CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

September 13, 2004

Paul E. Gillmor
Chairman
Subcommittee on Environment and Hazardous Materials
Washington, DC 20515-6115

Re: Notes and Questions from July 13, 2004 Hearing on POPs, PIC, and LRTAP: The Role of the U.S. and Draft Legislation to Implement These International Conventions

Dear Chairman Gillmor:

Thank you for your request for responses to your additional notes and questions stemming from my testimony at the July 13 Subcommittee hearing on POPs. All of my responses below are provided within the context of the Stockholm Convention on Persistent Organic Pollutants (POPs).

Throughout the Notes and Questions, there are many conclusions and opinions that are expressed as being those of the "Subcommittee." I found this confusing, because many of those conclusions and opinions run counter to views that minority members of the Subcommittee expressed at the hearing. Moreover, I am not aware of any vote or agreement having taken place that has resulted in a consolidated view on this subject among the Subcommittee members. For clarity's sake, therefore, I have taken the liberty of referring to the Notes and Questions as the work of the Chair, rather than the Subcommittee.

With the exception of my response to Question 12, my responses are limited to those questions to which you specifically asked me to reply. My silence on other parts of your Notes and Questions should not be construed as approval or disapproval of their contents.

Sincerely,

Glenn Wiser

1367 Connecticut Avenue, NW, Suite 300, Washington, DC 20036-1860 * Tel: 202-785-8700 * Fax: 202-785-8701 * E-mail: info@ciel.org
15 rue des Savoises, 1205 Geneva, Switzerland * Tel: 41-22-789-0738 * Fax: 41-22-789-0500 * Email: Geneva@ciel.org
Internet: http://www.ciel.org

Question 3 (Wiser): *What if the Executive Branch responded that they are not ready to support opting in at this time but might within 6 months? Would this be an impermissible answer under your proposal? If not permissible, what is the sanction that would apply and how would it be enforced? If permissible, is there much of a difference between your proposal and simple deference to the executive branch?*

Response: Page 3 of the Chair's Notes and Questions correctly states that "The decision to opt-in and the manner in which the U.S. chooses to regulate are two different occurrences." Despite the clarity in that sentence, the Chair's Question 3 and the comments preceding it confuse these two things, and thus erroneously suggest that mandatory rulemaking authority for EPA would somehow be synonymous with a congressional requirement that the Executive Branch "opt in" to a Stockholm new-listing amendment.

The Executive Branch's authority to decide whether or not to opt in to an additional treaty requirement stems from its foreign affairs/treaty making powers. It is not dependent on a delegation from Congress. Unlike the Chair's June 17 Discussion Draft, which impermissibly attempts to constrain Executive Branch prerogatives by requiring the President to make an Article 25.4 opt-in declaration, we believe the question of whether and when the Executive Branch consents to be bound by a Convention amendment is not one that should be addressed by this bill, because the Constitution does not give the Congress a role in that decision. (We do not voice an opinion here about the separate question of the Senate's role under its advice and consent powers.) Similarly, it would be inappropriate for the Congress to attempt to empower the courts to force the Executive Branch to exercise its foreign affairs/treaty making powers in this context.

The question this legislation needs to address is whether and how Congress will authorize EPA to regulate a POP when the Stockholm Conference of the Parties (COP) adds one to the Convention. Congress' constitutional power to do this is not contingent on whether or when the United States decides to opt in to a new-listing amendment or, for that matter, whether the amendment has entered into force for the United States. Yet Congress can effectively prevent the Executive Branch from exercising its treaty making powers by failing to give EPA adequate authority to ban or restrict the newly listed POP. Because of the constitutional separation of powers, the Executive Branch traditionally does not bind the United States to a treaty until it is confident that we will be able to comply with it. In the POPs context, that will require passage by the Congress of adequate implementing authority, unless such authority already exists. It would undercut the negotiating posture of the United States if, during a Stockholm new-listing discussion, the Executive Branch could not confidently predict whether it would obtain the implementing authority needed to allow the United States to regulate the chemical and thus opt-in to the new-listing amendment. Hence, the POPs implementing legislation must provide adequate implementing authority for future, additional POPs listings.

The most straightforward and reliable way to accomplish that would be for Congress to require EPA to regulate, or decide not to, within a specific time after the Conference listing decision. The statutory language pertaining to a decision not to regulate could be drafted in such a way as

to respond to some of the questions raised in this Notes and Questions. For example, a decision not to regulate under Title V could be made because EPA had concluded that the chemical is not a POP as defined under the Convention or because EPA already had exercised sufficient regulatory authority under a different statute.

Question 5 (Wiser): *Doesn't paragraph 7a within Article 8's reference to considerations in Annex F apply to international guidance for control measures under the treaty, and therefore is part of the relevant guidance in the treaty for parties? In your proposed rulemaking standard, why did you ignore the proposed rulemaking standards in Annex F? Are you stating that any guidance from the international body should be mandatory as US regulations?*

Response: Stockholm Article 8.7(a) does articulate a standard by which the Convention's Persistent Organic Pollutants Review Committee (POPRC) shall determine whether a chemical is a POP and thus, global action is warranted; and the Convention does not specifically define a methodology by which parties will determine the control measures for a new POPs listing. Annex F provides a non-exclusive list of items that the POPRC should consider when preparing its analysis of possible control measures for an additional POP. Neither Annex F nor the body of the Convention, however, specifically define how the items must be considered. Rather, Article 3 establishes the fundamental standard for POPs that are listed in the Convention: National control measures must be whatever "legal and administrative measures [are] necessary to eliminate" production, use, import, and export of the chemical.

<u>The Convention does not establish a fixed methodology for determining control measures.</u> The negotiating parties recognized that, given the tremendous disparity of implications different POPs may have for health, environment, and global, national, and local economies (e.g., compare the respective uses and control measures for DDT with those for PCBs), it would not be realistic or desirable to try to devise a single, fixed methodology for determining what the control measures will be for every POP that may be added to the Convention, because a "one size fits all" methodology could very well prove inappropriate or unworkable for a future POP listing. Instead, the parties agreed to the broad guidance contained in Art. 8.9: "The Conference of the Parties, taking due account of the recommendations of the [POPs Review] Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical, and specify its related control measures. . ."

<u>A Conference listing decision will establish requirements, not mere "guidance," for control measures.</u> The guidance to the Conference of the Parties (COP) contained in Article 8.9 pertains to how the COP will render its decision on an additional POP. It should not be construed (as Question 5 erroneously does) to suggest that the COP decision will provide mere "guidance from the international body" on how a party may or may not control a listed POP. While the United States will have the option of deciding whether or not it will be bound by an amendment to add a POP to the Convention, it will not have the option (if it accepts a new-listing amendment) to devise control measures that are less stringent than those required under the treaty, because doing so would put the United States in violation of its treaty commitments. This misunderstanding—that a new-listing amendment will contain only guidance about control

measures, rather than the control measures themselves—may be why the June 17 Discussion Draft proposes a regulatory standard that would likely not provide EPA with sufficient authority to ensure that the United States could comply with a new listing decision under the Stockholm Convention if it decided to "opt in" with respect to one.

Annex F outlines informational considerations; it does not contain a rulemaking standard. Confusion about the function of Annex F may be why the Chair seems to suggest or accept the argument that cost-benefit "balancing" is required by the Convention, and why it believes that statutory authority allowing EPA to regulate to an extent "that achieves a reasonable balance of social, environmental, and economic costs and benefits" would permit the United States to comply with a Stockholm new listing amendment. As we note in the first paragraph of this response, Annex F provides a non-exclusive list of items that the POPRC should consider when preparing its risk management evaluation of a chemical that may be added to the Convention. As such, it is basically a vehicle for the POPRC to gather and provide information to the parties regarding the comparative efficacy of various control strategies.

Annex F contains no guidance whatsoever on *how* the POPRC will recommend, or the parties will decide, what the control measures will be. Thus, Question 5 errs when it suggests that Annex F contains "proposed rulemaking standards." Moreover, nowhere does Annex F or the Convention body text contain an implicit or explicit suggestion that Convention parties must "balance" these items against each other when determining what the control measures for a POP should be. Indeed, a requirement to achieve a "balance" between these considerations could arguably conflict with the Art. 8.9 requirement that the Conference of the Parties must decide upon a proposed POP in "a precautionary manner."

The fundamental Convention standard for control measures is elimination. The core treaty terms of Article 3 establish the fundamental Convention standard for control measures. If a chemical is added to Annex A, the control measures must be whatever "legal and administrative measures [are] necessary to eliminate" production, use, import, and export of the chemical. Thus, for all of the intentionally produced POPs currently listed in the Convention (with the exception of DDT), the required control measure is elimination, which is to be accomplished by means available within each party's respective legal and administrative systems. We believe that a regulatory standard requiring cost-benefit balancing would be incapable of ensuring U.S. compliance with Stockholm Annex A amendments to which the United States desires to bind itself. Instead, when the United States agrees with the Conference decision that a chemical is a POP, the United States should take the "legal and administrative measures necessary to eliminate" production, use, import, and export of the chemical.

In very limited situations, the required control measure could be restriction. DDT is the only POP listed in Annex B, and thus the only intentionally produced POP that is subject to restriction, rather than elimination, under the Stockholm Convention. DDT is the sole exception to the elimination rule because of its unique public health role in malaria vector control, especially in Sub-Saharan Africa. We do not believe that the specific conditions leading to the treatment of DDT in Annex B are especially relevant to the domestic regulatory situation in the

United States; moreover, we do not anticipate that many, if indeed any, intentionally produced POPs will be added to Annex B in the future.

However, if an intentionally produced POP were added to Annex B, then we are confident that the United States would fully protect its interests during the international negotiations on the listing decision, so that the control measures contained in that decision would adequately reflect the public health needs of the United States. Given U.S. technical expertise and the advanced state—compared to most other countries in the world—of our health care, research and development, administrative, and other relevant capacities, we do not believe there is any realistic possibility that the global community would bind itself with Annex B control measures that were too strict for the United States to implement. Rather, the far more realistic scenario is that the United States will have to push many other countries to accept control measures that are stricter than they might otherwise prefer.

In conclusion, for new listing amendments to Stockholm Annexes A or B, we believe Congress should require EPA, within a fixed time, to initiate a rulemaking implementing the control measures required in the amendment, unless EPA concludes that the chemical is not a POP. We do not agree that EPA should be required to engage in de novo cost-benefit "balancing," because such balancing is not contained in the Convention and, due to the inherent shortcomings of cost-benefit balancing, it could prevent EPA from promulgating control measures that were strong enough to allow the United States to comply with the new-listing amendment.

Question 7(a) (All witnesses): *Please state whether the treaties directly regulate persons or rather rely on individual countries to choose the appropriate means of compliance. Please state whether any of the treaties have a specific regulatory standard for individual nations to follow.*

Response: The Stockholm Convention, like other multilateral environmental agreements of global scope, is an agreement among nations. It does not directly regulate persons.

The Convention—again like most other multilateral environmental agreements—leaves the decision of how best to implement specific treaty obligations up to individual parties. However, as noted in my response to Question 5, Stockholm Article 3 requires every party to "Prohibit and/or take the legal and administrative measures necessary to eliminate" its production, use, import, and export of POPs listed in Annex A; and to "Restrict its production and use of the chemicals listed in Annex B in accordance with the provisions of that Annex." Thus, if the purpose for enacting TSCA POPs amendments includes facilitating U.S. acceptance and compliance with a Stockholm new-listing amendment, then any regulatory standard in the bill must give EPA sufficient statutory authority to promulgate regulations that will ensure that the United States can comply with these requirements. A de novo cost-benefit balancing standard will not accomplish that.

Question 7(c) (All witnesses): *Do you believe the above Administration principles are prohibited by or consistent with the treaties? If you believe them to be prohibited, please point to specific language prohibiting such consideration.*

Response: Because the second quoted "Administration principle" is simply an elaboration of part of the first principle, this comment will refer only to the first quoted principle.

The Administration's principle states, in part, "the United States should compare the international decision to measures that are more and less stringent, thereby facilitating a risk-management decision as to which measure(s) provide(s) the most reasonable balance of benefits, risks and costs for specific uses."

This principle is neither prohibited nor consistent with the Stockholm Convention. One cannot say it is consistent, because the Convention contains no requirement (or even suggestion) that the POPRC or Conference will base their decisions on cost-benefit balancing. The principle simply adds an idea that is not present in the Convention.

Yet one cannot say that the Convention prohibits the principle, because the principle relates to domestic regulatory decisions about adding chemicals to the Convention. The principle necessarily contemplates making it impossible for the United States to comply with, and thus adopt, a new-listing amendment, because it would require EPA to consider regulatory measures that would be less stringent than those permitted under the amendment, and to chose the less stringent measures if they could be shown to provide a more "reasonable" result under the principle's cost-benefit balancing. However, because the Convention does not require parties to adopt new-listing amendments, a principle that could have the effect of preventing the United States from opting in to such an amendment would not contravene any legally binding obligation under the Convention.

By comparison, the principle would be prohibited under the Convention if it were applied to any of the chemicals presently listed in Annexes A or B, because all parties must agree to abide by the control measures contained in those annexes. Implementing control measures that were less strict—as envisioned under the principle—would violate that core treaty requirement.

Question 9 (all witnesses): *Would it not be useful to use a current regulatory authority if it would provide for more cohesive U.S. law? Also are there not circumstances where existing law may be sufficient and no new regulation required?*

Response: We agree that it would make sense for EPA to use current regulatory authority or existing law to deal with an additional POP under the Stockholm Convention whenever such authority or law were sufficient to ensure U.S. compliance with the new-listing amendment. That may well be the case for a POP added to Annex C, especially when unintentional production of the POP is caused by combustion and the release is to the air, and the Clean Air Act thus applies. The same may be said for measures related to releases of POPs listed in Annexes A, B, or C from stockpiles and wastes (where RCRA and CERCLA might apply). For POPs pesticides, EPA would presumably regulate under authority derived from amendments to FIFRA, which should be a discrete part of any POPs implementation bill that Congress adopts.

However, for industrial chemicals that have been added to Annex A (and whose production, use, import, and export have thus been prohibited), the only relevant statutory authority that is presently available to EPA is TSCA § 6(a). After EPA's proposed asbestos rule was overturned in the Corrosion Proof Fittings case, 947 F.2d 1201 (5th Cir. 1991), commentators generally concluded that the "least burdensome means" balancing test in § 6(a) does not give EPA effective authority to ban the production and use of industrial chemicals.[1]

Indeed, EPA has never finalized regulations for any other chemical under § 6(a) since Corrosion Proof Fittings. Thus, it would be unreasonable to presume that EPA could successfully implement a Stockholm Annex A amendment for an industrial chemical through its § 6(a) authority.

Question 11 (All witnesses): *Are there concerns over any anticipated use of all of these treaty exemptions, including the broader exceptions? . . . Is the concern limited to the country-specific exemptions?*

Response: The concern expressed in my testimony referred to the country-specific exemptions.

Question 12 (EPA): *Do you have examples where the provisions of the Safe Drinking Water Act risk language or the science provisions of Executive Order 12866 adversely and inappropriately paralyzed the rulemaking procedure? If so, please provide specific examples.*

Response: The introductory comments to Question 12 assert that the "sound science" language in the June 17 Discussion Draft is justified because the Safe Drinking Water Act Amendments of 1996 "were passed with broad bipartisan support and have worked very well," and because Executive Order 12866 is still in effect.

The environmental and health community objects to the presence of the "sound science" language in the Draft because it is superfluous and because it will provide entities that have a vested interest in continued production and use of POPs with an inappropriate litigation tool, which they may use to intimidate EPA in the rulemaking process.

The language is unnecessary because, as the comment notes, Executive Order 12866 already requires EPA to base its decisions on the best reasonably obtainable scientific information. Thus, it is not apparent how the additional "sound science" language in the Discussion Draft could improve the quality of EPA's decision-making.

A key difference between Executive Order 12866 and the Discussion Draft's language, however, is that private entities cannot base a judicial cause of action on an executive order. Under either the Administrative Procedure Act's arbitrary and capricious standard or TSCA's substantial evidence standard, agency rules that are not grounded in careful scientific analysis

[1] See, e.g., Testimony of Lisa Heinzerling, POPs, PIC, and LRTAP: The Role of the U.S. in Draft Legislation to Implement These International Conventions: Hearing Before the Subcomm. on Environment and Hazardous Materials of the House Comm. on Energy and Commerce, 108th Cong., at 2-11 (July 23, 2004).

may be struck down by the courts. Thus, regulated entities will be fully protected under the TSCA POPs amendments from any potential misuse of science by EPA—without the Discussion Draft's "sound science" language.

Because the language is unnecessary, we conclude that its underlying purpose is to provide producers and users of POPs chemicals—or anyone else who wants to delay instituting a covered regulation protecting human health and the environment—with an additional opportunity to sue EPA, or to create a "chilling effect" that will lessen EPA's desire to initiate a POPs-related rulemaking. As we noted in our answer to Question 3 above, Congress can effectively prevent the Executive Branch from exercising its treaty making powers by failing to give EPA adequate authority to ban or restrict a newly listed POP. Congress can also accomplish that by expanding the opportunity for individuals to sue EPA over its implementing regulations. Because we do not believe that U.S. participation in the Stockholm Convention should so easily be held hostage to the interests of private entities that produce or use POPs, we believe it is inappropriate for superfluous and potentially pernicious "sound science" provisions to be included in this bill.

As to whether the sound science provisions of the 1996 Safe Drinking Water Act Amendments have stifled rulemaking or "worked very well," we point out that the only substance EPA has regulated under the Amendments is arsenic, which it was specifically required to do.