# Legislation to Implement the POPs, PIC, and LRTAP POPs Agreements

## 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, U.S. Public Interest Research Group, Commonweal, Citizen's Environmental Coalition, and the Environmental Health Fund

## Before the Subcommittee on Environment and Hazardous Materials United States House of Representatives

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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:

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

[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.*

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 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