to address the production, use, and release of substances that persist in the environment for long periods of time and bioaccumulate as they move up through the food chain. The reduction or elimination of POPs sources called for in these agreements will have significant benefit to the United States by reducing exposures that affect human health and the environment. The Rotterdam Convention promotes information exchange and informed risk-based decision-making in the global movement of hazardous chemicals and pesticides, empowering governments and citizens to make their own domestic science- and risk-based decisions in an informed manner. The United States worked closely with other partner countries to reach a broad consensus on these pollution-reducing agreements. And we now have a better understanding of the operation of these agreements, based on their experience to date.

As you know, the United States was an active player in the negotiation of each of these agreements. Our scientists led the way in reviewing and assessing the substantive matters addressed by these agreements, and the United States was one of the larger financial and technical assistance donors. But now our participation is limited. While we have attended all of the major meetings that were held to discuss these treaties since October 2003, when the first of these agreements came into force, we are no longer in a leadership role and our ability to influence decisions is steadily decreasing. We sit in the back of the room, at the very end of the row, behind the flag that says "Observers." Once all the Parties in the room say what they want to say, the United States may be, but is not always, recognized by the Chair.

Given a number of the new substances being considered for addition to these agreements, it is critical for the United States to have a real and equal voice at the table. For POPs, those substances include pentabromodiphenyl ether (pentaBDE), hexabromobiphenyl (HBB), perfluorooctanyl sulfonate (PFOS), lindane, and chlordecone. There are also five new substances proposed for listing under LRTAP, and nine new substances under PIC. Decisions made about these substances under these various agreements will haven an impact on global production of and trade in these

substances. The United States, which has a lot of scientific information to bring to the table for discussion with respect to these substances, will want to ensure that available scientific information is carefully considered during the decision – making process, and that the decisions made by the Parties to these various agreements are grounded in sound science. Important decisions regarding these and other pollutants and chemicals of significant domestic interest will continue to be made over the course of the next few meetings of the Parties. The United States should be fully engaged to help shape the decisions, based on both domestic and international priorities.

To that end, our Agencies have reviewed Chairman Gillmor's bill, H.R. 4591 introduced in December of 2005, with an eye on the fundamental issue I identified in July of 2004, which is: does the legislation provide the legal authority necessary for the United States to implement all of the Toxic Substances Control Act-related obligations of the three agreements? We believe that this bill accomplishes this objective, filling in the gaps necessary in domestic law for the United States to fulfill the terms of these international agreements. The bill also provides a decision-making standard and approach that is generally consistent with that already applied by the U.S. Government when evaluating chemical substances and possible risk management actions. I would like to thank Chairman Gillmor and his staff for introducing a bill that would allow the United States to join these agreements which seek to promote the global reduction, if not elimination, of some of the world's most persistent and toxic substances. I applaud the Chairman for taking a leadership role.

The current legislative bill 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. The bill, for example, contains language to ensure that any manufacturing, use, processing, distribution in commerce for export, and disposal of the substances listed in the Stockholm Convention or in the LRTAP POPs Protocol that is inconsistent with the obligations of those agreements would no longer be authorized. The proposed legislation effectively implements the Rotterdam Convention as it tracks the obligations in the Convention relating to notice of control action, export notification, export controls and labeling for PIC-listed substances. The bill also requires EPA to issue notices that would communicate to our own domestic producers and exporters the importing decisions of other countries. Many of the provisions of this bill, such as those that require the EPA to publish a number of federal register notices, will keep the public informed and allow the public to provide us with significant information as we prepare for the international process and our own domestic proceedings.

The legislation would also enable the United States to join future convention amendments, if we choose, that are consistent with U.S. law and policy. This is a very important element of this legislation for the Administration. The United States has have earned international credibility and respect for the strength of our scientific risk assessments and regulatory decision making, and we want to continue our work to ensure that the international process remains subject to a high level of analytical and scientific rigor. Our absence from these treaties diminishes the voice of some of the best science and policy experts in the world in the international process and tends to decrease the balance afforded to the United States' risk-based approach to chemical management. We also miss the opportunity enjoyed by the Parties to chair key process and subsidiary bodies, which allows those Parties to directly participate and influence the fate and direction of the treaties. I assure you that we continue to think it is in the best interests of the United States to be a Party to these agreements.

I would now like to take just a few minutes to discuss several events that have occurred in the context of these treaties that highlight the immediate consequences of our current non-Party status and why I think it is in the best interests of the United States to be at the table. In the Stockholm Convention, the terms of reference for the Persistent Organic Pollutants Review Committee (POPRC) was decided upon and its membership

was chosen at the first conference of the Parties in May of 2005. The POPRC, while sounding like a rock band, is really the sole group of experts who review the chemicals that are nominated to be considered for addition to the treaty; a fundamentally influential activity and significant committee. At the Conference of the Parties, the United States, lacking ratification status, was not able to pursue a seat on the POPRC for its first term, when many crucial, precedent setting decisions will be made. Despite the recognized depth of the United States in terms of our scientific expertise and the significant role we play in the commercial aspects of the substances covered by these agreements, we are not able to be part of the POPRC decision – making process. The same scenario had occurred a few months earlier in the context of the Rotterdam Convention.

On a similar note, at the first meeting of the POPRC in 2005, we found that observer views, even when made by governments, were given limited weight in the deliberations. A specific case in point was in the development of a procedure for the treatment and handling of confidential business information. At the meeting, we made the point that it would be important to create a mechanism to provide confidential treatment to certain types of data, recognizing there are administrative costs to such a mechanism. Our view was that not having the capability to protect confidential business information may have the effect of discouraging the provision of valuable information in the committee's deliberations. This, in turn, may result in less informed decision-making by the Conference of the Parties. Our view was not given any consideration. Clearly, if we had been parties, a debate on the issue would have occurred.

It is not in the interest of the United States to continue to be silent. President Bush recognized the importance of U.S. participation in the international chemical arena when he stood in the Rose Garden and announced that the United States would sign the Stockholm Convention. I know you understand and agree that the United States needs implementing legislation that would allow us to take the final steps and join these three important environmental agreements now.

I am very proud of the leadership role the United States has played in developing these agreements. Each of these agreements provides an excellent example of how industry and environmental interests can work together to address serious issues, and they 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 industry, environmental organizations, and others as we implement these agreements. We are committed to working together with our domestic stakeholders and the international community to address these chemicals globally.

The Administration has reviewed this bill, and we believe that the provisions of the bill would allow the United States to take back its leadership role through effective participation in the implementation of the agreements and to regulate, as necessary, for compliance with the obligations of these three agreements. In order to take part in the international response to address the covered substances, to ensure the integrity of the treaty process, and to bring to the table some of the best science in the world, it is necessary for the United States to be an active and recognized party. We support the Chairman's efforts to move this bill forward and look forward to working with the committee as the process advances.

Thank you again for the opportunity to discuss these important international environmental agreements today. If the committee should need any technical assistance, we stand ready to help. Again, I want to thank you for your support and leadership in finalizing the implementing legislation necessary for the United States to meet the obligations under these three agreements.

I will be pleased to answer any questions.

MR. GILLMOR. The last time we held a hearing on this matter, both you and Ms. McMurray stated it was crucial that the United States pass implementing legislation in order to get a seat at the table. Obviously that did not happen and not only did we miss the first meetings of the parties, but we also will not be full parties at the next set of POPs meetings this spring. So the question is what happens if the United States is not able to pass implementing legislation and continues in its present "observer" status?

MS. HAZEN. Chairman, that is an extremely important question and thank you for asking it. The bottom line is that our domestic interests will go absolutely unrepresented in this process. The parties around the table will decide what substances should be listed, the information that we have and can bring to the table may be given increasingly less attention. Our domestic commercial interests will not be considered and the parties will determine what trade can or cannot occur. And we will have nothing to say about it.

MR. GILLMOR. Ms. McMurray, some opponents of my bill have argued that it is unusual for the United States, as a part of a larger international framework, to insist on its own domestic regulatory process and that this is a part of the Bush Administration's unilateral foreign policy. It is my understanding though, that this type of policy position from the United States is not new and that the Clinton Administration had the very same position. Is that correct?

MS. MCMURRAY. Yes, Mr. Chairman. If I could address your last point first though. We are up here testifying on three agreements that are extremely multilateral and so I find it odd that the word unilateral would be used in that we are seeking to work on global problems in a global fora and we are trying very hard to do that.

But to address your other questions, I think you can look at a broad array of multilateral environmental agreements and these three are certainly examples and say that no particular regulatory regime is required. The results are what is important. We are trying to get particular results. We are trying to get rid of chemicals. We are trying to decrease emissions depending on which treaty you are talking about. And really it is up to the individual countries to determine how to do that and we are supportive of that kind of a regime.

MR. GILLMOR. Ms. Hazen, as you know, I believe that the U.S. should have its own regulatory process for POPs chemicals as protective insurance of our national interest, especially since treaties are pacts between parties that may not agree. Does the POPs treaty by itself convey a specific mechanism for regulating POPs chemicals in each country?

MS. HAZEN. No, Mr. Chairman, the treaty does not lay out a specific mechanism for regulating POPs.

MR. GILLMOR. And considering the different needs and the resources of various countries, would it be appropriate for the POPs treaty to lay out a binding process for each of its member parties to take in regulating listed chemicals?

MS. HAZEN. No, as I said, the treaty does not lay out specific mechanisms. Each individual nation or country will determine for itself what is the most appropriate process to regulate and to move forward. Obviously countries will need to and want to take into consideration their domestic considerations.

MR. GILLMOR. Ms. McMurray, does the Administration support H.R. 4591?

MS. MCMURRAY. Yes, Mr. Chairman, we support the quite targeted approach that the bill takes, the focus on the specific changes to TSCA that are necessary to make us parties to these agreements.

MR. GILLMOR. Thank you very much and I will yield back the balance of my time.

Ms. Solis?

MS. SOLIS. Thank you.

Ms. McMurray, we just received a copy of your statement a moment ago so I want to let the staff know that. My question for you, Ms. McMurray, is since the beginning of the 109th Congress in January of 2005, has the Administration convened any joint meetings with industry officials, environmental groups, or public health groups, or State officials in an attempt to try to provide a broad based consensus on a set of amendments to the Toxic Substance Control Act to implement the POPs, yes or no?

MS. MCMURRAY. If you are asking for those specific dates, if I have convened meetings to discuss legislation, no because there has been none to discuss.

MS. SOLIS. Okay. I am not aware at this time of any EPA or State Department or other Administration officials reaching out to work "closely" with me or any Democratic members to develop a set of amendments to the Toxic Substance Control Act for the POPs Convention since the beginning of the 109th Congress in January of 2005. Am I correct?

MS. MCMURRAY. Well we worked quite extensively with your staff in the last Congress. And it was my understanding that you were in the process of developing a bill and it is only now that we have seen it. So we would be happy to work with you now to try and see if there is a bridge between yours and the Chairman's bill.

MS. SOLIS. Well it is incredible for me to try to understand that you say in your statement that there is an urgency to get all this legislation done now so that we can appropriately be at the table at these upcoming meetings, but even in your testimony you state that on what is upcoming May 1st and 5th, we would not even qualify if we worked that judiciously here to get anything done. So I think some of what is being said is somewhat disingenuous because I really believe that we could have probably had more collaboration and communication with you. You really have not and it is quite sad that, you know, we had to go this route at this time. We do want to try to work but I do not think that Mr. Gillmor's bill, the Chairman of the subcommittee, will take care of the concerns that many of us had, particularly former President Clinton, as well as President Bush. We signed on to a Convention that says we are going to prioritize health effects and try to protect the environment and those are areas I think everyone internationally agrees with. I do not see that we are somehow giving up our sovereignty to foreign countries when we sign on to agreements that both your President and my President have agreed to.

The notion of preemption, I would like to get your feedback on that. What is your stand on the language that is presented by Mr. Gillmor on State preemption?

MS. MCMURRAY. Congresswoman, I think that the State Department is perhaps not qualified to comment on a domestic issue of the preemption of State law so I would hope that Suzie Hazen could be called on to respond to that. But having said that, we did, literally I do not even have a copy of the letter from the attorneys general so I cannot even if I were to acknowledge that this was something within my expertise which it is not, I have not seen the letter.

MS. SOLIS. Very well, then I will ask Ms. Hazen.

MS. HAZEN. Thank you, Ms. Solis.

I too have not seen the letter and I would very much like to see the concerns that were raised in it because seeing those concerns will help me relate that back to the preemption portion of TSCA that already exists. I think what is important here is that I think the goal of all of us is to ensure that States continue to have the same authorities that they have to regulate in a more stringent fashion. As soon as--

MS. SOLIS. Do you feel, Ms. Hazen, that legislation that I introduced would still help us move towards implementation?

MS. HAZEN. With the concerns that have been raised by the attorneys general, I am reluctant to answer only because I am not aware of the specific concerns they have raised and if they are as substantive as folks would have me believe they are, I would like to see what it is they are raising about concerns. But I would be happy to take a look at the

specific issues they have raised and again see how it relates to the existing TSCA Section 18 preemption language that is in place and has been in place since 1976.

MS. SOLIS. Could you clarify for me, does my bill, in your opinion, provide the legal authority necessary for the U.S. to implement all of the Toxic Substance Control Act related obligations of these three agreements?

MS. HAZEN. It does appear from our analysis of the bill that your bill would allow the United States to implement the obligations under these agreements.

MS. SOLIS. And yet in your testimony you do not even mention my legislation wall.

MS. HAZEN. We were focusing on what we have had an opportunity for a fairly long period of time to focus on, H.R. 4591. When last we were here, we offered to provide whatever technical assistance we could provide. EPA offered to provide whatever technical assistance we could. We did, in fact, work quite closely with your staff. We have not been asked, to my knowledge since that time, since we finished that sort of section if you will, to provide additional assistance but we would be happy to do that.

MS. SOLIS. I would also like to note for the record that Chief United States Negotiator for the POPs Convention, Mr. Yeager, who is going to be testifying also submitted prepared testimony that states that H.R. 4800 puts forward a relatively straightforward process which would allow the U.S. to fully implement the Convention while retaining full discretion with regard to the regulation of any new POP. I yield back.

MR. GILLMOR. Does the gentleman from New Hampshire have questions?

MR. BASS. I do, Mr. Chairman. I thank the Chairman for recognizing me.

Both of you, one as a representative of the Department of State and the other representative of EPA, say that the bill introduced by my friend from Ohio would provide what the United States needs to implement these treaties. Now it is my understanding that the bill introduced by my friend from California, Ms. Solis, would defer most of the elements of regulatory decision-making including evaluation of science and means of regulations to the United Nation. It would also, as I understand it, completely eliminate considerations like cost, job impact, and national security. I am just curious to know why we need to do this in this legislation. In your opinion, do you think it is in effect to some extent an obligation of sovereignty when the treaties themselves do not actually require this?

MS. HAZEN. In H.R. 4591, the rulemaking standard is "to the extent necessary to protect human health and the environment in a matter that achieves a reasonable balance of the social costs." It pulls in all the components of much of our existing domestic framework. In H.R. 4800, the standard is "to protect against significant adverse human effects which at a minimum implements the control measure specified for the chemical" that would happen in the international arena. We do believe that it is very important that, while the listing by the Conference of the Parties and the information relative to that listing is important for the U.S. to take into consideration, we do believe that it is very important that, at the end of the day, it is the U.S. domestic process and the needs of the U.S. people that are taken into consideration as we move forward in a regulatory frame. I hope that answers your question.

MR. BASS. For both of you, under various agreements such as the POPs Convention, there is a process an international review committee designed to evaluate and make recommendations for inclusion of new chemicals on the list. Are there strict timelines given to the international review committee to evaluate and make these recommendations and if so, what are these timelines, and if not, do you believe that it would take the international review committees several years from initial consideration of a particular chemical to the final recommendation of an inclusion?

MS. MCMURRAY. Congressman, there are timelines. I must say though that given those, the review committees do not always meet them. We are always reminded that if something should happen in 2006 but it may slip to 2007, so yes, it is a reality that we have to wait quite a long time for decision-making from its bodies.

MR. BASS. On another subject, in reviewing both of the bills that we have before the committee today, which of the two proposed pieces of legislation would most ensure transparency in public notification within the U.S. to obtain the necessary and crucial information in a manner that EPA will be able to have the necessary time to closely evaluate the weight of that?

MS. HAZEN. At this point in time, the components of the Gillmor bill that speak to going through a rulemaking process to collect information, a rulemaking process that gives opportunities for public comment, provides a very transparent framework that would allow the public, and I use that word very broadly to include industry, environmental community, and the entire set of stakeholders, to engage in the process and see exactly where we are and an opportunity to provide any information that we may not have and to comment on any information which we do have.

MR. BASS. From your review of both bills, do you believe that the Gillmor legislation provides for the EPA on the domestic level to be conducting their own evaluation in step with the international process in providing the necessary time to process the immense amount of comments and data and so forth to ensure the avoidance of potential legal issues versus the other bill, which I believe has a strict timeline that kicks in after determination of the International Convention setting much smaller windows. Is this an issue for EPA?

MS. HAZEN. Because we have not yet obviously entered into how any of these processes would actually work, it is a little bit difficult to answer that question. I can say that there is a need to have a full and open process to fully consider information coming in and the position that the U.S. would want to take. As again I am stumbling here a bit because without a process in place, it is somewhat difficult to judge. So you have caught me a little bit off guard with that but--

MR. BASS. Fair enough, thank you.

I yield back, Mr. Chairman.

MR. GILLMOR. The gentleman yields back.

The gentlewoman from California.

MS. CAPPS. Thank you, Mr. Chairman, for holding this hearing.

Ms. Hazen, I would like to clarify a few of the issues relating to State preemption and the letter that you sent me dated August 3, 2004. I have a copy of it here and it followed a discussion or exchange that we had during our most recent hearing on this matter. As you acknowledged in your letter, Chairman Gillmor's bill now introduced as H.R. 4591, preempts or precludes a State from establishing or continuing in effect any requirement for a chemical substance or mixture for which a listing under the POPs Convention has entered into force for the United States. But then the letter stated that a State could request or petition that the Federal EPA promulgate a rule to allow its more stringent State law to apply to the chemical assuming a number of conditions are met in the formal rulemaking. Is that correct?

MS. HAZEN. I apologize. I did not catch the first--I have the letter in front of me.

MS. CAPPS. Okay.

MS. HAZEN. And I was trying to find where you were reading for the first part.

MS. CAPPS. It is the second paragraph and you do state that Mr. Gillmor's bill preempts or precludes a State from establishing or continuing any requirement for chemical substance as entered into force for the United States but then your letter states and this is the second paragraph that a State could request or petition that the Federal EPA promulgate a rule to allow its more stringent State law to apply to the

chemical assuming a number of conditions are met in a formal rulemaking. I just want to verify that.

MS. HAZEN. That is consistent with the current Section 18 preemption provision.

MS. CAPPS. Okay. In the 30 year history of the Toxic Substance Control Act, how many cases can you cite where the EPA has allowed a more stringent State law to be enacted or continued in effect?

MS. HAZEN. I do not have that information at my fingertips--

MS. CAPPS. Okay. I have assumed that you might not and I would hope that you would get back to me in writing about that matter.

MS. HAZEN. I would be happy to.

MS. CAPPS. But I want to ask you this. Are you currently aware of any cases, and if so could you cite them, that you are in the process of evaluating now?

MS. HAZEN. I am personally not aware of any right now which is not to say that there are not, there may be some pending requests to the Agency. Again, I would be happy to look into that as soon as I get back--

MS. CAPPS. Okay, all right, I appreciate that information as well.

I want to follow up by asking is it also correct that while EPA is conducting the rulemaking, this could go on for many years since there is no deadline. The State law under--would be preempted during this time of rulemaking or precluded from continuing in effect if Chairman Gillmor's bill is enacted into law.

MS. HAZEN. I believe what Chairman Gillmor said at the outset was that, based on his reading and his concerns that have been raised by the letter coming in from the attorneys general, that he is looking at, actually that we are looking at, the provisions that have to do with preemption.

MS. CAPPS. But as it exists now, during the rulemaking period, there would be no opportunity for States to enact their own legislation that would be in effect.

MS. HAZEN. I am not sure of the answer. I do not want to give you a mis-answer.

MS. CAPPS. I am asking for your interpretation of this law by the lawmaking agency and I would really appreciate if you would get back to be me because--

MS. HAZEN. I will.

MS. CAPPS. --my assumption is that there is. We have two bills before us and that the Solis bill, H.R. 4800 does not preempt State authority to enact more stringent requirements for listed POPs chemicals. That is very clear it does not. Am I right?

MS. HAZEN. The Solis bill, as I said earlier, takes in, certainly talks about more stringent provisions. The question that we have had consistently on that is what does it say about less stringent.

MS. CAPPS. Well I am only asking about more stringent.

MS. HAZEN. We believe it would allow for more stringent.

MS. CAPPS. All right.

MS. HAZEN. But what we do not know is if it would allow a State--

MS. CAPPS. Okay. I am only interested in the one part. Finally in conclusion, Ms. Hazen, I strongly urge you to read the testimony that will be presented today on behalf of California's attorney general expressing his acute and I am quoting him now "acute concern regarding the sweeping preemption language contained in Chairman Gillmor's H.R. 4591 and setting forth the specific examples." And I believe on the second panel his assistant or deputy will be testifying and I want this to be clear and I look forward to hearing your responses.

Thank you very much, I yield back.

MS. HAZEN. I will get back to you immediately on this.

MS. CAPPS. Thank you.

MR. GILLMOR. The gentlelady's time has expired.

The gentleman from Pennsylvania.

MR. PITTS. Thank you, Mr. Chairman.

Madam Secretary, does the POPs Convention require the international body when making a recommendation to list a chemical to consider U.S. manufacturing jobs, expert issues, or U.S. national security consequences that will arise as a result of regulatory action on that particular chemical?

MS. MCMURRAY. Congressman, my reading of the international agreement is that it would not take those very specific conditions that you cite into account, however, there is some allowance for economic impact and technological feasibility that can be taken into account under the treaty. So presumably if we made our case well enough before that technical review committee, we could have those factors considered.

MR. PITTS. Since several countries are preparing to offer proposals to list new chemicals at the next POPs conference of the parties, I have three questions. First, what countries are proposing these new additions. Secondly, what practical implications arise from us not being parties? And thirdly, if a proposal to list a chemical is rejected by the conference of the parties, is the proposal dead or can it be brought back at a later time?

MS. HAZEN. Is it all right if I--

MR. PITTS. Yes, yes.

MS. HAZEN. The five chemicals that are being proposed for listing: pentabromodiphenyl ether by Norway, chlordecone and

hexabromobiphenyl by the European Union, and then lindane by Mexico, and PFOS by Sweden, so those are the chemicals and the countries. I think the implication question is a very important and serious one. For pentabromodiphenyl ether, all uses in the U.S., all manufacturing in the U.S. was phased out last year and the company that manufactured has agreed not to and the agency, EPA, has followed that up with a regulatory backstop to assure that no new manufacture or import could begin. For both chlordecone and hexabromobiphenyl, we have no domestic production and, in fact, we too have followed those up with the same kind of backstop to ensure that they could not resume being made in the U.S. or to be imported. For lindane, there are two allowed uses in the U.S., one has to do with agriculture and one is a pharmaceutical use. And then for PFOS, we have four low volume uses, although no domestic production. And so for some of these, the implications would not be very severe, but for other pharmaceutical uses for which there may not be a substitute, for the low volume uses of PFOS for where there may not be substitutes that provide the same qualities, the implications could be severe. And then whether we could go back once a chemical is sort of, I think--

MR. PITTS. Rejected.

MS. HAZEN. --rejected, it is unclear because that occurrence has not happened but I would certainly think if new information became available, the cycle could start over again and the country could resubmit.

MR. PITTS. Okay. Now as I understand it, the Gillmor legislation utilizes a substantial evidence standard as part of its judicial review provisions. Is that correct?

MS. HAZEN. That is correct.

MR. PITTS. Is it the case that currently talks of Section 19 also contains a substantial evidence standard?

MS. HAZEN. Yes, sir, it does.

MR. PITTS. Okay. Do you see any reason for the judicial review process to be different for POPs than it is for current TSCA?

MS. HAZEN. I think to have consistency between this and the Toxic Substance Control Act, the Section 19 provisions is very much in keeping with the Administration's goal to have a very targeted strategic approach to changes.

MR. PITTS. Thank you, Mr. Chairman.

MR. GILLMOR. Thank you very much, Mr. Pitts.

The gentlelady from Illinois.

MS. SCHAKOWSKY. Thank you, Mr. Chairman.

I did want to briefly give my opening statement so it will be included orally in the record as well.

For quite sometime, the international community has recognized the threat that persistent organic pollutants, which are commonly referred to as POPs, pose to public health and the environment. POPs are exceedingly toxic chemicals that may take years to break down in the environment and can travel long distances. The use of these chemicals anywhere around the world is a threat to the health of our Nation. Effectively protecting the public health from POPs is only possible through international agreements. Congress has a duty to amend our laws so that the U.S. can be an active partner in international efforts to protect the public and the environment from these hazards.

As we all know, the Stockholm POPs Convention which entered into force on May 17, 2004, would ban or severly restrict the production, use, trade, and disposal of 12 of the most dangerous POPs. Unfortunately, the Convention has yet to be ratified by the United States. The two bills before us today, H.R. 4591 introduced by Chairman Gillmor and H.R. 4800 introduced by Ranking Member Solis, aim to make the necessary changes to existing law so that the U.S. will be in compliance with the Stockholm Convention once it is ratified.

I am concerned, however, that the language drafted by the Chairman will make it difficult to regulate POPs in the United States. H.R. 4591 seems to have been designed to preempt states' authority to regulate substances that become subject to the treaty. And in addition to the letter that was presented, my--well as part of that letter by Attorney General Lisa Madigan has signed onto that letter and there is an additional letter from the Attorney General of the State of Washington who has sent a letter of great concern about H.R. 4591. Also H.R. 4591 sets a new cost benefit standard that must be met before the United States can regulate a newly listed POP. Top experts in this field believe that it will be very difficult for the EPA to regulate such a cost benefit standard, therefore making it nearly impossible to protect us from additional pollutants. In addition, I am concerned that the bill lacks strong enough language to force a timely implementation of a POPs Convention decision.

The Stockholm Convention sets a good precedent for international action and cooperation between all of the stakeholders in the interest of public health and the environment. I believe that H.R. 4800 which contains a health-based standard presents a solution that is properly aligned with the Stockholm Convention's framework.

And in my time remaining, I wanted to go back to the issue of the chemicals that are being the five chemicals now that are being considered for addition to the POPs list right now. Let me clarify. It is my understanding that none of those chemicals are manufactured in the United States. Is that right?

MS. HAZEN. That is correct.

MS. SCHAKOWSKY. And that some have, while you have backup language you said in the EPA to prevent the manufacture of how many of those was that?

MS. HAZEN. We have for one--for four of those we have what we call a significant no use rule which provides for a regulatory backstop.

MS. SCHAKOWSKY. Now are any of those, I think I missed that you actually use though imported into the United States?

MS. HAZEN. We have PFOS which has four low volume uses in the United States. We also have lindane, which is used in the United States. Currently I am aware of two uses for lindane. One is used as a pharmaceutical in shampoos for the treatment of head lice and it also has an agricultural use in the treatment of seed. It is a pretreatment used to deter bacteria growth on seed prior to its being planted.

MS. SCHAKOWSKY. I wanted to ask you if you agree. You have looked at both bills, right?

MS. HAZEN. Yes, I have.

MS. SCHAKOWSKY. Do you agree that under H.R. 4800, no regulation on industry of a new POP chemical could go into effect in the United States until the President has made an independent decision to consent to be bound?

MS. HAZEN. Both bills ensure that the U.S. maintains its opt in obligation which means we do not, we are not bound by the treaty until we affirmatively, the U.S., opt in for any new listing.

MS. SCHAKOWSKY. Thank you.

I yield back.

MR. GILLMOR. The gentlelady yields back.

The gentleman from Michigan.

MR. STUPAK. Thank you, Mr. Chairman.

Ms. Hazen, if I may, back in July of '04, you appeared before our committee and I asked you, as I said in my opening statement, about the U.S./Canadian Transboundary. I asked the question when was the Administration or the EPA going to implement rules to enforce the Canadian/U.S. Waste Agreement as we call it, Hazardous Waste Agreement and you told me back in 2004 it would be soon, 2003 I was told it was soon, in 1994 I was told soon. Now we are at 2006, it is now 12 years since I first asked the question, nothing has been done. When is the EPA going to enforce that agreement, the U.S./Canadian Transboundary Movement of Hazardous Waste Bilateral Agreement?

MS. HAZEN. After our last hearing, I got back to you after I had gone to the appropriate folks in the Agency to ask when that would happen. As you know, it is not something managed in my area. That does not mean I am not responsible as an EPA official for it. I am not aware of its current status and I will follow up.

MR. STUPAK. I am not blaming you personally, but you are a representative of the EPA that comes here and urges us, as I have heard this morning, to move quickly on this POPs agreement or another agreement. There is this urgency that the U.S. does not want to be, using your words, merely observers at these Conventions and these treaties, but yet, we are 12 years away. Has the Administration taken a position on Chairman Gillmor's bill on the U.S./Canadian trash issue? It is our bill, it was passed by this committee unanimously, H.R. 2491?

MS. MCMURRAY. Congressman, not to my knowledge but I think we need to get back to you for the record. This is not something that either of us works on.

MR. STUPAK. You cannot be surprised I would ask the question because I have been asking it since 1994. So I am getting silence. How about--

MS. MCMURRAY. I would be happy to--

MR. STUPAK. --can you get back with me on the Administration's position on H.R. 2491?

MS. MCMURRAY. Yes.

MR. STUPAK. Can you get back with me on the Administration's position on enforcement of the U.S./Canadian Bilateral Agreement?

MS. MCMURRAY. Absolutely.

MR. STUPAK. Okay, 30 days, I am going to hold you to it. And then we get to the end of it, then what?

MS. HAZEN. Then do I go to jail? We will respond within 30 days.

MR. STUPAK. Okay. I am not going to say I like the response but I am sure there is one.

Okay, in my opening statement, I asked about my state, which has already banned on PBDEs the fire retardant. Do you agree that if Michigan's ban is more stringent than the future Federal law that the Michigan law should be allowed to stand? What my concern is States are allowed to be more stringent with their requirements under the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Solid Waste Disposal Act. Under Mr. Gillmor's legislation, if I read it correctly, we would not be allowed to have our more stringent standards.

MS. HAZEN. Again, I have not yet seen the letter that has been submitted by the States attorneys general and I very much need to see the specifics of what is in that letter. I understand that there will be revision to the Chairman's bill. And I would like to look at the letter as it relates to the existing Section 18 exemption component of TSCA. As you know, TSCA allows for States to regulate more stringently and we are told here the goal is to make sure that States can regulate more stringently when it meets their needs.

MR. STUPAK. Sure. So why should it be any different than the Clean Water Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, or the Clean Air Act?

MS. HAZEN. My understanding is that when it comes to the Clean Air Act, the provisions under the Clean Air Act would not be covered and so that more stringent acts that are taken as a result of the Clean Air Act would immediately be appropriate.

MR. STUPAK. So under Gillmor would it really be the same as like the Clean Water Act, the Clean Air Act, where we allow the States to have more stringent standards? Why should this one bill be separate?

MS. HAZEN. I think the Gillmor bill does allow the States to impose more stringent standards. I think the question is, is there a process that needs to be gone through in order to do that and I think, is it not, the question that is in debate here?

MR. STUPAK. Right, the way I understand it, it is like the Food Safety Bill that we are supposed to be doing today on the floor, States would then have to petition whether it is the EPA or the FDA to have stricter standards where underneath these bills if a State has a standard that is more stringent, it is allowed without having to go through the administrative bureaucracy to get an approval that a State would see as a bigger standard especially when with all due respect you do not get back to us for 12 or 13 years on enforcement standards, how are we ever going to be able to do anything?

MS. HAZEN. The issue, as you say, is what is the process. Is there a process and should there be a process that one needs to go through in order to regulate more stringently? TSCA requires that folks come in to do that and ask for an exemption.

MR. STUPAK. Okay.

MS. HAZEN. I understand the question. We need to--I need to see this letter from the Attorneys General and then I can perhaps be more precise in my answer.

MR. STUPAK. Ms. McMurray, just one real quick question. What is the Administration's position on whether each future chemical listed by the Convention will require specific events by, excuse me, specific advice and consent by the U.S. Senate? Will each chemical have to go through the full Senate advice and consent process before it can be regulated?

MS. MCMURRAY. Congressman, this is a matter that really we have to determine with the aid of the Senate Foreign Relations Committee. It relates to the resolution of ratification and we have never gotten that far before because we have never had any legislation to show them.

MR. STUPAK. So do you have a position or a recommendation you will make to the Senate Foreign Relations Committee?

MS. MCMURRAY. At this point, no, I do not.

MR. STUPAK. Will you get back to us in 30 days on that?

MS. MCMURRAY. We will be happy to, yes.

MR. STUPAK. Okay. Thank you, Mr. Chairman.

MR. HALL. [Presiding] All right, the chair recognizes the gentleman from Washington, Mr. Inslee.

MR. INSLEE. I thank you for the important hearing.

You know we have these persistent organics in the food chain out in the State of Washington and we are looking at listing of workers right now who have these incredible concentrations of these chemicals and others and we are part of that food chain so this is a big deal. And I can just tell you I am concerned about it would be a good irony if ratification of this treaty actually sends us backwards in our ability to move against organic phosphates. In Mr. Gillmor's bill, I am afraid that is exactly what would happen because while we are largely in concurrence with the treaty now, this would actually remove the ability of States to move forward on this. So actually this is a sad irony that we would be ratifying an international treaty and disabling 50 organizations that could be committed to where we are moving forward on this. And I cannot see a reason why we would want to go backwards. That concern is shared by others including the Republican Attorney General in Washington and I will submit for the record a letter from him about those concerns. I will submit a letter from the Washington State Department of Ecology about that.

If you look at the State of Washington that has had significant efforts moving forward against brominated flame retardants PBEDs. Some States have already banned it. The State of Washington is considering that ban. Michigan banned it and I guess the question I have is wouldn't the Gillmor bill stop the State of Washington from moving forward to ban PBEDs?

MS. HAZEN. This is the same preemption question and I apologize for saying the same thing, but everyone is referring to the concerns and the specific legislative issues raised in the letter from the State Attorney Generals and I have not had, I have not seen that letter. Clearly as I said, I believe the Administration's goal here is to ensure that States can regulate more stringently when they need to and so I need to see what is in the State Attorneys General letter before I can comment specifically on what issues they have raised.

MR. INSLEE. I am not sure, I appreciate but I am not sure why you say that. If the Administration's position is that States should be able to regulate on a more stringent basis than Federal legislation on organic phosphates, shouldn't you be able to tell us you are against this provision of the Gillmor bill which essentially removes that ability? I mean what

is the mystery here? Why do you have to learn it from the attorney generals that this bill is removing State ability to move forward? Why aren't you on our side here?

MS. HAZEN. It is not an issue of sides. There already is the ability, the States already have the ability to regulate more stringently and under TSCA there is a provision, the Section 18 exemption provision. If a State wants to regulate more stringently, there is a petition process that is gone through and I have already committed to getting back to the Representative from California to your right that I will look into how many of those petitions have actually been filed before the Agency. And while she did not ask, I am assuming she also wants to know what their status is. My understanding here is the process that is a concern. Does a State have to go through a petition process in order to do this or not, and that is why I am trying to determine, that is why I need to see what questions this letter raises about the existing TSCA standard which has been in place for now almost 30 years.

MR. INSLEE. What is the understanding of what this Gillmor bill does to Federal preemption? What is your understanding States would have to do if at all to have a more stringent standard?

MS. HAZEN. My understanding of the Gillmor bill is that it is consistent with the current exemption provisions of TSCA Section 18 and that a State could act more stringently if it went through the Section 18 exemption process, Section 18 like process of TSCA. So that is my understanding of what is currently in the bill.

MR. INSLEE. So what you are telling us is if it just comports with existing law that is okay with you but if it imposes an additional restriction on States, an additional burden or hoops they have to jump through then you would be opposed to it. Is that right?

MS. HAZEN. What I am saying is that we obviously have current law that stipulates how this process is to work. If we are going to change that, we have to take a close look at it, all of us collectively, to protect the interests that we are all interested in.

MR. INSLEE. I want to ask just one question briefly of Ms. McMurray. You are the assistant secretary for Oceans and International Environmental and Scientific Affairs. This is a little beyond the scope of this hearing but it is a chance to ask you a question. What have you done about the increasing acidification of our oceans caused by carbon dioxide which is totally unregulated in this country right now? What have you done about that problem?

MS. MCMURRAY. Well Congressman, this certainly is beyond the scope of this hearing but I would happy to take a stab at an answer. To talk about carbon dioxide emissions you have to look at the approach that we have taken that is as the President has outlined an alternative to

Kyoto which a number of countries obviously have chosen. We instead have looked at an alternative which is partnerships with other countries most prominently and most recently in Asia because we felt that the Kyoto process failed to engage China and India, the two largest emitters of carbon dioxide after the United States and growing so we decided to pursue a partnership with them and others in South Asia to put forward technology cooperation towards new sources of energy and other kinds of technology that would indeed lessen carbon dioxide emission but would then lead to the solution that hopefully is what, is the source of your questions which is less emissions.

MR. INSLEE. Just so you know your plan is a spectacular failure. Our CO_2 emissions went up this year. It is on the front page of the National Post. That ought to be a enough to know you ought to do something else.

Thank you.

MS. MCMURRAY. Thank you.

MR. HALL. I thank the gentleman.

Mr. Green, the gentleman from Texas is recognized.

MR. GREEN. Thank you, Mr. Chairman and I would like to have my full statement placed into the record.

MR. HALL. Without objection.

[The prepared statement Hon. Gene Green follows:]

PREPARED STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I would like to thank Chairman Gillmor and Ranking Member Solis for holding this hearing on legislation to implement international environmental agreements on Persistent Organic Pollutants (POPs), Prior Informed Consent (PIC), and Long Range Transboundary Air Pollutants (LRTAP).

Many of us were here in July 2004 when the subcommittee last addressed this issue, with POPs being the most difficult to reach agreement on due to the potential impact it has on the American chemical industry.

The problem with implementing the POPs Convention is not the 12 pollutants it currently bans, since each of these is already banned in the U.S., but how to add additional pollutants to that list.

I believe all sides agree we must protect the U.S.'s ability to "opt-in" to future regulation of additional POPs so that the U.S. and the American chemical industry are not automatically bound by future international decisions.

However, the two pieces of implementing legislation vary widely on rule-making criteria for the addition of future POPs, state preemption rights, and the judicial review process.

By not passing implementing legislation, both in this committee and in the other committees with jurisdiction, we are leaving the U.S. on the sidelines while other parties to the Convention begin discussing the regulation of additional POPs.

We need a piece of legislation that does not undermine American industry by subjecting them to whatever regulation the international Convention sees fit, but we also

should also not be playing Santa Claus by giving industry a piece of legislation that will all but ensure no additional chemicals will be regulated.

I believe we should work together with industry and environmental groups to reach a compromise piece of legislation that satisfies all sides to the extent possible, regulates additional chemicals that meet a fair standard, and protects the U.S.'s ability to opt-in to future POPs regulations.

By turning this into a partisan battle, possibly nothing will get accomplished, and we hamstring the U.S.'s ability to participate in the key decisions that will be made under the Convention to regulate additional pollutants.

Unfortunately, we have heard little from this Administration on this issue, and they have never sent their version of implementing legislation to Congress. Other committees in the House and Senate seem to be ignoring this as well.

Mr. Chairman, since it is unlikely the other committees with jurisdiction on the POPs convention will act this Congress, I would like to see us work together to produce bipartisan, practical compromise legislation on POPS. In the legislative process, both sides need to be willing to reach compromises.

MR. GREEN. Ms. Hazen, my concern about the legislation we have and frankly even our Ranking Members' is that I was hoping we would see a balance in this committee and hopefully we will see that after we get through with some of these hearings in view of it so I would like to in some of my questions talk about that.

Ms. Hazen, it is my understanding that these bills and treaties will not effect EPA's ability to regulate air toxics under the Clean Air Act. And coming from Houston, we are continuing to fight our air pollution problems and I want to be sure that the case with these bills or treaties effect regulation of our air toxics under the Clean Air Act?

MS. HAZEN. These treaties, our involvement in the treaties, will not impact our domestic ability to follow through on what we need to do either under the Clean Air Act or any other act.

MR. GREEN. So what do you see as the policy differences between the Ranking Member's bill and our, and the Chairman's bill on the topic of adding additional chemicals to these treaties? I understand the ones that they are talking about doing we all produce in our country anyway and again coming from a district that produces a lot of chemicals is that true?

MS. HAZEN. Is it true that there are policy differences?

MR. GREEN. Well there are policy differences, I understand that but what are the policy differences but also is the--and the follow up would be are those chemicals that are discussed being banned, you know, are they produced in the United States anyway?

MS. HAZEN. There are policy differences between the bills as you point out. H.R. 4800 relies more solidly on a determination of an international body in terms of what action should be taken to regulate a chemical. While H.R. 4591 provides for the U.S. to take those issues into consideration as it makes its domestic determination, relying more

heavily on domestic policy. As you noted, the chemicals that are currently listed on Stockholm POPs as well as those which are being proposed will not have significant impact on the U.S.; however, I did not have the opportunity to point out that we are talking about three agreements here. One of the other agreements, the POPs Long Range Transport Agreement envisions adding at least four of the seven that appear to be under consideration but it was four of those are not subject at this point to any use or manufacturing restrictions in the U.S. They are albeit manufactured in low volume but these would if these were to show up on the LRTAP POPs list, it would have an impact on us.

MR. GREEN. Okay. So it is not for us a concern about giving an international agency that total authority. But Ms. McMurray, do you see any evidence that the other countries are starting to use the process to nominate additional chemicals for regulation for competitive advantage under the cover of environmental regulation?

MS. MCMURRAY. Congressman, we have not analyzed it in that particular way. It relates though to your previous question which is are there chemicals perhaps coming down the line that would be manufactured in the United States that we might want to continue to manufacture and that would certainly raise the trade issue. I think that is certainly a possibility. It may become a possibility sooner rather than later and I think it underscores our need to be at the table as a party so that we can be vigilant about these chemicals.

MR. GREEN. Okay, thank you.

Ms. Hazen one last question, me and my colleagues are concerned about instituting the burdensome cost benefit in risk analysis to Section 6 of the Toxic Substance Act for deciding whether to regulate additional chemicals under the treaties. Some people point to the inability of EPA to regulate even obvious materials like asbestos under Section 6 as proof as to an unworkable process, others like the Chairman and some folks in the industry say Gillmor's bill provisions are similar to the section test but would be more streamlined. How did you compare in contrast the two standards for regulating new chemicals under the Chairman's bill and the Ranking Member's bill in terms of policy standard and regulatory process?

MS. HAZEN. My reading of H.R. 4800, the cost and benefits consideration would be similar to or identical to that which would have been taking place during the Conference of the Parties or the international decision. There are requirements in the Stockholm Convention for consideration of cost and benefits in Annex F of that Convention. H.R. 4591 relies more heavily on what has been the traditionally domestic practice of incorporating a significantly broader array of costs and benefits, as well as, socio-economic costs as well and

so one I think is much broader than the other in assuring that we consider all implications, for example, including substitute uses for which there are no substitutes, those kinds of things.

MR. GREEN. Okay. Thank you, Mr. Chairman.

MR. GILLMOR. I want to thank all of you on our first panel very much for your participation.

Now we will move to our second panel. And we would like to ask each witness to try to limit their summary, if they can, to three minutes each and, after we go through everybody, then we will get into the questions. Also, I understand one of the witnesses, Mr. Yeager, has a commitment. If you want to go first, Mr. Yeager, go ahead.

STATEMENTS OF BROOKS B. YEAGER, VISITING FELLOW, THE H. JOHN HEINZ III CENTER FOR SCIENCE, ECONOMICS, AND THE ENVIRONMENT; MICHAEL P. WALLS, MANAGING DIRECTOR, REGULATORY AND TECHNICAL AFFAIRS DEPARTMENT, AMERICAN CHEMISTRY COUNCIL; CLAUDIA POLSKY, DEPUTY ATTORNEY GENERAL, ENVIRONMENTAL SECTION, CALIFORNIA DEPARTMENT OF JUSTICE; JIM ROEWER, EXECUTIVE DIRECTOR, UTILITY SOLID WASTE ACTIVITIES GROUP; LYNN R. GOLDMAN, MD, MPH, PROFESSOR, ENVIRONMENTAL HEALTH SCIENCES, BLOOMBERG SCHOOL OF PUBLIC HEALTH, JOHNS HOPKINS UNIVERSITY; E. DONALD ELLIOTT, PARTNER, WILLKIE, FARR AND GALLAGHER, LLP; STEVEN GOLDBERG, VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL, REGULATORY LAW AND GOVERNMENT AFFAIRS, CROPLIFE AMERICA; AND GLENN M. WISER, SENIOR ATTORNEY, CENTER FOR INTERNATIONAL AND ENVIRONMENTAL LAW

MR. YEAGER. I apologize for having a commitment in the afternoon.

If I might request that my full statement be included in the record.

MR. GILLMOR. Yes, the full statement of all the witnesses will be entered in the record.

MR. YEAGER. Mr. Chairman, I am here at your request and which I appreciate your invitation very much.

I want to note that I am not representing any organization or entity in connection with the hearing and so the views that I would state are entirely my own.

From April 1999 to January 2001, I served as the Deputy Assistant Secretary for Environment and Development at the Department of State,

and in that capacity I was the chief negotiator for the Stockholm Convention. I want to focus my attention on the issue I think is of some interest to the committee about the provisions in the Convention that relate to the addition of chemicals, which was certainly a matter of extremely high priority for the U.S. negotiating team and the corresponding U.S. regulatory response to those provisions. I would like to echo Assistant Secretary McMurray's comments that there are real disadvantages to the U.S. not being a participant in the Convention. I will note that it is almost five years since President Bush's Rose Garden celebration of the Convention, which I took as an implicit understanding that the commission has negotiated, why the negotiating team was something that the Bush Administration strongly supported. But since that time, the Administration, I believe, has made it somewhat more difficult than it needs to be through draft legislation to implement the legislation and that drafting difficulty appears to have occurred most strongly in the provisions with regards to the additional chemicals.

The problem is, Mr. Chairman, that setting up a different standard from the one in the Convention for the listing of chemicals, or for the regulation of chemicals once listed, offers very little protection to U.S. interests beyond the protections already negotiated in the Convention. And it does have the effect of complicating U.S. regulatory response and, in fact, raising the potential that the U.S. could agree to list a chemical because of agreeing with the scientific assessment of the chemical was likely to produce significant adverse health and environmental effects of global concerns so the global action was warranted and at the same time make it impossible for the U.S. to completely fulfill its obligations once the chemical is listed.

The irony is that the provisions of the Convention itself were very carefully negotiated to fully protect U.S. interests and as we articulated during negotiations, the interest was to achieve an ambitious treaty that would address the global environmental damage of a small set of chemicals that were extremely unusual in their impacts and effects because of the characteristics that have been noted by many witnesses, but at the same time to create a Convention whose decisions would be practical and implantable by the United States, financially efficient and consistent with the fundamental structure of our national approach to chemical regulation. I think it is clear from the Bush Administration's ratification submission to the Senate that in fact our negotiators succeeded in doing that.

And I am going to say that it would be useful, I think, for the Committee to look at the negotiating history of the Convention, and I would just like to note for the committee that the U.S. negotiating team during the Convention negotiations insisted on regular scientific criteria

according to which a chemical would be evaluated, and regular institutional process through which the criteria would be applied which included a number of considerations that have been put forward by representatives this morning, including socio-economic conditions and impacts of various control measures.

And then finally, in negotiating the terms under which the Convention would review the recommendations of the scientific committee, and the conditions under which the Convention could make a decision to accept or reject a chemical, and the procedures for party governments in response to a commission decision. Basically, the commission decision has to be based on the order of science. It has to include a careful screening of all the aspects of the chemical, including the consequences of control measures. It has to be adopted by a 75 percent vote, a three quarters majority of the Convention, and even then every government, including the United States, is able to opt out of such a listing and, in fact, as Ms. McMurray said in her statement, the U.S. will take the position that we have opted out, unless we decide to opt in at the U.S. Government's discretion.

MR. GILLMOR. Mr. Yeager, we have to ask you to wrap up.

MR. YEAGER. Yes, I will be glad to. The thrust of my statement is that both bills before the committee do a service in tracking the Convention's decision-making process and with the regulatory process in the United States that allows useful comment, information from industry and civil society, and for the U.S. to make a decision with regard to a chemical completely within some discretion. I think that there is a difficulty in setting up a standard for the U.S. regulatory process that is materially different from the Convention standard and that is it does not help protect us anymore, but it does make our implementation with the Convention more complicated.

Thank you.

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

PREPARED STATEMENT OF BROOKS B. YEAGER, VISITING FELLOW, THE H. JOHN HEINZ III CENTER FOR SCIENCE, ECONOMICS, AND THE ENVIRONMENT

Mr. Chairman and Members of the Committee:

I appreciate your invitation to testify at today's hearing. For the record, my name is Brooks Yeager. I am currently an environmental consultant and the principal of Birdwell Strategies. I am also a Visiting Fellow at the H. John Heinz III Center for Science, Economics and the Environment. However, I am not representing any organization or entity in connection with this hearing, and the views I present today are entirely my own.

From April, 1999 to January, 2001, I served as Deputy Assistant Secretary for Environment and Development at the U.S. State Department. In that capacity, I was responsible for the development and negotiation of U.S. Government policy in a range of bilateral and global environmental discussions and undertakings.

During that time, I served as the United States' chief negotiator for the 2001 Stockholm Convention on Persistent Organic Pollutants, known colloquially as the POPs Agreement or Treaty. I headed the U.S. delegation to the third, fourth, and fifth and final negotiating session on the Convention, and coordinated numerous intersessional consultations with various negotiating partners. I also led the U.S. interagency group that developed the U.S. position in preparation for the negotiations.

We are here today to discuss proposed implementing legislation for this ground-breaking treaty. I have focused my testimony on what I believe to be an issue of keen interest to the Committee -- the scientific and institutional process for adding new chemicals to the Convention, including its negotiating history, and the corresponding U.S. regulatory process set out in the implementing legislation.

Background: The U.S. Interest in a Global Treaty on Persistent Organic Pollutants

First I would like to offer some background on the treaty itself. The Stockholm 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.

Our government has made a concerted effort, starting not long after the publication of Rachel Carson's pathbreaking Silent Spring, to eliminate the production and use of the most well-known POPs chemicals in the United States, and as a result, we no longer manufacture any of the 12 POPs listed in the Convention's Annexes A and B, and have made great progress in reducing emissions of POPs byproducts listed in Annex C.

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. The Convention's global mechanism to reduce and eliminate these "chemical travelers without passports" is very much in our national interest.

The Stockholm Convention Negotiations

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. Fortunately, I had the privilege of working with a superb interagency team, with senior policy and technical representatives from seven agencies, including the EPA, whose senior experts can be credited with developing much of the Convention's technical architecture.

Development of the U.S. position was accomplished through an exhaustive process involving regular working teams among the seven domestic agencies, and frequent consultations with industry, the environmental and public health communities, Native American representatives, and various interested state governments, including the State of Alaska.

Notably, both industry and environmental representatives made important contributions to the final product. I would like to note in particular the constructive roles played by Clif Curtis, Richard Liroff, and the POPs Team at the World Wildlife Fund, and Michael Walls and Paul Hagen of the American Chemistry Council (ACC). A letter to EPA Administrator Whitman on February 26, 2002, from Mr. Frederick Webber, ACC's President and CEO, expressed ACC's support for the result of the negotiations:

> 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.

Impediments to U.S. Ratification

Four years later, one hundred and nineteen countries have now ratified the Convention, but the United States has not. Our failure to do so is unfortunate from a variety of perspectives. First, it prevents the U.S. from playing its rightful role as a leader in global chemicals management. Second, it prevents us from helping to shape the Convention's operational mechanisms and standards as they are developed by the Conference of Parties. Third, it places our chemical industry at a potential disadvantage as the Convention considers restrictions on future chemicals. Finally, our failure to ratify can only deepen our estrangement within the international community, and the impression, widely held, that we consistently allow domestic political concerns to trump our interest in cooperating with others for the good of the world.

Although the Convention was negotiated under the Clinton Administration, it was strongly supported and signed by the incoming Bush Administration, celebrated by President Bush in a 2001 Rose Garden ceremony, and forwarded to the Senate for expeditious ratification. At the same time, however, senior officials in the Administration who had not been involved in the negotiations and did not understand the Convention's built-in protections for national discretion injected unnecessary complications in the Congressional discussions of implementing legislation for the Convention, and the Administration must bear a great deal of responsibility for the delay in ratification.

As various Committees grappled with the legislative changes necessary to implement the Convention, Administration officials insisted on language that, at least in my view, would unduly burden and hobble the U.S. response to the listing of new chemicals under the Convention. This language offers very little, if any, protection to U.S. interests beyond the protections already negotiated in the Convention, but does have the effect of complicating the U.S. regulatory response, proposing domestic regulatory standards that differ significantly from the standards in the Convention, and de-linking the U.S. regulatory process from our obligations under the Convention.

Overview of the Stockholm POPs Convention: Structure and Policy

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 quantitative 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 for Adding New POPs Chemicals: Negotiations on Article 8

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, rigorous 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 Convention's Procedures for Adding Chemicals Protect the U.S. Interest

The final agreement on these issues 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.

As negotiated, The Convention provisions for the addition of chemicals, coupled with the exemption procedures and the process for amending the Convention annexes, set a very high scientific and institutional standard for the addition of new chemicals. They also provide the U.S. with the full opportunity to bring our government's scientific expertise to bear on the examination of any chemical proposed for addition to the Convention, with great deal of flexibility in formulating a national response to any such nomination, and with complete discretion in deciding whether to accept or reject the listing of new chemicals, once the Convention reaches a decision on them.

Under these provisions, the Conference of the Parties (COP) has already established a Persistent Organic Pollutants Review Committee (POPRC). Parties must submit chemical nominations to the POPRC, which will evaluate any chemical nominated based on the agreed scientific criteria including persistence, bioaccumulation, long-range transport, and toxicity. If the POPRC is satisfied that the screening criteria have been fulfilled, it must prepare a draft risk profile in accordance with Annex E, to be made available for input from all Parties and observers. Only if, on the basis of the risk profile, The POPRC concludes that the chemical

> … is likely as a result of its long-range transport to lead to significant adverse human health and/or environmental effects such that global action is warranted…

shall the Committee then proceed to invite information from Parties and observers related as to 'socio-economic considerations' as set out in Annex F, and, after having considered such information, recommend to the Conference of the Parties "whether the chemical should be considered… for listing in Annexes A, B, or C. Even then, a decision of the Conference of the Parties to list the chemical, which must come in the form of an amendment to the annexes, must be agreed by consensus, or, if there is objection, by a three-quarters majority of those present and voting.

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. A number of parties have already taken advantage of this option, and it is my understanding that the State Department has indicated that the U.S. will do so as well when it submits its ratification.

Including these and other procedural safeguards in the POPs treaty was a major objective of U.S. negotiators. 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.

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.

Chairman Gillmor's "Stockholm and Rotterdam Toxics Treaty Act of 2006" (H.R.4591) 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. Representative Solis' "POPs, LRTAP POPs, and PIC Implementation Act of 2006," (H.R.4800) addresses the same set of issues. My comments will focus on issues related to the implementation of the Stockholm Convention, and particularly its provisions for the addition of new POPs chemicals over time.

Comments on Proposed Implementing Legislation

Mr. Chairman, the Bush Administration's ratification submittal makes clear that in the Administration's view at the time, U.S. implementation of the Convention required only minimal change in the key U.S. chemical regulatory statutes, primarily directed at providing necessary authorities to prevent production of POPs chemicals for export. For the most part, as the submittal recognizes at several points, the U.S. will implement its obligations under existing authorities. This position is an implicit recognition of the successful effort by the Clinton Administration to craft obligations which, though strong, comport with the existing structure of U.S. regulation. Interestingly, the submittal's discussion of the Convention's Article 8 listing provisions does not call for any substantial changes in the underlying statutes, reflecting the conclusion that bringing the U.S. regulatory process into conformance with the obligations of the Convention would be largely a process of aligning procedural steps.

It is clear, however, that some adjustments in both TSCA and FIFRA are desirable, both to ensure that the Convention's objectives for the regulation of new chemicals are achieved through the appropriate national means, and to provide for appropriate input from industry and civil society to the EPA as it formulates the scientific and technical view of the U.S. as new chemicals move through the POPRC process.

Both bills before the Committee do a reasonable job of tracking the Convention's process for adding new chemicals. At each stage of the process, the bills create opportunities for the U.S. private sector and civil society to offer comments and information to help inform both U.S. decisions in the Convention context and the agency regulatory process necessary to effect the U.S. position. However, of the two principal bills before the Committee, I believe that H.R.4800 has a number of advantages in providing for U.S. implementation of the Convention.

H.R. 4800 takes a straightforward approach to reflecting the Convention decision-making process in the U.S. regulatory environment, while at the same time, protecting the full range of discretion as to what position to take, and ultimately whether to support or reject the listing of any particular chemical afforded by the Convention. At each stage of the decision-making process, H.R.4800 provides an appropriate opportunity for public comment. Importantly, although it requires regulatory action, it allows the EPA to make an independent regulatory decision that either conforms to the Convention's listing, or rejects its application to the U.S.

However, it does so in a manner that recognizes that the U.S. will be a participant in the Convention's decision process. Moreover, it assumes that the Convention's fundamental standard of "significant adverse effect to human health and/or the environment," if accepted for any particular chemical by the U.S., will set the standard for consequent U.S. regulations.

In contrast, H.R.4591 as currently presented includes several major shortcomings that would jeopardize U.S. participation in the Convention and would also make it unnecessarily difficult to regulate POPs in the United States. It would establish new regulatory 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 process and will remain a key player in those deliberations as a party to the Convention. Finally, in the view of many observers with more knowledge than I can claim of the U.S. domestic regulatory context, it would set damaging and unacceptable precedents for domestic management of chemicals.

Specifically, under H.R.4591, there is 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. And 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.

But if EPA does decide to regulate, it can 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 term of art that sets a different standard from the one the U.S. will have agreed to in the Convention, and one which, by virtue of its novelty, is bound to result in years of litigation and judicial interpretation.

By contrast, under the Stockholm Convention, parties are obligated to regulate additional POPs in a manner meeting the standards of the Convention and the terms of the appropriate Annex, unless they have exercised their right to "opt out" with reference to the chemical in question. In general, the Convention requires that parties (including the United States) must decide upon additional POPs "in a precautionary manner." Yet H.R.4591 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. Further differentiating the U.S. regulatory standard from that enshrined in the Convention, the language of H.R.4591 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.

Finally, H.R.4591 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 H.R.4591 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.

In summary, H.R.4800 puts forward a relatively straightforward process which would allow the U.S. to fully implement the Convention while retaining full discretion with regard to the regulation of any new POP, whereas H.R.4591 adds considerable regulatory baggage which would complicate the U.S. response, and employs different regulatory standards from those agreed in the Convention, thus raising the possibility that the U.S. might agree with a Convention listing decision, but find itself unable to fully implement it.

Mr. Chairman, and Members of the Committee, United States ratification of the Stockholm Convention presents a real "win-win" opportunity for the U.S. and the other 119 nations already party to this historic agreement. It's a "win" for the U.S., providing an effective, responsible international instrument that is in our country's best interests in addressing the pernicious challenges of POPs globally, in concert with the global community. At the same time, it's a "win" for the other treaty partners, who would benefit from the tremendous technical and policy expertise and experience that only the U.S. can bring to the table. Some of that expertise can of course be provided as an observer. But such expertise is most effectively and fully brought to bear when one has a direct stake in the outcome, as a party. Hopefully, sooner rather than later, the U.S will be in a position to deposit its instrument of ratification. In my view, H.R.4800, Representative Solis' bill, which is more seamlessly aligned with the Convention's procedures, offers the best opportunity to achieve this goal soon.

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

MR. GILLMOR. Thank you.

We will go to Michael Walls, American Chemistry Council.

MR. WALLS. Good morning, Mr. Chairman.

Excuse me, members of the subcommittee. Thank you for the chance to be here today. We appreciate the opportunity to reiterate our industry's strong support not only for these three international agreements, but for Mr. Gillmor's legislation, H.R. 4591.

We have three principal points to make today. First, the U.S. must be a party to these agreements. H.R. 4591 is the best vehicle for assuring that the U.S. can meet its obligations under those agreements. Second, the Stockholm POPs Treaty establishes a process and a standard for how chemicals should be added to the list of covered substances and how they should be regulated. H.R. 4591 ensures that process is fairly and faithfully reflected in a parallel domestic regulatory process. Finally, nothing in these agreements requires that the United States cede domestic regulatory authority to the international body. Decisions under those agreements are important and they should factor into domestic decision-making. But the treaties allow each party to make their own decisions. H.R. 4591 ensures that there is a robust record on which EPA can base its decisions.

So why is it important that the United States be a party to these agreements? Decisions are already being made, and the fact is that U.S. influence on those decisions has been significantly diminished. U.S. businesses, and potentially U.S. jobs, are affected as a result. Now all of us agree that the procedures for adding new substances under the Stockholm Convention are well designed. But it remains to be seen whether those procedures will be rigorously implemented. In fact, it would be naive to assume that all parties to those agreements share the U.S. view on what the criteria and decision-making standards are. And we have already had some experience with other governments' efforts to

exclude, dilute, and redefine the criteria as they are set out in these agreements.

Let me cite a few examples. Guidance is being developed under the Stockholm Convention to implement Annexes E and F. In both cases, the significant debate right now is whether or not risk, a fundamental principle in both of those annexes, will be included at all. In late 2005, the executive body under the LRTAP POPs protocol received a recommendation from the U.S. Government that additional guidance be provided to the parties on how to interpret whether a substance is likely to cause significant adverse effects. Note that that is the standard under the POPs protocol for determining whether, not how, but whether a substance is listed under that agreement. The parties to that protocol rejected the U.S. proposal and basically indicated a view that the terms "likely" and "significant" as used in that standard created some significant interpretive problems.

In short, the U.S. Government's attempts to ensure that the POPs agreements are being implemented as we intended them to be are being thwarted. We need implementing legislation that sends a powerful signal to those governments, a powerful signal that we are not going to weaken the risk-benefit approach in the agreements. We need a domestic regulatory process that mirrors the international process, and H.R. 4591 does that. Just as the treaties contemplate a reasonable balance of hazard, risk, cost, benefits, and impacts, H.R. 4591 does the same thing.

Now by contrast, H.R. 4800 purports to implement a decision-making standard in the LRTAP POPs protocol. But as I have already mentioned, even the other parties to that agreement believe that there are problems with applying that standard. Now, in our view, H.R. 4800 takes the decision-making standard of the POPs protocol out of context. It takes a standard to be applied to whether a substance will be listed, and attempts to apply it to the question of how a substance should be regulated, particularly as a matter of domestic law.

MR. GILLMOR. I need to ask you to wrap up pretty soon.

MR. WALLS. I am doing that just now, Mr. Chairman.

The text of both treaties require that all of those considerations be factored in the decision-making process and our domestic implementing legislation should do no less.

Thank you very much.

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

PREPARED STATEMENT OF MICHAEL P. WALLS, MANAGING DIRECTOR, REGULATORY AND TECHNICAL AFFAIRS DEPARTMENT, AMERICAN CHEMISTRY COUNCIL

I. Introduction

The American Chemistry Council (ACC) appreciates this opportunity to reiterate its strong support for 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). We also appreciate the opportunity to record our strong support for H.R. 4591, Mr. Gillmor's legislation to implement these agreements by amending the Toxic Substances Control Act (TSCA).

Prompt action on H.R. 4591 is required to ensure that the United States can continue its international leadership role under these agreements. H.R. 4591 contains the legislative changes to TSCA necessary for the United States to meet its obligations under these agreements, and it sends a powerful message to other governments – a message that the agreements must be implemented as they were intended, with no more and no less.

II. U.S. Participation is Necessary in Order to Ensure the Reasonable Implementation of these Agreements.

As the Subcommittee is aware, the LRTAP POPs Protocol, the Stockholm Convention and the PIC Convention are all in force. Initial meetings of the parties to these agreements have been held, key positions on subsidiary bodies have been allocated, and work has already begun in those subsidiary bodies. Chemicals of significant importance to U.S. industry have been nominated for inclusion in the conventions. Future decisions on nominated chemicals, review processes and best practices will have a major impact on our industry, which is global in scale. Already the risk-based, science-justified processes for listing new chemicals are under attack by governments who would prefer to ignore those requirements. Yet the ability of the United States to lead and appropriately influence the decisions that have long-term consequences for the operation of the agreements has been significantly reduced because our government is not a Party.

For that reason, we think that it is vital that the Congress take action quickly to adopt H.R. 4591 and allow the United States to join these agreements and deal effectively with their implementation at both the domestic and international level. In ACC's view, H.R. 4591 is the best vehicle for integrating TSCA and U.S. obligations under the agreement.

III. H.R. 4591 Addresses the Key Required Changes in U.S. Statutory Authority

The three international agreements only require modest statutory changes to TSCA. These 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.

The single most controversial issue with respect to these treaties has been how to handle future decisions to add new POPs substances under the agreements as a matter of U.S. law and regulation.

The POPs agreements do not obligate the Parties to establish mechanisms to address future treaty amendments like new chemicals, and the United States could limit its implementing changes to the targeted fixes noted above. But the treaties contemplate the possibility that chemicals will be added to the list of covered substances in the future, and ACC shares the view that legislative economy suggests an adding mechanism should be considered for the legislation. ACC therefore supports the establishment of a new domestic process that would give EPA special new authority to prohibit or restrict the manufacture, use, or export of POPs substances listed by future decisions under the treaties.

The Stockholm Convention establishes a process by which a new chemical will be added to the list of POPs:

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.
6. The COP then decides whether to amend the Convention to include the new chemical on one of the Annexes.

H.R. 4591 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.

More importantly, 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. A domestic regulatory process is required to provide the United States sufficient flexibility to determine how it will regulate a particular substance and what, if any, critical uses or exemptions might be necessary. The domestic process should include the risk and cost/benefit considerations envisioned in the treaty. Further, 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.

H.R. 4591 appropriately reflects these risk management considerations in a domestic regulatory process for new POPs substances that mirror the procedural and substantive decisions under the Stockholm Convention and the LRTAP POPs Protocol. When a new substance is adopted under one of these agreements, EPA is granted special new authority

to regulate these newly listed substances "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.

EPA is also authorized to consider 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 require that relevant social, economic, environmental and health information is considered in reaching a decision to list a new chemical; H.R. 4591 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 domestic and international record to consider in reaching a domestic regulatory decision – and a sufficient opportunity to ensure that the record supports its subsequent regulatory actions.

H.R. 4591 sends a powerful signal to those governments that are attempting to weaken the risk/benefit approach set out in the POPs agreements. To date, the international process for evaluating new chemicals is only in the initial stages, but some governments are working to remove or dilute the criteria for evaluating new chemicals, including the evaluation of risk, costs and the potential consequences and risks of any alternatives and potential risk management measures. These efforts further reinforce the need for a clear domestic regulatory process.

The domestic regulatory process in H.R. 4591 sends a clear signal that in order to ensure that the United States can be party to a treaty amendment to list a new chemical, the record must provide appropriate support. 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. H.R. 4591 does no less – and supports the appropriate use of analytical tools such as risk assessment and cost/benefit analysis that EPA already employs in its decisions to manage the risks of chemicals.

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 H.R. 4591 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.

We also note that H.R. 4591 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 H.R. 4591 simply adapts existing requirements in a manner that ensures the United States can meet its international obligations.

H.R. 4591 also appropriately establishes a requirement that the Executive Branch consult with Congress as amendments to the treaty obligations 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 through coordinated risk management at the global level. 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 must become a Party to the agreements as soon as possible.

H.R. 4591 fully implements U.S. obligations under the three agreements into TSCA. It 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. We commend Mr. Gillmor for introducing this bill, and urge the Subcommittee and Congress to take quick action on the legislation to ensure that the United States can once again fill its leadership role in international chemical regulatory matters.

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

Ranking Member Solis has asked to recognize Ms. Polsky out of order, because she has to leave; Ms. Polsky.

MS. POLSKY. Thank you.

Mr. Chairman and members of the subcommittee, my name is Claudia Polsky and I am a Deputy Attorney General in the California Department of Justice Environment Section. I appreciate the opportunity to testify before you on behalf of California Attorney General Bill Lockyer providing domestic legislation to implement the Stockholm Convention on POPs.

Mr. Lockyer's concerns about the preemptive effects of the Chairman's bill on State environmental laws is, as you now know, shared by at least 11 other attorneys general who felt this issue of sufficient importance that we wanted to send a representative to you, in person, to answer any questions you may have on this matter.

Environmental protection is an area of traditional State regulation. It is at the very core of States' police powers to protect the health and welfare of their citizens. As the Supreme Court explained in a recent preemption case, in the areas of traditional State regulation, the Supreme Court assumes that Federal statutes do not supplant State law, unless Congress has made such an intention clear and manifest. Unfortunately, as described in detail in my written testimony, the Gillmor bill makes its

preemptive intention both clear and manifest. And it thereby threatens to destroy a very productive Federal-State partnership in toxics regulation.

Specifically, the Gillmor bill has proposed a new subsection of TSCA, governing that statute's effect on State law. This proposed Subsection 18(a)(2)(C) does not parallel the existing subsection of TSCA that would continue to govern the relationship between States and the Federal Government for non-POP chemicals. Instead, the proposed new subsection, by prohibiting States from establishing or continuing in effect any legal requirement with respect to a Stockholm POP listing that has entered into force for the United States, nullifies otherwise available options for preserving State regulation when EPA regulates a chemical under TSCA. Existing options under TSCA which would not be available under the Gillmor amendment are: States' ability to ban a particular chemical within their borders, and States' ability to regulate pursuant to any and every other Federal environmental law. Both would out the requirement that States seek EPA permission to do so. That is absolutely critical.

The bill thus represents a step backward, rather than forward with respect to regulation of the most persistent and dangerous chemicals. It actually makes these chemicals harder for States to regulate than shorter lived, more benign chemicals.

Now, I want to turn to address Chairman Gillmor's explicit statement today that H.R. 4591 is in fact, not intended to preempt State laws and that essentially this has all been a misunderstanding, and the State Attorneys General are hot and bothered about nothing. I have two responses to that. One, I do not believe there has been any misunderstanding. Eleven attorneys general reading this text have come to the independent legal conclusion that the Gillmor bill threatens to displace State authority to regulate POPs. Their interpretation is bolstered by two very basic cantons of statutory construction. First, where a specific matter is addressed by statute, one does not look to the statute's general provisions for guidance on that matter. Thus, because the new subsection of TSCA, Section 18 would pertain specifically to POP chemicals and less preemptive sections preceding it would not control interpretation.

The second canton is that where a statute expressly undermines--

MR. GILLMOR. For time reasons we are going to have to wrap up, Ms. Polsky.

MS. POLSKY. Okay. Let me jump then to my second and critical response to your suggestion today that you have no preemptive intent and that response is that is terrific. If that is the case, Attorney General Lockyer and the other attorneys general who have written to you, or to the subcommittee to replace the existing preemption language in the

Gillmor bill with the language in section 507 of the Solis bill, which expressly authorizes States to regulate POPs as stringently or more stringently than POPs are regulated by EPA.

Thank you.

[The prepared statement of Claudia Polsky follows:]

PREPARED STATEMENT OF CLAUDIA POLSKY, DEPUTY ATTORNEY GENERAL, ENVIRONMENTAL SECTION, CALIFORNIA DEPARTMENT OF JUSTICE

SUMMARY of the testimony of California Department of Justice
Bill Lockyer, Attorney General
Presented by Claudia Polsky, Deputy Attorney General

The Attorney General of California protects public health and natural resources in California by prosecuting actions pursuant to both State and Federal environmental laws within State borders. This testimony focuses on the Attorney General's concern regarding the sweeping preemption language contained in Chairman Gillmor's H.R. 4591, which will amend Section 18 of the Toxic Substances Control Act (TSCA) in ways inimical to State sovereign interests and to pollution prevention. The Attorney General's legal analysis is that proposed new subsection (a)(2)(C) of Section 18 of TSCA not only has the potential to preempt important State laws regulating toxic pollutants, but may result in a regulatory regime under TSCA wherein the *most* toxic pollutants are the *least* regulated.

California and other States have historically taken a leadership role in reducing the nation's use of persistent organic pollutants (POPs), regulating existing Stockholm Convention pesticides such as DDT and PCBs well in advance of federal regulation. States have a critical role in preserving, and in continuing to enact, State laws that reduce the use of additional POPs that will be listed under the Stockholm Convention in future.

The Attorney General's testimony describes the interaction between federal and State toxics regulation, and the precise mechanism by which H.R. 4591 would displace State law; it explains the importance to California and other States of preserving State regulation of chemicals with POP attributes; and it urges the Subcommittee to reject the Gillmor preemption language in favor of that contained in the Solis bill, H.R. 4800.

Mr. Chairman and Members of the Subcommittee:

I. Introduction

My name is Claudia Polsky, and I am a Deputy Attorney General in the State of California Department of Justice. I appreciate the opportunity to testify today on behalf of Attorney General Bill Lockyer regarding the competing Gillmor and Solis bills to implement the Stockholm Convention on Persistent Organic Pollutants ("POPs Treaty" or "Stockholm Convention").

The California Attorney General is a State constitutional officer, empowered to litigate not only on behalf of State client agencies, but in his independent capacity to represent the interests of the People of the State of California. Under our State Government Code, the Attorney General is specifically authorized and urged to initiate independent legal actions to protect the California environment from "pollution, impairment, or destruction." The Attorney General prosecutes actions pursuant to both State and Federal environmental laws within State borders, and is mindful of the important complementary roles that State and Federal rules play in environmental protection.

My testimony today will therefore focus on the Attorney General's acute concern regarding the sweeping preemption language contained in Chairman Gillmor's H.R.

4591, which will amend Section 18 of the Toxic Substances Control Act (TSCA) (15 U.S.C. § 2617) in ways inimical to State sovereign interests and to pollution prevention. The Attorney General's analysis is that proposed new subsection (a)(2)(C) of Section 18 of TSCA not only has the potential to preempt important State laws regulating toxic pollutants, but may result in a perverse regulatory regime under TSCA wherein the *most* toxic pollutants are the *least* regulated. Specifically: as soon as a Treaty POP listing goes into force for any non-pesticidal chemical in the United States, State regulation of the listed chemical would, under the Gillmor bill, be immediately preempted -- regardless of whether State regulation was the same as, or more stringent than, EPA regulation, and even where EPA declined to regulate the chemical in any significant way.

This testimony describes the pioneering role of California and other States in identifying and regulating persistent toxic chemicals, in which States serve as the laboratories of democracy envisioned by the Constitution's framers. It then explains the mechanics of H.R. 4591's preemption provision, and its likely consequences for POPs regulation in California and other States. This testimony concludes by urging the Subcommittee to adopt the alternative preemption language contained in the Solis bill, H.R. 4800. This language makes explicit that any State law with respect to a POPs chemical that is *equally protective* or *more* protective of health and environment than a corresponding federal law or regulation is presumed to survive preemption, and States need not apply to EPA for any discretionary determination in the matter. Such a regime mirrors the cooperative federalist structure of our bedrock federal environmental laws, and will realize the Stockholm Convention's potential for reducing the adverse impacts from POPs chemicals quickly and effectively.

II. California's preemption concerns

The California Attorney General is gravely concerned by any statutory language that threatens States' role in identifying and controlling the most toxic and long-lived chemicals within their borders – those with POP characteristics. States have historically played a leadership role in protecting Americans from persistent organic pollutants in the absence of, or well in advance of, federal regulatory action. For example, the State of Connecticut in 1976 banned the manufacture and heavily regulated the use of PCBs (one of the initial "dirty dozen" chemicals currently listed under the POPs Treaty) two years before EPA regulated this class of chemicals. Similarly, Michigan banned most uses of the POPs chemical DDT in 1969, and New York State banned it in 1970, well in advance of EPA's nationwide ban in 1972.

States continue to play a leadership role in the POP arena as they begin to regulate flame retardants, dioxins, and newly identified carcinogens in advance of, or more stringently than, the federal EPA. Eager as the People of the State of California are to see the U.S. ratify and implement the POP Treaty, their Attorney General urges you to reject any implementation bill that would displace State authority to establish and continue more stringent POP regulation than that adopted by EPA.

I present this testimony solely on behalf of Attorney General Lockyer and the People of the State of California that he represents. As the most populous State in the nation; as the nation's number one agricultural State, with all of the pesticide use that status implies; and as the State with the most extensive regulation of persistent organic chemicals, California has more at stake in this preemption battle than does any other single State.

III. How H.R. 4591 preempts State law

Under the Gillmor bill, whenever a new, non-pesticidal POP is listed under the Stockholm Convention, State regulations of that chemical would be categorically preempted at the moment of the listing's "entry into force" for the United States. (H.R. 4591, Section 6, governing "conforming amendments" to TSCA.) The California Attorney General's preemption concerns regarding such a TSCA amendment can only be understood by examining how the Gillmor bill upsets the existing, carefully crafted federal-State relationship under TSCA.

The Toxic Substances Control Act is enforced exclusively by the federal government. Unlike the regime under statutes such as the Clean Water Act and the Resource Conservation and Recovery Act (RCRA), States have no delegated enforcement authority under TSCA. Further, Section 18 of TSCA contains an express preemption provision, such that State regulation may in certain instances be precluded or displaced by EPA regulation. Nonetheless, TSCA preserves significant State authority to regulate TSCA-regulated chemicals and chemical mixtures (hereafter, "chemicals"), by sparing State regulations from preemption if they meet any one of four criteria. The net effect is that States may regulate toxic chemicals if federal regulation is absent; States are presumed to have broad authority to ban any and all TSCA chemicals within their borders; and States are empowered to regulate chemicals pursuant to all other federal environmental laws that delegate such authority to States.

First, States may regulate any chemical that is not being regulated by U.S. EPA. TSCA § 18(a)(1). Second, outright State prohibitions on the use of any EPA-regulated substance within State borders are expressly authorized by Section 18(a)(2)(B). States do not need EPA permission to enact or retain such prohibitions, even if they result in more stringent chemical regulation at the State than federal level. TSCA § 18(a)(2)(B)(iii). Third, States may establish or retain any State regulation of a TSCA-regulated chemical if the State regulation is adopted pursuant to any other federal law, including but not limited to the Clean Air Act. TSCA § 18(a)(2)(B)(ii). Again, retention of such State regulations is automatic, and does not require EPA permission.

Fourth and finally, if EPA grants a discretionary "exemption" from preemption upon "application" by a State, that State may establish or retain its own regulations regarding a TSCA-regulated chemical. TSCA § 18(b). Such exemptions may be granted as long as the State regulations do not conflict with federal regulations, the State regulations confer a "significantly higher degree of protection from risk" than do corresponding federal regulations, and the State regulations do not unduly burden interstate commerce. *Id*. Thus, TSCA accommodates States' interests in regulation except in those limited cases where State regulations are largely duplicative of federal regulations, pose enforcement conflicts for regulators, or pose compliance problems for regulated entities.

Troublingly, however, the new TSCA subsection 18(a)(2)(C) contemplated by the Gillmor bill has substantially greater preemptive effect than the existing TSCA preemption subsections, even though it will govern some of the most dangerous chemicals, where the case for federal/State cooperation is most compelling. The Gillmor bill prohibits States or their subdivisions from "establishing or continuing in effect" any existing legal requirement – such as a statute, regulation, or other legal mandate – that applies to a POPs chemical for which a listing has "entered into force for the U.S." (Proposed TSCA § 18(a)(2)(C).)

First, and most obviously, this language lacks the type of automatic exceptions to preemption contained in subsection (a)(2)(b). Thus, States could not automatically prohibit the use of a POPs chemical within their borders – a significant insult to their territorial sovereignty, as well as an impediment to environmental and public health protection. States also could not regulate POPs chemicals pursuant to any and every other Federal law, as they currently can under subsection (a)(2)(b), which will continue to apply to non-POPs chemicals.

Further, whereas EPA's promulgation of a substantive "rule" regulating a TSCA chemical is what in some instances triggers preemption, and the need for a State to apply to EPA for an exemption from preemption, the preemption trigger in the Gillmor bill is a POPs listing's "entry into force for the U.S." A hypothetical scenario is the U.S. consents to be bound by ("opts in" to) listing of an additional POP chemical in the future, but obtains a Treaty-authorized exemption that allows the U.S. to continue using the chemical for specific purposes (a "use exemption"). This exemption could indeed be broad enough to exempt all current domestic uses of that chemical. The underlying POPs listing would nonetheless be "in force" for the U.S., meaning that State regulation of the relevant chemical would be preempted *even in the face of complete federal regulatory inaction*.

The net result of the preemption language in the Gillmor bill is that H.R. 4591, which would amend TSCA to address the world's most dangerous and persistent toxins, would make those toxics *harder* for States to regulate than less toxic and shorter-lived chemicals. Although federal laws sometimes -- and with good reason -- preempt State laws that conflict with federal laws, or that render dual compliance with federal and State law unworkable for regulated industries, the Attorney General is unaware of any instance in which a federal environmental law preempts State law in the *absence* of any substantive federal regulation of the same subject matter.

The upside-down statutory architecture of H.R. 4591, which effectively makes federal regulation a ceiling rather than regulatory floor with regard to POPs chemicals, makes no sense on several levels. First, there is no evidence of a need for nationally uniform regulation of POPs chemicals, which may be in greater use or present greater hazards in some States than in others. POP reduction is not primarily a matter of product packaging or labeling mandates -- the type of regulation that induces uniformity concerns -- but rather, a matter or prohibiting certain product uses or pollutant emissions in localities where they cause human health and environmental harm. Neither is there any evidence before the Subcommittee of tension between existing federal and State law governing chemicals with POP attributes. And there can be no suggestion that State regulation of POP chemicals will create tension with the Stockholm Convention itself. To the contrary: State leadership in POP regulation furthers the Treaty's fundamental purpose of expeditious reduction of persistent organic pollutants. As a final matter, the Gillmor bill's statutory design is at odds with the long-standing design of federal environmental statutes, such as the Clean Water Act, RCRA, and even much of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which generally require State standards to meet *or exceed* federal requirements.

The preemption language in H.R. 4591 is unprecedented, unnecessary, and unwise, and it provides sufficient basis to reject the Gillmor implementation bill *in toto.*

IV. California examples

I turn now from the hypothetical to actual California-specific examples of State legislation that, under the Gillmor bill, would likely be preempted by POP listings under the Treaty. As a preliminary matter, because the United States already has banned all of the initial "dirty dozen" chemicals listed under the POPs Treaty, the regulatory action as far as the United States is concerned lies in the potential for future additions to the list of Treaty-regulated chemicals.

Among the organic chemicals with persistence attributes and environmental effects likely to qualify them for listing as POPs chemicals are numerous pesticides and brominated flame retardants. In both of these realms, California has been a regulatory leader, and a POP Treaty listing followed by weak or nonexistent federal regulation would sound the death knell for heretofore successful State efforts. This result is unnecessary and wholly counterproductive where the State's exercise of its police power

to protect the general health and welfare does not conflict with any important federal interest or impose undue burdens on nationwide businesses.

An example of scientifically and popularly supported, yet preempt-able California legislation under the Gillmor bill is the State's banning of certain brominated flame retardants, or PBDEs, in 2003. This action was prompted by the discovery of astonishingly high, and increasing, levels of these compounds in human breast tissue, in human blood, in wildlife, and in sediments in our State. Animal studies have shown that PBDEs are neurodevelopmental toxins, liver toxins, and disrupters of thyroid function at exposure levels only slightly above those observed in our State's population.

California's ban on the "penta" and "octa" forms of PDBE took effect a mere two months ago, and has yet to effect its anticipated pollution reduction. Its potential may never be realized, however, should the Gillmor bill become law. PBDE is currently under consideration for listing by the POPs Review Committee. And if its variants are listed and the U.S. opts in to such regulation, California's law – even if more health protective than EPA's – could be a legal nullity.

California has also pro-actively regulated certain chemicals with POPs attributes under its 1986 citizen initiative Proposition 65 ("Prop 65"), a law designed to reduce human exposure to carcinogens and reproductive toxins within the State. Prop 65 requires the State to publish annually a list of chemicals "known to the State to cause cancer or reproductive toxicity." Shortly after the listing of a chemical under Prop 65, businesses are prohibited from knowingly discharging any significant amount of that chemical into any source of drinking water in the State. They are also required to provide a "clear and reasonable" warning to members of the public before exposing them to a listed chemical through other means (such as air emissions or consumer products) that would pose a "significant risk."

Prop 65 already regulates two chemicals that are under active consideration for POP treaty listing: chlordecone (better known by its trade name, Kepone), and the flame retardant hexabromobiphenyl (a polybrominated biphenyl, or PBB). It is more than likely that additional chemicals already listed, and to be listed, under Proposition 65 will come over time to be listed under the POPs Treaty, thereby making California's warning and discharge requirements subject to ouster – notwithstanding California's compelling rationale for regulating, within its own borders, those chemicals that are "known to the State to cause cancer or reproductive toxicity" in its citizens.

California has also regulated POP pesticides in advance of anticipated international and national regulation. One example is our statewide ban on lindane, a persistent organic chemical used as both an agricultural pesticide and a pharmaceutical treatment for head lice. Lindane-based lice treatments create a particular health risk to children, who can experience seizures and other central nervous system effects as a result of lindane exposure.

After a California agency determined in the mid-1990s that lindane was both the least effective and the most toxic lice treatment available, California, in 2000, became the first state in the nation to ban the sale and use of lindane in such treatments. In addition to the direct risk reduction achieved by this ban, the ban has led to a 10-fold reduction in lindane pollution of water leaving State water treatment plants, reducing downstream exposure risks.

POP pesticides are not regulated by TSCA, and thus not within the purview of this Subcommittee. I nonetheless urge the Subcommittee to consider the inconsistency and illogic in enacting domestic POPs legislation that *authorizes* States to regulate pesticidal POPs, yet *preempts* States from regulating non-pesticidal POPs with identical health and environmental effects.

V. Other States share -- or should share - California's concerns

In chronicling how much California has to lose under the preemptive regime of H.R. 4591, however, I do not mean to suggest that our State's concerns are unique. California's concerns about preemption of state laws governing the most toxic and long-lived pollutants have been explicitly echoed by the ten co-signatories to the multi-state letter recently sent to the House Committee on Energy and Commerce regarding POP treaty implementation – New Mexico, Massachusetts, Connecticut, Delaware, Georgia, Illinois, Minnesota, New Jersey, New York, and Oregon.

Attorney General Lockyer's concerns are also shared by Washington State Attorney General Rob McKenna, who wrote separately to the Committee to urge that "States must remain free to regulate in this area [of POP chemicals]," and that federal preemption in POP regulation is "*counter productive to our shared interest in protecting the health and welfare of our citizens.*"

Indeed, State legislation at risk under the Gillmor bill encompasses virtually every State in the Union. For example, California's landmark legislation banning the most dangerous brominated flame retardants has inspired nationwide emulation, including emulation by many States represented by members of this Subcommittee. I note that PBDE legislation has been enacted in Representative Fossella's State of New York, Representative Allen's State of Maine, and in Representatives Rogers' and Stupak's State of Michigan, among others. Thus, the preemption issue is not a remotely partisan one, but rather, a matter of preserving all States' ability to investigate, innovate, and regulate with respect to the most dangerous toxic chemicals known.

VI. Conclusion

The multi-State Attorney General letter (Attachment A hereto) identifies problems with H.R. 4591 beyond the preemption language that I have highlighted today. As other witnesses describe more fully in their testimony, the Gillmor bill requires EPA to use a type of cost-benefit standard in deciding whether to regulate or prohibit a POP, rather than the health-based standard contained in the Stockholm Convention. In addition, the bill requires duplicative EPA review of scientific evidence that will already have been amply vetted by the POPs Review Committee prior to a new POP listing. Both of these features will inject delay into domestic POPs regulation, and will result in regulation that is highly vulnerable to industry challenge.

The Gillmor bill's preemptive language, when combined with these other impediments to swift and stringent EPA regulation of POPs Treaty chemicals, virtually insures a significant lag between international listing and stringent domestic regulation of POPs chemicals. This regime is not in States' interests; it is not in our national interest; and it does not advance the Stockholm Convention's goal of "protecting human health and the environment from the harmful impacts of persistent organic pollutants."

Accordingly, as an alternative to Chairman Gillmor's bill, the Attorney General urges the Subcommittee's support for Representative Solis' Treaty implementation bill, H.R. 4800. Section 507 of that bill, which provides that State laws governing listed POPs are not pre-empted as long as they are at least as stringent as federal laws, is the appropriate means of resolving overlapping federal and State authority in the area of toxics regulation. The Solis bill respects constitutional principles of cooperative federalism; it recognizes that protection of citizens' health and welfare is a core police power of the States that should not be lightly abrogated; and it preserves conditions under which State regulatory innovation may spur national action, rather than dictating a lowest-common-denominator approach to toxics regulation.

// *Attachment*

ATTACHMENT A
Multi-State Attorney General letter to House Committee on Energy and Commerce

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February 28, 2006

The Honorable Joe Barton
Chair, House Committee on Energy & Commerce
2109 Rayburn House Office Building
Washington, DC 20515

The Honorable John D. Dingell
Ranking Member, House Committee on Energy & Commerce
2328 Rayburn House Office Building
Washington, DC 20515

Re: HR 4591 - POPs Treaty Implementation Legislation

Dear Chairman Barton and Congressman Dingell:

We submit this letter on behalf of the undersigned Attorneys General. The United States joined the Stockholm Convention on Persistent Organic Pollutants, commonly known as the "POPs Treaty," in 2001. The treaty represents an important step toward protecting our nation's citizens and our global neighbors from the risks posed by certain especially toxic substances that accumulate in the global environment.

Unfortunately, HR 4591, a bill to implement the POPs Treaty and other related international agreements, recently introduced by Congressman Paul Gillmor, Chairman of the House Subcommittee on Environment and Hazardous Materials, includes unduly broad preemption language that could severely limit states' abilities to protect their citizens from these toxic chemicals.

HR 4591 includes the following language designed to preempt state authority to regulate substances that become subject to the Treaty:

> [N]o State or political subdivision may establish or continue in effect any requirement that is applicable to a POPs chemical substance or mixture or LRTAP POPs chemical substance or mixture . . . for which a listing under . . . the POPs Convention or . . . the LRTAP POPs Protocol has entered into force for the United States (except as permitted in section 116 of the Clean Air Act).

Although currently applicable federal law in this area does include some preemption of state authority, there is nothing equivalent to the sweeping impact of the proposed bill. Indeed, under the bill's language, state authority to regulate substances listed under the POPs Treaty could be preempted even if an exemption to the POPs Treaty allows continued use of a substance. We are especially concerned about such a possibility as we consider potentially toxic substances that states have already begun to regulate in the absence of federal regulation. A good example involves brominated flame retardants known as PBDEs that some states have already banned, and that many other states are considering banning. We urge you and other members of the Energy and Commerce Committee to ensure that this counterproductive preemption language does not become law.

The Gillmor bill also requires unacceptable EPA review procedures before any new POP would be regulated in the United States. Although the states recognize the value of EPA's additional analysis, the procedures set forth in the bill would duplicate the international review process and potentially delay important federal action. Under that process, the Persistent Organic Pollutant Review Committee, a group of experts in risk analysis chosen by the parties to the Treaty, including the United States, must conclude that a chemical needs to be regulated to protect human health and the environment before the substance is listed, a conclusion that is accorded very little weight in the review procedures under the bill.

As Georgetown University Law Professor Lisa Heinzerling highlighted in her testimony before the Committee on Rep. Gillmor's "discussion draft" of the bill, circulated on June 17, 2004, and in relevant respects identical to HR 4591, the bill does not require the United States to do anything in response to an international recommendation to list a new POP, or even impose a deadline for EPA to decide whether or not it will act. The bill also lacks any enforcement mechanism whatsoever to allow for challenges to EPA's decisions with respect to newly identified POPs that may later become subject to the treaty. This potential for sanctioned nonresponse to an international decision to list a new toxic substance as a POP is troubling.

In addition, HR 4591 includes an approach to cost-benefit balancing that Professor Heinzerling aptly describes as "systematically biased against environmental protection," particularly when it comes to protecting against pollutants like POPs. See Testimony of Georgetown Law Professor Lisa Heinzerling to the Subcommittee on Environment and Hazardous Materials, http://www.progressiveregulation.org/articles/Heinzerling_071504.pdf.

We believe that rather than erecting potentially insurmountable barriers against protecting people and the environment from the risks posed by POPs, as HR 4591 appears to do,

the implementing legislation should ensure both that states have the ability to protect themselves, and that EPA be required to act expeditiously when new substances are listed as POPs.

Very truly yours,

Thomas F. Reilly
Massachusetts Attorney General

Mike Hatch
Minnesota Attorney General

Bill Lockyer
California Attorney General

Zulima V. Farber
(as authorized)
Zulima V. Farber
New Jersey Attorney General

Richard Blumenthal
Connecticut Attorney General

Eliot Spitzer
New York Attorney General

Carl C. Danberg
Delaware Attorney General

Hardy Myers
Oregon Attorney General

Thurbert Baker
Georgia Attorney General

Patricia A. Madrid
Attorney General of New Mexico

Lisa Madigan
Illinois Attorney General

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MR. GILLMOR. We normally give questions when we are done with all the witnesses, but since you have to leave, let me make one point.

One, you did not write me. I have not received any letter from you. All I have seen is a news release. Two, this bill has been out there for 20 months. If the attorneys general had a concern, it would seem logical to

contact the Chairman of the Subcommittee or the sponsor of the bill. I have not heard from you and I would like to know why.

MS. POLSKY. Sure. Thank you, Chairman.

A few responses, first of all, let me say candidly to the extent that earlier input from the State Attorneys General would have been beneficial to this subcommittee; I regret that that did not occur. However, it must be noted that preemption concerns about a nearly identical bill were amply expressed by other parties in 2004, the opinion of the State Attorney--

MR. GILLMOR. You expressed an opinion at that time in response to a letter from a member of the committee that there were not those problems with preemption existing. So I understand where you are coming from, and you understand where I am coming from.

MS. POLSKY. Sure. All I would like to say is that fortunately, it appears that there is ample time for course correction and to the extent that there has been any misunderstanding about your subjective preemptive intent, I urge you to clarify the language.

Thank you.

MR. GILLMOR. Thank you.

We will now go to Mr. Roewer, Utility Solid Waste Activities Group.

MR. ROEWER. Thank you, Mr. Chairman, Ms. Solis.

I would like to commend the subcommittee on holding this hearing and I would like to thank you for the opportunity to present the views of the Utility Solid Waste Activities Group, or USWAG, and the Edison Electric Institute regarding legislation implementing the Stockholm POPs Convention and the LRTAP POPs protocol.

The utility industry supports the leading role that the United States has played in helping to force the POPs Convention and we share the view of others expressed here today. It is extremely important the United States continue to play a leading role regarding the implementation and future strategic direction of the Convention. We are concerned, however, that further delay in implementing legislation is seriously compromising the United States' interests in playing a meaningful and constructive role in the process. The first party's conference was held last May and the next is scheduled for this May in Geneva. The game is underway and the United States is not a player in a process where important decisions are being taken that will affect the future use of chemicals in this and other countries. The time has come for Congress to ratify the Convention and enact enabling legislation so that the United States can fully participate as a party.

The introduction of your bill is a critical first step in achieving this objective and establishes the appropriate statutory structure for

implementing the United States' obligations under the Convention in a manner consistent with the Convention's goals, while at the same time preserving the sovereign role of the United States in establishing laws within its borders. The legislation correctly recognizes that PCBs are already subject to a mature and comprehensive regulatory program under Section 6E of TSCA. The PCB regulatory program has been in place for a quarter of a century and is among the most comprehensive and effective in the world and is the product of considerable regulatory scrutiny and development. Recognizing this, H.R. 4591 appropriately removes PCBs from the legislation's blanket prohibition on the manufacture, processing, use, and disposal of POPs chemicals because, quite frankly, our existing regulatory controls already meet the Convention's objectives for PCBs. The manner in which your legislation addresses PCBs is an excellent example of how the POPs implementing legislation should be structured.

Nothing in the Convention directs, let alone suggests, that the United States rewrite its existing laws to meet its obligations. The purpose of implementing legislation should be to allow Congress to exercise its authority to establish how the United States, through our existing domestic laws, will meet its obligations as a party. Thus, POPs legislation should reflect a deliberate and thoughtful analysis regarding whether existing U.S. laws allow the United States to meet its obligations. To the extent that any such laws are deficient in any particular area, implementing legislation should be comprised of targeted amendments to fill such gaps.

We are concerned, however, that some may view the implementation process as an opportunity to revisit more generally the scope of TSCA. Attempting to reopen the scope and structure of TSCA under the guise that such amendments are necessary to fulfill our obligations is unnecessary and would only result in further delay in getting the United States into the game. The subcommittee should not let this legislative effort become a Christmas tree for TSCA. If it does, other issues that have long been resolved, such as the established ban on importation of PCBs into this country, may very well be reopened.

H.R. 4591 also takes the right respect with regards to the POPs listing process whether or not the United States should issue rules further regulating a newly identified POP. The legislature would establish a structured process whereby new POPs listing decisions are thoroughly monitored and evaluated by EPA and the public throughout the listing process. In this way, if a new POP is identified by the Conference of Parties, the United States then has a robust record to evaluate the technical soundness of the list and could decide whether additional domestic controls are required for this POP. These types of checks and

balances are necessary because, despite the rather detailed process in the Convention for rendering listing decisions, the United States cannot presume that each new listing decision will adhere to these procedures or will be technically sound. Technical mistakes and procedural lapses have been known to occur in rendering decisions under the Convention. Therefore, it is essential that implementing legislation retain a mechanism for the United States to independently evaluate and determine on its own whether and how to further control a newly identified POP.

MR. GILLMOR. Thank you.

MR. ROEWER. Finally, if I may, I would like to touch on the issue of preemption as we--

MR. GILLMOR. If you can do it quickly, because we do have a vote.

MR. ROEWER. Just one minute at most. Since its original enactment, TSCA Section 18 has a Federal preemption provision. As we read your bill, that does nothing to that preemption provision. It still allows states and local governments to petition EPA seeking the authority and approval to regulate those substances more stringently than under TSCA.

Thank you.

[The prepared statement of Jim Roewer follows:]

PREPARED STATEMENT OF JIM ROEWER, EXECUTIVE DIRECTOR, UTILITY SOLD WASTE ACTIVITIES GROUP

Summary

- The time has come for Congress to ratify the Stockholm Convention and enact implementing legislation so that the United States can fully participate as a Party in this important process.

- H.R. 4591 is a critical first step in achieving this objective. It would establish the appropriate structure for implementing the United States' obligations under the Convention in a manner faithful to the Convention's goals, while preserving the United States' sovereign role in establishing laws within its borders.

- The legislation correctly recognizes that PCBs are already subject to a comprehensive regulatory program under section 6(e) of the Toxic Substances Control Act ("TSCA") and, as a result, properly removes PCBs from the legislation's prohibition on POP chemicals because existing regulatory controls already meet the Convention's objectives for PCBs.

- Nothing in the Convention directs – let alone suggests – that the United States rewrite its existing laws to meet its Convention obligations. The purpose of implementing legislation is to allow Congress to exercise its authority to establish how the United States, through our existing domestic laws, will meet its obligations as a Party to the Convention.

- Reopening the scope of TSCA under the guise that such amendments are necessary to fulfill our goals under the Convention is unnecessary and would further delay the United States' ratification of the Convention.

- H.R. 4591 takes the right approach with respect to the listing process for newly identified POP chemicals by establishing a process whereby new listing decisions are monitored and evaluated by EPA and the public. In this way, the United States will have a robust record upon which to evaluate the technical soundness of the listing decision and on which to decide whether additional controls are warranted for the new POP.

- H.R. 4591 remains faithful to TSCA's preemption provision by prohibiting any State or political subdivision from establishing or continuing in effect any requirement applicable to a POP chemical that is more stringent than federal law, while preserving the ability of States or political subdivisions to petition EPA seeking approval for adopting or continuing in effect more stringent laws.

Good morning. My name is James Roewer. I am the Executive Director of the Utility Solid Waste Activities Group (or "USWAG") and I would like to thank the Subcommittee for the opportunity to present this statement on behalf of USWAG and the Edison Electric Institute ("EEI") regarding the important issue of implementing legislation to enable the United States to fulfill its obligations as a party to the Stockholm POPs Convention, LRTAP POPs Protocol, and Rotterdam PIC Convention (which I refer to collectively as the " POPs Convention" or "Convention").[1]

The utility industry has a substantial interest in the development of legislation implementing the POPs Convention because, among other reasons, polychlorinated biphenyls or PCBs are one of the 12 persistent organic pollutants ("POPs") identified in the Convention. Therefore, let me commend the Subcommittee for holding this hearing. EEI and USWAG support the leading role that the United States has played in helping to forge the POPs Convention, and we share the view of others 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.

We are concerned, however, that further delay in enacting implementing legislation is seriously compromising the interests of the United States in playing a meaningful and constructive role in this process. As you know, the first Conference of the Parties was held last May, with the second Conference scheduled for this May in Geneva. Put simply, the game is underway and the United States is not a player in a process where important decisions affecting the future use of chemicals in this and other countries are being made. The time has come for Congress to both ratify the Convention and enact implementing legislation so the United States can fully and effectively participate as a Party in this important process.

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[1] EEI is an association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide. EEl's U.S. members serve roughly 90 percent of the ultimate customers in the shareholder-owned segment of the industry and 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.

Fortunately, the introduction of H.R. 4591 is a critical first step in achieving this objective. It would establish the appropriate statutory structure for implementing the United States' obligations under the Convention in a manner that is faithful to the Convention's goals, while at the same time preserving the sovereign role of the United States in establishing laws within its borders. As an initial matter, it correctly recognizes that PCBs are already subject to a mature and comprehensive regulatory program under section 6(e) of the Toxic Substances Control Act ("TSCA"), which allows for the limited use of PCBs in a manner 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.

Recognizing this, H.R. 4591 appropriately removes PCBs from the legislation's blanket prohibition on the manufacture, processing, use and disposal of POP chemicals because our existing regulatory controls already meet the Convention's objectives for PCBs. This approach is consistent with Secretary of State Powell's letter transmitting the POPs Convention to the President, where he explained 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." 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, at XX.

The manner in which H.R. 4591 addresses PCBs is a good example of how the POPs implementing legislation should be structured. Nothing in the Convention directs – let alone suggests – that the United States rewrite its existing laws to meet its Convention obligations. Rather, the purpose of the implementing legislation is to allow Congress to exercise *its* authority to establish how the United States, *through our existing domestic laws,* will meet its obligations as a Party to the Convention. Where an existing domestic regulatory program already enables the United States to meet its Convention obligations – as is the case with PCBs – there is no need to amend U.S. law.

Indeed, given that the United States already is one of the world's leaders in chemical regulation, it is not remarkable that in his letter transmitting the Convention to the President, Secretary Powell also explained 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). Thus, POPs implementing legislation should reflect a deliberate and thoughtful analysis regarding whether existing U.S. laws allow the United States to meet its Convention obligations. To the extent that such laws are deficient in any particular area, implementing legislation should be comprised of targeted amendments to fill such gaps. H.R. 4591 reflects this thoughtful and targeted approach to implementing the United States' obligations under the Convention.

We are concerned, however, that some may view the implementation process as an opportunity to revisit more generally the scope of TSCA, as opposed to focusing solely on the targeted amendments necessary to fulfill our Convention obligations. Attempting to reopen the scope and structure of TSCA under the guise that such amendments are necessary to fulfill our goals under the Convention is unnecessary and would result only in further delay in getting the United States into the game. I respectfully submit that the Subcommittee ***not*** let this legislative effort become a "Christmas tree" of amendments to TSCA; if it does, other issues that have long been resolved – such as the established ban on importing PCBs into this country – could be reopened.

In this regard, H.R. 4591 also takes the right approach with respect to the so-called "listing process" – namely, whether or not the United States should issue rules further

regulating a chemical newly identified as a POP under the Convention. Rather than establishing a statutory presumption in favor of automatically deferring to the decision of the Conference of the Parties – many of whom have less developed environmental controls than does the United States – H.R. 4591 would establish a structured process whereby new POP listing decisions are thoroughly monitored and evaluated by EPA and the public throughout the listing process. In this way, if a new POP is identified by the Conference of the Parties, the United States will have a robust record to evaluate the technical soundness of the listing decision upon which it could decide whether additional domestic controls are required for the new POP.

This type of checks and balances is necessary because, despite the rather detailed procedures in the Convention for rendering listing decisions, the United States should not presume that each new listing decision will adequately adhere to these procedures or will be technically sound; unfortunately, technical mistakes and/or procedural lapses have been known to occur in rendering determinations under the Convention. Therefore, it is important that implementing legislation retain a mechanism for the United States to independently evaluate and determine on its own whether and how to further control a newly identified POP. H.R. 4591 does this, and thereby preserves the sovereign role of the United States in enacting domestic legislation applicable to its citizens.

Finally, we want to touch briefly on the issue of preemption. Since it original enactment in 1976, TSCA section 18 has included a federal preemption provision prohibiting any State or political subdivision from regulating a chemical substance already controlled under TSCA unless the State or local law is identical to TSCA's control provision or is adopted under the authority of another federal law. Congress included this provision in TSCA because it wanted to ensure uniformity in the regulation of chemical substances, as opposed to a patchwork of 50 differing State regulations. At the same time, TSCA authorizes EPA to grant petitions from State and local governments to regulate a particular chemical more stringently than otherwise required under federal law if such State or local regulation does not, among other things, unduly burden interstate commerce. This structure has worked well for nearly 30 years, and there is no need to modify this provision.

H.R. 4591 is consistent with TSCA's long-standing statutory structure by prohibiting any State or political subdivision from establishing or continuing in effect any requirement applicable to a POPs chemical listed in the Convention. However, consistent with TSCA, nothing in H.R. 4591 prohibits any State or political subdivision from petitioning EPA to seek approval for adopting or continuing in effect a State or local law applicable to a POP that is more stringent than federal law.

Unfortunately, H.R. 4800 turns TSCA's existing preemption provision on its head by directing that any new POP regulation become the regulatory "floor" for any State or political subdivision, while at the same time *not* prohibiting a State or local regulation from being more stringent than federal law. This effectively would allow any State or political subdivision to end-run TSCA's petitioning process, where EPA must first approve any State or local regulation that is more stringent than federal law. The net result would be a patchwork of differing State and local chemical regulation laws; precisely the opposite result of what Congress intended in enacting TSCA. This attempted gerrymandering with TSCA's established structure is neither necessary nor constructive in forging implementing legislation, and we respectfully submit that the Subcommittee not go down this path.

* * * *

I would like to thank the Subcommittee for the opportunity to present the views of EEI and USWAG on legislation for implementing the Stockholm Convention. I would be glad to answer any questions you have concerning my testimony.

MR. GILLMOR. Well, considering what you said, I am glad you took the extra minute.

MR. ROEWER. I thought you would.

MR. GILLMOR. Dr. Goldman, if you can stay within the three minutes, we could take your testimony; Ms. Solis and I hopefully will be able to get over and make the votes, and then we will come back as soon as possible. I would anticipate that would be at 12:45. Dr. Goldman?

MS. GOLDMAN. I think I can do that. Thank you, Mr. Chairman and thank you also to Ms. Solis for the opportunity to testify at this hearing today.

I am a pediatrician and a professor at the Johns Hopkins Bloomberg School of Public Health, and between 1993 and 1998, I served as Assistant Administrator for Prevention Pesticides and Toxic Substances at the U.S. EPA. This is the office of EPA that is responsible for the implementation of TSCA.

I am skipping over the points that I will make about the PIC legislation, except to say that this is a very important agreement internationally, especially to developing countries, and should be a priority for us to ratify that agreement. In terms of POPs, you are all well aware of the very serious array of health effects including cancer, neurological developmental, and reproductive effects that have been associated with POPs, particularly high levels of exposure that occur to the fetus and the infant who, of course, we would like to protect. LRTAP POPs is a very important mutual agreement. It has already been pointed out the very significant role that that agreement will play in commerce throughout Europe and our commerce with Europe and of course, we want to be a part of that agreement.

In terms of the Stockholm Convention on Persistent Organic Pollutants, that agreement, as Mr. Yeager has already pointed out, was very carefully negotiated by the U.S. Government to assure that it is science-based and also that there is a process by which the United States can choose to opt in or opt out of the new POPs listing. Your criterion, Mr. Chairman, in terms of science-based and no international convention telling us what to do, was foremost on the minds of everybody involved in this Convention as it was being developed. And you are all very well aware that has entered into force.

What I would like to turn to now are the two pieces of legislation that have been put forward, H.R. 4591 and H.R. 4800. There are two crucial differences that I think are very important. One is that H.R. 4591 would impose a requirement that EPA would decide to opt in only to the extent necessary to protect human health and the environment in a manner that it sees as a reasonable balance of social, environmental, and economic costs and benefits. And preferable is the approach proposed in

H.R. 4800, in which Congress would establish a presumption that EPA will implement these decisions from the POPs Conventions and require that EPA would demonstrate why a listed chemical should not be controlled. We certainly want to maintain our prerogative in not to waive a chemical that is listed by the Commission, but the EPA should explain and citizens should have recourse to be able to file a suit if EPA fails in its duty to make such decisions just as we had with other environmental laws. Second, the decision standard is not in alignment with the standard agreement in the POPs Convention, or with current law. I think that it creates new burdens on the aAgency, is a recipe for paralysis, and also creates many new opportunities for litigation, which I think would not be the intent of the Chairman, or any other member of this body.

So in concluding, I would say that we do need to be a part of the global POPs Convention. We do need to assume our share of responsibility and I believe that there is a path forward that would be a bipartisan approach that would achieve that in the future.

Thank you very much.

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

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

Mr. Chairman and members of the Subcommittee on Environment and Hazardous Materials, it is my honor to testify today on proposed legislation to implement the POPs, PIC, and LRTAP POPs agreements. I am a Professor of Environmental Health Sciences at the Bloomberg School of Public Health. I also serve as chair of the Board for the Children's Environmental Health Network and member of the Board of Trustees of Environmental Defense. However, my testimony represents my own views and not the views of these other organizations.

From 1993-98, I served as Assistant Administrator for Prevention, Pesticides and Toxic Substances at the US Environmental Protection Agency (EPA). While serving in that position I was involved with the regulation of chemicals and pesticides and with technical efforts related to the development of the POPs Conventions. I led the US delegation to the first POPs negotiating session as well.

Rotterdam Convention on Prior Informed Consent (PIC)

Under the Toxic Substances Control Act (TSCA) the US has 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 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 are to notify importing countries prior to shipping a

chemical that is "banned or severely restricted." In the 1990s developing countries pressured for a convention on prior informed consent. 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 US 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 is a logical outgrowth of voluntary efforts that preceded it. While at the EPA I participated in processes that assured that the terms of the convention are consistent with US regulatory and science based approaches and acceptable to environmental and industry groups alike. 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 was held last 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 US 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. At this point there seem to be no plans by the U.S. government to put such a process in place; Congress should address this point in legislation.

Persistent Organic Pollutants Cause Global Problems that Require Global Solutions

Persistent organic pollutants 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, polychlorinated biphenyls (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 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. Most POPs are transferred from a mother to the 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.

Given the seriousness of the threats to health and the environment that are posed by persistent toxic chemicals it should come as no surprise that the US government has taken many steps to eliminate and control their release to the environment. In 1978

amendments to the Toxic Substances Control Act, Congress directed the EPA to ban the manufacture of PCBs and to clean up PCBs in the environment. EPA banned DDT and many of the other most persistent and harmful pesticides. Under the 1990 Clean Air Act EPA was able to achieve dramatic reductions in dioxin releases from incinerators and we have also eliminated certain technologies that are associated with very high releases of dioxins such as chlorine paper pulp bleaching, production of certain chemicals that contain dioxin contaminants, and the herbicide 2.4.5-T ("Agent Orange")/

While at the EPA I participated in the development of 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[1]. This policy had some positive effect. 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[2]. This experience demonstrates that new POPs are under development every day; one should not assume that such developments would exclusively occur in the US.

In 1999, the EPA also lowered the reporting threshold for several of the most persistent bioaccumulative chemicals under the Toxics Release Inventory: 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 [3]. 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. Reporting under TRI has helped to clearly identify many sources of these chemicals to the environment in addition to the "usual suspects" such as the chemical industry. However, it should be noted that the Bush administration has proposed to alter these reporting thresholds and to decrease the frequency of such reporting.

It has long been recognized that domestic actions to control POPs emissions will not be sufficient to secure our nation's food supply and environment from harmful levels of contamination by POPs chemicals and pesticides. POPs know no boundaries and, unfortunately, POPs emitted from numerous small sources on a global basis can have a cumulative impact that is deleterious. The U.S. Government first took multilateral action on POPs in the context of the North American region. To secure the Great Lakes, which contains one-fifth of the world's supply of fresh water, the US and Canada established the Boundary Waters Agreement of 1909. In 1978 the two countries signed the first

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[1] 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.

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

[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. 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.

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 Because POPs are largely transported by air, Mexico was brought into the picture in efforts carried out under the North American Commission for Environmental Cooperation (CEC) to take action on the twelve "dirty dozen' POPs chemicals [4].

The LRTAP POPs Protocol

Air transport of POPs has also been controlled under the international LRTAP (Convention on Long-range Transboundary Air Pollution) POPs agreement adopted in 1988, is under the UN Economic Commission for Europe. The LRTAP POPs protocol bans the production and use of aldrin, chlordane, chlordecone, dieldrin, endrin, hexabromobiphenyl, mirex and toxaphene; phases out production of DDT, heptachlor, hexaclorobenzene, and PCBs; severely restricts the use of DDT, HCH (including lindane) and PCBs; reduces emissions of dioxins, furans, PAHs and HCB; and sets limit values emissions from incinerating municipal, hazardous and medical waste. While at EPA I worked with scientists and the chemical and pesticide industry to assure that the technical structure of the LRTAP POPs agreement was sound and in accord with scientific principles and policies that could be supported by all parties. This protocol came into force in October 2003 and unfortunately has not yet been ratified by the U.S. (although we have ratified the LRTAP convention).

The Stockholm Convention on Persistent Organic Pollutants

In May of 2001, the Stockholm Convention on Persistent Organic Pollutants (POPs) was signed by the by a number of nations including the United States. The treaty calls for the elimination of the pesticides aldrin, chlordane, dieldrin, endrin, heptachlor, hexachlorobenzene (HCB), mirex and toxaphene, as well as the industrial chemical polychlorinated biphenyls (PCBs); restriction of use of the pesticide DDT to disease vector control until safe, affordable and effective alternatives are in place; removal of PCB equipment; and minimization of unintentional release of dioxins and furans. It also includes provisions to include additional POPs to the treaty and prevent the introduction of new POPs into commerce, and 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. An amendment to add a chemical to the Stockholm Convention can only apply to the United States if we decide to "opt in" to it. The Bush Administration estimates that it will typically take about five years for a chemical to be nominated and ultimately 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. The Stockholm Convention comes into force last year.

Pending Legislation

You have before you today two bills that have been put forward for ratification of the PIC and POPs conventions. These two bills are similar with regards to the PIC convention but take different approaches to POPs ratification. H.R.4800 is a direct

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

approach that would fully ratify the Conventions while reserving the right for the US to make its own decision with about the regulation of any new POP. H.R.4591 adds a number of burdensome and complicated provisions, including novel criteria that are at variance with the language in both Convention and in current US law. Under H.R. 4591 the bar has been raised to such a significant degree that in my opinion it is a step backward in comparison with current U.S. law. Let me explain further:

Presumption of implementation: Congress needs to establish a presumption that the EPA will implement decisions made by the Stockholm Convention. Congress should expect that the US Government will fully participate in the decision making process of the convention, including the application of decision criteria and the consideration of invitation provided by the US government that is relevant to the criteria. Although Congress should set a clear expectation for regulatory action following a POPs listing, it should allow the EPA to make an independent regulatory decision either consistent with the Convention's listing, or in rejection of its applicability to the circumstances in the U.S. While HR 4800 would achieve this purpose, HR 4591 does not. Rather, HR 4591 neither requires action by EPA for decisions nor does it even set a timeline for the EPA to determine whether it would act or to publish a statement of reasons for its failure to act. HR 4591 gives citizens no recourse if the EPA fails to act

Decision standard: The standard that the US negotiated for the POPs convention, that is, to "protect against significant adverse human health and environmental effects associated with the chemical substance or mixture", should be the standard for actions to implement POPs convention decisions. HR 4800 adheres to this standard. HR 4591, on the other hand, is 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. These new procedures, if enacted by Congress, would increase the burden to EPA and the taxpayers of unnecessary analyses, open new opportunities for litigation, and render it difficult if not impossible for the EPA to take action to implement POPs listings. The existing TSCA section 6 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.

In closing, the US needs to step up to the plate to assume its share of the responsibilities for assuring global chemical safety. In the best of all possible worlds we would have been a member of the PIC, LRTAP POPs and Stockholm agreements from the beginning. However, there still time for us to become engaged as active participants. I hope that the members of the committee will come together in a bipartisan fashion to support legislation such as HR 4800. The future health of our children, and the planet, depend on it.

MR. GILLMOR. Thank you. I am impressed by the presentation of your statement.

We are in recess now and we will return right after the last vote. I would anticipate that would be about 12:35. Thank you very much.

[Recess.]

MR. GILLMOR. The subcommittee will come to order, and we will proceed with Mr. Elliott.

MR. ELLIOTT. Thank you, Mr. Chairman.

I am an attorney in private practice with Willkie Farr and Gallagher, but I am testifying today as a private citizen and not on behalf of any client or interest. I am former General Counsel to EPA and a professor

of environmental law at Yale and Georgetown, and particularly interested in international and comparative environmental law.

I want to talk particularly about the process for adding new substances through the informal rulemaking. But the overall perspective I have is I am encouraged by the occasional notes of bipartisanship and getting this done. I am discouraged by some of the partisan posturing on all sides and I do think the important issue is not the differences between the two bills, which I see as being relatively narrow and technical, but working together to get the POPs Conventions ratified and in place.

With regard to the issue of adding new substances through informal rulemaking, I do support the approach in the Gillmor bill, the broader consideration of issues. I think there are a number of distinct advantages to having a broad process through informal rulemaking, rather than trying to narrowly constrain the issues. Number one, it is a safety valve in case American interests or special situations have not previously been adequately considered. Number two, I think it is a very important opportunity to promote public understanding and acceptance of the international decisions. Number three, based on my experience, attempts to exclude economics and risk issues from other environmental statutes haven't worked very well and actually when you tell the EPA Administrator we are not supposed to think about economics, I actually think it takes on a greater role. My experience in briefing EPA administrators on economics is they normally said okay, I thought it was worse than that, really that is not that bad. So I think it may actually be counterproductive.

And finally, I do not think the American people are ready, if they ever will be, to delegate our Government's decision-making authority to an international bureaucracy. And with all due respect to my colleague, Glenn Wiser, I do not believe that one bill is more true to the letter or spirit of the international conventions than the other. I think that there is a difficult constitutional issue, not with regard to whether or not treaties are part of the law of the land, I think that is agreed, but over whether or not we can legitimately delegate the Government's decision-making authority to others. We have in the past, for example: the Montreal Protocol is part of the Clean Air Act. We have a long tradition of implementing international agreements through our own domestic processes and I think that is the approach that we should follow here.

My last comment is I was General Counsel of the EPA at the time of the asbestos ban decision and the court decision overturning it. I do agree with those who suggest that TSCA needs to be streamlined and improved in some ways, but I do not think this is the right time or place to try to do that. And I would note finally, that I do not believe that the Solis bill by limiting a standard in the rulemaking "significant adverse

effect" would solve the problem that we had with the asbestos decision, because that was precisely the issue on which the court reversed us; we had not adequately shown a "significant adverse effect."

So for all those reasons, I favor the broader ventilation of the issues through rulemaking in the Gillmor bill, but my overall perspective is you all are close and I hope you can work together and get this done.

Thank you for the opportunity to share my views.

[The prepared statement of E. Donald Elliott follows:]

PREPARED STATEMENT OF E. DONALD ELLIOTT, PARTNER, WILLKIE FARR & GALLAGHER, LLP

Summary of Key Points in Testimony of E. Donald Elliott

- Law professor and former EPA General Counsel; Supports Gilmor legislation, (H.R. 4591) especially aspect of adding new substances through informal rulemaking under TSCA.
- Implementing international regimes for controlling hazardous chemicals should be done in a way that preserves what is distinctively valuable about U.S. environmental law and administrative procedures and without generating unnecessary controversy about giving up national sovereignty to international bodies.
- Informal rulemaking following opportunity for public notice and comment is "one of the greatest inventions of modern government." The issues open to discussion in such a rulemaking should not be unduly constrained or restricted.
- Broad notice and comment rulemaking provides an important safety valve in case American interests or special situations have not been considered adequately.
- Broad notice and comment rulemaking before adding new substances also provides an important opportunity to promote public understanding and acceptance of international decisions by allowing them to be discussed and considered at the national level.
- Legislating that any consideration of economics or risk substitution are off limits in the rulemaking would be a mistake. Artificial limits on what can be raised are not only bad policy, but perversely, may result in economic considerations actually taking on a larger role in decisions, because it hands opponents the argument that economics and substitution effects have not been properly considered, as opposed to properly airing out those issues at the administrative level.
- The American people are not ready – if they ever will be – to delegate our government's decision-making authority to faceless international bureaucrats over whom they have no control. Those of us who support international regimes to control hazardous chemicals do not need to pick an unnecessary fight over the controversial issue of giving up national sovereignty.

Testimony of E. Donald Elliott[1]

As a long-time academic in environmental and administrative law, as well as a former EPA General Counsel and a practicing environmental lawyer, I am pleased to support H.R. 4591, Mr. Gillmor's legislation to implement the three important international agreements listed above, and particularly the aspect of adding new substances through rulemaking under the Toxic Substances Control Act (TSCA). Implementing the international regimes for controlling hazardous chemicals as a matter of U.S. law is important and overdue, but it should be done wisely, and in a way that preserves what is distinctively valuable about U.S. environmental law and administrative procedures without generating unnecessary controversy about giving up national sovereignty to international bodies.

The most important issue for the next generation of environmental policy, in my opinion, is how to integrate the system of laws for protecting the environment in the U.S. into the developing global system. For that reason, I have written extensively arguing for greater harmonization of U.S. environmental law with the evolving worldwide system, and I currently teach a seminar at the Georgetown University Law Center comparing approaches for regulating chemicals, biotech and nanotech in the U.S. and the European Union. Integrating U.S. law with international environmental law was also an important focal point during my tenure at EPA, where we were involved in setting up the international activities division and writing domestic legislation to implement the Montreal Protocol on CFCs into the Clean Air Amendments of 1990.

Suffice it to say that there are important differences between the regulatory regimes, cultures, legal traditions and institutional approaches to environmental regulation in the U.S. and abroad. Both we and our foreign colleagues have many things to learn from others, but also many important techniques to share with the rest of the world. I am convinced that in the long-run the system of integrated environmental protection that emerges internationally will be an amalgam that incorporates the best features of the U.S. system, the E.U. system and also features drawn from other countries, including developing countries. But we are nowhere near being able to design that ultimate system today. It will evolve over time as we interact and argue about principles and specific cases in numerous international forums.

But in the meantime, we must be careful to preserve what is best about U.S. environmental regulation and administrative procedures, while at the same time learning to integrate successful approaches from our colleagues worldwide. But I emphasize that not all foreign approaches are successful just because they are different! I have little patience with those who are concerned that E.U. is somehow getting "ahead" on the environment, and therefore that we must rush to adopt piecemeal European approaches to environmental protection, many of which are remarkably similar to ideas that we tried and abandoned 20 or 30 years ago! And in any event, some are alien to our legal system and democratic traditions.

There are many features of environmental law in the U.S. that are far superior to the systems that prevail in Europe and at the international level. These include (1) broad opportunities for public participation and input from all elements of society, (2) sophisticated approaches for regulatory impact assessment including risk assessment and economic analysis, and (3) judicial review by affected groups who feel their interests have not been properly considered by decision-makers. I support the Gilmor legislation because it seems to me to preserve these distinctively-American aspects by using notice and comment rulemaking under the Toxic Substances Control Act to implement the

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[1] Partner and Chair of Worldwide Environmental Department, Willkie Farr & Gallagher LLP, Professor (adj) of Law, Yale and Georgetown Law Schools; Former General Counsel, Environmental Protection Agency, 1898-1991.

international agreements to control hazardous chemicals, and particularly to add new substances to the regime.

Informal notice and comment rulemaking under Section 553 of the Administrative Procedure Act has been called "one of the greatest inventions of modern government,"[2] by a preeminent administrative law scholar, the late Kenneth Culp Davis, then of the University of Chicago law school. Modeled on legislative hearings, notice and comment rulemaking before an administrative agency can be a relatively quick and inexpensive means for allowing all affected elements of society to participate in policymaking by submitting written comments and data for consideration by decision-makers. We have a well-developed system of notice and comment rulemaking to provide opportunities not just for "transparency" but for genuine public participation in making decisions, while such processes are only beginning to develop aboard.

I urge the Subcommittee and the Congress to preserve what is best about the U.S. system for environmental regulation by allowing broad opportunities for public participation in rulemakings under TSCA as a way of implementing the conventions, and most particularly on the controversial issue of adding new substances to the international regimes. In my opinion, rulemaking that allows broad consideration and discussion of all relevant factors are a good investment, because they will greatly enhance the acceptability of international decisions by providing an opportunity for discussion and re-consideration at the national level. I anticipate that there will be few, if any, actual instances of EPA deviating from the international consensus to add a new hazardous substance to the regime, but broad notice and comment rulemaking provides an important safety value in case American interests or special situations have not been considered, as well as an important opportunity to promote public understanding and acceptance of international decisions by allowing them to be discussed and considered at the national level. The American people are not ready – if they ever will be – to delegate our government's decision-making authority to faceless international bureaucrats over whom they have no control by writing what amounts to a blank check to follow their lead. There is no more recurrent and controversial issue in 20th century law than the extent to which American "sovereignty" can be delegated to international bodies. Even if it can be done constitutionally (an issue that is by no means self-evident), it is unwise and should not be done lightly as a policy matter. This is a fight that we in the environmental area do not need and should not pick. The approach in the Gilmore bill is a sensible way to avoid an unnecessary and unproductive controversy about the process for adding new substances to the international regulatory regime.[3]

I am aware that other proposals, including that introduced by Ms. Solis, take a narrower approach and would radically constrain the issues open for consideration in rulemaking, essentially limiting EPA's mandate to verifying that the international body acted correctly in finding that a substance poses a significant threat to human health or the environment. While constraining the factors that EPA may consider in a rulemaking is an approach that is used in some domestic environmental laws, I think that experience has shown that it is wiser to let participants raise a broad range of concerns for the agency's consideration. For example, the New Source Performance Standards under section 111 of the Clean Air, which allows broad consideration of economic and energy effects as well as pollution reduction benefits, has generally worked efficiently and without great controversy. Whereas the decision by Congress to preclude EPA from

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[2] Kenneth Culp Davis, Cases, Text and Problems on Administrative Law 241 (6ht ed. 1977).

[3] Thus, I am in general agreement with the testimony of the American Chemistry Council in this hearing. I do not necessarily subscribe to their position, however, the use of informal rulemaking under TSCA Section 6 should be limited to implementing international agreements. As I have written elsewhere, the cumbersome procedures and evidentiary standards for regulating substances under TSCA section 6 are badly broken and need to be fixed, but that it is topic for another day.

considering economics in setting National Ambient Air Quality standards has provoked great controversy and litigation. In my view, trying to prohibit discussion of important values is self-defeating and counter-productive. My experience in briefing Administrators of EPA over the years about the anticipated economic effects of proposed rules was that they generally breathed a sigh of relief and said, "oh that's not so bad; I thought it would be worse." Perversely, then, ruling any consideration of economics out of bounds before the game begins may result in economic considerations actually taking on a larger role in the ultimate decision, because opponents can argue that economics and risk substitution effects were never even considered. On the other hand, when those considerations are thoroughly ventilated and laid to rest on the record, EPA generally moves forward anyway, but with greater confidence that the actual economic and other anticipated effects will not in fact be nearly as disastrous as imagined by the opponents.

It is ironic to me that some of my friends in the environmental movement argue for constraining public dialogue and limiting consideration to certain specified factors only. The central insight of our first great environmental statute, the National Environmental Policy Act of 1969, which has been emulated worldwide, is that public understanding and acceptance of decisions significantly affecting the human environment will be increased if all relevant considerations are laid on the public record prior to a decision. We should follow that same insight in adding new substances to the POPs convention by encouraging broad-ranging public dialogue and participation.

I appreciate this opportunity to share my views with the Subcommittee.

MR. GILLMOR. Thank you, Mr. Elliott.

Mr. Goldberg.

MR. GOLDBERG. Thank you, Mr. Chairman.

I am Steven Goldberg. I am Vice President and Associate General Counsel of PSF Corporation and I am 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 U.S. We commend you, Mr. Chairman, and Ms. Solis, and the entire committee for your continued leadership on these complex issues. Be assured, CropLife America does support the POPs and PIC international and environmental agreements.

It may be obvious that our industry's products provide many benefits to people in the environment. Our products have an enormous beneficial impact on the availability of abundant and affordable food and fiber, while also protecting people, animals, and our homes and businesses from disease carrying and destructive pests. At the same time, we recognize that a number of the products currently listed in the POPs Convention are pesticides. The United States does have the strongest and most emulated pesticide regulatory system in the world and it is especially notable that under the Government's statute the specific pesticides listed in the Convention were controlled in the U.S. long before the passage of the treaty.

It is important to note that FIFRA does apply a risk-benefit standard in U.S. law, and for that reason we believe that the Gillmor bill, H.R.

4591, correctly reflects the decisions that should be taken in implementing this treaty.

Let me emphasize a few more points that have been made in my testimony. Given Congress' specific and recurrent decisions on pesticide laws over the years, we believe FIFRA provides the necessary and appropriate statutory framework to implement the Conventions without adding pesticide provisions to TSCA. We believe that it is the subcommittee's intent to maintain that jurisdictional alignment and we look forward to working with the subcommittee to preserve that alignment.

Second, EPA needs to 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 implanting legislation not enable other countries to use these agreements to adversely impact the availability of U.S. registered pesticides that meet our standards for use in agriculture, public health, and for other purposes. 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.

For these reasons, we support H.R. 4591 and commend Mr. Gillmor and your staff for continued leadership. This bill supports a science-based decision-making standard that parallels current U.S. law for evaluating chemical substance and risk mitigation and parallels U.S. pesticide implementation. We further support the bill's preservation of U.S. sovereignty in determining which products can be manufactured, imported, and used. As mentioned before, timely U.S. ratification is vital for this legislation and these treaties. Members of the LRTAP and Stockholm Conventions have nominated additional chemicals that could be potentially banned. Some of these newly listed chemicals, such as lindane, would have a direct impact on domestic manufacturers and agricultural producers. Lindane is safely used today as a seed treatment for barley, wheat, oats, and rye, and for some of the crops remains the only available alternative. It is also approved by the U.S. Food and Drug Administration as a topical treatment for serious health risks such as human scabies and head lice. The U.S. will be excluded from meetings considering these products unless legislation is signed into law and the Conventions are ratified.

This hearing is an important step towards U.S. ratification. This is a complicated issue and I commend the Chairman and the subcommittee for the progress that has been made towards crafting implementing legislation. We support H.R. 4591 as introduced by Chairman Gillmor, and urge this committee to quickly adopt the legislation and allow the U.S. full participation in these treaties.

Thank you.

[The prepared statement of Steven Goldberg follows:]

PREPARED STATEMENT OF STEVEN GOLDBERG, VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL, REGULATORY LAW & GOVERNMENT AFFAIRS, 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 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 your continued leadership on this complex issue. I appreciate the opportunity to testify before you this morning on the legislative proposals 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). I had the distinguished opportunity to appear before this Committee in 2004 on this very issue and I think you will find our position on these important treaties are as relevant today as they were then.

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 guide U.S. decision-making 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 beneficial impact on the availability of abundant and affordable food and fiber while also protecting people, animals, and our homes and businesses from disease-carrying and destructive pests. Pesticides control outbreaks of crop-damaging diseases, insect infestations and noxious weeds in order to enhance U.S. food and fiber production. Pesticides are also used to combat damaging and health-threatening pests and insects, and to control and eliminate vector-borne illness caused by rats, mosquitoes (such as West Nile virus and other encephalitis) and ticks (such as Lyme disease), among others. They combat cockroaches and mold/mildew in housing, restrooms, cafeterias and elsewhere, reducing known allergens that cause 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 the production of 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 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. According to Nobel Peace Prize winner Norman Borlaug, "Growing more crops and trees per acre leaves more land for nature." Former U.S. Senator George

McGovern also 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 142 separate scientific safety tests to ensure that a product, when used properly, does not present health or environmental concerns. On average, only one in 139,000 chemicals makes it from the chemist's laboratory to the farmer's field. Pesticide development, testing and EPA approval takes 8 to 10 years and costs manufacturers up to $200 million for each product.

Given Congress' specific and recurrent decisions on pesticide law over the years, we believe FIFRA provides the necessary and appropriate 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 alignment of FIFRA and TSCA, and we look forward to working with the Committee to preserve this alignment.

CropLife America supports the sovereign right of nations to decide which pesticides they will allow to be imported and used within their borders. The POPs and PIC Conventions recognize this important concept and provide for each nation's right to implement the agreements within its 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 future agreements. Health and environmental protections established 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 for use in agriculture, public health protection and other purposes. The agreements should not become the means 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.

For these reasons, we support the legislation introduced by Chairman Gillmor and commend both he and his staff for their continued leadership in moving this issue forward. We believe H.R. 4591 embodies the key provisions identified above and best implements the original scope and intent of the treaties. The bill supports a science-based, decision-making standard that parallels current U.S. law for evaluating chemical substances and risk mitigation. We further support the bill's preservation of U.S.

sovereignty in determining which products can be manufactured, imported and used domestically.

We believe that timely U.S. ratification and implementation of these treaties is vital to protecting our country's interests. A number of meetings have already been held by each of the three Conventions, and yet the U.S. remains strictly an observer to these negotiations. The Rotterdam Convention on PIC held its second Conference of the Parties meeting in September 2005 and more recently a meeting of the Chemical Review Committee in February 2006. The second Conference of the Stockholm Convention on POPs is scheduled for May of this year. Decisions made at these meetings will continue to impact U.S. businesses and markets and yet U.S. negotiators have no authority to influence these policy discussions.

Members of both the Long-Range Transboundary Air Pollution (LRTAP) and the Stockholm Conventions have recently nominated additional chemicals that could potentially be banned in accordance with the POPs agreements. Some of these newly listed chemicals, such as lindane, would have a direct impact on domestic manufacturers and agricultural producers. Lindane is safely used today as a seed treatment for barley, wheat, oats and rye for wireworm control and for some of these crops, remains the only alternative available. While limited alternatives do exist for other agricultural pests controlled by lindane, their cost and effectiveness in controlling related pests make them economically unfeasible in the U.S. Lindane is also approved by the U.S. Food and Drug Administration as a topical pharmaceutical treatment for serious health risks such as human scabies and head lice. Approximately one in every ten American children will suffer from head lice infestation by the time they reach the 6th grade. It is imperative that the U.S. obtain official voting status while these and other valuable products are being considered for possible elimination by the Conventions. The U.S. will be excluded from these meetings until implementing legislation is signed into law and the conventions are ratified by the U.S., hopefully 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, such as those outlined in H.R. 4591. 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 and to "opt-in" or "opt-out" of each international POPs listing based on its 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 pesticides, recognizing that some beneficial uses still exist, particularly in developing countries, as reflected in the specific exemptions in annexes of both agreements.

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 for stakeholder opportunity to comment on 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 intact through the legislative process.

Recommendations for POPs and PIC Implementing Legislation

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

- The POPs and PIC agreements affect not only U.S. pesticide manufacturers but U.S. growers as well. Without the active participation of the U.S. government in governance of the Conventions, having full representation and voting power, America's ability to export commodities grown with the benefits of U.S. crop protection products could be subject to arbitrary bans and unfair trade barriers by other nations.
- 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.
- Any modification of existing domestic use exemptions for pesticides listed under POPs or PIC must be effectuated through the existing FIFRA Section 6 process.
- We further believe that any chemicals proposed as replacement alternatives to those listed as POPs must also be subject to the same scientifically rigorous socio-economic and risk/benefit assessments.

Conclusion

In closing, our industry remains committed to the scientific growth and improvement of regulatory capacity, especially in the developing world. For more than 10 years, we have been active participants in the OECD and NAFTA international forums

to harmonize pesticide regulatory processes. 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. ratification of 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. We support H.R. 4591 as introduced by Chairman Gillmor and urge this committee to quickly adopt this legislation and allow the U.S. full participation in the treaties.

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.

[Below we use agreements, treaties, and conventions synonymously in the same paragraph.]

Summary

- CropLife America supports the POPs and PIC agreements and remains committed to working with both Congress and the Administration to enact legislation needed to ratify these treaties. Because the U.S. has the strongest and most emulated pesticide regulatory system in the world, we support legislation that protects U.S. sovereignty in complying with its international obligations. The Federal Insecticide, Fungicide and Rodenticide Act 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 alignment between FIFRA and TSCA and look forward to working with Congress to achieve this intent.

- CropLife America supports FIFRA as the basis for U.S. pesticide decisions under the POPs/PIC treaties. The rights of individual countries to determine which pesticides will be permitted for use domestically and allowed to be imported into their country must be protected. We further support the existing risk-benefit standards established by FIFRA and encourage the adoption of implementing legislation that preserves these principles.

- A number of meetings have already been held by members of each treaty where participation by the U.S. has been limited to observer status. Meanwhile, foreign countries can continue to propose the elimination of valuable products used in the U.S. for protecting our food supply and public health. We encourage the timely ratification of the treaties to allow for official U.S. participation.

CropLife America believes H.R. 4591 provides the legal authority needed for the U.S. to ratify the treaties. We further believe this legislation best reflects the original scope and intent of the POPs/PIC treaties and encourage Congress to adopt this legislation and allow the U.S. to ratify these important agreements.

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

Mr. Wiser.

MR. WISER. Thank you, Mr. Chairman.

I would like to begin by making what I think should be a very clear and obvious point and that is that neither the Gillmor nor the Solis bill cedes rulemaking authority to the United Nations. Both bills respect and maintain U.S. sovereignty by ensuring that the United States can make its own independent judgment whether to be bound by future international decisions to regulate additional POPs. However, they do have a number of striking contrasts. I will address three of them.

First, timely U.S. action. Once the United States commits to regulating additional POPs chemicals that have been added to the Stockholm Convention, EPA must have the mandate to respond quickly and effectively to that commitment. The Gillmor bill does not require EPA to take any action after an international decision to add a new POP to the Convention, even when the United States fully supports that decision. The Solis bill embodies a better approach. It directs EPA to take prompt regulatory action when a new POP chemical is added to the Convention. Such action can include the decision not to regulate if EPA concludes that the chemical is not likely to cause significant adverse effects on human health or the environment.

Second, the regulatory standard. A health-based decision-making standard is at the heart of the Stockholm Convention. As a treaty that would become part of our supreme law of the land, the Convention should be the source of the standard for U.S. implementing amendments. The Gillmor bill jettisons the Convention's health standard and instead directs EPA to search for a reasonable balance between the cost to chemical companies and the benefits of protecting children and other vulnerable Americans from some of the world's most dangerous chemicals. Such cost-benefit standards have been shown time and again to overestimate the cost of regulation and dramatically undervalue the benefits of protecting public health. Moreover, because the Gillmor bill would allow cost to trump health, it would severely jeopardize the ability of the United States to join the rest of the world in accepting decisions to add dangerous POPs chemicals to the treaty. The Solis bill adopts the Stockholm Convention's health-based standard for regulating POPs. The bill asks EPA to implement the control measures specified in the Convention in a manner that protects again significant adverse human health and environmental effects.

Third and finally, the standard for judicial review. POPs implementing legislation must avoid approaches that do not work. The Government Accountability Office reported last year that EPA has regulated very few existing chemicals under TSCA Section 6, none since 1990, because EPA has been unable to meet the TSCA regulatory standard. The report adds that TSCA's substantial evidence rule for judicial review has been a significant factor in that failure. The Gillmor

bill would extend this failure to POPs legislation by combining a cost benefit balancing standard for rulemaking and a substantial evidence standard for judicial review. Thus, it would apply two of the most onerous reasons why TSCA Section 6 has failed as a viable tool with which EPA can protect human health and the environment from extremely dangerous chemicals. This Section 6 isle approach should have no place in implementing legislation for international obligations of the United States because it has failed to protect Americans and because it would make it difficult or impossible for EPA to implement a new POPs listing decision. The Solis bill takes a more workable and appropriate approach where international relations are implicated by providing any person the right to petition for judicial review when they allege a POPs rulemaking has been arbitrary or capricious.

In closing, we urge you, the members of this subcommittee, to support legislation that will enable the United States to reassert global leadership in protecting its citizens and that will live up to the expectations of the American people that protecting human health should be a primary objective of U.S. environmental and health law. The Solis bill will do this in a pragmatic and effective manner, the Gillmor bill will not.

Thank you.

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

PREPARED STATEMENT OF GLENN M. WISER, SENIOR ATTORNEY, CENTER FOR INTERNATIONAL AND ENVIRONMENTAL LAW

I. Introduction

Mr. Chairman and Members of the Subcommittee:

My name is Glenn Wiser. I am a Senior Attorney at the Center for International Environmental Law (CIEL), where I manage our Chemicals Program. Thank you for the opportunity to testify on behalf of my organization and on behalf of our partners, including National Environmental Trust, Oceana, Pesticide Action Network North America, Physicians for Social Responsibility, Sierra Club, U.S. Public Interest Research Group, Commonweal, Citizen's Environmental Coalition, and the Environmental Health Fund, 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 national environmental law and policy around the world.

Much of my work at CIEL has focused on the development and implementation of multilateral environmental and health treaties, including the Stockholm POPs Convention. I am a member of the Steering Committee of the International POPs Elimination Network (IPEN), a global public interest network with more than 400 participating non-governmental organizations in 70 countries in all regions of the world. Since May, 2001 I have worked closely with numerous U.S. 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, in a manner consistent with the objects and purposes of the Convention. As part of these activities, we spearheaded the preparation of a letter sent

earlier this week to Representatives Barton, Dingell, Gillmor, and Solis from 45 of America's most prominent environmental health organizations to encourage leadership in ensuring that the paramount health and environmental protection goals of the Stockholm Convention are fully embodied in U.S. implementing amendments to TSCA. [Please see attached letter to Representatives Barton, Dingell, Gillmor, and Solis dated February 28, 2006.]

Today, I would like to provide you with a summary of our organizations' views on legislation that would amend the Toxic Substances Control Act (TSCA) to implement the Stockholm POPs Convention, the LRTAP POPs Protocol, and the Rotterdam PIC Convention. My comments will focus primarily on those aspects of the legislation that deal with the Stockholm POPs Convention. First, I will briefly describe what POPs are and how the Stockholm Convention deals with them. Second, I will compare the Solis bill (H.R. 4800) and the Gillmor bill (H.R. 4591), and will explain that, while both bills ensure the sovereignty of U.S. decision-making on POPs, only the Solis bill will adequately implement both the letter and spirit of the Stockholm Convention. Third, I will discuss some key provisions of the Stockholm Convention related to listings of additional POPs, to clarify their respective roles and their relevance to U.S. implementing amendments.

II. POPs and the Stockholm Convention

Persistent organic pollutants (POPs) are a global threat. Carried around the world by wind and water, they persist for years in the environment and accumulate in our bodies, where they can cause cancer, neurological and learning disabilities, and harm immune and reproductive systems. Infants and children in the United States and throughout the world are especially vulnerable to exposure before birth and from their mother's milk. Many Americans, especially Alaskans and indigenous peoples, workers, and communities near industrial facilities, bear a heavy burden of chemical contamination from POPs.

The Stockholm POPs Convention was negotiated with the active participation of the U.S. government and signed by the Bush Administration with broad support from the business community, workers, and the environmental and health community. The treaty bans or severely restricts ten industrial or agricultural chemicals, and sets the goal of minimizing and ultimately eliminating two industrial byproducts. At U.S. insistence, it also establishes a rigorous, science-based process for identifying and adding other POPs to the Convention. As none of the "dirty dozen POPs" chemicals presently in the treaty are intentionally produced in the United States, how Congress chooses to implement the treaty's provisions for regulating other POPs is the test of U.S. leadership in this area.

III. The Solis and Gillmor Bills: H.R. 4800 and H.R. 4591

Representatives Hilda Solis and Paul Gillmor have each introduced bills that would amend TSCA for the purpose of allowing the United States to implement the Stockholm Convention, the LRTAP POPs Protocol, and the Rotterdam PIC Convention. Both bills respect and maintain U.S. sovereignty by ensuring that the United States can make its own, independent decisions whether to be bound by future international decisions to regulate additional POPs. But the two bills have widely divergent visions of whether and how Americans should be protected from these dangerous substances. The Solis bill (H.R. 4800) seeks to implement the letter and spirit of the POPs Convention by giving EPA clear authority to regulate POPs and by living up to the expectations of the American people that protecting human health should be a primary objective of U.S. environmental and health law.

In contrast, the Gillmor bill (H.R. 4591) would abandon the Convention's fundamental health protection goal, introduce a standard that will weaken U.S. environmental and health safeguards, and create regulatory hurdles that would make it

practically impossible for EPA ever to protect Americans from some of the world's most dangerous chemicals. Indeed, judging by the text of the Gillmor bill and the press release issued when it was introduced, one might reasonably conclude that the drive behind the bill is to enable the Bush Administration to win a "seat at the table" for negotiations on additional POPs that may be added to the Stockholm Convention, while ensuring that EPA will never have sufficient authority to regulate any such POPs that eventually are added.

We believe such an approach would be cynical and misguided.

If and when it is ratified, the Stockholm POPs Convention will become, as Article VI of our Constitution provides, part of the "supreme law of the land." Thus, we urge all members of this Subcommittee, in considering implementing legislation for the Convention, to support TSCA amendments that are consistent with the treaty's binding, overarching objective, as stated in its Article 1: ". . . [T]he objective of this Convention is to protect human health and the environment from persistent organic pollutants."

The contrasts between the Gillmor and Solis bills are especially striking in the following areas:

A. Timely U.S. action

Once the United States commits to regulating additional POPs chemicals that have been added to the Stockholm Convention, EPA must have the mandate to respond quickly and effectively.

- The Gillmor bill does not require EPA to take *any* action after an international decision to add a new POP to the Convention, even when the United States supports the decision.
- The Solis bill embodies a better approach, directing EPA to take prompt regulatory action when a new POP chemical is added to the Convention. Such action can include a decision *not* to regulate if EPA concludes that the chemical is not likely to cause significant adverse effects on human health or the environment.

B. Regulatory standard

A health-based decision-making standard is at the heart of the Stockholm Convention. As a treaty that will become part of "the law of the land," the Convention should be the source of the standard for U.S. implementing amendments.

- The Gillmor bill jettisons the Convention's health standard and directs EPA to find a "reasonable balance" between the costs to chemical companies and the benefits of protecting children and other vulnerable Americans from some of the world's most dangerous chemicals. Such cost-benefit standards have been shown time and again to overestimate the cost of regulation and dramatically undervalue the benefits of protecting public health. Moreover, because the Gillmor bill would allow costs to trump health, it would severely jeopardize the ability of the United States to join the rest of the world in accepting amendments that add dangerous POPs chemicals to the treaty.
- The Solis bill adopts the Stockholm Convention's health-based standard for regulating POPs. The bill directs EPA to implement the control measures specified in the Convention in a manner that protects against "significant adverse human health and environmental effects."

C. Judicial review

The Government Accountability Office (GAO) reported last year that EPA has regulated very few existing chemicals under TSCA section 6 (none since 1990), because

it has had difficulty meeting the TSCA regulatory standard.[1] TSCA's "substantial evidence" rule for judicial review has been a significant factor in that difficulty:

> According to EPA officials, the economic costs of regulating a chemical are usually more easily documented than the risks of the chemical or the benefits associated with controlling those risks, and *it is difficult to show by substantial evidence that EPA is promulgating the least burdensome requirement* (emphasis added).[2]

- By combining a cost-benefit balancing standard for rulemaking and a substantial evidence standard for judicial review, the Gillmor bill would apply to POPs legislation two of the most onerous reasons why TSCA § 6 has failed as a viable tool with which EPA can protect human health and the environment from extremely dangerous chemicals. This § 6 approach should have no place in implementing legislation for international obligations of the United States, because it could make it difficult or impossible for EPA to reliably implement a new POPs listing decision.
- The Solis bill takes a more workable, appropriate approach where international relations are implicated, by providing any person the right to petition for judicial review when they allege that a POPs rulemaking has been arbitrary or capricious.

D. Relationship to state measures to protect health

Many states are already taking action to regulate POPs, including California, Hawaii, Illinois, Maine, Massachusetts, Michigan, New Jersey, New York, and Washington.

- The Gillmor bill would not only make it difficult for EPA to regulate a newly listed POP chemical, but would also preempt all state and local POPs regulations and prohibit states from taking regulatory action in the future. This sweeping preemption language could void state and local measures to control POPs even when the EPA ultimately fails to regulate the chemical.
- The Solis bill respects state and local efforts to protect public health from POPs by specifically allowing states to adopt or maintain stricter standards.

IV. Stockholm Convention Provisions for Additional POPs Listings

In past discussions on POPs implementing legislation undertaken by this Subcommittee, there has been some confusion about how the Stockholm Convention's "adding mechanism" for other POPs works. This confusion has led to an erroneous belief by some that the Convention somehow authorizes or even requires a cost-benefit balancing standard. This section of my testimony attempts to alleviate some of this confusion by explaining the functions of some of those parts of the treaty that are related to decision-making on additional POPs.

A. Article 8.7(a) articulates the standard for determining whether a substance is a POPs chemical under the Stockholm Convention

Stockholm Article 8.7(a) articulates the standard by which the Convention's Persistent Organic Pollutants Review Committee (POPRC) shall determine whether a chemical is a POP and thus, whether global action is warranted: a proposal to list a chemical shall proceed if the POPRC decides, on the basis of the risk profile conducted in accordance with Annex E, that "the chemical is likely as a result of its long-range

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[1] GAO, *Chemical Regulation: Options Exist to Improve EPA's Ability to Assess Health Risks and Manage Its Chemical Review Program* 27-29 (GAO-05-458, June 2005).
[2] *Id.*

environmental transport to lead to significant adverse human health and/or environmental effects such that global action is warranted." The Solis bill contains a regulatory standard based on this Article 8.7(a) standard, while the Gillmor bill does not.

B. Annex F outlines informational considerations; it does not contain a rulemaking standard

The Convention's 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. Confusion about the function of Annex F may be why some members of this Subcommittee have seemed to suggest or accept the argument that cost-benefit "balancing" is required by the Convention. Moreover, it may explain why they have claimed that statutory authority allowing EPA to regulate only 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 noted above, 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, Annex F does not contain any "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."

C. The fundamental Convention standard for control measures is elimination

The core terms of Stockholm Article 3 establish the Convention's fundamental 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.

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 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.

D. A cost-benefit "balancing" standard will not enable the United States to comply with Stockholm new-listing amendments

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. Thus, 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 does not pose significant adverse health or environmental effects. 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.

V. Conclusion

In closing, on behalf of my organization and our partners, and in collaboration with the 45 U.S. environmental and health organizations who endorsed Tuesday's letter to Representatives Barton, Dingell, Gillmor, and Solis, I urge you to support implementing legislation that will enable the United States to reassert global leadership in protecting its citizens, especially our children and children's children, from persistent organic pollutants. The Solis bill will do this in a pragmatic and effective manner, while the Gillmor bill will not.

Attachment: Environmental and health organizations letter to Representatives Barton, Dingell, Gillmor, and Solis dated February 28, 2006

*** Advocates for Environmental Human Rights * Alaska Community Action on Toxics * American Rivers * Arizona Toxics Information * Beyond Pesticides * Breast Cancer Fund * Californians for Alternatives to Toxics * Center for Environmental Health * Center for Health, Environment and Justice * Center for International Environmental Law * Chemical Weapons Working Group * Circumpolar Conservation Union * Citizen's Environmental Coalition * Clean Water Action * Commonweal * Department of the Planet Earth * Earthjustice * Ecology Center * Environment California * Environmental Health Fund * Environmental Health Strategy Center * Environmental Working Group * EnviroSpec * Friends of the Earth * Foundation for Advancements in Science and Education * Greenpeace * Indigenous Environmental Network * International Indian Treaty Council * International POPs Elimination Network * League of Conservation Voters * MOMS (Making our Milk Safe) * National Environmental Trust * National Pediculosis Association * National Wildlife Federation * Natural Resources Council of Maine * Pesticide Action Network North America * Physicians for Social Responsibility * Oceana * San Francisco Physicians for Social Responsibility * Science and Environmental Health Network * Sciencecorps * Sierra Club * U.S. Public Interest Research Group * Washington Toxics Coalition * World Wildlife Fund ***

February 28, 2006

The Honorable Joe Barton
Chairman
House Committee on Energy and Commerce
2109 Rayburn Building
Washington, DC 20515

The Honorable John D. Dingell
Ranking Member
House Committee on Energy and Commerce
2328 Rayburn Building
Washington, DC 20515

The Honorable Paul E. Gillmor
Chairman
House Subcommittee on Environment
and Hazardous Materials
1203 Longworth Building
Washington, DC 20515

The Honorable Hilda L. Solis
Ranking Member
House Subcommittee on Environment
and Hazardous Materials
1641 Longworth Building
Washington, DC 20515

Re: Legislation to implement the Stockholm Convention on Persistent Organic Pollutants (POPs)

Dear Chairmen and Ranking Members:

We write to strongly encourage your leadership in ensuring that the paramount health and environmental protection goals of the Stockholm Convention are fully embodied in U.S. implementing amendments to the Toxic Substances Control Act (TSCA). Persistent organic pollutants (POPs) are a global threat. Carried around the world by wind and water, they persist for years in the environment and accumulate in our bodies, where they can cause cancer, neurological and learning disabilities, and harm immune and reproductive systems. Infants and children in the United States and

throughout the world are especially vulnerable to exposure before birth and from their mother's milk. Many Americans, especially Alaskans and indigenous peoples, workers, and communities near industrial facilities, bear a heavy burden of chemical contamination from POPs.

The Stockholm POPs Convention was negotiated with the active participation of the U.S. government and signed by the Bush Administration with broad support from the business community, workers, and the environmental and health community. The treaty bans or severely restricts ten industrial or agricultural chemicals, and sets the goal of minimizing and ultimately eliminating two industrial byproducts. At U.S. insistence, it also establishes a rigorous, science-based process for identifying and adding other POPs to the Convention. As none of the "dirty dozen POPs" chemicals presently in the treaty are intentionally produced in the United States, how Congress chooses to implement the treaty's provisions for regulating other POPs is a test of U.S. leadership.

Representatives Solis and Gillmor have each introduced bills that would amend TSCA for the purpose of allowing the United States to implement the Stockholm Convention. Both bills protect U.S. sovereignty by ensuring that the United States can make its own, independent decisions whether to be bound by future international decisions to regulate additional POPs. But the two bills have widely divergent visions of how Americans should be protected from these dangerous substances. The Solis bill (H.R. 4800) seeks to implement the letter and spirit of the POPs Convention by giving EPA clear authority to regulate and by living up to the expectations of the American people that protecting human health should be a primary objective of U.S. environment and health law. The Gillmor bill (H.R. 4591) would abandon the Convention's fundamental health protection goal, introduce a standard that will weaken U.S. environmental and health safeguards, and create regulatory hurdles that would make it practically impossible for EPA to ever protect Americans from some of the world's most dangerous chemicals.

On behalf of all Americans who will benefit from U.S. ratification of the POPs Convention, we urge you to support implementing legislation that will enable the United States to reassert leadership in protecting its citizens from persistent organic pollutants. The Solis bill does this in a pragmatic and effective manner by requiring timely U.S. action, by implementing the Convention's health-based standard, and by honoring the right of state, local and tribal authorities to protect their citizens from the dangers of POPs. The Solis bill reflects the high standard for implementing legislation that our organizations have insisted upon since the Convention was signed.

Ensure Timely U.S. Action

Once the United States commits to regulating additional POPs chemicals added to the Stockholm Convention, EPA must have the authority to respond quickly and effectively.

- The Gillmor bill does not require the United States to take *any* action after an international decision to add a new POP to the Convention, even when the United States supports the decision. Moreover, the Gillmor bill politicizes science, mandating that EPA apply potentially onerous requirements that invite litigation while doing nothing to improve the scientific quality of regulatory decisions.

- The Solis bill embodies a better approach, directing EPA to take prompt regulatory action when a new POP chemical is added to the Convention. Such action can include a decision *not* to regulate if EPA concludes that there will be no adverse effect on human health. The bill sensibly instructs EPA to take into account the findings of the international scientific review process, in which the United States would be a full participant, as the logical starting point for its evaluation, thereby avoiding costly, time-consuming, and redundant analysis.

Adopt the Treaty's Health Standard

A health-based decision-making standard is at the heart of the Stockholm Convention. As a treaty that will become part of "the law of the land," the Convention text should be the source of the standard for implementing amendments in the United States.

- The Gillmor bill jettisons the Convention's health standard and directs EPA to find a "reasonable balance" between the costs to chemical companies and the benefits of protecting children and other vulnerable Americans from some of the world's most dangerous chemicals. Such cost-benefit standards have been shown time and again to overestimate the cost of regulation and dramatically undervalue the benefits of protecting public health. Moreover, because the Gillmor bill would allow costs to trump health, it would all but ensure that the United States could *never* join the rest of the world in accepting amendments that add dangerous POPs chemicals to the treaty.

- The Solis bill adopts the Stockholm Convention's health-based standard for regulating POPs. The bill directs EPA to implement the control measures specified in the Convention in a manner that protects against "significant adverse human health and environmental effects."

Respect State Measures to Protect Health

Many states are already taking action to regulate POPs, including California, Hawaii, Illinois, Maine, Massachusetts, Michigan, New Jersey, New York, and Washington.

- The Gillmor bill would not only make it difficult for EPA to regulate a newly listed POP chemical, but would also preempt all state and local POPs regulations and prohibit states from taking regulatory action in the future. This sweeping preemption

language could void state and local measures to control POPs even when the EPA ultimately fails to regulate the chemical.

- The Solis bill respects state and local efforts to protect public health from POPs by specifically allowing stricter state standards.

Our organizations support strong, vibrant U.S. participation in the Stockholm Convention. We ask you to join us in realizing that vision by supporting implementing legislation that is true to the letter and the spirit of the POPs agreement, as represented by the Solis bill. At the same time, we reaffirm our commitment to ensure that the flawed approach of the Gillmor bill, an approach that will undermine health and environmental protections, is not enacted into U.S. law.

Sincerely,

Deborah Altschuler
President
National Pediculosis Association
Needham, MA

Björn Beeler
International Coordinator
International POPs Elimination Network
Berkeley, CA

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cc: The Honorable James M. Inhofe, The Honorable James F. Jeffords
The Honorable Saxby Chambliss, The Honorable Tom Harkin
The Honorable Richard G. Lugar, The Honorable Joseph R. Biden
The Honorable Bob Goodlatte, The Honorable Collin Peterson

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MR. GILLMOR. Thank you very much.

Mr. Roewer, I think we have completed the entire panel and I appreciate your patience while we went through that process. Mr. Roewer, a number of your panelists believe that the science process within the international body is rigorous enough that the United States

should not engage in another scientific review. Would you share that opinion?

MR. ROEWER. Well, I think it would be very short-sighted and limiting to not have a backstop within U.S. law to engage in an additional review of the same factors, as well as some additional factors that may come forward, additional evidence, as well as consideration for the very important issues that we heard here in national security, economic drivers as well. To not have that second look or that backstop really would not be, in our estimation, protective of the United States interests.

And as I said in my testimony, we really cannot presume that the listing decisions that are reached by the Conference of Parties for any of these Conventions are going to be technically sound. Mr. Walls referred to some short circuiting in the process. I think we have seen cases where the technical arguments were not as strong as they should be and dolcias that were developed by countries for Canada POPs, but nonetheless, even though the case was not made, the conference of parties, or in this case the POPRC, decided it looks enough like a POP that we are going to move it forward notwithstanding the fact that we may not have made the case or one of the characteristics of POPs. So for those reasons, I think it is very important the United States retain the ability to fully evaluate the chemicals that are listed in making decision of how and whether, or whether and how, those chemicals are regulated under our domestic laws.

MR. GILLMOR. Thank you.

Mr. Goldberg, in terms of other countries, where do you think the United States ranks in terms of chemical regulation and safety, particularly in assuring that chemicals will be safely used and present the lowest possible risk for human health?

MR. GOLDBERG. Well I defer part of that question to Mr. Walls. I will say for those products that are listed that are pesticides, the U.S. is by far the most protective in terms of its system, and to echo Mr. Roewer, part of the issue is ensuring that future decisions on POPs take into account the unique circumstances and unique needs of American growers, American producers, and the world at large in having safe and effective products. I think from a chemical system standpoint, TSCA has worked amazingly well at protecting the American public.

MR. GILLMOR. Do you want to jump in on that, Mr. Walls?

MR. WALLS. Yes, thank you, Mr. Chairman.

I think it would be useful to focus on what, how I read H.R. 4800 and contrasting it with the approach that Mr. Goldberg just set out in terms of the protective nature of U.S. regulation. As I read H.R. 4800, EPA would be required to adopt any new regulations on chemicals that

have been subject to international action unless it can justify a no action decision solely on the grounds that it is not likely to pose a significant adverse health or adverse health or environmental effect. That means that the risk management considerations for domestic regulation are excluded. That is, EPA cannot look at the risk factors under that approach. And even if EPA were to subsequently determine that risk management considerations did not justify adopting the international decision, I think the agency would be constrained in its ability to effectively regulate domestically.

MR. GILLMOR. Thank you very much.

That will conclude our questions. I would ask the witnesses, however, if members of the subcommittee had questions that they would like to submit to you in writing, which may be the case, hopefully that is acceptable and that way you can get a response back.

With that, I kind of apologize, it gives you a real sense of how disorganized we are here in Congress but we try to muddle through. I appreciate all your testimony and all of your help. The meeting is adjourned.

[Whereupon, at 1:05 p.m., the subcommittee was adjourned.]

RESPONSE FOR THE RECORD BY E. DONALD ELLIOTT, PARTNER, WILLKIE FARR & GALLAGHER LLP

The Honorable Paul E. Gillmor

1. How does the process of notice and comment in American environmental regulation compare to the same experience under the POP's treaty? Do private public interests groups have more or less input on the international decision making process then the domestic one? Is it not the case that all NGO's, from corporations to environmental groups, would have less input in environmental regulation if there is no domestic regime to determine implementation as under H.R. 4800? Why then, do you think would environmental groups support a process they have less influence over?

I am loathe to try to speak for environmental groups. They may feel that environmental considerations carry more weight in the elitist world of international bureaucrats and negotiators than in the more democratic and participatory law-making processes in the United States where many different interests all have a seat at the table and are weighed in the balance. However, if that is their analysis (and I do not know that it is), it would be short-sighted and wrong. The best way to bring the American people to support environmental regulation is through a wide-ranging and thorough discussion in which all relevant issues and values are discussed, weighed and resolved, not by trying to short-circuit the deliberative process and limit consideration to only certain values that are paramount in the minds of some but ruling off-limits the considerations that others would like to bring to the debate. That approach of limiting debate never really works in the long run in a democratic society. That is the point that Jefferson made when he wrote: "I know no safe depositary of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their

discretion by education." --Thomas Jefferson to William C. Jarvis, 1820. ME 15:278 and "Though [the people] may acquiesce, they cannot approve what they do not understand." --Thomas Jefferson: Opinion on Apportionment Bill, 1792. ME 3:211, http://etext.virginia.edu/jefferson/quotations/jeff1350.htm

2. By not having an opportunity to voice economic concerns and only giving the United States a yes or no option on POP's decisions, as is the case in H.R. 4800, does it not make it more difficult for the U.S. to opt – in to POP regulations? How does this lack of opportunity to compromise damage meaningful participation in the POPS Convention by the United States, not to mention implementation of future chemicals during the POP's Treaty?

I agree. Ironically, attempting to exclude economics, the availability of substitutes and other considerations from the discussion, may actually make it more difficult to regulate certain substances, not easier as some proponents wrongly suppose. I point that out in my prepared testimony and also my answer to Mr. Dingell's Question #1 below and I will not repeat the full analysis here. Let me merely say that the classic case in American law that makes this point is International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). There Judge Leventhal pointed out that the extent of proof required should be a function of the consequences of an error in one direction or another. One has to consider benefits and the availability of substitutes to strike that balance properly and to decide how much science is enough. Adam Babich, Too Much Science In Environmental Law, 28 *Columbia Journal of Environmental Law* 119 (2003).

3. Do you think it is inconsistent for the opponents of H.R. 4591 to express reservations about its impact on state sovereignty while supporting a bill that adopts a regulatory standard based on and international listing recommendation and impinges on national sovereignty by denying the U.S. the chance to consider domestic issues when regulating?

Yes, inconsistent, but even worse, also ill-informed. Despite rhetorical usage to the contrary, states of the United States are not really "sovereign." Under our Constitution, many of the essential attributes of sovereignty (such as the ability to conduct foreign relations or war) have been taken away from the states and given to the federal government. One of these attributes of "sovereignty" that no longer resides with the states is the power to regulate interstate commerce. U.S. Constitution, Art.I, Sect. 8. Congress has plenary power to regulate interstate commerce. When it chooses to do so, its action does not in any way impinge on the "sovereignty" of the states, because the People took that aspect of "sovereignty" away from the states in 1789 when they ratified the Constitution and gave it to the federal government.

However, as a policy matter, I do favor clarifying H.R. 4591 as suggested by Chairman Gillmor during the hearing to make clear that the regular pre-emption process of TSCA Section 18 would apply. This section of TSCA is the appropriate balance between state and federal regulation that was carefully struck by Congress for the case of hazardous substances that move across state lines. It has generally worked well. For example (to answer a question that was asked but not answered during the hearing), more stringent regulation of toxics under California's Proposition 65 was not preempted by the first Bush Administration under TSCA in the early 1990's despite a request from some in industry to do so. I think that H.R. 4591 should use the same standards and process for preemption as the rest of TSCA, not a different one.

The references at the hearing by some to other environmental statutes such as the Clean Air Act and Clean Water Act are totally inapt, because those statutes primarily regulate stationary facilities, not products that move across states lines. (Where they *do*

regulate products that move across state lines, such as automobiles, federal standards are generally pre-emptive of inconsistent state regulation). This is the general pattern that applies not only in the U.S. but also in the E.U. – where regulation involves a product that moves across jurisdictions, regulation is generally pre-emptive.

4. Is it reasonable to set the precedent of having other nations decide our environmental policy for us when they themselves have difficulty following through on their environmental treaty commitments, like the EU with Kyoto?

No. The essence of my testimony is that we should retain the right to decide environmental policy for ourselves, using our own values and our own legal processes and traditions. The treaties wisely give us that right. While I feel that the situations in which we will ultimately deviate from the international consensus will be few and far between in practice, the principle that we should decide for ourselves in our own way is an important one (at least at this stage in history).

5. In the hearing on July 13, 2004, Mr. Yeager, Mr. Wiser, and Dr. Goldman all agreed with the view that the treaty relies on countries to choose their own appropriate means of implementation and the adding process. Therefore, it is up to the individual country's legislative body, which would be the Congress, to establish a process. HR 4591 proposes a standard that provides EPA with sufficient authority, that EPA has stated on the record gives them sufficient authority, and that several industry and trade groups have testified they are comfortable with. The rulemaking standard in the bill is "to protect human health and the environment" while the manner in which it does so is the balancing of social, environmental, and economic costs and benefits. However the standard itself remains to protect human health, <u>all humans</u>, women and children, not just manufacturing interests, as some allege. Why then, as proposed under HR 4800, does the U.S., need to jump to the conclusion of the international COP, even while the COP doesn't require us to implement in the same manner? In other words, is it not inherent in this country's domestic process to properly vet each proposal through the same regulatory standards of domestic law before we chose to sign up for it? While this instance may have its genesis from a treaty, in the end aren't we talking about U.S. laws and U.S. persons that we are regulating and shouldn't they have the same process they are guaranteed if the proposal didn't have its genesis from an international proposal?

I agree.

<u>The Honorable John D. Dingell and the Honorable Hilda L. Solis</u>

1. In your written testimony, you stated that "As I have written elsewhere, the cumbersome procedures and evidentiary standards for regulating substances under TSCA Section 6 are badly broken and need to be fixed . . . ." Please state specifically which cumbersome procedures and evidentiary standards are badly broken and explain why and how they should be fixed.

In a chapter for a forthcoming book comparing the approaches to regulating chemicals in the U.S. and the European Union, I have written (with German Law Professor Ortwin Renn):

> "Throughout its 35-year history, EPA has attempted to use its TSCA section 6 authority on only a few occasions. But when it has done so, its principal attempts to use section 6 for precautionary regulation to prevent harm have

been set aside in court. As a result of this experience, EPA has generally drawn the lesson that section 6 of TSCA is not a useful "tool" for precautionary regulation. There are two separate problems with section 6. First, as the price of removing its opposition to the enactment of TSCA in 1976, the chemical industry negotiated virtually unique procedural provisions that require EPA to hold cumbersome oral hearings including cross-examination of witnesses before issuing a section 6 rule. 15 U.S.C. §2605(c). These so-called "hybrid rulemaking proceedings" are much slower, more cumbersome and more expensive for EPA to conduct than the notice-and-comment rulemaking proceedings under 5 U.S.C. §553 of the Administrative Procedure Act that are typical of most other statutes administered by EPA.

"Even where EPA has shouldered the burden of mounting the extensive procedural hearings required by section 6 of TSCA, its rules have been set aside in court for lack of sufficient support in the record. The key case is *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir., 1991), which invalidated EPA's 1989 TSCA rule to ban virtually all uses of asbestos, 54 Fed. Reg. 29,460 (1989). Asbestos was identified by the ancient Greek physician Galen as constituting a risk to health, and thousands of American workers have suffered from asbestos-related disease, hundreds of thousands of civil lawsuits for damages now clog our courts and over 70 companies have been forced into bankruptcy. In an attempt to deal with this major public health problem, in 1989, EPA attempted to ban all uses of asbestos for which there were readily available substitutes. EPA's rule was supported by 10 years of hearings, and over 100,000 pages of record, including several hundred scientific studies. This was a clear and self-conscious attempt by EPA to use section 6 of TSCA on a precautionary basis, arguing that since asbestos had been shown to be harmful in many uses, it should be banned in other contexts as well, at least if substitutes were readily available. The court disagreed, striking down EPA's precautionary asbestos ban rule on the grounds that there was not sufficient proof of actual harm from each and every use of asbestos. In one (in)famous footnote, the court even opined (based on a numerical risk assessment cited by industry) that more people die from accidentally aspirating toothpicks than from some of the uses of asbestos that EPA wanted to ban.

"Unfortunately, the *Corrosion Proof Fittings* case is not an outlier. Unlike regulators in Europe who may act on a precautionary basis in advance of hard and fast scientific proof by relying on consensus expert judgments, regulators in the U.S. must generally build a factual "record" to support their decisions to regulate or to take a product off the market. *AFL v. OSHA*, 965 F.2d 962 (11th Cir. 1992)(invalidating permissible exposure limits for 428 toxic substances in the workplace which had been based on expert consensus standards). U.S. administrative law requirements to assemble a comprehensive factual record and for adversarial and "searching" judicial review of the factual basis of expert decisions tend to discourage U.S. agencies from promulgating risk-based regulations on a "precautionary" (*i.e.* weak or preliminary scientific) basis but instead to wait until a risk assessment can be conducted to provide the necessary "record" for judicial review (Martonik, Nash and Grossman, 2001). The present author has argued that this unfortunate situation results because in recent years, most U.S. courts have mistakenly assimilated questions of scientific support for precautionary regulations to questions of fact, rather than recognizing their true nature as questions of "policy." *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.)(en banc), *cert. denied*, 426 U.S. 941 (1976; see also

> Charnley and Elliott, 2002)[Gail Charnley and E. Donald Elliott, Risk Versus Precaution: Environmental Law and Public Health Protection, 32 ELR 10363 (Mar. 2002)]." Ortwin Renn and E. Donald Elliott, Precautionary Regulation of Chemicals in the US and EU, forthcoming *in The Reality of Precaution: Comparing Risk Regulation in the US and Europe* (eds., Jonathan Wiener, Michael Rogers, Jim Hammitt and Peter Sand).

The solutions are more difficult, but I think we should follow something similar to what the European Union has endorsed in Commission of the European Communities, Communication from the Commission on the Precautionary Principle, COM (2000)1 (Feb 2, 2000). http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub07_en.pdf That policy statement recognizes that the quantum of scientific evidence necessary to support regulatory action will differ depending upon a number of factors including economics and the availability of substitutes.

> "Decision-makers need to be aware of the degree of uncertainty attached to the results of the evaluation of the available scientific information. Judging what is an
> "acceptable" level of risk for society is an eminently *political* responsibility. … *Examining costs and benefits* entails comparing the overall cost to … action and lack of action, in both the short and long term. This is not simply an economic cost-benefit analysis: its scope is much broader, and includes non-economic considerations, such as the efficacy of possible options and their acceptability to the public."

On the other hand, the U.S. courts (as discussed above and in my next answer) have mistakenly assimilated the question of the extent of scientific certainty necessary to support regulation to a simple-minded question of fact, rather than recognizing that it is really a policy issue that should differ from one context to another – depending on the policy consequences of an error in one direction or the other. I explain the problem and the proposed solution this way in 2002 article with a co-author:

> "By overemphasizing the factual component of risk assessment, U.S. appellate courts misunderstand the nature of risk assessment and undervalue expert judgment and policy considerations. Implementation of the recent European Commission Communication on the precautionary principle, however, would not require the same high level of factual evidence to support decisions about managing potential risks." Gail Charnley and E. Donald Elliott, Risk Versus Precaution: Environmental Law and Public Health Protection, 32 ELR 10363 (Mar. 2002).

A single standard for the quantum of scientific data or certainty needed to support regulation (whether it is "substantial evidence" or "capricious and arbitrary") makes no sense. Rather, there should be a sliding scale for how much scientific certainty is required that changes depending on other policy factors such as the extent of harm that is possible, the availability of substitutes and economic benefits To take a concrete example, if a substance might kill millions of people, and it has only small benefits and substitutes are readily available, a much lesser degree of scientific proof should be required before taking regulatory action than if the potential harm is low but the benefits of continued use are high.

To implement the concept of precautionary regulation successfully, agencies must be permitted to consider a broad range of policy factors, not just the scientific evidence underlying a finding of significant risk in isolation. The degree of scientific support

required to support regulatory action should be lesser or greater depending on the consequences of a decision one way or the other. See International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). That is a major reason why I favor the broader scope of consideration of risk/benefit tradeoffs allowed by H.R. 4591.

2. Do you believe that TSCA Section 6 is a useful tool for protecting Americans from exposures to harmful chemicals? If not, please explain why.

No. Not as interpreted by the court of appeals in Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir., 1991)(setting aside TSCA §6 rule banning 5 uses of asbestos, 54 Fed. Reg. 29,460 (1989), on grounds that despite ten years of rulemaking, EPA had not compiled substantial evidence to support its action). That case sets the evidentiary standard for regulation under Section 6 so high that EPA can no longer use TSCA Section 6 as a useful tool for regulating chemicals. If after thousands of deaths from asbestos exposure, EPA could not regulate asbestos under section 6, it is virtually impossible for EPA to regulate any chemical under section 6. There is an extensive scientific literature about asbestos, and it is banned in many other countries throughout the world, including most countries in Europe. That asbestos cannot be banned successfully under TSCA section 6 in the United States is clear and convincing evidence, in my view, that section 6, as interpreted by the court in Corrosion Proof Fittings case, is no longer "a useful tool for protecting Americans from exposures to harmful chemicals." That conclusion is borne out by the fact that EPA has not attempted to use section 6 in any significant way in the 15 years since the Corrosion Proof Fittings case was decided in 1991. That case is a public policy and public health disaster and should be explicitly overruled by Congress.

3. Based on your experience as General Counsel of the Environmental Protection Agency (EPA), including your work defending EPA's attempt to regulate asbestos under Section 6 of TSCA, would it be better to use an "arbitrary and capricious" standard of judicial review, the standard that is used for most other environmental rulemakings?

Along with most courts and commentators, I think there is no real difference in practice between the arbitrary and capricious standard and the substantial evidence standard. William Fox, Dean of Catholic University Law School, explains it this way in his administrative law treatise:

> "In 1984, one of the newer members of the D.C. Circuit (now a Supreme Court Justice), Antonin Scalia, took the bull by the horns and decided there simply was no difference between the substantial evidence test and the arbitrary/capricious test. Writing for the court in *Assn of Data Processing Service Orgs. v. Bd. of Governors, Federal Reserve Sys.,* [745 F.2d 677 (D.C. Cir. 1984).] then-Judge Scalia … put it: '[Substantial evidence] is only a specific application of [arbitrary/capricious] separately recited in the APA not to establish a more rigorous standard of factual support but to emphasize that in the case of formal proceedings, the factual support must be found in the closed [hearing] record as opposed to elsewhere' In Scalia's opinion, the distinction is mainly one of semantics. The touchstone for both tests is reasonableness. The differences between the two are differences of analytical technique rather than analytical substance. While not all courts of appeals have adopted Justice Scalia's language, most courts appear to accept his reasoning. At present, there seems not to be much agonizing over the distinction between

arbitrary/capricious and substantial evidence." William F. Fox, Jr., Understanding Administrative Law p. 334 (4th ed. Lexis Publishing, 2000)(ISBN 0-8205-4727-1)(emphasis supplied).

Congress would simply be fooling itself if it thought that it would make any real difference in practice to substitute one form of words for the other. Today most courts equate the two standards, and my experience is that there is little if any difference in their practical effect. It certainly would NOT address the underlying problems in TSCA Section 6 that have rendered it no longer a useful tool for EPA. See answer #1 above.

4. On page 4 of your testimony you state that: "Informal notice and comment rulemaking under Section 553 of the Administrative Procedure Act has been called 'one of the greatest inventions of modern government . . .'." Do you agree that H.R. 4800 incorporates the Section 553 rulemaking procedures? (*See*, H.R. 4800, page 44, lines 5-9: "Regulations promulgated by the Administrator under this section shall comply with section 553 of Title 5, United States Code (without regard to any reference in that section to sections 556 and 557 of that title).")

Yes. I agree. My concern with H.R. 4800 is that the issues in the rulemaking are too narrowly circumscribed so that the benefits that informal rulemaking would normally offer are lost. Informal rulemaking which is not artificially narrowed to a single issue gives the agency broad input from the public and educates the public so that they are more likely to understand and accept a regulation. This is the wise and successful strategy behind many of our environmental laws. The actual decision rarely changes much through the notice-and-comment process, but the process is useful nonetheless because it increases buy-in and also provides a safety valve in those rare instances in which the agency is about to make a serious mistake.

While I do agree that technically H.R. 4800 utilizes informal rulemaking, I feel that it arbitrarily limits the usefulness of the rulemaking process by unduly restricting the issues that can be raised. (See, H.R. 4800, pages 38, lines 6-25 and page 39, lines 1-5: "if the parties to the LRTAP POPs Protocol decide to list a chemical substance or mixture …, the Administrator shall— … (A) not more than 1 year after the date of such decision, publish in the Federal Register— (i) a proposed rule, to prohibit or restrict the domestic manufacture, processing, distribution in commerce for export, use, or disposal of the additional chemical substance or mixture, that protects against significant adverse human health and environmental effects from such domestic manufacture, processing, distribution in commerce for export, use, or disposal associated with the chemical substance or mixture … which at a minimum implements the control measures specified for the chemical substance or mixture in Annex A and B of the POPs Convention and Annex I and to the LRTAP POPs Protocol."). I read this language as precluding consideration by the Administrator in the rulemaking of any subjects except (1) whether a substance has in fact been added to the list, and (2) what regulatory measures are required to eliminate "significant adverse human health and environmental effects" from the substance and are at least as stringent as those required by the Convention and its Annexes. As the drafters are undoubtedly aware, very similar language has been read by the Supreme Court as precluding any consideration of economics, *Whitman v. American Trucking Assn.,* 531 U.S. 457 (2001), and in light of the debate about consideration of other factors in the legislative history here, I think that the language of H.R. 4800 if enacted would be interpreted by the courts to limit consideration by EPA to the factors enumerated above.

However, there is potentially room for a compromise in that the language "*significant* adverse human health and environmental effects" certainly *could* be read to

permit discussion in the rulemaking, and consideration by the Administrator in making a decision, of all relevant factors such as substitutes and benefits going to the question of whether a particular risk should be considered "significant" under all the circumstances. I would certainly welcome clarification by the supporters of the Solis bill that a broader discussion of all relevant factors is contemplated in the rulemaking, if that is indeed their intention.

RESPONSE FOR THE RECORD BY JIM ROEWER, EXECUTIVE DIRECTOR, UTILITY SOLID WASTE ACTIVITIES GROUP

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March 31, 2006

The Honorable Paul E. Gillmor
Chairman
Subcommittee on Environment and
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2125 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Gillmor:

Set forth below are my responses to the follow-up questions from the Subcommittee hearing held on March 2, 2006, entitled "Legislation to Implement the POPs, PIC, and LRTAP POPs Agreements." On behalf of the Utility Solid Waste Activities Group ("USWAG") and the Edison Electric Institute ("EEI"), I would again like to thank the Subcommittee for the opportunity to present our views on legislation implementing the Stockholm Convention.

As I stated in my testimony earlier this month, USWAG and EEI support the leading role that the United States played in helping to forge the Convention and we believe that it is extremely important for the United States to enact implementing legislation so that it can continue to play a leading role regarding future strategic decisions involving the Convention. We believe that your bill – H.R. 4591 – provides the appropriate vehicle for implementing the United States' participation in the Convention.

Please contact me at (202) 508-5645 if you have questions regarding the answers set forth below.

Very truly yours,

James R. Roewer
Executive Director

USWAG & EEI Response to Questions From Honorable Paul Gillmor

1. You state in your testimony that the type of check and balance systems contained in H.R. 4591 are necessary because, despite the rather detailed procedures in the Convention for rendering listing decisions, the U.S. should not presume that each new listing will adequately adhere to these procedures or will be technically sound. Can you tell me whether H.R. 4800 has any of these same assurances? If we opt in under Ms. Solis' standard, would we simply have to take the same standard as the international body proposes and bypass any check and balance that is a cornerstone of our democracy. Why should the U.S. needs to agree to this?

Answer: H.R. 4800 does not contain anywhere near the same level of procedural safeguards as H.R. 4591 in evaluating the technical soundness of persistent organic pollutant ("POP") listing decisions. Therefore, H.R. 4800 accords much greater statutory deference to the decisions of an international body in determining how the United States should regulate particular chemicals under its domestic laws. As a practical matter, H.R. 4800 prevents EPA from conducting a full and open formal rulemaking regarding whether and how to regulate a newly identified POP; instead, H.R. 4800 subjects EPA to an accelerated decision-making process limited in scope to the same listing criteria that POPs Conference of the Parties uses to determine whether to list a particular chemical as a POP. This not only undermines the ability of the United States to verify the scientific and technical validity of a new listing decision – which have on occasion been procedurally and/or technically flawed – but it also prevents a full and open consideration of all relevant factors in determining whether and how a particular chemical should be regulated under our domestic laws.

Such an approach is fundamentally at odds with this country's long and successful practice of developing environmental regulations of chemicals through rulemaking procedures where all relevant factors, including economic implications, can be brought to light and considered by EPA before rendering a final rulemaking decision. Nothing in the Convention directs, let alone suggests, that the EPA restrict its traditional rulemaking process under the Administrative Procedure Act ("APA") in evaluating whether and how to regulate a particular chemical, including chemicals newly identified as POPs by an international body. Not only is there no reason for the United States to agree to such an approach, but there are also compelling reasons to *reject* this approach; namely, to preserve the sovereignty of the United States in undertaking regulatory decisions through a process that allows *all* factors to be raised by the public and thoroughly considered by EPA before rendering a final decision. Such a process lies at the heart of the rulemaking process under the APA and nothing in the Convention directs the United States to eviscerate this procedure.

As E. Donald Elliott, the former Assistant Administrator and General Counsel at EPA, articulated in his testimony before the Subcommittee earlier this month: "The American people are not ready – if they ever will be – to delegate our government's decision-making authority to faceless international bureaucrats over whom they have no control by writing what amounts to a blank check to follow their lead." Put simply, there is no reason for the United States to agree to the approach in H.R. 4800 that prevents the United States from deciding under its own laws and procedures whether and how to regulate particular chemical substances within our borders.

2. As you mention in your testimony, conventions do not regulate people. However, you then talk about our nation potentially being subject to conflicting standards between domestic law and international standards. Could you please expound on this issue? Could a person be subject then to a two count indictment: one under TSCA and one under the Conventions?

Answer: What I meant by conflicting standards was that unless the POPs Convention implementing legislation is coordinated with existing U.S. laws, it is likely that there will be duplicative and potentially inconsistent statutory directives under the implementing legislation and existing law. For example, consider PCBs. This particular POP is already extensively regulated under the Toxic Substances Control Act ("TSCA"). Indeed, PCBs are one of the most heavily regulated chemicals in the United States, with Congress having specifically singled out PCBs for regulation under TSCA section 6(e) (15 U.S.C. § 2605(e)). In response to this statutory directive, EPA has established a mature and comprehensive regulatory program for PCBs, which essentially regulates every facet of PCB use, storage, transportation and disposal in this country. *See e.g.*, 40 C.F.R. Part 761, Subparts A-K. At the same time, the Convention establishes goals for the management of PCBs, including PCB use and disposal requirements. These very activities, however, are already comprehensively regulated under TSCA. Therefore, unless the implementing legislation is drafted in a manner consistent with the structure of existing U.S law regulating PCBs – such as the case of H.R. 4591 – there is a high likelihood of duplicative and potentially inconsistent statutory schemes addressing the same chemical substance. Also, having two federal statutes independently regulating the same activity involving the same chemical substance raises the distinct possibility of a two count indictment for the same action: one under TSCA and one under the Convention's implementing legislation.

3. In the hearing on July 13, 2004, Mr. Yeager, Mr. Wiser, and Dr. Goldman all agreed with the view that the treaty relies on countries to choose their own appropriate means of implementation and the adding process. Therefore, it is up to the individual country's legislative body, which would be the Congress, to establish a process. HR 4591 proposes a standard that provides EPA with sufficient authority, that EPA has stated on the record gives them sufficient authority, and that several industry and trade groups have testified they are comfortable with. The rulemaking standard in the bill is "to protect human health and the environment" while the manner in which it does so is the balancing of social, environmental, and economic costs and benefits. However the standard itself remains to protect human health, all humans, women and children, not just manufacturing interests, as some allege. Why then, as proposed under HR 4800, does the U.S., need to jump to the conclusion of the international COP, even while the COP doesn't require us to implement in the same manner? In other words, is it not inherent in this country's domestic process to properly vet each proposal through the same regulatory standards of domestic law before we chose to sign up for it? While this instance may have its genesis from a treaty, in the end aren't we talking about U.S. laws and U.S. persons that we are regulating and shouldn't they have the same process they are guaranteed if the proposal didn't have its genesis from an international proposal?

Answer: As explained in response to Question One above, we fully agree that it is inherent in this country's domestic process to properly evaluate each POP listing decision through our existing regulatory procedures before determining whether and how to regulate a newly listed POP in this country. The fact that that the genesis of an obligation to evaluate whether and how to regulate a chemical substance in this country derives from an international treaty does not mean that the United States subordinate its domestic laws to an international body in rendering a domestic regulatory decision.

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, a key goal to keep in mind when crafting implementing legislation is to allow Congress to exercise its authority to establish how the United States, through our existing domestic laws, will meet its Treaty obligations. This will ensure that decisions regarding

how the United States implements its Convention obligations remain within the sovereign jurisdiction of the United States and are determined by the Congress and the Executive Branch.

Response to Questions From Honorable John Dingell and Honorable Hilda Solis

Do you agree that H.R. 4800 properly removes PCBs from the legislation's prohibition on POP chemicals because existing regulatory controls already meet the Convention's objectives for PCBs?

Answer: Yes. H.R. 4800 correctly recognizes that PCBs are already subject to a mature and comprehensive regulatory program under section 6(e) of the Toxic Substances Control Act ("TSCA"), which in fact *already* includes a statutory ban on the manufacture and use of PCBs except as expressly allowed by EPA. *See* 15 U.S.C. § 2605(e). This statutory ban meets or exceeds the PCB objectives set forth in the Convention; indeed, USWAG respectfully submits that the PCB goals included in the Convention are modeled in large part after the existing U.S. PCB regulatory program.

Recognizing this, H.R. 4800 – like H.R. 4591 – appropriately removes PCBs from the legislation's blanket prohibition on the manufacture, processing, use and disposal of POP chemicals because our existing regulatory controls already meet the Convention's objectives for PCBs. For example, PCBs are *only* authorized for use in specified electrical equipment conditioned on an express finding by EPA that such uses will not pose an unreasonable risk of injury to health or the environment. *See* 15 U.S.C. § 2605(e)(2)(B); *see also* 40 C.F.R. § 761.20(a)-(e). Consistent with this statutory standard, EPA has long ago established a ban on the use of certain PCB-containing electrical equipment, such as a *complete* ban on the use of PCB Transformers that pose a risk to food or feed (which went into effect over 20 years ago, on October 1, 1985). *See id*. at § 761.30(a)(1)(i). A similar ban went into effect in 1990 for PCB Transformers used in or near commercial buildings. *See id*. at § 761.30(a)(1)(ii). These bans far exceed – and plainly pre-date – many of the PCB phase-out goals set forth in the Convention. In addition to the existing domestic PCB bans, EPA's PCB regulatory program also includes an array of PCB labeling, transportation, storage, and disposal requirements, all of which ensure that such practices will not pose an unreasonable risk of injury to health or the environment, and which address the PCB goals set forth in Part II of Annex A to the Convention (*compare* 40 C.F.R. Part 761, Subparts A-K with Part II of Annex A to the Convention).

The fact that the existing PCB regulatory program meets the Convention's goals with respect to PCBs was expressly addressed in Secretary of State Powell's letter transmitting the POPs Convention to the President, where he explained 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*." 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, at XX (emphasis added). In light of the above, USWAG fully agrees that H.R. 4800 properly removes PCBs from the legislation's prohibition on POP chemicals because existing regulatory controls already meet the Convention's objectives for PCBs.

RESPONSE FOR THE RECORD BY BROOKS B. YEAGER, VISITING FELLOW, THE H. JOHN HEINZ III CENTER FOR SCIENCE, ECONOMICS, AND THE ENVIRONMENT

April 5, 2006

Hon. Paul Gillmor
Chairman
Subcommittee on Environment and Hazardous Materials
2125 Rayburn House Office Building
Washington, D.C., 20515-6115

Re: March 2, 2006 Hearing on Legislation to Implement the POPs, PIC, and LRTAP POPs Agreements: Answers to questions from Members of the Subcommittee

Dear Chairman Gillmor,

Thank you for your request for responses to questions from members of the subcommittee regarding my testimony at the March 2 hearing. I apologize for the delay in submitting my answers; I have been on extended travel for the past several weeks. I trust my responses will still be timely. I have interpolated my responses after each of the questions as presented to me.

Sincerely,

Brooks B. Yeager
Environmental Consultant
10608 Woodsdale Dr.
Silver Spring, MD, 20901

The Honorable Paul E. Gillmor

1. I am concerned about your misinterpretation of the standard of "reasonable balance". The language is not directing the EPA to strike a reasonable balance between the costs of the regulation to chemical companies, and the benefits of protecting women, children and Native Americans. Instead, the balance must be struck between the benefits of protecting all humans and the environment and the cost to U.S. society in terms of jobs, American competitiveness, our standard of living, as well as the cost of alternatives that may turn out to be worse than the original chemical. Do you agree that these costs are impacts worthy of consideration by U.S. elected officials and regulators in addition to the international body?

   (A) I don't believe my testimony gave any particular definition to the 'reasonable balance' standard, except to note that it represents a different standard for the regulation of POPs from the standard(s) contained in the Stockholm Convention, which are contained in the Convention text and in the annexes to which particular chemicals would be added. Holding a different standard may present the problem I alluded to in my testimony – that we would agree to a listing decision but be unable to implement it fully, and therefore unable to meet our national obligation

under the Convention. I don't disagree that U.S. officials should consider economic costs and other consequences of control, but I believe the appropriate point to do so is in considering available control strategies prior to taking a position on a listing decision (i.e. in parallel with the Convention process).

2. Wasn't it a goal of the environmental NGOs in the U.S. who had been supportive of quick ratification of POPS Convention to seek a targeted approach to implementing legislation that avoided larger reforms which could bog down ratification and implementation efforts?

   (A) The NGOs involved would be best able to articulate their intentions at the time. However, the goal of achieving a targeted approach to necessary implementing legislation was one that was shared by members of the U.S. delegation.

3. Your testimony regarding H.R. 4800 refers to the required regulatory action EPA must take upon listing, but that it preserves the independent regulatory decision process. At the same time, you claim H.R. 4591 encourages duplicative efforts and creates a burdensome regulatory process. I have a couple of questions:

   A. First, how does a regulatory standard that completely defers to the international listing criteria and does not allow other any other considerations in the process create an "independent regulatory process" other than in name only?

      (A) I believe the independence of the U.S. regulatory process comes from the fact that U.S. officials would make an independent review of information provided by U.S. civil society, including the private sector, as well as of any scientific questions. That review would then inform the U.S. agencies in making decisions as to the U.S. position on any issue of listing, etc., considered by the Convention. The fact that the review undertaken by the U.S. works with the basic process and standards set out in the Convention does not prejudge the result in any way; however, it does ensure, that if the U.S. reaches a regulatory decision that allows it to support a listing, our regulatory actions will be in conformance with the Convention's standards.

   B. Second, the requirement of regulatory action by the EPA under H.R. 4800 is triggered by the listing of the chemical by the international body. So even though the U.S. may choose not to opt-in, the EPA is still required to continue a regulatory process defined in H.R. 4800. Isn't this requirement a potential source of wasting resources, energy, time, money, and people on a regulatory path if the U.S. has no intention of opting in? Would you not consider this a waste of finite Federal resources and the potential data call-ups required under H.R. 4800 a regulatory burden?

      (A) It's important to remember that the POPs Convention is designed to capture only the most problematic chemicals, that pose a significant threat of adverse effects to the environment and health that require management at the global level. I think if the Convention concludes that a chemical merits listing under what most observers would agree is a very rigorous test, the chemical

would warrant the kind of review in the U.S. contemplated by HR 4800.

4. As you know, a treaty is a pact between parties that are not likely to otherwise agree. As one of the principle U.S. negotiators for the POPS treaty, wasn't one of the U.S. interests to be able to domestically implement the treaty according to current national laws? Since the term negotiate implies compromise, I would expect that the international treaty, while reflecting some of the U.S. interests, does not reflect them all. In order to implement this treaty within the boundaries of the U.S. isn't it necessary to consider all U.S. interests? As long as the U.S. complies with the intent of the treaty and meets all its obligations, why shouldn't the U.S. implement the treaty in manner best suited to its needs?

   (A) I think the bulk of my testimony addresses this point. My view is that the Convention represents a balance of interests in which the U.S. successfully achieved its negotiating objectives, and that the result fully accommodates the national need to consider the full range of U.S. interests and to make an independent, informed decision regarding future listings.

5. Is your objection to cost-benefit analysis based on the idea that there is a better way to make decision other than comparing one effect to another, or is it because of the difficulty in assigning value to the expected benefits like good health and avoidance of child development problems?

   (A) My concern is two-fold: first, cost-benefit calculations have difficulty assigning specific values to expected benefits of the kind you describe, while at the same time often attributing high specific costs to potential changes in regulatory practice, and therefore often undervalue benefits; and second, enshrining a cost-benefit approach in the decision-making process as to how to regulate a listed chemical poses the real threat of having the U.S. agree to a listing decision undr the Convention that it is unable to fully implement.

6. As the lead negotiator for the United States under the Clinton Administration, you were responsible for promoting and securing the "opt-in" process. Is that correct? When you negotiated the "opt-in" provisions were you expecting that Congress would propose language to automatically defer to the listing criteria used by the POP RoC? Actually, if that was the case, why would we need to "opt-in," wouldn't it be better if we "opted-out?" Does the fact that we pushed for an "opt-in" mean that we wanted to preserve as much sovereignty and decision making for ourselves as opposed to the international body?

   (A) Securing the option to automatically "opt out" of future listings upon ratification, and thus of having a new listing only apply to the U.S. if and when we "opt in" was considered an important goal by negotiators, and in effect a form of insurance that the U.S. would have full and sovereign discretion with regard to any new listing, and could not be pressured to accept a listing with which our regulatory authorities disagreed. I don't believe the negotiating team had any particular assumption in mind regarding whether the U.S. regulatory process would be based on the Convention's criteria, though we did, in negotiating the criteria and standards in the Convention, try to assure that they were consistent with the thrust of applicable U.S. regulations.

7. Why is it not appropriate for the United States to have its own process that is distinct and separate from the POPS Treaty for regulatory purposes?

(A) I believe it is appropriate for the U.S. to have its own process, and to use its independent review to inform its decision on listing matters under the Convention. I think, as I said in my testimony, that unnecessary difficulties arise when the U.S. process is bases on standards that are substantially different than those in the Convention.

The Honorable John D. Dingell and the Honorable Hilda L. Solis

1. Does H.R. 4800 preserve the negotiated Stockholm Convention provision which provides the United States with complete discretion in deciding whether to accept or reject the listing of any new chemical, once the POPs Convention reaches a decision on them?

(A) Yes, I believe it does. At every point in the process, U.S. regulators will have the ability to make an independent decision, which is responsive to the U.S. situation, and which can then be used as guidance by U.S. representatives to the Convention.

2. As the chief negotiator for the United States of the POPs Convention, do you agree that H.R. 4800 allows EPA to make an independent regulatory decision that either implements the Convention's listing decision, or rejects its application to the United States?

(A) Yes, I believe HR 4800 fully preserves the U.S. sovereign right to make an independent decision on any and all issues coming before the Convention.

3. As the chief U.S. negotiator, can you comment on whether Annex F contains "proposed rulemaking standards" and whether Annex F or the Convention body text contain either an implicit or explicit suggestion that Convention parties must "balance" these items against each other when determining what the control measures for a POP chemical should be?

(A) I believe Annex F contains guidance to parties, and to the POPROC and the COP, regarding the evaluation of possible control strategies for chemicals which the Convention is considering listing. In that respect, it is structured as a typology of considerations that could or should be applied at this stage of the process. I do not believe that it contains 'proposed rulemaking standards' for new chemicals.

The Convention's basic standards for the regulation of chemicals are contained in its text, and most importantly in the text of the appropriate article and annex under which a new chemical would be listed. So, for a chemical listed in Annex A under Article 3, the basic regulatory standard is "…to take the legal/administrative measures necessary to eliminate.. production and use…[and] import and export [of the chemical]," subject to the specific exemptions and general notes contained in Annex A. There is no notion in the text of a 'balancing' as such, though the listing process does assume some consideration of risk, costs and alternative control strategies under Annex E and F.

RESPONSE FOR THE RECORD BY LYNN R. GOLDMAN, MD, MPH, PROFESSOR, ENVIRONMENTAL HEALTH SCIENCES, BLOOMBERG SCHOOL OF PUBLIC HEALTH, JOHNS HOPKINS UNIVERSITY

March 30, 2006

Paul E. Gillmor, Chairman
Subcommittee on Environment and Hazardous Materials
Washington, DC 20515-6115

Re: Response to Questions to Witness March 17, 2006
"Legislation to Implement the POPs, PIC, and LRTAP Agreements"

Dear Chairman Gillmor:

Thank you for your letter of March 17, 2006 requesting my responses to questions from Members of your Committee arising from the testimony that I gave at the Subcommittee hearing on POPs, PIC and LRTAP. I am pleased to provide my views on these issues.

The Honorable Paul E. Gillmor

1. *In your oral testimony, you stated the standard proposed in H.R. 4591 would be ripe for litigatory challenges because it introduces new legal terms, notwithstanding the use of "protect human health and the environment" in Section 3004(a) of the Solid Waste Disposal Act. That aside, wouldn't new litigation also result from the introduction of any new terms into TSCA, including the regulatory standard in H.R, 4800?*

Of course, any provision of any law is likely to be litigated. However, language such as the language proposed in H.R. 4800, has been interpreted in the context of other statutes, is less likely to tie up the courts and the agency than the standard in H.R. 4591. Certainly the term "protect human health and the environment" is included in many statutes. But what is novel to H.R. 4591, and of concern to me, is the standard for action which is: "the Administrator may issue rules to prohibit or restrict the manufacture, processing, distribution in commerce for export, use, or disposal of the additional chemical substance 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*." The language which I believe to be troublesome is highlighted in italics. What is meant by "to the extent necessary?" What is a "reasonable balance?" What is encompassed by terms like "social" costs? Are environmental but not health costs and benefits to be "balanced"?

2. *H.R. 4800 uses one of the listing criteria for the POPRC as the domestic regulatory standard. Considering that Mexico is proposing to eliminate the use of lindane, a chemical that is both approved and effective in the treatment of head lice in the United States, what would be the impact on public health for the United States under H.R. 4800, if the POPRC were to list lindane, but the POPS Conference of the Parties were to recommend less stringent control measures?*

First, in my opinion as a pediatrician even though lindane continues to be marketed for head lice treatment in the U.S. it has been shown to be less efficacious than far less toxic products and I do not recommend its use for treatment of head lice, especially for

children (and most cases of head lice occur among children). That is, even though I would agree that lindane is approved for use in the US it is less effective than safer alternatives and I see no reason for prescribing it in this day and age. Second, I have no idea what is the regulatory status of lindane as a pharmaceutical agent in Mexico, that is, I do not know that it is unavailable as a treatment for head lice. But, third, the provisions of the POPS convention do not prevent parties from taking more stringent measures to protect health and the environment in their countries.

3. *North Korea and Iran have both ratified the POP's treaty. Are you concerned that the standard for regulation under POP's that you advocate in your testimony is influenced by countries who have hostile positions towards our nation and its interests?*

No. Given that nearly every nation in the world is a party to this convention this is not a likely scenario and thus I do not share this concern.

4. *By only granting a straight up "yes" or "no" decision on accepting POP's regulations, the so called "opt – in" option, which I assume is implied in HR. 4800, denies the United States the ability to forge a compromise in determining how it will implement decisions. This feature would be available to our nation in H.R. 4591. Does the all or none approach of H.R. 4800 make it less likely America will agree to POP's decisions? By giving no leeway in the decision making process, no other option besides "yes" or "no," what damage does H.R. 4800 do to full realization of the dynamic nature of the POP's treaty?*

None at all. Even if the US government were to decide not to "opt-in" to a decision it would still have ample authority under existing statutes to take other regulatory actions..

5. *Is not the very existence of the "opt-in" imply a tacit acknowledgement of the important role domestic government institutions play in environmental regulation and that they should be able to exercise it outside of the framework of international conventions? If the POP's Treaty recognizes the right of sovereign nations in the developed world to self – regulate chemicals, why would you now suggest we sacrifice that right?*

I make no such suggestion. While at the EPA, I was part of the process that developed the US government's position on the POPs convention. Then, and now, I was supportive of the provisions of the POPs convention including the recognition of the right of sovereign nations to regulate chemicals.

6. *You testify that the domestic regime of regulation established under H.R. 4591 impairs the "international presumption" that decisions made by the Stockholm will be implemented. But the Treaty already gives countries the discretion to "opt – in" to these very decisions. Does this "opt – in" component you support also diminish the presumption of implementation? How can you argue against the concept of domestic regulation on the grounds of international presumption when you mention in your testimony a portion of the Treaty that, by your argument, has the same effect?*

No. As in any international agreement, the "opt-in" provision was very carefully negotiated and balanced against other provisions of the treaty so that, at the end of the day, the treaty was acceptable to the US government as well as to other governments who

negotiated the agreement. It is not I but rather the proposed legislation H.R. 4591 that attempts to tilt the carefully negotiated balance of the treaty by asserting a presumption that the U.S. generally will not implement agreements under this convention. The manner in which this is done (establishing regulatory hurdles that EPA never will be able to jump) is less important than the effect of H.R. 4591.

The Honorable John D. Dingell and the Honorable Hilda L. Solis

1. *What are the criteria that the Environmental Protection Agency should use to determine whether proposed legislation allows the United States to effectively and efficiently implement the listing decisions and control measures of the POPs Convention?*

I was surprised by the US EPA testimony to the effect that the sole criterion for evaluation of legislation should be that the US government can ratify the convention and participate as part of the Conference of Parties. This is necessary but not sufficient. EPA should also evaluate proposed legislation to assure that it will give it the authority to carry out its mission, the protection of health and the environment. In the case of H.R. 4591 such authority would actually be weakened. This is too high of a price to pay for admission to the POPs convention and should be rejected by the EPA and Congress alike.

Very truly yours,

Lynn R. Goldman, M.D., M.P.H.
Professor, Environmental Health Sciences

RESPONSE FOR THE RECORD BY STEVEN GOLDBERG, VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL, REGULATORY LAW & GOVERNMENT AFFAIRS, CROPLIFE AMERICA

TO:	**The Honorable Paul Gillmor** **Chairman, Subcommittee on Environmental and Hazardous Materials**
FROM:	**Steven Goldberg, on behalf of CropLife America**
DATE:	**April 5, 2006**
RE:	**Response to supplemental questions on legislation to implement POPs, LRTAP and PIC Conventions**

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 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 to 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.

Follow-up Questions to POPs/PIC Hearing

The Honorable Paul E. Gillmor:

1. **Can you explain how Ms. Solis proposed regulatory standard, "protect against significant adverse human health and environmental effects" would allow, if at all, your industry to properly balance the benefits to people and the environment you discuss in your testimony, such as controlling outbreaks of crop damaging diseases, insect infestations, and ensuring abundant and affordable food and fiber while protecting people, animals, and our homes? Is this standard anywhere else in U.S. domestic law? Are you concerned?**

   H.R. 4800 would create a new regulatory standard under the Toxic Substances Control Act (TSCA) to "protect against significant adverse human health and environmental effects" caused by chemical substances or mixtures. However, it remains unclear what protocol would be used in making the 'significant adverse effects' determination. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the law governing domestic pesticide use, already contains a regulatory standard that protects the environment against unreasonable adverse effects. This provision is clearly defined to include "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide". Under this provision the EPA Administrator "shall consider the risks and benefits of public health pesticides separate from the risks and benefits of other pesticides. In weighing any regulatory action concerning a public health pesticide under this Act, the Administrator shall weigh any risks of the pesticide against the health risks such as the diseases transmitted by the vector to be controlled by the pesticide." The pesticide community supports the

risk/benefit component under FIFRA and believes that it provides a clear framework for evaluating pesticide use while also considering the benefits that such use would provide to society. The regulatory standard as proposed in H.R. 4800 does not clearly address the nature of "significant adverse effects" nor does it weigh the benefits of a particular use against any risks that may or may not be associated with that use.

2. **Can you explain whether H.R. 4800 recognizes the risk-benefit standards or judicial review standards of FIFRA? Why are you concerned that it doesn't?**

As mentioned above, it is our opinion that H.R. 4800 does not recognize the risk/benefit component as defined by FIFRA. With respect to the judicial review provisions, both TSCA and FIFRA provide for appellate review of significant agency actions terminating rights to distribute or manufacture products under the standard requiring a court to uphold such agency actions "if supported by substantial evidence when considered on the record as a whole." H.R. 4800 provides for judicial review on a much looser standard, requiring a court to uphold the law unless the action was "arbitrary or capricious." We are troubled by this provision. In the context of the POPs listing process, this standard would allow the Agency virtually to ignore substantial evidence on health, security and economic benefits and even ignore contrary scientific evidence with little judicial scrutiny.

3. **A number of your fellow panelists here have mentioned in their testimony that they believe the chemical industry should bear a greater burden in developing and providing data on chemicals to EPA before these chemicals can go to market. In light of the expense and length of time it takes a chemical company like yours to go from the lab to the factory, could you please explain the impact this would have on your industry and whether you agree with their premise about this regulatory burden?**

Chemicals represent the most regulated products in the U.S. In the last several decades, Congress has passed legislation to increase federal agencies' ability to determine the health and environmental risks associated with toxic chemicals and to address such risks. Some of these laws, such as the Clean Air Act; the Clean Water Act; the Federal Food, Drug and Cosmetic Act; and the Federal Insecticide, Fungicide, and Rodenticide Act; authorize the control of hazardous chemicals in, among other things, the air, water, soil, food, drugs, and pesticides. Other laws, such as the Occupational Safety and Health Act and the Consumer Product Safety Act, can be used to protect workers and consumers from unsafe exposures to chemicals in the workplace and the home.

TSCA provides EPA with the authority, upon making certain determinations, to collect information about the hazards posed by chemical substances and to take action to control unreasonable risks by either preventing dangerous chemicals from making their way into commerce or otherwise regulating them, such as by placing restrictions on those already in the marketplace or requiring specific testing. TSCA allows EPA to control the entire life cycle of chemicals from their production and distribution to their use and disposal.

As for the approval and registration of pesticides, EPA requires up to 142 separate scientific safety tests to ensure that a product, when used properly, does not present health or environmental concerns. On average, only one in

139,000 chemicals make it from the chemist's laboratory to the farmer's field. Pesticide development, testing and EPA approval takes 8 to 10 years and costs manufacturers up to $200 million for each product. Additional regulatory requirements on new chemicals would add significant costs and additional time delays for manufacturers who dedicate years to research and development before even considering bringing a new product to market. Additional requirements would reduce incentives for both large and small companies to discover new products that may significantly benefit certain areas of agriculture production or protect human health from continually emerging diseases. CropLife America believes the current regulatory framework afforded to EPA is more than adequate to protect human health and the environment from new chemical products.

4. **As your industry knows, particularly in light of the battle over the use of methyl bromide and genetically modified organisms, sometimes the struggle to protect the global environment can have specific economic and trade consequences for certain countries. Noting the comments in your testimony about the ways that previous global environmental treaties became the base for future environmental agreements, is this something we should be worried about concerning POPs?**

The U.S. has the strongest most emulated pesticide regulatory system in the world. CropLife believes any new revisions to current law should adhere to the highest scientific information available and include a risk/benefit component that considers the benefits a particular product provides to human health and the environment.

Both CropLife members and the agricultural community realize the effects of conflicting environmental policies on a regular basis particularly as it relates to our international trading partners. For example, as the case with methyl bromide, while currently banned in the U.S., except under special conditions, our international trading partners continue to use in agricultural production. Some of these crops are later imported into the U.S. and marketed as organically grown.

Crop Life America supports the POPs Convention and believes that U.S. presence in the Convention is mandatory to insuring that the Convention does not become a short circuit around good science, nor permit countries to erect articifical trade barriers. We reiterate as well that implementation in the U.S. must be based upon sound science, and take into account the environmental, health, security and economic considerations that are built into H.R. 4591.

5. **You mention that POPs Convention and the LRTAP POPs Protocol support a transparent, science-based approach, that considers health and socio=economic impacts in its decision and allows countries to opt-in or out of these decisions. Many of your panelists have criticized H.R. 4591 for addressing these features. Do you believe H.R. 4591 should include these features and if so does the bill properly track these features with the agreements?**

The purpose and language of H.R. 4591 are intended to make sure that decisions on implementation in the U.S. are based upon transparent, sound science, and reflect consideration of health, security and economic considerations. This is consistent both with the listing process under the

Convention and Protocol, and, as well, with the provisions authorizing individual countries to opt-out of particular listing decisions. We strongly support these elements of H.R. 4591, which are consistent with the intent of the Convention and Protocol.

6. **In the hearing on July 13, 2004, Mr. Yeager, Mr. Wiser, and Dr. Goldman all agreed with the view that the treaty relies on countries to choose their own appropriate means of implementation and the adding process. Therefore, it is up to the individual country's legislative body, which would be the Congress, to establish a process. H.R. 4591 proposes a standard that provides EPA with sufficient authority, that EPA has stated on the record gives them sufficient authority, and that several industry and trade groups have testified they are comfortable with. The rulemaking standard in the bill is "to protect human health and the environment" while the manner in which it does so is the balancing of social, environmental, and economic costs and benefits. However the standard itself remains to protect human health, all humans, women and children, not just manufacturing interests, as some allege. Why then, as proposed under H.R. 4800, does the U.S., need to jump to the conclusion of the international COP, even while the COP doesn't require us to implement in the same manner? In other words, is it not inherent in this country's domestic process to properly vet each proposal through the same regulatory standards of domestic law before we chose to sign up for it? While this instance may have its genesis from a treaty, in the end aren't we talking about U.S. laws and U.S. persons that we are regulating and shouldn't they have the same process they are guaranteed if the proposal didn't have its genesis from an international proposal?**

   CropLife America agrees that the U.S. sovereignty under the international agreements must remain in place when considering any new proposals. Any new proposals must meet the standards of U.S. law before implementation of the decision of an internal body. And we note that H.R. 4591 implements the Convention and Protocol under a standard, protection of human health, consistent with the Convention.

TO: **The Honorable Hilda L. Solis**
FROM: **Steven Goldberg, on behalf of CropLife America**
DATE: **April 5, 2006**
RE: **Response to supplemental questions on legislation to implement POPs, LRTAP and PIC Conventions**

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 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 to 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 the Subcommittee's leadership in holding a hearing with participation from a wide array of interested stakeholders, and continuing to work with all interested parties to fine tune the language. 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 implementing legislation.

The Honorable Hilda L. Solis:

1. **Is it correct that some of the leading member companies of CropLife International such as BASF, Bayer Crop Science, Dow AgroScience, DuPont, FMC, Monsanto and Sunitomo are also members of the American Chemistry Council? How does CropLife International's representation of these corporate members differ from the American Chemistry Council's representation?**

   Some, but not all, of these companies share membership with CropLife America, Crop Life International and the American Chemistry Council. Many of the listed companies offer chemical divisions, as well as, crop protection divisions whose products are regulated primarily by FIFRA. In general, CropLife represents the interests of companies manufacturing or distributing products for crop protection.

2. **If the POPs Convention decided to make a listing decision for the pesticide uses of lindane such as the six seed treatment uses, are you recommending that U.S. regulatory action be taken under implementing amendments to the Toxic Substances Control Act or under the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act?**

   Lindane is a registered pesticide and therefore any additional U.S. regulatory action would have to be under FIFRA. It is important to note that lindane represents a key example of a chemical that is currently being considered by the Conference of the Parties to be potentially banned or further restricted in use. Lindane is a valuable pesticide that is currently used in the U.S under specific conditions by agricultural producers as a seed treatment with no viable alternatives for many of its uses. Without official U.S. representation, as a party, to the treaties, products such as lindane could be banned from use without consideration of the needs for this product.

TO: **The Honorable John D. Dingell**
FROM: **Steven Goldberg, on behalf of CropLife America**
DATE: **April 5, 2006**
RE: **Response to supplemental questions on legislation to implement POPs, LRTAP and PIC Conventions**

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The United States has the strongest and most emulated pesticide regulatory system in the world. Congress saw the need to 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.

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The Honorable John D. Dingell:

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RESPONSE FOR THE RECORD BY MICHAEL P. WALLS, MANAGING DIRECTOR, REGULATORY AND TECHNICAL AFFAIRS DEPARTMENT, AMERICAN CHEMISTRY COUNCIL

April 4, 2006

Mr. Peter Kielty
Legislative Clerk
House Committee on Energy and Commerce
2125 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515
VIA Email to: Peter.Kielty@mail.house.gov

Dear Mr. Kielty:

I have attached a copy of the American Chemistry Council's responses to the additional questions from the Subcommittee on Environment and Hazardous Materials from the hearing on legislation to implement the POPs, PIC and LRTAP POPs Agreements.

A hard copy of these responses will be delivered to your office on April l5, 2006.

If you have any questions concerning these responses, please contact me at 703 741 5167, or by email at mike_walls@americanchemistry.com.

Sincerely,

Michael P. Walls
Managing Director
Regulatory & Technical Affairs

Attachment

cc: J. Couri
R. Flagg
R. Simon

American Chemistry Council
Follow-up Questions to POPs/PIC Hearing

The Honorable Paul E. Gillmor:

1. **What interests or other organizations besides those represented at the witness table for our hearing support H.R. 4591 or the principles enshrined in it?**

The following organizations have also expressed support for H.R. 4591 or the principles that it represents:

U.S. Council for International Business
Council of Great Lakes Industries
North American Metals Council
Electronic Industries Association
Semiconductor Industry Association
The Chlorine Chemistry Council
The Alliance for Responsible Chlorine Chemistry
The Vinyl Institute

2. **Mr. Walls: Could you please explain where in H.R. 4800 there is a requirement for the public to comment regarding U.S. interests and concerns once the COP has accepted the proposal to take action?**

There is no requirement in H.R. 4800 for public notice and comment following a decision by the Conference of the Parties (COP) on a new chemical listing under the Stockholm Convention. In Section 502(h) of H.R. 4800, the public has no opportunity to provide comment to EPA on whether or not the United States should adopt a COP decision.

3. **Is it reasonable to set the precedent of having other nations decide our environmental policy for us when they themselves have difficulty following through on their environmental treaty commitments, like the EU with Kyoto?**

The American Chemistry Council believes that H.R. 4591 recognizes the inherent difficulty and uncertainty of how international agreements are implemented. The United States government has been justifiably proud of how rigorously it implements international agreements – and H.R. 4591 commits the United States to a process and decision-making standard that will ensure that when the government agrees to adopt an international standard, we will be able to meet our treaty obligations in full.

4. **A number of your fellow panelists here have mentioned in their testimony that they believe the chemical industry should bear a greater burden in developing and providing data on chemicals to EPA before these chemicals can go to market. In light of the expense and length of time it takes a chemical company like yours to go from the lab to the factory, could you please explain the impact this would have on your industry and whether you agree with their premise about this regulatory burden?**

The comments made by several other panel members on the responsibility of the chemical industry to provide data before a chemical can be marketed unfortunately demonstrates a telling ignorance of what is actually required under the Toxic Substances Control Act and the Federal Insecticide, Rodenticide and Fungicide Act. In the case of persistent organic pollutants (POPs), for example, EPA has long implemented a Pre-

Manufacturing Notice (PMN) policy with respect to chemicals that have persistent and bioaccumulative characteristics. The application of that policy has worked to require that any new chemical application for such chemicals be supported by considerable hazard, use and exposure information. Moreover, it is our understanding that EPA has approved no new chemical applications for substances representing the most serious persistent and bioaccumulative concerns.

TSCA provides EPA with the authority, upon making certain determinations, to collect information about the hazards posed by chemical substances and to take action to control unreasonable risks by either preventing dangerous chemicals from making their way into commerce or otherwise regulating them, such as by placing restrictions on those already in the marketplace or requiring specific testing. TSCA allows EPA to control the entire life cycle of chemicals from their production and distribution to their use and disposal. H.R. 4591 complements that authority by extending EPA's regulatory authority to the chemicals addressed by the Stockholm, LRTAP and Rotterdam agreements.

5. Sometimes the struggle to protect the global environment can have specific economic and trade consequences for certain countries. Is this something we should be worried about concerning POPs since other countries have already ratified the treaty, like China, the EU, Iran, etc.?

The treaties which are the subject of H.R. 4591 all provide considerable flexibility to Parties to evaluate the economic and competitive consequences of actions under the agreements, in making decisions about whether and how to adopt the international decision. The fact that a particular government has ratified the agreements does not in itself tell us what actions or activities that government will take in implementing its responsibilities. Moreover, the possible economic and competitive consequences should be evaluated as one of the several factors that underpin a national implementation decision. H.R. 4591 preserves the sovereign right of the United States to make such a determination, while preserving the ultimate objective of health and environmental protection.

6. A number of your fellow panelists believe that the science process within the international body is rigorous enough and that the United States should not engage in another scientific review. Do you share this opinion?

H.R. 4591 provides flexibility to the United States in deciding whether the science supporting the international decision process is rigorous enough, and does not require that the United States engage in another scientific review. In those instances where the international science does not meet well-accepted standards for scientific rigor (a concept already contained in several U.S. environmental statutes) the United States will have the opportunity to ascertain the state of the science.

7. Some of your fellow panelists have characterized the cost-benefit standard in TSCA as placing chemical company profits above the need of protecting health. Are you aware of any regulation, pursuant to a cost-benefit standard, that has tried to value company profits at all when trying to regulate a chemical?

The American Chemistry Council is not aware of any regulation based on a cost-benefit standard that has valued company profits in attempting to regulate a chemical. Section 6 of TSCA requires EPA to do what Congress has directed: to balance the effects and magnitude of effects of a chemical substance on health and the environment with the benefits of a substance (and possible substitutes) and the reasonably ascertainable

economic and social consequences of a regulation. H.R. 4591 requires nothing more, and does not put company profits ahead of health or environmental considerations.

8. **In the hearing on July 13, 2004, Mr. Yeager, Mr. Wiser, and Dr. Goldman all agreed with the view that the treaty relies on countries to choose their own appropriate means of implementation and the adding process. Therefore, it is up to the individual country's legislative body, which would be the Congress, to establish a process. H.R. 4591 proposes a standard that provides EPA with sufficient authority, that EPA has stated on the record gives them sufficient authority, and that several industry and trade groups have testified they are comfortable with. The rulemaking standard in the bill is "to protect human health and the environment" while the manner in which it does so is the balancing of social, environmental, and economic costs and benefits. However the standard itself remains to protect human health, all humans, women and children, not just manufacturing interests, as some allege. Why then, as proposed under H.R. 4800, does the U.S. need to jump to the conclusion of the international COP, even while the COP doesn't require us to implement in the same manner? In other words, is it not inherent in this country's domestic process to properly vet each proposal through the same regulatory standards of domestic law before we chose to sign up for it? While this instance may have its genesis from a treaty, in the end aren't we talking about U.S. laws and U.S. persons that we are regulating and shouldn't they have the same process they are guaranteed if the proposal didn't have its genesis from an international proposal?**

The American Chemistry Council believes that H.R. 4591 provides all the tools necessary for the United States to meet its obligations under the treaties. We agree that the standard contained in H.R. 4591 requires an appropriate balancing of interests, with the underlying goal of protecting public health and the environment. A significant advantage of the process and decision-making standard contained in H.R. 4591 is that it provides a vehicle for an **express consideration of the impacts on health and the environment in the United States** – a factor that may, but may not, be considered in decisions at the international level.

RESPONSE FOR THE RECORD BY GLENN M. WISER, SENIOR ATTORNEY, CENTER FOR INTERNATIONAL AND ENVIRONMENTAL LAW

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

March 31, 2006

Hon. Paul E. Gillmor
Chairman
Subcommittee on Environment and Hazardous Materials
2125 Rayburn House Office Building
Washington, DC 20515-6115

Re: March 2, 2006 Hearing on Legislation to Implement the POPs, PIC, and LRTAP POPs Agreements: Answers to questions from Members of the Subcommittee

Dear Chairman Gillmor:

Thank you for your request for responses to your questions stemming from my testimony at the March 2 Subcommittee hearing entitled, "Legislation to Implement the POPs, PIC, and LRTAP POPs Agreements." All of my responses below are provided within the context of the Stockholm Convention on Persistent Organic Pollutants (POPs). For ease of presentation, I have reproduced your questions in their entirety, and inserted my answers directly after each question or sub-question.

Sincerely,

Glenn Wiser
Senior Attorney

1. You have stated in your testimony that you believe the "reasonable balance" standard required by H.R. 4591 would be a substantially weaker standard compared with the standard employed by the international body and H.R. 4800. I would like to understand the source of this concern, particularly since this standard does not go into effect until the United States opts-in to a specific chemical, implicitly declaring that the POPS Treaty standard is the reason *why* the U.S. wants to regulate the chemical.

   A. Do you agree that all the domestic notice and comment periods required in H.R. 4591 that occur throughout the international community's deliberations do not include or ask for a cost-benefit analysis to be conducted?

      ANSWER: Yes.

   B. Do you agree that the "reasonable balance" test only occurs when the U.S. is undertaking a rulemaking?

      ANSWER: Yes. However, EPA's perception of the workability of that test may affect whether or not it ever initiates a rulemaking. Please see my response to (G) below.

   C. Do you agree that in H.R. 4591, any domestic regulations resulting from the rulemaking can only be put into force when the U.S. consents to be bound by the treaty for the new chemical?

      ANSWER: Yes.

   D. Do agree [sic] that information used by the U.S. to make the consent decision is based on the data that was requested and received during the notice and comment periods that I described before, which does not include the "reasonable balance" test?

      ANSWER: No. By "consent decision," I understand you to mean a decision of the United States to deposit its instrument of ratification or acceptance for a new-listing amendment and thus to be legally bound by that amendment. Such a decision will be made by the President under her or his foreign affairs/treaty making powers. Under the separation of powers doctrine, it would not be appropriate for Congress to try to *require* the President to make that decision on the basis of information obtained through the notice and comment periods in H.R. 4591; as I understand H.R. 4591, the bill does not try to establish such a requirement. The President may or may not base the U.S. "consent decision" upon some or all of the data requested and received during the notice and comment periods, but the extent to which she or he will base the decision upon that information is not dictated by any part of H.R. 4591. Because none of H.R. 4591's provisions can directly establish requirements for the President's "consent decision," I cannot agree with a statement "that information used by the U.S. to make the consent decision is based on the data that was requested and received during the notice and comment periods."

E. Do you agree that when the U.S. consents to be bound by the international community's decision on a new chemical, that the consent decision is based on the environmental and health-based standard?

ANSWER: As I imply in my answer to (D) above, I do not presume to know what the President's consent decision will be based upon. I do not believe it is spelled out by any part of H.R. 4591.

F. Do you agree that there is a distinction between whether or not to take an action and how to take an action?

ANSWER: Yes. However, your line of questioning here suggests that it may be helpful to clarify precisely *what* action is being contemplated. There are two distinct, primary actions. One is the EPA Administrator's decision whether or not to initiate a rulemaking in respect to a POP that has been added to the Stockholm Convention. The other action is a decision by the President whether or not the United States should "opt in" to a new-listing amendment to the Convention and thus be bound by that amendment. The statutory authority contemplated under H.R. 4591 goes to the first action (EPA rulemaking), but not to the second (President's opt-in decision).

Although these two actions are distinct, *how* H.R. 4591 instructs EPA to take its action can have a direct bearing on *whether* the President may bind the United States to a treaty amendment for a newly listed POP. That is because Congress can effectively prevent the President from exercising her or his treaty making powers by failing to give EPA adequate authority to ban or restrict the newly listed POP. The President should not bind the United States to a new listing amendment until our domestic implementing regulations for the amendment are in place, because to do otherwise, the President would put U.S. compliance with the treaty amendment at risk, thereby calling into question the President's ability to "take care that the laws be faithfully executed." (U.S. Const. art. II, § 3). Thus, while there is certainly a distinction between whether or not to take these actions and how to take them, how they may be taken can have a direct correlation with whether they can be taken.

G. So, do you agree that the "reasonable balance" standard is only used when determining *how* to implement the treaty, which becomes effective only after the U.S. consents to be bound in the first place?

ANSWER: No. As I suggest above, and as I have stated in my testimony, the "reasonable balance" standard, coupled with H.R. 4591's standard of review, could make it difficult or impossible for EPA to implement a new POPs listing decision, and thus could jeopardize the ability of the United States to join the rest of the world in accepting decisions to add dangerous POPs chemicals to the Stockholm Convention. Because H.R. 4591 could make it exceedingly difficult or impossible for EPA to successfully promulgate a rule that would be strong enough to permit the United States to comply with a new-listing amendment, we anticipate that

H.R. 4591 would have—and indeed, may be intended to have—the effect of prohibiting the President from opting in to future Stockholm amendments.

2. Am I correct to say that one of your objections to H.R. 4591 is the use of a cost-benefit analysis in the rule-making procedure?

ANSWER: Yes.

Do you believe that when the international community conducts a cost-benefit analysis, it is able to adequately account for all U.S. costs and all U.S. benefits and include them in their evaluation?

ANSWER: I assume your intent is not to ask this as a general or hypothetical question, but rather to ask it within the context of the Stockholm Convention's Article 8 procedures for evaluating and adding other POPs to the treaty. If my assumption is correct, the premise of the question is nonsensical, because the Stockholm Convention's listing procedures for additional POPs do not include any reference to cost-benefit analysis.

More generally, in the context of environmental health regulation, cost-benefit analyses do not adequately account for all costs and benefits. Thus, they are inherently flawed and inappropriate as a rule of decision.

Isn't standard practice in any U.S. decision-making process to conduct a cost-benefit analysis unless specifically prohibited by law?

ANSWER: I am not aware of such a sweeping "standard practice" for U.S. decision-making.

How does this reliance on the international community to ensure American interests are preserved maintain the sovereignty of U.S. decision-making?

ANSWER: The sovereignty of U.S. decision-making is fully maintained by the existence in the Stockholm Convention of Article 25.4, which provides that a new-listing amendment "shall enter into force [for the United States] only upon the deposit of its instrument of ratification, acceptance, approval or accession." This "opt-in" right ensures that the United States can never be bound by a Stockholm Convention new-listing decision against its will. However, if the United States concludes that the results of the international listing process—in which it will have actively participated—serve American interests, then the United States should be able to promptly and effectively adopt and implement the new listing amendment. If it were to become law, H.R. 4591 would likely prevent that from happening.

Given our nation's problems with our "allies" that manifest themselves in the "Oil-for-Food" scandal, is it not in the interest of the U.S. to conduct its own evaluation in the event that the international community does not include all U.S. costs and benefits of regulation?

ANSWER: While the Stockholm Convention is administered as part of the United Nations system, it is a fully autonomous and distinct legal entity that is answerable exclusively to the will of its states party. Thus, I do not understand what relevance the "Oil-for-Food" scandal may have to an evaluation of this treaty and whether its processes, rights, and obligations may serve U.S. interests. I suggest it would be more appropriate to look to the performance of other multilateral environmental agreements, which, to the best of my knowledge, have functioned free of scandal. Alternatively, one may find enlightenment by examining whether there is any relationship between U.S. interests, this legislative process, and the vote-selling and influence-peddling scandals that have recently roiled the Congress. There is no reason to tar all international processes with the problems of the Oil-for-Food program, just as there is no reason to tar all U.S. lawmakers with the problems of Jack Abramoff and former Congressman Cunningham.

3. Where in H.R. 4591 is the specific language that prohibits the United States from meeting the minimum control measures in the POPS Treaty?

   ANSWER: I am not aware of any provision within H.R. 4591 that contains "specific language that prohibits the United States from meeting the minimum control measures in the POPS [sic] Treaty." Similarly, I am not aware (as I believe your question implies) of any instance in which anyone has alleged that H.R. 4591 contains "specific language that prohibits the United States from meeting the minimum control measures in the POPS [sic] Treaty." Rather, the point I have made repeatedly in my testimony, and which I reiterate in these answers, is that the "reasonable balance" standard, coupled with H.R. 4591's standard of review, could make it exceedingly difficult or impossible for EPA to successfully promulgate a rule that would be strong enough to permit the United States to comply with a new-listing amendment.

4. I think we both support elimination of the "dirty dozen" and a process for addressing additional chemicals in the future – a concern raised by several environmental NGOs in the 107th Congress. Certainly, though, nothing approaching our desire to see additional extremely dangerous chemicals addressed would be accomplished if the United States were to remain in "observer status" – the same status that your group currently enjoys at the meetings of the full POPs parties. Since you consider having a seat at the table a lesser goal, does that conversely mean that you also believe that your government should have no more say in the POPs Convention than your group?

   ANSWER: Your question is predicated on your assertion that I "consider having a seat at the table a lesser goal." I do not believe I have ever made such a statement; in fact, I have repeatedly said in public that it is very important for the United States to participate actively and constructively in the Stockholm Convention as one of the states party.

5. H.R. 4800 takes the main criteria for considering a chemical by the POPs Conference of the Parties and makes it our domestic regulatory standard for these chemicals. H.R. 4800, however, also allows the use of other domestic environmental laws for compliance with the POPs Convention. This sets up a

potential confrontation between existing environmental law and the mandate in the Solis legislation to use one of the Treaty's listing criteria. If we seek full compliance with the treaty, when US law and the treaty are in conflict, which should prevail: domestic law or the treaty?

ANSWER: Because this question is very difficult to understand, I will parse the sentences:

> "H.R. 4800 . . . allows the use of other domestic environmental laws for compliance with the POPs Convention. This sets up a potential confrontation between existing environmental law and the mandate in the Solis legislation to use one of the Treaty's listing criteria."

The purpose of H.R. 4800 § 502(h) is to provide EPA with the statutory authority to regulate in a timely manner POPs substances that have been added to the Stockholm Convention, so that the United States can reliably opt-in to a new-listing amendment if it chooses to do so. However, H.R. 4800 accurately recognizes that "industrial chemicals"—which typically fall within the scope of TSCA—may not be the only kind of POPs that are added to the treaty. For example, a POP may be unintentionally caused by combustion with a release to the air, it may be related to releases from stockpiles and wastes, or it may be a pesticide.

H.R. 4800 instructs the Administrator to initiate a rulemaking under § 502(h) *unless* the Administrator determines that (1) the chemical is not likely to lead to significant adverse human health or environmental effects, (2) the chemical is already regulated in the United States in a manner that would allow us to comply with the Stockholm amendment in question, or (3) a rule is being promulgated under another section of the U.S. Code (e.g., FIFRA, RCRA, CERCLA, the Clean Air Act, etc.) that similarly would allow us to comply with the Stockholm amendment. This latter exception makes simple, common sense, because it allows the United States to regulate the POP under whatever statutory authority represents the most expedient, efficient, and effective way to do so.

It is not apparent to me why you would say that H.R. 4800's choice-of-law provision "sets up a potential confrontation between existing environmental law and the mandate in the Solis legislation to use one of the Treaty's listing criteria." Perhaps you are trying to suggest that H.R. 4800—rather than serving as U.S. implementing legislation for a non-self executing treaty—is somehow trying to force EPA to regulate directly from the text of some disembodied international agreement. However, such a suggestion would misconstrue the purpose of U.S. implementing legislation for a treaty; confuse the relationship between U.S. statutes, regulations, and treaties to which we are party; and require a misreading of H.R. 4800.

Nowhere in H.R. 4800 does there appear a mandate to EPA "to use one of the Treaty's listing criteria." As I explained above, the mandate is to regulate a POP in a manner that will allow the United States to comply with a new-listing amendment, unless EPA determines that the chemical is not likely to lead to significant adverse human health or environmental effects.

> "If we seek full compliance with the treaty, when US law and the treaty are in conflict, which should prevail: domestic law or the treaty?"

This sentence establishes a false dichotomy between "US law" and "the treaty." As you know, the "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . ." (U.S. Const. art. VI, cl. 2). That is why, for those treaties such as the Stockholm Convention that are not self-executing, it is essential that the United States have in place adequate legal authority to ensure that we can comply with the treaty before we ratify it. It is also the reason why I have emphasized that if the Congress enacts implementing legislation that makes it difficult or impossible for EPA to promulgate rules that allow the United States to comply with a Stockholm Convention new-listing amendment, then the President will not be able to opt in to such an amendment, because to do so would jeopardize her or his ability to ensure that the laws are faithfully executed. Our concern is not that H.R. 4591 would establish a conflict between U.S. legal obligations. Rather, it is that, in some or even most cases, the only way the United States could avoid such a conflict were H.R. 4591 enacted would be to refrain from adopting Stockholm Convention amendments that regulate additional POPs.

I would like to make an additional observation regarding the regulatory standard in H.R. 4800. You have attacked that standard because it is derived from the text of the Stockholm Convention, and apparently because that fact somehow suggests to you that it is perhaps un-scientific or even an affront to U.S. sovereignty. However, in the Message from President Bush to the Senate transmitting the Stockholm Convention, the following statement appears as part of the Letter of Submittal from then-Secretary of States Colin Powell:

> [Under Article 8 of the Convention, the Persistent Organic Pollutants Review Committee] must still determine that the chemical is "likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects." *This formulation is consistent with risk-based decision-making by chemical regulators under existing U.S. law* (emphasis added). S. Treaty Doc. No. 107-5, at xiv (2002).

This formulation is, of course, the same one from which is derived the H.R. 4800 standard to protect "against significant adverse human health and environmental effects." I do not understand why a formulation that the Secretary of State and the President said "is consistent with risk-based decision-making by chemical regulators under existing U.S. law" would be acceptable when the Stockholm Convention was presented to the U.S. Senate for its advice and consent, but would not be acceptable for inclusion in the implementing legislation intended to implement the Convention.

6. Your testimony from both the July 13, 2004 hearing before our panel and the one on March 2, 2006 make clear that you do not support the creation of a domestic regulatory standard that departs from the treaty review processes. However, I noticed that the website for your group, the Center for International Environmental Law, contains a July 16, 1999 Technical Statement by United States Environmental

Organizations – 14 in total including CIEL – that raised concerns about U.S. involvement in the World Trade Organization when it stated:

> "*We are pleased to learn that the Administration now seems to agree that ad hoc dispute settlement decisions alone are not a solution to the impact that WTO rules as currently interpreted may have on measures to protect the environment. United States leadership…is needed to ensure that WTO forums — including the Dispute Settlement Body — and WTO rules consistently defer to regulations and other measures adopted by international and national institutions.*"

How do you square your organization's position with the need for the protection of distinct and separate domestic processes from international frameworks with your support for the selective, treaty-dependent regime in H.R. 4800?

> ANSWER: First, I do not agree that my testimonies "make clear that [I] do not support the creation of a domestic regulatory standard that departs from the treaty review processes." The more accurate characterization of my views is that I do not support creation of a domestic regulatory process that would make it more difficult or impossible for the United States ever to opt in to Stockholm Convention amendments for additional POPs.
>
> As to your question, it seems to be based on the faulty syllogism that if my organization supports U.S. ratification and full implementation of the Stockholm Convention, we must necessarily support U.S. subservience to all multilateral agreements and institutions. CIEL is dedicated to using international law and institutions to protect the environment, promote human health, and ensure a just and sustainable society. We support U.S. ratification and full implementation of the Stockholm Convention because we think the treaty is a good agreement that lives up to both America's and CIEL's ideals, and because we are convinced it will serve U.S. interests by helping to protect the health and well being of Americans and people throughout the world, especially our children, grandchildren, and unborn generations.
>
> We do not share the same enthusiasm for some aspects of the World Trade Organization and its underlying agreements, because we believe that in some ways they do not contribute to achievement of a just and sustainable society, nor do they serve the interests of most Americans. We have been consistent in this respect for many years by supporting active, constructive involvement by the United States in sound multilateral agreements; opposing U.S. obstruction to such agreements when it has occurred; and trying to convince the United States Government to use its considerable influence to demand reforms and improvements in those agreements and institutions, such as the WTO, that we believe have serious flaws.

7. You state that, with the exception of DDT, all Annex A chemicals should be banned but posit that a risk-based standard would jeopardize the ability to ban these chemicals. I have two (2) questions: first, H.R. 4591 does not apply a risk-based standard to the existing 12. Actually, doesn't H.R. 4591 ban all 11 of the "dirty dozen" that are already part of Annex A as well as place a restrictive, domestic legal construct on PCBs?

ANSWER: To the best of my knowledge, I have never stated that DDT is an Annex A chemical. DDT is an Annex B chemical, meaning that it is not targeted for elimination under the Stockholm Convention, but instead is subject to restriction.

H.R. 4591, like H.R. 4800, bans outright all of the intentionally produced POPs that are presently listed in the Stockholm Convention, with the exception of PCBs, which are subject to a more extended phase-out. Accordingly, neither bill delegates rulemaking authority to EPA for the purpose of banning the existing 12.

Second, you acknowledge that a chemical, like DDT, should not be banned. Doesn't this mean that you contradict your very interest in requiring all chemicals be banned as per CIEL's statement on its web page that chemicals should be guilty until proven innocent?

ANSWER: I am unaware of any organization, let alone CIEL, that has "an interest in requiring all chemicals be banned." The position would be preposterous on its face if it were made by anyone. I assume that the intent behind that phrase was to say that CIEL has "an interest in requiring all *POPs* be banned."

As we have stated previously, we do believe all anthropogenic chemicals that exhibit characteristics of persistence, toxicity, and the ability to bioaccumulate and travel long distances should be phased out and eliminated from the global environment. However, we recognize that some chemicals with those qualities (DDT being the prominent example) may serve important public health purposes, and that eliminating the use of such chemicals before affordable, effective alternatives are widely available could cause serious problems, especially in developing countries. That is why we support restriction of DDT to disease vector control in accordance with the terms of Annex B, and why we support dramatically increased public and private funding to combat malaria and to develop and make available affordable, effective alternatives to DDT as soon as feasible.

As to the putative statement on CIEL's website "that chemicals should be guilty until proven innocent," I would appreciate your telling me precisely where on our website that statement can be found, because I would like to correct it immediately if it is there. However, I assume that you have, in fact, misquoted us, and you were actually referring to one of our frequent criticisms of TSCA § 6 and the traditional U.S. approach to regulating chemicals, which we say fail in part because they are based on an outmoded assumption that all chemicals are innocent unless they are proven guilty.

8. You state that criteria not considered by the POP COP should be reinserted as part of a domestic regulatory process designed to implement and satisfy our obligations to this treaty. Since the POP-RoC is not charged with worrying about any of our nation's interests, does that mean you support not having the United States assess its own implementation in terms of impacts on U.S. jobs, U.S. standard of living, or national defense concerns?

ANSWER: I am not familiar with any institution called the "POP COP." I assume you mean the Persistent Organic Pollutants Review Committee, or POPRC.

If some members of this Subcommittee and the Congress ever decide to drop their insistence on using this implementing legislation to score ideological points, and if they thereby allow the United States to proceed with ratification, I predict the United States will immediately have significant influence on the POPRC and will soon be a member of it. The nature of the Stockholm Article 8 procedures—which reflect the design characteristics insisted upon the U.S. Government during the treaty's negotiation—are such that they provide significant opportunities for the United States to present information relevant to our economic, security, and other domestic needs, and to insist that such information be used to shape the ultimate outcome of the POPRC's recommendation for the chemical in question. To suggest, as I understand your question implicitly does, that the other members of the POPRC will decide to ignore or even deny serious interests and needs of the United States during the listing process presupposes, in my view, that the process has significantly broken down. Moreover, it presupposes that no other countries will share any of the same interests and needs in respect to a persistent organic pollutant, or that members of the global community will spite themselves in order to spite the United States. In any event, if one of these scenarios came to pass, then the United States would have the ready safeguard of Article 22.4, which ensures that the amendment shall not enter into force for the United States unless and until we agree to be bound by it.

Also, if the POP COP [sic] dismisses certain "scientific" findings as unsubstantiated or unsupportable, do you believe that the United States should be compelled to consider or accept them as part of a rulemaking record?

ANSWER: We do not believe that this legislation should place restrictions on EPA as to what scientific information it may or may not consider during the rulemaking process. Rather, EPA should have the discretion to be guided by its own expertise, subject to the requirements of Executive Order 12866, in determining what scientific resources it will consult and the weight it will give to them. H.R. 4800 recognizes the value of giving EPA this discretion. In contrast, H.R. 4591 contains language that tries to second guess EPA's ability to weigh the value of scientific information. This "sound science" language would 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 inclination to initiate a POPs-related rulemaking.

9. For the generation of a risk profile, Annex E states "The purpose of the review is to evaluate whether 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." Do you agree that this is the standard in H.R. 4800?

ANSWER: No. The standard in H.R. 4800, found in § 502(h)(1)(B)(i) reads as follows:

> [The Administrator shall publish a final rule] to prohibit or restrict the domestic manufacture, processing, distribution in commerce for export, use, or disposal of the additional chemical substance or mixture, that protects against significant adverse human health and environmental effects from such domestic manufacture, processing, distribution in commerce for export, use, or disposal associated with the chemical substance or mixture (including, as the Administrator considers appropriate, effects from long-range environmental transport), which at a minimum implements the control measures specified for the chemical substance or mixture in Annex A and B of the POPs Convention and Annex I and II to the LRTAP POPs Protocol

The "significant adverse human health and environmental effects" part of the H.R. 4800 standard is derived from Stockholm Article 8.7(a), which is similar to the language you quote from Annex E.

Is it correct to say that based on the information requirements listed in only Annex E, no additional chemical would be placed in Annex B?

ANSWER: No. Annex E lists information requirements for the risk profile required by Art. 8.6. Thus it pertains to the POPRC decision of whether a chemical should be considered a POP. Annex E does not go to control measures, which are to be proposed in response to the risk management evaluation required under Art. 8.7. It is through the risk management evaluation and determination of control measures that a chemical could ultimately be placed in Annex A, B, or C.

Isn't it true that the cost-benefit analysis conducted in Annex F reveals the cost to human health in addition to the benefits in banning a chemical like DDT?

ANSWER: No. Annex F contains nothing about cost-benefit analysis. Instead, it provides an indicative list of factors that the POPRC should consider in preparing the risk management evaluation. There are no provisions for cost-benefit analysis anywhere in the Stockholm Convention.

If there were a chemical proposed for listing that had beneficial uses like DDT, and using only the standard as outlined in Annex E and H.R. 4800, isn't it true that if a chemical causes significant adverse human health and/or environmental effects, it would be placed in Annex A regardless of the life-saving uses it may have?

ANSWER: No. As I have explained above, focusing solely on Annex E does not reveal anything about what the control measures for a POP will be. Annex E is used to inform development of the risk profile, which in turn is used to determine whether the chemical in question is a POP and warrants global action. What that global action will be (i.e., what the control measures will be) is determined through development of the risk management evaluation and through the decision-making processes of the Conference of the Parties. That is why the rulemaking mandate of H.R. 4800 quoted above contains language related to the determination of whether a chemical is a POP that causes

> significant adverse human health and environmental effects, as well as language related to control measures.

If any considerations other than the significant adverse human health and/or environmental effects are included, doesn't that mean that this standard was not meant to be the regulatory standard, but the threshold by which the international community is compelled to act, not how they act?

> ANSWER: Please refer to my answer above, which responds to this question. However, I would like to add that your question seems to indicate confusion about precisely what one means by "regulatory standard." Generally speaking, the operative section of a U.S. environmental health law will contain a standard by which EPA should or must make a determination to act, and then instructions for what EPA should or must do after such a determination is made. For example, TSCA § 6(a) contains the standard of "unreasonable risk of injury to health or the environment," which is followed by the various "least burdensome means" responses EPA may apply (the Corrosion Proof Fittings court's interpretation of how EPA may apply these "least burdensome means" responses is widely viewed as the reason why § 6(a) is dysfunctional). An example from the U.S. Code that is more analogous to POPs implementing legislation is § 602 of the Clean Air Act, which implements the Montreal Protocol on Ozone Depleting Substances, a multilateral environmental agreement like the Stockholm Convention. Section 602 contains the standards "causes or contributes significantly to harmful effects on the stratospheric ozone layer" and "cause or contribute to harmful effects on the stratospheric ozone layer." After finding that one of these standards is met, the Administrator must add the chemical in question to one of the lists of ozone-depleting substances. The chemical is then subject to the timed phase-out required by Congress in either § 604 or § 605.
>
> Like these and other U.S. environmental health laws, H.R. 4800 contains a standard for action (production, use, distribution, etc. of the chemical is likely to lead to significant adverse human health and environmental effects) and instructions from Congress for the required action (implement the control measures specified for the chemical in Annex A, B, or C of the Stockholm Convention).

RESPONSE FOR THE RECORD BY HON. CLAUDIA A. MCMURRAY, ASSISTANT SECRETARY FOR OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, U.S. DEPARTMENT OF STATE

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Chairman Paul Gillmor (#1)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
What countries are on the review panels and what kind of working relationship do we have with these countries? How similar are their environmental and economic interests to our own?

Answer:
The countries represented on the POPs Review Committee during 2006 are: Armenia, Australia, Brazil, Burkina Faso, Canada, Chad, China, Czech Republic, Ecuador, Ethiopia, Fiji, Germany, Ivory Coast, Japan, Jordan, Mauritius, Mexico, Morocco, Norway, Philippines, Qatar, Sierra Leone, Slovenia, South Africa, Spain, Sweden, Thailand, Trinidad and Tobago, United Kingdom, Uruguay and Yemen.
The countries represented on the PIC Chemical Review Committee during 2006 are: Argentina, Australia, Brazil, Canada, Ecuador, Finland, France, Gabon, Ghana, Hungary, Jamaica, Jordan, Kyrgyzstan, Italy, Libya, Malaysia, Netherlands, Nigeria, Oman, Rwanda, Samoa, Senegal, Slovenia, South Africa, Republic of Korea, Switzerland, Syrian Arab Republic, Thailand, Ukraine, United Republic of Tanzania and Uruguay.
We have a productive working relationship with the vast majority of the countries listed above, and are actively engaged with many of them. The environmental and economic interests of countries on the committee vary widely. As a general matter, developed country economies share broad similarities, and most have well-developed chemical regulatory systems that have been in place for some time. We generally find that our interests are most closely aligned with countries such as Australia, Canada, Japan, and South Korea of the countries listed above.
Developing country economies are drastically different than developed economies, and the level of environmental protection varies widely. Our environmental and economic interests are therefore often different, though not necessarily incompatible with those of developing countries.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Chairman Paul Gillmor (#2)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
There has been much made of our nation's need to participate as full partners in the POPS Convention, LRTAP POPS Protocol and the PIC Convention. North Korea and Iran have both ratified the POP's treaty. Are you concerned that these countries have hostile positions towards our nation and its interests but would be able to have greater influence in the POPS COP than the US?

Answer:
We are concerned that we are unable to take a role as a full member at technical committees and at the Conference of the Parties to these agreements. One hundred twenty countries, including those you identified above, have ratified the Stockholm Convention on POPs. Many of these countries have significantly different priorities, concerns, and national interests than the United States. By joining these agreements, these countries have enhanced their influence within these agreements, while U.S. influence is seriously undermined by our role as a non-Party.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Chairman Paul Gillmor (#3)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
In a written submission to follow-up questions from Chairman Gillmor resulting from the July 13, 2004 hearing, both EPA and the State Department stated: "We believe that a decision 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 for U.S. regulations." Is that correct and is that still your position?

Answer:
The Administration continues to believe that a COP decision to add a chemical should not become mandatory for U.S. regulations, but rather should be given appropriate consideration as part of EPA's deliberative rulemaking process.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Chairman Paul Gillmor (#4)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
Are you aware of any Federal environmental regulatory standard that is drawn directly from a treaty?

Answer:
There are federal environmental statutes that implement or incorporate standards contained in treaties. Following are a few examples, though this list is not intended to be exhaustive. The Endangered Species Act states that it is a violation to engage in "trade in any specimens contrary to the provisions of the Convention [on Trade in Endangered Species], or to possess any specimens traded contrary to the provisions of the Convention." 16 U.S.C. 1538(c)(1). Another example is the Marine Protection, Research and Sanctuaries Act, which provides that, "to the extent that he may do so without relaxing the requirements of this subchapter, the Administrator, in establishing or revising criteria [for reviewing and evaluating permit applications for ocean dumping], shall apply the standards and criteria binding upon the United States under the Convention [on the Prevention of Marine Pollution by Dumping of Wastes and Other

Matter]." 33 U.S.C. 1412 (a). Similarly, the Act to Prevent Pollution from Ships prohibits activities inconsistent with Annex V of MARPOL and Annex IV of the Antarctic Protocol, and requires reporting in "the manner prescribed" by the London Convention. 33 U.S.C. 1902; 1905(e); 1906(b); 1907(a).

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Chairman Paul Gillmor (#5)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
Does a determination by the POPRC (or international review panel) precede a final vote by the COP?

Answer:
Yes. After the POPRC has completed its evaluation of a chemical it may make a recommendation to the COP as to whether that chemical should be listed for control measures. It is then up to the COP to decide whether the chemical should actually be listed.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Chairman Paul Gillmor (#6)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
Is the POPS COP bound in any way to accept or adopt recommended control measures of the POPRC?

Answer:
No. Under the Convention, the COP must "tak[e] due account of the recommendations of the Committee," but it is not bound in any way to follow those recommendations.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Chairman Paul Gillmor (#7)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
Are there constitutional concerns with putting a mandatory duty on EPA to make a decision to act through either a rule or order etc that is triggered by the international listing process? (HR 4800 pg 37 lines 4-9) How does this not tie the hands of the Executive branch regarding its treaty powers into forcing them to decide whether to utilize the opt in within one year or not?

Answer:
The Administration has expressed the view that the triggering of domestic processes must be a matter of domestic discretion. In any event, once the United States has declared in its instrument of ratification that Annex A, B, or C amendments will enter into force only upon the deposit of a further instrument, the Executive Branch would no longer be faced with any restrictive time-frame for making a decision as to whether to join an Annex A, B, or C amendment.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Representatives John D. Dingell and Hilda L. Solis (#1)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
Does the Administration of President Bush support specific "advice and consent" by the U.S. Senate for each new chemical listed by the Conference of the Parties pursuant to the POPs convention? If so, please explain why.

Answer:
The Administration supports consultations with the Senate in determining whether specific "advice and consent" for each new chemical would be required. The Department historically has considered the following eight factors in making a judgment as to whether a particular amendment requires the advice and consent of the Senate:
The degree of commitment or risk for the entire Nation;
Whether the agreement is intended to affect state laws;
Whether the agreement requires enabling legislation;
Past U.S. practice;
The preference of Congress;
The degree of formality desired;
The proposed duration and need for prompt conclusion; and
General international practice on similar agreements.

This analysis takes into account the Senate's constitutional role in advising and consenting to an amendment. We plan to work with the Senate Foreign Relations Committee to address this issue.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Representatives John D. Dingell and Hilda L. Solis (#2)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 3, 2006

Questions:
Has any official from the Department of State had any written or oral communication with Members or staff of the Senate Foreign Relations Committee with respect to whether there should be "advice and consent" for each new chemical listed by the Conference of Parties under the POPs Convention? If so, please describe any advice, representations, or recommendations provided by officials of the Department of State to Members or staff of the Senate Foreign Relations Committee relating to the issue of specific "advice and consent" for each newly listed POPs chemical.

Answers:
I have not had any written or oral communication with any Member or staff of the Senate Foreign Relations Committee with respect to whether there should be "advice and consent" for each new chemical listed by the Conference of Parties under the POPs Convention. To the best of my knowledge, in past years, there have been only informal staff-level consultations with the Senate Foreign Relations Committee. These discussions did not result in any formal advice, representations, or recommendations, but were consistent with the position expressed in our answer to the previous question.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Representatives John D. Dingell and Hilda L. Solis (#3)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
You have testified that the "POPs Convention creates a science-based procedure to govern the addition of chemicals to the Convention beyond the current twelve substances."

Do you agree with others who have indicated that the international process is likely to take a minimum of five years from the time a proposal to list a chemical is submitted to the Secretariat until the time the Conference of Parties may decide to list the chemical and specify its related control measures? If you do not agree, please explain why.

Answer:
The Stockholm Convention sets out the procedures by which new chemicals can be proposed, considered by the POPs Review Committee, and a final decision on an amendment ultimately taken by the Conference of the Parties (COP). While the COP itself may set out specific timelines with respect to how work is anticipated to progress in the POPs Review Committee over a certain period of time, the Convention itself does not specify a timetable for proposals to proceed. We believe it is likely to take approximately five years for a party submitting a proposal to list a chemical to advance to a COP decision to add a chemical to the Annex A, B, or C. During this process, both the POPRC and the COP would take important decisions on the progress of the chemical through the technical review process prior to the final decision on its addition to the Convention.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Representatives John D. Dingell and Hilda L. Solis (#4)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
H.R. 4800 clearly provides that no final rule can take effect unless the United States has consented to be bound by the listing of the chemical substance or mixture with respect to which the final rule applies (Section 502(h)(1)). In addition, H.R. 4800 allows the Administrator of the Environmental Protection Agency (EPA) to make a proposed decision and issue a final decision not to regulate a listed POPs chemical if the

Administrator decides that a chemical is not likely to lead to significant adverse human health or environmental effects from domestic manufacture, processing… use or disposal (Section 502(h)(1)). Under H.R. 4800 the EPA Administrator's decision could only be set aside if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" -- the traditional standard of review under the Federal Administrative Procedure Act (Section 502(h)(2)(E)).

In view of these provisions which give the President complete discretion to opt-in and the Administrator authority to decide not to regulate, do you agree that H.R. 4800 does not require the United States to automatically adopt decisions of the Conference of the Parties of the POPs Convention with respect to newly listed chemicals?

Answer:
While we would agree that H.R. 4800 would not require automatic adoption of decisions of the COP, it would require EPA to automatically undertake a domestic rulemaking when the Conference of the Parties has decided to list a chemical. We remain concerned that this requirement would enable the Parties to the Convention to trigger a U.S. domestic process.

Questions for the Record Submitted to
Assistant Secretary Claudia McMurray by
Representatives John D. Dingell and Hilda L. Solis (#5)
House Committee on Energy and Commerce
Subcommittee on Environment and Hazardous Materials
March 2, 2006

Question:
Do you also agree that neither H.R. 4800 nor H.R. 4591 delegates regulatory powers to the United Nations?

Answer:
We agree that neither bill delegates regulatory powers to the United Nations.

RESPONSE FOR THE RECORD BY SUSAN B. HAZEN, PRINCIPAL DEPUTY ASSISTANT ADMINISTRATOR, OFFICE OF PREVENTION, PESTICIDES, AND TOXIC SUBSTANCES, U.S. ENVIRONMENTAL PROTECTION AGENCY

THE HONORABLE PAUL E. GILLMOR

1. **Ms. Hazen, you testified before our subcommittee on July 13, 2004 regarding a discussion draft -- which became the basis for H.R. 4591 -- that I had circulated as well as the importance of the POPS Convention and our need to be a party to it. I have a series of questions that I would like to ask you to make sure your position on items to which you testified to during the July 13, 2004 hearing has not changed. A simple "yes" or "no" is all that is required to answer the question.**

   A. **On July 13, 2004, you testified before this subcommittee that the legislative language now contained in H.R. 4591 allows EPA, when issuing rules, to look at achieving a reasonable balance of social, environmental, and economic costs and benefits. Is this still your position?**

      Yes.

   B. **In a written submission to follow-up questions from Chairman Gillmor resulting from the July 13, 2004 hearing, both EPA and the State Department stated: "We believe that a decision 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 for U.S. regulations." Is that correct and is that still your position?**

      Yes.

   C. **On July 13, 2004, you testified that you believed the legislative language now in H.R. 4591 provided the United States with the regulatory authority necessary to take action when the United States Government is in agreement with an international decision to list a chemical under the POPs Treaty. Is that still your position?**

      Yes. I believe that the legislative language in H.R. 4591 would allow the Administration to begin the domestic regulatory process with respect to a substance that has been agreed to by the POPs Conference of the Parties and for which the United States is interested in depositing an instrument of ratification, acceptance, or approval.

   D. **On July 13, 2004, you testified that the legislative language now in H.R. 4591 allowed the use of "objective scientific practices" and "best scientific information, including peer reviewed studies to be used for the domestic rulemakings record." Is that still your position?**

      Yes.

E. On July 13, 2004, you testified that the legislative language in H.R. 4591 allowed the United States to consider the information that was gathered and evaluated as part of the international process. Is that still your position?

Yes.

F. On July 13, 2004, you testified that the legislative language now in H.R. 4591 allows the United States, when weighing costs, benefits, and risks; to consider domestic production, export and the use of chemical as well as the national and international consequences that will arise as a result of regulatory action on that particular chemical. Is that still your position?

Yes.

G. You testified before this subcommittee on July 13, 2001 that even though the word "precaution" is not printed anywhere in the language, of what is now H.R. 4591, that you believed the provisions "built in" many important features, including transparency in the domestic process, opportunities for public comment and public participation in the broadest sense, and the "social and environmental cost consideration component" that "bring in this concept of precaution." Do you stand by your earlier comments about H.R. 4591's built in precautionary features?

Yes.

2. Ms. Hazen, I have a series of questions that try to understand the differences between TSCA and what proposed in H.R. 4591. Again, these questions only require a "yes" or "no" answer.

A. Under TSCA Section 6, EPA may not regulate until it finds a chemical poses an "unreasonable risk," the proposed regulatory authority in H.R. 4591 would be "to the extent necessary to protect human health and the environment." Is the standard in H.R. 4591 a difficult standard to meet for regulatory purposes? Is this standard more burdensome that current TSCA's standard?

How difficult the standard is to meet will, of course, depend on the related science and the other information available with respect to the relevant chemical substance or mixture. I do not believe the standard in H.R. 4591 is more burdensome than the current TSCA standard.

B. TSCA section 6 requires EPA to select the "least burdensome requirement" to address "unreasonable risk". By contrast, H.R. 4591 would protect human health and the environment "in a manner that achieves a reasonable balance of social, environmental, and economic costs and benefits." Does H.R. 4591 require the specific language of TSCA Section 6's regulatory test of "least burdensome requirement" to address "unreasonable risk" to be met in order to regulate a chemical for POPs compliance? On paper, does the "reasonable balance" test of H.R. 4591 appear to be more deferential?

H.R. 4591 does not contain the specific language on "least burdensome" that currently appears in TSCA Section 6. On paper, I would say that yes, the "reasonable balance" test seems to be more deferential to Agency decisions.

C. Our committee has received testimony from people who believe TSCA Section 6 can be a time consuming process when it comes to regulating chemical substances and mixtures. H.R. 4591 is intended, only for specific chemical substances and mixtures for which the U.S. wants to join the POPS Treaty or the LRTAP POPS Protocol, to help truncate the TSCA section 6 process, including the provision of informal hearings with the opportunity to cross-examine witnesses. The rulemaking authority in H.R. 4591 would not contain this requirement. By removing that requirement, does that make the regulatory process for POPS chemical substances or mixtures move more quickly?

Yes, we would expect it to have that effect.

D. Again, H.R. 4591 is intended, only for specific chemical substances and mixtures for which the U.S. wants to join the POPS Treaty or the LRTAP POPS Protocol, to help truncate the TSCA section 6 process, including the specific TSCA section 6 requirement on the Administrator to make a comparison of the estimated costs of complying with actions taken under TSCA and other laws and the relevant efficiencies of those laws. H.R. 4591's regulatory authority does not require this. By removing that requirement, does that make the regulatory process for POPS chemical substances or mixtures move more quickly?

There is no general requirement under TSCA for such an analysis. This analysis is required only when the Administrator determines that a risk of injury to health or the environment could be eliminated or reduced to a sufficient extent by actions taken under another Federal law administered in whole or in part by the Administrator, but notwithstanding, the Administrator finds it in the public interest to regulate under TSCA.

Finally, here are a few other "yes" or "no" questions for you:

3. Is one of the criteria for listing a chemical by the POPS Review Committee: "whether a chemical is likely to result of its long-range transport to lead to significant adverse human health and/or environmental effects?"

Yes. As part of its review process, the POPRC considers whether 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. Importantly, the POPRC does not list a chemical but, after further evaluation, it may recommend to the COP that the chemical be added to the Convention.

4. Does a recommendation by the POPRC (or international review panel) precede a final vote by the COP?

Yes.

5. **Is the regulatory standard in H.R. 4800: "protects against significant adverse human health and environmental effects from such domestic manufacture, processing, distribution in commerce for export, use, or disposal associated with the chemical substance or mixture (including, as the Administrator considers appropriate, effects from long-range environmental transport)."**

   Yes.

6. **Are you aware of the any Federal environmental regulatory standard that is drawn directly from a treaty?**

   There are federal environmental statutes that implement or incorporate standards contained in treaties. Following are a few examples, though this list is not intended to be exhaustive. The Endangered Species Act states that it is a violation to engage in "trade in any specimens contrary to the provisions of the Convention [on Trade in Endangered Species], or to possess any specimens traded contrary to the provisions of the Convention."16 U.S.C. 1538(c)(1). Another example is the Marine Protection, Research and Sanctuaries Act, which provides that, "to the extent that he may do so without relaxing the requirements of this subchapter, the Administrator, in establishing or revising criteria for reviewing and evaluating permit applications for ocean dumping, shall apply the standards and criteria binding upon the United States under the Convention [on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter]." 33 U.S.C. 1412(a). Similarly, the Act to Prevent Pollution from Ships prohibits activities inconsistent with Annex V of MARPOL and Annex IV of the Antarctic Protocol, and requires reporting in "the manner prescribed" by the London Convention.33 U.S.C. 1902; 1905(e); 1906(b); 1907(a).

7. **On its face, does the standard in H.R. 4800 allow for any specific consideration by EPA of domestic security concerns?**

   No. H.R. 4800 does not explicitly address this issue.

8. **On its face, does the standard in H.R. 4800 allow for any specific consideration by EPA of the impact on jobs or the U.S. economy due to the loss of a chemical?**

   No. H.R. 4800 does not explicitly address these issues.

9. **Is the POPS COP bound in any way to accept or adopt recommendations of the POPRC?**

   No.

THE HONORABLE JOHN D. DINGELL AND THE HONORABLE BART STUPAK

1. **The original United States Canadian Bilateral Agreement Concerning the Transboundary Movement of Hazardous Waste (Bilateral Agreement) was entered into in 1986 and amended in 1992 to cover municipal solid waste. At a Subcommittee on Environmental and Hazardous Materials hearing on July 23, 2003, the Environmental Protection Agency (EPA) witness, Mr. Robert Springer, stated that with respect to implementing legislative proposals to allow EPA to enforce the Bilateral Agreement "we will bring those forward shortly."**

Almost three years have elapsed since Mr. Springer's testimony and 14 years since municipal solid waste was covered by the Bilateral Agreement and the Administration has failed to send up the legislative proposals necessary for the EPA to enforce this important international Bilateral Agreement with Canada. Why has the Administration not submitted legislative proposals to Congress that would allow EPA to fully enforce the Bilateral Agreement?

The Administration has resolved all major issues and is finalizing clearance of draft Basel legislation that would authorize implementation of the municipal solid waste provisions of the Bilateral Agreement. The Administration did not want to divert attention from legislation previously forwarded to Congress that would allow the United States to ratify the Stockholm Convention on Persistent Organic Pollutants (POPs). Once progress is made on the POPs legislation, we expect the Administration to submit the draft Basel legislation to Congress for consideration.

2. **In the absence of any sense of urgency from the Administration, the Committee on Energy and Commerce in a unanimous and bipartisan fashion on September 27, 2005, reported H.R. 2491, the International Solid Waste Importation and Management Act of 2005. It provides all necessary authority to allow the United States to enforce the Bilateral Agreement. Does EPA and the Bush Administration support H.R. 2491, as passed unanimously by this Committee? If not, please specify why not.**

   The Administration is continuing to review the complex issues in the International Solid Waste Importation and Management Act (H.R. 2491) and has no position on the bill at this time.

3. **Is it correct that Canada has notified EPA officials, formally or informally, that it will have all of its implementing regulations for the Bilateral Agreement in effect and operational this year, 2006?**

   On February 20, 2006, Environment Canada notified EPA in writing that it had launched its public consultation process on proposed regulations for the export, import and transit of non-hazardous waste destined for final disposal. Environment Canada anticipates publishing proposed regulations in either 2007 or 2008. These regulations would not become operational until they became final sometime in 2008 or 2009.

4. **What is the EPA projected timeline for when the United States implementing regulations for the Bilateral Agreement will be in effect and operational?**

   Until Congress provides EPA with the additional statutory authority needed to implement fully the 1992 Amendments to the Bilateral Agreement, we cannot implement the municipal solid waste provisions under the Bilateral Agreement.

5. **With respect to the more than 400 trucks a day crossing the border to bring municipal solid waste from Toronto, Canada to Michigan, the Committee on Energy and Commerce House Report (No. 109-235) found that "the significant amount of municipal solid waste imports is having deleterious effects on the environment and public safety, while also eroding support for state and local recycling programs."**

Recently the Department of Homeland Security (DHS) Office of the Inspector General found that the Customs and Border Patrol Bureau is not able to properly screen and inspect the 350 truckloads of municipal solid waste entering the United States daily through Detroit and Port Huron. Is EPA aware of the Inspector General's Report documenting security concerns with the trash shipments into Michigan?

Yes, EPA is aware of the report.

6. **Has EPA also obtained and reviewed the classified version of the DHS Inspector General's report relating to trucks carrying Canadian municipal solid waste?**

   Yes, EPA is aware of the existence of the classified version of the report, but we have not been asked by DHS to review the classified report that we understand deals solely with security issues. EPA's review of a document is normally only requested by other agencies when soliciting comments on environmental issues.

THE HONORABLE JOHN D. DINGELL AND THE HONORABLE HILDA L. SOLIS

1. **Does any provision in the Stockholm Convention on Persistent Organic Pollutants require preemption or preclusion of stricter State standards with respect to a chemical substance or mixture?**

   The Stockholm Convention does not preclude such standards.

2. **In the 30 year history of the Toxic Substances Control Act (TSCA), how many State petitions or applications under Section 18(b) have been granted by the Environmental Protection Agency (EPA) after a rulemaking to allow a more stringent State law to be enacted or continue in effect? If any, please identify the date of any petition or application and provide any rules that EPA has issued under Section 18(b) of the Toxic Substances Control Act.**

   In the past 30 years, EPA has received only one application from a State under section 18(b). The request was received from the state of Connecticut, asking the Agency to allow it to require the registration of PCB transformers with the State's Department of Environmental Protection. EPA responded to Connecticut by adopting a nationwide uniform registration program for PCB transformers, thus effectively denying the petition by Connecticut to operate a state registration program by implementing a national program.

3. **Are there any deadlines for EPA to conduct the rulemaking required by Section 18(b) of the Toxic Substances Control Act after receiving a State petition to allow a more stringent State law to be enacted or continue in effect?**

   TSCA does not contain any deadlines for conducting a rulemaking under section 18(b).

4. **Is it correct that under H.R. 4591, a more stringent State law is preempted or precluded at the time a POPs chemical substance or mixture that is listed under Annex A or B of the POPs Convention has entered into force for the United States?**

It is our understanding that Mr. Gillmor is revising the current text of H.R. 4591. However, under the current bill dated Dec. 16, 2005, such a State law would be subject to section 18 of TSCA as proposed to be amended by the bill, and thus would be preempted.

5. **Further, is it correct that H.R. 4591, would preempt or preclude more stringent State laws until the time the EPA grants an exemption by rule under Section 18(b) of the Toxic Substances Control Act?**

   As indicated above, under the December 16, 2005 version of the Gillmor bill, a State law regarding a POPs chemical substance or mixture would be subject to the provisions and procedures of TSCA Section 18. Under that provision, a State law regarding such a substance or mixture is preempted until EPA grants an exemption pursuant to the standards set forth in the law.

6. **A State petition for an exemption pursuant to Section 18(b) is only permitted to be granted by rule if the EPA Administrator determines that the State requirement provides (1) a significantly higher degree of protection and (2) does not, through difficulties in marketing, distribution, or other factors, unduly burden interstate commerce.**

   Has the EPA issued guidance setting forth the criteria by which the agency would determine whether a State law does not "unduly burden interstate commerce"? If so, please provide it. Has the EPA ever made such a determination? If so, please describe the circumstances and provide a copy of the determination.

   EPA has not issued guidance interpreting TSCA section 18(b), nor has EPA made such determinations.

7. **Are there any other statutes that EPA administers where it is responsible for determining whether a State law unduly burdens interstate commerce? If so, please identify the specific statutory provisions.**

   Section 3006(b) of the Resource Conservation and Recovery Act requires, in part, that authorized state hazardous waste programs be "consistent" with the federal program and other approved state programs. EPA has defined this "consistency" element at 40 CFR § 271.4. In order to be "consistent," a State program, among other things, cannot unreasonably restrict, impede or ban the movement of hazardous waste across the state border.

8. **Is it correct that the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act all specifically allow States to enact more stringent State requirements and do not require States to petition the EPA and do not require subsequent EPA approval by rule for more stringent requirements to continue in effect or be enacted?**

   In these statutes, Congress did specifically allow states to enact more stringent requirements, and it did not impose a petition and approval process for more stringent state requirements. Although this is different from the approach Congress took in TSCA, it nonetheless bears emphasis that the schemes established by Congress in these other statutes do in effect impose limitations on the scope of more stringent state requirements that can become part of a federally authorized program.

For example, as discussed in response to question 7, under section 3006(b) of RCRA, as interpreted in EPA regulations, a state may not maintain a requirement as part of a federally authorized hazardous waste program, even if the requirement is more stringent than applicable federal requirements, if the requirement unreasonably restricts, impedes or bans the interstate movement of hazardous waste. In addition, under RCRA, the Clean Water Act, and the Safe Drinking Water Act Underground Injection Control program, state requirements that are broader in scope than applicable federal requirements are not considered part of a state's authorized program, even though states may maintain them as a matter of state law. See 40 CFR 271.1(i)(2) (RCRA); 40 CFR 123.1(i)(2) (Clean Water Act); 40 CFR 145.1(g)(2) (Safe Drinking Water Act UIC program).

9. Under the provisions of H.R. 4591, can a State regulate any chemical that is not being regulated by EPA in the absence of a State application and EPA approval by rule pursuant to Section 18(b) of the Toxic Substances Control Act?

H.R. 4591 does not change the current rights of a state under TSCA to regulate a chemical in the absence of EPA regulation of that chemical unless that chemical is a listed POPs chemical that meets the definition of a POPs chemical substance or mixture or a LRTAP POPs chemical substance or mixture in Section 501 of that bill and the listing has entered into force for the United States (except as permitted in Sec. 116 of the Clean Air Act).

10. Under the provisions of H.R. 4591, can a State impose an outright prohibition on the use of any EPA-regulated substance within the State in the absence of a State application and EPA approval by rule pursuant to Section 18(b) of the Toxic Substances Control Act?

As noted above, it is our understanding that Mr. Gillmor is revising these provisions of the December 16, 2005 version of the bill. Under the current version of that bill, a State could prohibit the use of an EPA-regulated substance unless that substance meets the definition of a POPs chemical substance or mixture or a LRTAP POPs chemical substance or mixture in Section 501 and the listing has entered into force for the United States (except as permitted in Sec. 116 of the Clean Air Act). However, a State would need to petition EPA under TSCA section 18(b) to grant approval to establish or continue in effect any State prohibition on the use of a POPs chemical substance or mixture or a LRTAP POPs chemical substance or mixture (as defined in Section 501) once the listing for the chemical substance or mixture has entered into force for the United States (except as permitted in Sec. 116 of the Clean Air Act).

11. Under the provisions of H.R. 4591, can a State establish or retain any State regulation of a TSCA-regulated chemical if the State regulation is adopted pursuant to the Resource Conservation and Recovery Act, the Clean Water Act, and the Safe Drinking Water Act, in the absence of a State application and EPA approval by rule pursuant to Section 18(b) of the Toxic Substances Control Act?

As indicated above, it is our understanding that Mr. Gillmor is revising the current pre-emption text of H.R. 4591. However, under the current bill dated Dec. 16, 2005, it appears that the answer is yes, unless the substance meets the definition of a POPs chemical substance or mixture or a LRTAP POPs chemical substance or

mixture in Section 501 of the bill and the listing has entered into force for the United States (except as permitted in Sec. 116 of the Clean Air Act), in which case a state can request an exemption from the Administrator.

12. **Do you agree that H.R. 4800 provides for a transparent rulemaking process under the Administrative Procedure Act for any EPA regulation, and that the rulemaking process would provide interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments?**

    Yes, as currently written section 502 (h) of H.R. 4800 provides for a rulemaking process under the Administrative Procedure Act that allows interested persons an opportunity to participate.

13. **Do you agree that H.R. 4800 will ensure transparency in public notification within the United States so that the public will have notice and opportunity to comment on a decision by the POPs Review Committee or Conference that screening criteria are met under the POPs Convention [see Section 502(e)]? If not, please provide any specific changes EPA is seeking with respect to transparency in public notification within the United States so EPA can obtain necessary and crucial information.**

    Yes, as currently written section 502(e) of H.R. 4800 provides that the public will have notice and an opportunity to comment on a decision by the POPs Review Committee or Conference that screening criteria are met under the POPs Convention.

14. **Does H.R. 4800 provide a transparent framework that would allow the public, including industry, the environmental community, and other stakeholders to engage in the process to see exactly where EPA is and provide an opportunity to provide any information EPA does not have and comment on information EPA does have?**

    Yes, as currently written section 502 of H.R. 4800 provides a framework that would allow the public, including industry, the environmental community, and other stakeholders to engage in the process.

15. **Do you agree that H.R. 4800 ensures transparency in public notification within the United States so that the public will have notice and opportunity to comment on a decision by the POPs Review Committee or the Executive Body that global action is warranted under the POPs Convention (see Section 502(f))?**

    While H.R. 4800 ensures that the public will have notice and opportunity to comment on a decision by the POPs Review Committee or the Executive Body that global action is warranted under the POPs Convention, please note that under the LRTAP POPs Protocol, there is not a step where the Executive Body determines whether "global action" is warranted. Rather, the Executive Body is to ensure that "one or more technical reviews of the proposals are conducted" if it determines that "further consideration of a substance is determined to be warranted" - - where a technical review would include an evaluation of "whether sufficient information exists to suggest that the substance is likely to have significant adverse human

health and/or environmental effects as a result of its long-range transboundary atmospheric transport."

16. Is EPA currently required to assess potential impacts on the domestic economies of other countries in deciding whether action should be taken to regulate under the Toxic Substances Control Act?

No. TSCA does not direct EPA to consider potential impacts on the economies of other countries.

17. At the Subcommittee hearing you testified that for pentabromodiphenylether (penta-BDE), chlordecone (kepone) and hexabromobiphenyl (HBB), there is no manufacturing in the United States and that EPA has followed up "with a regulatory backstop to assure that no new manufacturer or import could begin."

For these three chemicals or substances please describe the environmental and health concerns that led EPA to impose a regulatory backstop to ensure the end of manufacturing or import into the United States. For each of the chemicals or substances, describe the regulatory backstop that prevents manufacture or import into the U.S. and the date it was finalized. Is there any current use of any these three chemicals or substances in the United States?

Penta-BDE. With respect to health and environmental concerns, there are only limited available studies. However, those studies show that Penta-BDE is persistent in the environment and bioaccumulates in organisms, and toxicity test data indicate the potential for adverse effects in humans. The major findings from the limited toxicity studies in rodents are effects on the liver and the thyroid. Furthermore, the effects on the thyroid have raised concerns for the potential for adverse effects on nervous system development. Environmental monitoring programs in Europe, Asia, North America, and the Arctic have detected Penta-BDE in human breast milk, fish, aquatic birds, and elsewhere in the environment. There are limited data suggesting that Penta-BDE can cause adverse effects in aquatic species.

The Great Lakes Corporation (now "Chemtura") voluntarily agreed to phase out production of penta-BDE as of December 31, 2004. According to the information currently available to EPA, Great Lakes was the sole U.S. manufacturer of commercial penta-BDE. EPA also believes that currently there is no import of penta-BDE into the United States. On December 6, 2004, EPA proposed a TSCA Section 5 Significant New Use Rule (SNUR) covering penta-BDE and certain other polybrominated diphenylether (PBDE) congeners. The SNUR, when finalized, would require manufacturers and importers to notify EPA 90 days before commencing the manufacture or import of the subject substances on or after January 1, 2005, for any use. The final rule is currently under development. EPA believes that manufacturers of end products have switched to alternatives to penta-BDE. Products that contain the substance (e.g., foam in furniture) are still in use.

Chlordecone (kepone). Pursuant to section 6 (b) of the Federal Insecticide, Fungicide and Rodenticide Act, EPA issued a series of Federal Register notices in 1976 and 1977 to cancel all chlordecone-containing products because of cancer concerns. This means that chlordecone can no longer be lawfully distributed, sold, or used as a pesticide in the United States.

For hexabromobiphenyl (HBB). EPA's hazard assessment of polybrominated biphenyls (PBBs) in 1979 indicated that HBBs are teratogenic, embryotoxic, and immunosuppressive in mice and rats, and carcinogenic in rats. PBBs are persistent, accumulate in the environment, and should show similar toxicity to polychlorinated biphenyls (PCBs) due to the fact that PBBs and PCBs have similar chemical structures. Production of PBBs, including HBB, has been phased out. EPA published a SNUR on January 26, 1987, designating "any use" of HBB as a significant new use. Persons must submit a notice to EPA at least 90 days before they manufacture, import, or process the chemical substance for any use. EPA has never received such a notice for HBB. It is possible that some of the materials that incorporated HBB prior to its phase out in United States commerce are still in use.

What action would EPA take if a company attempted to manufacture or import one of these chemicals or substances into the United States?

For HBB and penta-BDE (once a SNUR is finalized), if EPA receives a SNUR notice, EPA would consider all the available information, including that in the notice, and would take action, if appropriate, under TSCA section 5(e), 5(f), 6, or 7 to control the activities for which it has received the SNUR notice. For chlordecone, because there are no registered uses of the pesticide, distribution of the pesticide is prohibited, unless it is for export.

18. You also testified that there is no domestic production of the chemical perfluoroctane sulfonate (PFOS). For this chemical please answer the following questions:

(a) Has EPA issued a significant new use rule for PFOS? If so, please indicate when it was finalized.

On March 11, 2002, EPA promulgated a SNUR under TSCA for 13 PFOS-related chemicals, including polymers. These chemicals were predominantly PFOS-based, but included a range of higher and lower homologues – chemicals with different carbon chain length structures – as well. These related chemicals, including PFOS and its higher and lower homologues, are collectively referred to as perfluoroalkyl sulfonates, or PFAS. The SNUR designated any manufacture or import of these chemicals for any use on or after January 1, 2002 as a "significant new use."

On December 9, 2002, EPA promulgated a final SNUR for 75 additional PFAS substances. This SNUR excluded from regulation four specific uses of these chemicals, including semiconductor manufacture, aviation hydraulics, certain imaging uses, and the use as an intermediate to produce other chemicals for the aforementioned uses, but designated any manufacture or import for any other use of these chemicals on or after January 1, 2003 as significant new use.

On March 10, 2006, EPA proposed a SNUR for 183 PFAS chemicals on the TSCA section 8(b) Inventory of existing chemical substances. The proposed "significant new use" for these chemicals is any manufacture or import for any use with the exception of the uses excluded from regulation in prior PFAS SNURs.

(b) What were the environmental and health concerns that led EPA to issue a significant new use rule?

PFOS had been detected at low levels in the blood of humans and wildlife throughout the United States and elsewhere, providing clear evidence of widespread exposure to the chemical. PFOS is persistent in the environment, and has a half-life in humans measured in years, indicating a potential for bioaccumulation. Animal studies demonstrated reproductive, developmental, and systemic toxicity.

(c) Is it correct that the 3M company was the sole manufacturer of PFOS in the United States and it halted production in 2000 and discontinued its use in the product Scotchgard? What were the environmental and health concerns that led the 3M Company to discontinue the manufacture and use of PFOS?

3M was the sole U.S. manufacturer of PFOS, and the principal manufacturer worldwide. In 2000, 3M voluntarily committed to discontinue the production of PFOS by the end of 2002. 3M discontinued about 80% of PFOS production by the end of 2000, including all PFOS manufacture in the United States and terminated global production by the end of 2002. 3M reformulated its Scotchgard® products to eliminate the presence of PFOS during that phase-out period. 3M indicated in their press release and correspondence that they made their decision to phase out the manufacture and use of PFOS "in light of the persistence of certain fluorochemicals and their detection at extremely low levels in the blood of the general population and wildlife."

(d) Is it correct that toxicology data show that rat and monkey exposure to high doses of PFOS can result in death, while low doses can cause gastrointestinal lesions and weight loss?

Yes, although it is important to take note of the specifics of that assessment with respect to factors such as exposure, age, and bioaccumulation.

(e) Is it correct that PFOS has been shown to be moderately toxic in fish and acquatic organisms?

Studies on PFOS do generally indicate moderate toxicity to environmental species (fish, aquatic plants and invertebrates, amphibians and birds), although in the case of honey bees, high toxicity was observed.

19. It is our understanding that Sweden has proposed perflurooctone sulfonate (PFOS) for listing under the POPs Convention, but in your testimony you used the term PFAS. Are they the same chemical or a different chemical? Do you agree that PFOS is the chemical being proposed by Sweden?

PFAS chemicals are a more general group that includes PFOS chemicals. PFOS chemicals are perfluoroalkyl sulfonate (PFAS) chemicals characterized predominantly by an eight-carbon chain length. Many PFAS chemicals comprise a range of carbon chain lengths, including eight-carbon structures as well as both higher and lower homologues. EPA uses the generic term PFAS to encompass this entire family of perfluorinated compounds, which includes those with eight carbons as well as those with shorter and longer carbon chain lengths. The Agency uses the term PFOS to represent only those PFAS chemical substances that are predominantly eight carbons in length. We agree that PFOS is a chemical being

proposed by Sweden, although Sweden also proposed 96 additional PFAS chemicals for listing consideration.

20. In your testimony you indicated there are several low volume uses of PFAS. Please describe these uses and identify where the PFAS is manufactured if there is no domestic production.

In the final SNUR on 75 PFAS chemicals published December 9, 2002 and the proposed SNUR on 183 additional PFAS chemicals published March 10, 2006, EPA included four exclusions: (i) use as an anti-erosion additive in fire-resistant phosphate ester aviation hydraulic fluids; (ii) use as a component of a photoresist substance, including a photo acid generator or surfactant, or as a component of an anti-reflective coating, used in a photomicrolithography process to produce semiconductors or similar components of electronic or other miniaturized devices; (iii) use in coatings for surface tension, static discharge, and adhesion control for analog and digital imaging films, papers, and printing plates, or as a surfactant in mixtures used to process imaging film; and (iv) use as an intermediate only to produce other chemical substances to be used solely for the uses listed in i., ii., or iii.

Although these PFAS chemicals are not currently manufactured in the United States, some of these chemicals are still manufactured by companies in Germany, Italy, Korea, and Japan, and may also be produced in China and Russia. Companies using these PFAS chemicals in these applications may be importing the chemicals, or may have stockpiled these PFAS chemicals while they were still being produced in the United States. Each of these uses is characterized by very low volume, low exposure potential, and low release to the environment, and viable alternatives to PFAS in these specific technical uses are not presently available.

Are there any uses of PFOS in the United States? If so, please identify any such uses and identity the quantities being imported, the name and location of the manufacturer, and the name of the companies that are using PFOS in the United States.

EPA is currently unaware of any uses of PFOS in the United States beyond the limited volume used in the four exclusions provided for in the December, 2002 final rule. Some old PFOS-based products may still be in use, including fire fighting foams produced prior to the phase-out.

21. Is it correct that all lindane manufacturing in the U.S. ceased in 1977?

Yes, all lindane manufacturing in the United States ceased in 1977.

22. Is it correct that the sole supplier of lindane to the U.S. is Inquinosa, a Spanish company? Is it also correct that the lindane imported into the U.S. is from a Romanian plant owned by Inquinosa?

Yes, Inquinosa is the sole supplier of lindane to the United States at this time. They manufacture it at the OLTCHIM facility under a joint venture in Valcea, Romania.

23. Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA in 2002 allowed six agricultural uses of lindane for seed treatment subject to the Agency's ability "to establish all required tolerances for lindane residues

on food." Has EPA established all required tolerances for lindane residues on food? If so, when were such tolerances established?

EPA has not established tolerances for potential lindane residues on food resulting from the seed treatment uses but plans to make a decision by August, 2006. On February 8, 2006 EPA published a revised risk assessment for lindane and the other hexachlorocyclohexane (HCH) isomers, which are byproducts of the lindane manufacturing process. The revised risk assessment indicates potential risks from dietary exposure, not to lindane from seed treatment but to the alpha and beta HCH isomers, to communities in Alaska and others in the circumpolar Arctic region who depend on subsistence food. EPA is reviewing the data that has been submitted and will consider the public comments on the revised risk assessment.

24. In the Technical Review Report on lindane under the UNECE POPs Protocol prepared by the Federal Environment Agency of Austria and published in August 2004, there is an assertion that, in response to a 2004 questionnaire, only the United States "reported the use of lindane for seed treatment to be relevant." The report further stated that "all other countries are in the stage of prohibition or had already interdicted all authorization and use of lindane containing plant protection products." Are these statements accurate and do they reflect the results of the 2004 questionnaire? If not, please explain why?

These statements are accurate and reflect the results of the 2004 questionnaire.

25. Is it correct that 16 countries reported available and well known alternatives to lindane in 2004? Please describe the alternatives.

16 countries have reported on available alternatives for the use of lindane. According to the Technical Review Report on Lindane, prepared by Austria for the UNECE POPs Protocol, the following alternatives were reported to be used in the UNECE region: pyrethroids, imidacloprid, fipronil, isofenphos, thiamethoxan, clothianidin benfuracarb, furathiocarb, carbosulfan, aldicarb, terbufos, carbofuran, fenitrothion, tefluthrin, chlorpyrifos, diazinon, alpha cypermethrin, beta cyfluthrin, methiocarb, chloronicotinyls, permethrin, tetramethrin, pyrethrins, d phenothrin, malathion, diazinon, fenitrothion, bendiocarb, crotamiton, ivermectin, benzyl benzoates, deltamethrin, neonicotinoides, and bactoculicidum.

In the United States, EPA has registered alternatives for all of the six seed treatment uses of lindane. For the pharmaceutical uses of lindane, FDA has alternatives available for both head lice and scabies treatments.

26. Does EPA consider lindane to be toxic to humans and mobile in the environment with the potential to bioaccumulate?

EPA conducted a human health risk assessment to support the 2002 Re-registration Eligibility Decision for lindane. Based on EPA's assessment of dietary and drinking water risk associated with use of lindane as a pre-plant seed treatment, both acute and chronic aggregate dietary and drinking water risks from lindane are below EPA's level of concern. Based on the Agency's assessment, on-farm handling of the lindane dust formulation to mix/load and plant treated seed resulted in risks of concern. However, required mitigation including use of a lower seed planting rate and additional personal protective equipment reduced these risks to below EPA's level of concern for on-farm handlers. Estimates of risk from

commercial seed treatment were below EPA's level of concern with no risk mitigation required. Also, the Agency's assessment indicated no risk concerns for post-application exposures to agricultural workers.

Lindane is persistent and moderately mobile in the environment, with an estimated aerobic soil half-life of 2.6 years. Lindane bioconcentrates appreciably, but depurates rapidly. Lindane can bio-accumulate easily in the food chain due to its high lipid solubility and can bio-concentrate rapidly in microrganisms, invertebrates, fish, birds and mammals; however, bio-transformation and elimination are relatively rapid when exposure is discontinued.

27. Does EPA consider lindane to be a possible human carcinogen?

Based on all available data received through 2001, EPA has classified lindane in the category entitled "Suggestive evidence of carcinogenicity, but not sufficient to assess human carcinogenic potential", based on an increased incidence of benign lung tumors in female mice only. The Center for Disease Control's Agency for Toxic Substances and Disease Registry concurs with EPA's classification.

28. Has lindane been found to cause neurotoxic effects and does it also appear to cause kidney and liver toxicity?

Lindane primarily affects the nervous system. At high doses, in acute, subchronic, and developmental neurotoxicity studies and chronic toxicity/oncogenicity studies, lindane was found to cause neurotoxic effects. Lindane also appears to cause renal and hepatic toxicity.

29. Is it correct that the U.S. has cancelled the use of lindane as an aerial application and that the North American Free Trade Agreement (NAFTA) has restricted the use of lindane, prohibiting all aerial application of the pesticide? What were the reasons that led the U.S. and NAFTA to take restrictive measures and prohibit aerial application?

The EPA cancellation decision for the aerial application of lindane was made in 1983, more than 10 years before NAFTA and its related side agreements. The concern was for risk to aquatic organisms from spray drift. Lindane is acutely toxic to fish, so eliminating spray drift from aerial application was one way to cut back on the risks from drift. This action was based on the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

30. If the POPs Convention listed lindane with minimum control measures, would EPA use the Federal Insecticide, Fungicide and Rodenticide Act or the Toxic Substance Control Act to effectuate the lindane listing decision of the POPs Convention?

If the United States was interested in opting-in to the listing, we would use the appropriate statute or statutes to meet the control measures, consistent with our domestic authorities and decision-making process. While FIFRA is the predominant statute for regulating pesticides, lindane is listed on the TSCA Inventory (although we are aware of no recent production for TSCA uses) and has uses that are regulated under the Federal Food, Drug, and Cosmetic Act.

31. Would the provisions of H.R. 4800 or H.R. 4591 be applicable in effecting a POPs Convention listing decision for lindane? If so, please explain how the authorities of H.R. 4800 or H.R. 4591 would be applicable.

As a general matter, the provisions of H.R. 4800 or H.R. 4591are applicable to a chemical substance or mixture, not a pesticide product. However, if the lindane decision at hand is about a chemical substance or mixture issue, then the authorities given in the legislation would, for example, allow the United States to be informed by the bills' public information provisions before the chemical is considered by the Conference of the Parties. This information could then be used by the United States in evaluating any proposed listing decision.

32. Is it correct that under the NAFTA, lindane is undergoing a joint re-registration review between the U.S. and Canada? What is the current status of this review? What position is Canada taking with respect to the use of lindane?

The United States is not conducting a joint re-registration review with Canada. However, we would note that since 2000, EPA and the Canadian Pest Management Regulatory Agency (PMRA) have had a data review sharing agreement. Based on the March, 2006 draft of the Lindane North American Regional Action Plan (NARAP), lindane is no longer registered in Canada for agricultural pest control uses, including veterinary uses, as of January 1, 2005. Lindane is still approved for lice and scabies treatment in Canada as a non-prescription drug with four commercial products containing 1% lindane in solution, currently marketed by two companies.

33. Is it also correct that under the NAFTA environmental side agreement, the U.S., Canada, and Mexico committed, beginning in 2002, to develop a North American Regional Action Plan (NARAP) on lindane?

Please describe the results to date of the actions taken by the three countries to develop a NARAP on lindane.

In 2002 the Council of Ministers for the Commission for Economic Cooperation (CEC) issued Resolution 02-07 directing the Sound Management of Chemicals Working Group to develop a NARAP on lindane, with EPA chairing the Lindane Task Force.

The initial draft of the Lindane NARAP was developed in September 2004. The draft has gone through intra- and inter-agency review in all three countries and through a public comment period that ended in November 2005. The final intra- and inter-agency review ended in February 2006. The goal is to have the NARAP finalized by early May 2006 so that it can be transmitted to the CEC Council for approval in June 2006.

34. At the Subcommittee hearing you indicated that there was one other use for lindane, a pharmaceutical use. Is it correct that lindane has been approved by the FDA as a prescription drug to treat lice and scabies?

Lindane use, with the appropriate FDA box warning, is approved by the FDA for pediculosis (lice) and scabies treatment and has been marketed as a pharmaceutical product since 1951. In 2003, as a result of the reassessment of lindane risk factors,

FDA took action to increase hazard warnings and to reduce the maximum package size to minimize the possibility of overuse. FDA issued a Public Health Advisory concerning the use of topical formulations of lindane lotion and lindane shampoo for the treatment of scabies and lice. The boxed warning emphasizes that lindane is a second-line treatment, updates information about its potential risks, especially in children and adults weighing less than 110 pounds, and reminds practitioners that reapplication of lindane lotion or lindane shampoo is not the appropriate treatment if itching continues after the single treatment.

35. Is it correct that EPA stated in 2002 that, based on blood-level analysis, it cannot conclude at this time with reasonable certainty that exposure to lindane through scabies treatment will not result in unacceptable exposure and risk?

EPA did state in 2002 that, based on blood-level analysis, it "cannot conclude at this time with reasonable certainty that exposure to lindane through scabies treatment will not result in unacceptable exposure and risk." However, EPA defers to FDA as the lead U.S. Agency on human ectoparasite products and the FDA concluded that risk from exposure to lindane as a second-line use product, when other products failed or were not tolerated, was reasonable, considering the benefit.

36. What studies or scientific assessments has the EPA conducted since 2002 to determine whether exposure to lindane through scabies treatment will result in unacceptable exposure and risk? Please provide any such studies or assessments.

EPA has not conducted any studies or scientific assessments since 2002 on the exposure to lindane for scabies treatment. EPA defers to FDA as the lead U.S. Agency on human ectoparasite products.

37. Is it correct that in 2000 the State of California banned the use or sale of lindane for use on humans in the treatment of lice and scabies?

At a public meeting of the Lindane Task Force, Ann Heil of the County Sanitation Districts of Los Angeles County stated that California AB 2318 Chapter 236 banned the use or sale of lindane for use on humans in the treatment of lice and scabies.

38. Is it correct that an anecdotal survey of medical and public health authorities conducted by the Los Angeles County Sanitation Districts noted no difficulties or concerns that were raised by the California ban after over two years in a population of 30 million?

It is our understanding that this anecdotal information was followed up with additional data collection that was provided to the Lindane Task Force in October 2005 by Mr. Stan Husted, Manager, Head Lice Prevention and Control Program, California Department of Health Services.

39. Is it also correct that lindane concentrations in wastewater exiting the Los Angeles County Sanitation Districts treatment plants have declined from non-attainment of the 19 ppt goal to negligible following the 2002 institution of the ban in California on pharmaceutical sales of lindane?

According to the information provided to the Lindane Task Force by Ann Heil of the County Sanitation Districts of Los Angeles County at the public meeting held in Anchorage, Alaska, February 11-12, 2004, this is correct.

40. Is it correct that there are no remaining allowable uses for lindane in agricultural products in Canada?

It is our understanding that as of January 1, 2005, lindane is no longer registered for agricultural pest control uses in Canada, including veterinary uses. This information was provided by the Canadian representatives to the Lindane Task Force to be included in the March 2006 draft of the Lindane North American Regional Action Plan (NARAP). For additional information about this document, see question 33 above.

41. Is it correct that Mexico has agreed to eliminate all agricultural, veterinary, and pharmaceutical uses of lindane through a phased-out approach?

This is correct pursuant to information provided by the Mexican representatives to the Lindane Task Force to be included in the March 2006 draft of the Lindane North American Regional Action Plan (NARAP). For additional information about this document, see question 33 above.

42. Are you aware of other States that have banned the use or sale of lindane for use on humans in the treatment of lice or scabies or have similar legislation introduced? If so, please identify any such State.

To our knowledge, New York and Illinois have introduced similar legislation. (New York Bill A08628 introduced on February 5, 2004 but it did not pass; another bill, A04162, was reintroduced but it was defeated in the health committee on May 31, 2005.) (Illinois Bill HB 1362 was introduced on April 8, 2005 but was re-referred to the rules committee on May 6, 2005.)

43. If the Conference of the Parties determines that lindane should be listed in Annex A for elimination and the President consents to opt-in, under what statutory authority would the U.S. eliminate the pharmaceutical use of lindane as a prescription drug to treat lice and scabies?

If lindane were listed in Annex A for elimination without an exemption for the pharmaceutical use, the United States would not opt-in to the listing until the domestic controls were in place to assure compliance with the listing. Pharmaceuticals are regulated by FDA under the Federal Food, Drug, and Cosmetic Act.

44. If the Conference of the Parties were to list a chemical in Annex A for elimination without providing for any production or use exemptions, and assuming the President consents to opt-in, under H.R. 4591 how would the Administrator ensure that the U.S. could eliminate the chemical given that he must meet the cost-benefit balancing test (i.e. a reasonable balance of social, environmental, and economic costs and benefits) under Section 503(e)?

The United States would not opt-in to the listing of a chemical in Annex A for elimination until the domestic controls were in place to assure compliance with that listing.

45. Please list the types of rulemakings under EPA's jurisdiction that use an "arbitrary and capricious" standard for judicial review.

The standard of judicial review in the Administrative Procedure Act ("APA"),at 5 U.S.C. 706, generally applies to EPA rulemakings, except in cases where a statute expressly supersedes or modifies the standard. Section 706(2)(A) provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Most EPA rulemakings are subject to this standard, with some exceptions (e.g., rulemakings under Clean Water Act section 307 to establish effluent limitations for certain toxic pollutants, which are governed by the "substantial evidence" standard; and rulemakings under sections 4(a), 5(b)(4), 6(a) and 6(e) of the Toxic Substances Control Act, which are governed by the "substantial evidence" standard (TSCA Section 19(c)). Review of some rulemakings under the Clean Air Act is governed by section 307(d)(9) of that statute, rather than the APA, but that provision incorporates the same standard of review as the APA.

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