POPs, PIC, and LRTAP: The Role of the U.S. and Draft Legislation to Implement These International Conventions

Written Testimony of Glenn M. Wiser, Senior Attorney, The Center for International Environmental Law On Behalf of National Environmental Trust, Oceana, Pesticide Action Network North America, Physicians for Social Responsibility, Sierra Club, and U.S. Public Interest Research Group

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Center for International Environmental Law
1367 Connecticut Ave, NW, Suite 300
Washington, DC 20036
(202) 785-8700

I. Introduction

Mr. Chairman and Members of the Subcommittee:

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

Much of my work at CIEL has focused on the development and implementation of multilateral treaties such as the Climate Convention, the Framework Convention on Tobacco Control, and the Stockholm POPs Convention. Since May, 2001, I have worked closely with numerous environmental and health organizations to help develop legally sound, environmentally responsible legislation that will permit the United States to ratify and participate fully and effectively in the Stockholm Convention. My organization also coordinates a network of grassroots and activist organizations located throughout the country who work on issues related to chemicals management and safety, and who strongly support the Stockholm Convention.

A core group of public interest organizations, including CIEL, National Environmental Trust, Oceana, Physicians for Social Responsibility, the U.S. Public Interest Research Group, and the World Wildlife Fund, has worked with Congress over the last two years to help develop the implementing legislation for the Stockholm Convention. At the request of the Senate Environment and Public Works Committee

(EPW), this group consulted extensively with industry representatives and EPW staff on amendments to the Toxic Substances Control Act (TSCA), which were eventually approved by EPW in July 2003 as the POPs, LRTAP POPs, and PIC Implementation Act of 2003, S. 1486. We have also participated in lengthy consultations with members of the Senate Committee on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture to educate and assist them in the development of POPs implementing bills that would amend the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

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

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

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

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

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

II. Persistent Organic Pollutants and the Stockholm Convention

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

2. The Stockholm POPs Convention. The Stockholm Convention bans or severely restricts 12 of the most hazardous POPs, and establishes an international, science-based process for adding other POPs to the treaty. The Convention entered into force on May 17, 2004. The Convention's first "Conference of the Parties" will meet in May, 2005 to adopt rules of procedure and guidelines for many of the treaty processes and institutions, including the committee that will make recommendations on additional POPs. The United States can attend the first Conference of the Parties as an official party only if it ratifies the treaty no later than early February 2005 (90 days before the Conference). Nevertheless, it can attend that meeting as an observer, and may join as a full party if it ratifies at a later date.

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

III. The June 17, 2004 Discussion Draft

U.S. environmental and health organizations enthusiastically support the Stockholm POPs Convention. We are proud of the important role we believe our groups played in the development of this treaty, and we look forward to the day when America

joins the 70 other countries that have already ratified it.[1] We are convinced that U.S. participation and leadership in the Convention will be essential for achieving our vision of elimination of persistent organic pollutants and other persistent toxic substances from the world's environment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Under the Discussion Draft, EPA would have complete discretion to decide whether or not it should prohibit or restrict an additional POP. But if it decided to regulate, it could do so only "to the extent necessary to protect human health and the environment in a manner that achieves a reasonable balance of social, environmental, and economic costs and benefits."

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

A Better Approach: Congress should avoid a complex, de novo regulatory standard, and it should wholly reject a cost-benefit standard that may have the effect of making it impossible for the United States to concur with international decisions to address additional POPs. The most sensible standard to use in the legislation would be based upon the Convention, and would require EPA to implement the control measures specified in the Convention in a manner that protects against "significant adverse human health or environmental effects." If, despite the international decision to list a POP, EPA concluded that the chemical was not likely to lead to significant adverse human health or environmental effects, then EPA could issue a decision not to regulate.

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

- The environmental and health community believes that high quality, objective scientific research and analysis should provide the foundation for the evaluation and management of POPs and other persistent toxic substances.
- The modern regulatory catch phrase of "sound science" was developed by the tobacco companies as a way to confuse the public, thwart attempts at regulation, and obfuscate the fact that their products are among the most harmful products legally sold. The concept has been described as "an effort to inject . . . politics into the world of science and to use the uncertainty that inevitably surrounds

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

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

science as an excuse to delay new rules. . ."[4] It has been roundly criticized in a recent letter to the Bush Administration from 18 Nobel laureates, National Medal of Science Recipients, and other leading researchers.[5]

- Under the Discussion Draft, the sound science requirement would help give chemical companies one of big tobacco's most effective anti-health, anti-regulatory tools, while doing little, if anything, to improve the quality of scientific analysis in a POPs rulemaking.

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

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

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

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

IV. Bush Administration Arguments Against Implementation of the POPs Convention

During the course of our environmental and health groups' work on POPs implementing legislation, the Bush Administration has repeatedly raised objections, based on constitutional grounds, to some of the options that have been proposed. These include objections based on the separation of powers doctrine and on a putative "international non-delegation doctrine." I would like to respond to these assertions, for

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

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

the record, so that Congress will not be misled on this matter now or in subsequent development of the POPs legislation.

1. The separation of powers argument. In a letter dated March 25, 2004 from William Moschella, Assistant Attorney General, to Senator Tom Harkin, the Department of Justice claimed that mandatory notice and comment provisions tied to the international listing process of the Stockholm Convention would unconstitutionally infringe upon the President's treaty making powers. Independent analyses of that letter by the Congressional Research Service and by my organization, CIEL, demonstrated that the Administration's legal theory had no foundation in U.S. law and was without merit. [Please see attached CIEL Memorandum dated April 5, 2004.]

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

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

This theory is premised on the assumption that when Congress delegates responsibilities to the Executive Branch and makes the exercise of those responsibilities contingent on the occurrence of an international event, then Congress has unconstitutionally given lawmaking powers to whatever international institution is responsible for the event. But the theory is fatally flawed because it confuses who is exercising legislative power when the United States implements treaties in this fashion. While decisions by the international body may trigger the Executive Branch's responsibility to implement the law, that is so only because Congress decided that the law would be contingent on such a decision. Congress alone has established what the law

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

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

will be, and it has delegated the responsibility to implement the law to the Executive Branch. The international body has no role in either of these functions.

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

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

- Clean Air Act, 42 U.S.C. § 7671e, implementing the Montreal Protocol on Substances that Deplete the Ozone Layer (providing that in the event "the Montreal Protocol is modified to . . . control or reduce . . . any substance more rapidly [than otherwise provided by law]," the Administrator shall promulgate regulations to establish a more stringent phase-out schedule).
- Tariff Act, 19 U.S.C. § 1516(a)(g)(4)(A), implementing Chapter 19 of the North American Free Trade Agreement (NAFTA) (providing that when a Chapter 19 arbitration panel decides to refer a challenged matter on anti-dumping or countervailing duties back to the International Trade Commission, the ITC is bound by statute to "take action not inconsistent with the decision" of the panel).
- Chemical Weapons Convention Implementation Act, 22 U.S.C. § 6725, implementing the Chemical Weapons Convention (requiring the United States Government (through the State Department acting as the U.S. National Authority) to seek the issuance of a search warrant in response to a demand from the Organization for the Prohibition of Chemical Weapons (OPCW) to engage in a challenge inspection of a public or private facility).
- Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 811(d), implementing the Convention on Psychotropic Substances (providing that whenever the Secretary of State receives notification from the World Health Organization that a listing schedule will change, Secretary of Health, Education, and Welfare (now Health and Human Services) must publish the notice in the Federal Register, invite comment, and prepare medical and scientific evaluations).
- Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 346a(b)(4) (providing that the Administrator, in establishing a tolerance for a pesticide chemical residue in or on a food, shall determine whether a maximum residue level for the pesticide chemical has been established by the Codex Alimentarius Commission; if a Codex maximum residue level has been established for the pesticide chemical and

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

the Administrator does not propose to adopt the Codex level, the Administrator shall publish for public comment a notice explaining the reasons for departing from the Codex level).

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

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

V. Conclusion

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

Attachments: CEO letter to Senators Cochran, Harkin, Goodlatte, and Stenholm, dated April 19, 2004

CIEL memorandum, "Analysis of Department of Justice Letter Regarding the Constitutionality of Mandatory Notice and Comment Provisions Proposed in Implementing Legislation for the Stockholm Convention on Persistent Organic Pollutants (POPs)" dated April 5, 2004