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of Law, Geo. U. L. Center)

Lisa Heinzerling  
*Georgetown University Law Center*, [heinzerl@law.georgetown.edu](mailto:heinzerl@law.georgetown.edu)

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Testimony of

**Lisa Heinzerling**

**Professor of Law  
Georgetown University Law Center**

**Member Scholar  
Center for Progressive Regulation**

**Before the  
Subcommittee on  
Environment and Hazardous Materials of the  
Committee on Energy and Commerce  
U.S. House of Representatives**

Hearing on

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

July 13, 2004

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**TESTIMONY OF**  
**LISA HEINZERLING**  
**PROFESSOR OF LAW,**  
**GEORGETOWN UNIVERSITY LAW CENTER**  
**MEMBER SCHOLAR,**  
**CENTER FOR PROGRESSIVE REGULATION**  
**BEFORE THE SUBCOMMITTEE ON**  
**ENVIRONMENT AND HAZARDOUS MATERIALS OF THE**  
**COMMITTEE ON ENERGY AND COMMERCE**  
**U.S. HOUSE OF REPRESENTATIVES**

**JULY 13, 2004**

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

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

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

1. As currently interpreted, the Toxic Substances Control Act is not an adequate mechanism for regulating toxic substances. Thus the implementation of international agreements on POPs is of critical importance in ensuring the adequacy of future controls on toxic substances.
2. The paralyzing procedures contemplated by the “Gillmor Discussion Draft” [hereinafter “Discussion Draft”] circulating in the House would virtually guarantee that no new toxic substances would be added to the list of substances regulated by international agreements on POPs.
3. Recent assertions by the Executive Branch concerning supposed constitutional limits on using international decisions to trigger domestic obligations, and on requiring public notice-and-comment procedures based on such international decisions, are without merit.

## **I. The Inadequacy of the Toxic Substances Control Act in Regulating Toxic Substances**

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

Section 6 of TSCA provides the Environmental Protection Agency (EPA) with broad authority to control the manufacture, processing, distribution in commerce, use, and disposal of chemical substances and mixtures. Section 6(a) gives the agency a wide-ranging menu of options for controlling harmful chemicals, including everything from requiring labeling for such chemicals to banning them altogether. Section 6(a) of TSCA *requires* EPA – through the use of the mandatory “shall” – to regulate a

chemical substance when the agency finds there is a “reasonable basis” to conclude that it poses an “unreasonable risk of injury” to human health or the environment. 15 U.S.C. § 2605(a). This provision requires the agency to regulate such a substance “to the extent necessary to protect adequately against such risk using the least burdensome requirements.” *Id.* Section 6(c)(1) instructs the agency, when issuing a rule under section 6(a), to “consider and publish a statement with respect to” the effects of a chemical on human health and the environment, the magnitude of exposures to such chemical, the benefits of the chemical for “various uses and the availability of substitutes for such uses,” and “the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health.” 15 U.S.C. § 2605(c)(1).

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

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

In 1979, EPA began looking into the possibility of banning asbestos under section 6 of TSCA.<sup>1</sup> The agency acted in response to increasing concerns about the harms to human health caused by asbestos. Ten years

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<sup>1</sup> Commercial and Industrial Use of Asbestos Fibers, 44 Fed. Reg. 60,061.

and a 45,000-page record later,<sup>2</sup> EPA produced a final rule banning virtually all uses of asbestos in several phases.<sup>3</sup> The agency found that asbestos posed an unreasonable risk to human health in all stages of its production and use, and that the substance was thus an appropriate candidate for the kind of comprehensive regulation offered by TSCA's section 6.<sup>4</sup>

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

1. In order to regulate under section 6(a) of TSCA, EPA must begin by examining the least intrusive regulatory alternative (such as labeling), considering the costs and benefits of such alternative. EPA may consider a more intrusive regulatory option only if "unreasonable risks" are predicted to remain under the less onerous alternative. In order to justify a ban – like the asbestos ban – EPA would have to examine the costs and benefits of numerous less onerous regulatory alternatives, and conclude that each would allow unreasonable risks to remain unaddressed.
2. In examining costs and benefits under section 6(c) of TSCA, EPA was required to "discount" benefits as well as costs – which, in effect, means treating regulatory benefits such as lives saved as if they were a financial investment. Discounting benefits in the context of toxic chemical control places a large thumb on the scale – against regulation.
3. EPA may not use unquantified benefits to justify regulating a harmful chemical, except in close cases.
4. EPA may not exceed undefined limits on how much money it requires industry to spend to save a human life.

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<sup>2</sup> PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY at 409 (Aspen, 4th ed. 2003).

<sup>3</sup> EPA, Asbestos: Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions, 54 Fed. Reg. 29,460 (1989).

<sup>4</sup> *Id.* at 29,461.

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

*Detailed Analysis of Less Burdensome Alternatives*

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

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

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

947 F.2d at 1217 (citation omitted). The court justified the imposition of this heavy procedural burden on the agency by reference to the language of TSCA, which, the court concluded, offered regulatory options in an order proceeding from most to least stringent. *Id.* at 1215-16. In fact, however, the regulatory options identified in TSCA § 6 are not arranged in the tidy

order the court perceived.<sup>5</sup> Moreover, even if they were, nothing in TSCA suggests that EPA is bound to follow the rigid and onerous procedure required by the court in *Corrosion Proof Fittings*. Indeed, where, as EPA did with respect to asbestos, the agency finds that a substance poses unreasonable risks throughout its industrial life cycle, then the agency is bound by the terms of the statute to protect against “such risk.” 15 U.S.C. §2605(a). In those circumstances, a product ban happens to be the “least burdensome” method available to protect against “such risk.”

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

Such a process is not merely onerous; it may well be impossible. In analyzing the costs and benefits of a ban of asbestos, EPA was faced with the difficult but not impossible task of trying to identify the risks that would be avoided if asbestos were no longer used or produced (with very limited exceptions). Even so, the task was complicated and time-consuming, and many of the benefits of EPA’s ban – including the prevention of nonfatal illnesses associated with asbestos, and the prevention of death from any disease other than cancer – remained unquantified by the agency. Under the court of appeals’ approach, however, EPA would be forced to figure out how many lives would be saved by, for example, a particular labeling requirement; how many saved by a particular disposal requirement; and so forth. The analytical demands imposed by the court of appeals’ decision are positively paralyzing.

### *Discounting Benefits*

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



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

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

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

On the matter of discounting, too, the court of appeals’ opinion in *Corrosion Proof Fittings* is deeply problematic. In an ordinary case, one would expect a court to defer to the agency’s determination that benefits accrued as soon as the risk from asbestos was reduced. In everyday life, after all, we regard the removal of a risk as a benefit as soon as it happens;

we don't ordinarily react to the removal of a carcinogen in our environment, for example, by announcing that we will hold off feeling relieved until the date when we might have developed cancer had the carcinogen not been taken away.

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

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

The international agreements on POPs are aimed at phasing out pollutants that, among other things, cause long-latency human diseases such as cancer. The agreements are also aimed at phasing out pollutants that persist in the environment over long periods of time and thus pose risks to future generations. The benefits produced by the treaty are the very kinds of benefits trivialized through the use of discounting, as required by the court in *Corrosion Proof Fittings*. TSCA, as currently interpreted, is thus not an effective mechanism for controlling these substances.

### *Limited Role for Unquantified Benefits*

In seeking to ban virtually all uses of asbestos, EPA had justified its decision based partly on unquantified benefits. For example, the agency used a 13-year time horizon in its analysis of costs and benefits, but emphasized that the benefits of the rule – though unquantified beyond the

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

<sup>7</sup> *Id.*, ch. 8.

13-year horizon – would continue to occur even past its analytical horizon. 54 Fed. Reg. at 29,486-88. In addition, although the agency was able to quantify only the benefits of saving lives due to cancers averted, the agency also cited many other, unquantifiable benefits in support of its rule – including nonfatal illnesses, fatalities due to causes other than cancer, and ecological effects. *Id.* at 29,479, 29,498.

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

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

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

### *How Much to Spend to Save a Human Life*

One last aspect of the decision in *Corrosion Proof Fittings* that renders TSCA’s § 6 a weak mechanism for controlling toxic substances is the court’s holding that EPA had, with the asbestos ban, required industry to spend too much to save a human life. The court pointed to cost figures per life saved, disaggregated by industry. These figures showed how much it would cost to save a life in, for example, the asbestos pipes industry vs. the asbestos shingles industry vs. the asbestos brakes industry. In some

industries, the cost per life saved, when lives were discounted at 3 percent per year, reached into the tens of millions of dollars. 947 F.2d at 1218, 1222.

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

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

### *TSCA Today*

Despite the promise suggested by the text of TSCA section 6(a), that promise has remained unfulfilled in the years since *Corrosion Proof Fittings* was decided. For here was a case in which the agency had spent a decade compiling a thorough and careful record of the harms caused by one of the hazardous substances about which we know the most, and yet the court overturned the agency's rule and required the agency to conduct almost

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

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

impossibly detailed analysis before attempting to ban another substance under the statute. Perhaps it goes without saying that the agency has not tried again.

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

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

## **II. The Paralyzing Requirements of the “Discussion Draft”**

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

Before delving into the details of the Discussion Draft, it is worth bearing in mind the context in which EPA action under the POPs

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<sup>10</sup> Eric Pianin, *White House Move on Toxic-Chemicals Pact Assailed*, WASHINGTON POST, Apr. 12, 2002, at A13.

implementing legislation will occur. The domestic listing process contemplated in the Discussion Draft begins only *after* international panels have engaged in a thorough, science-based process of review and have concluded that a new substance warrants regulation under the international agreements for POPs.<sup>11</sup>

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

The POPs treaty explicitly takes a protective, precautionary approach to regulating POPs. The preamble states: “Mindful of the precautionary approach as set forth in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Convention is to protect human health and the environment from persistent organic pollutants.” Stockholm Convention, art. 1. Article 8(7)(a) of the Convention specifically states that “[l]ack of full scientific certainty shall not prevent the proposal [to list a new chemical] from proceeding,” and Article 8(9) provides that the Conference of the Parties, “taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical.” In the fierce current

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

debates over precautionary approaches to environmental policy, therefore, the POPs treaty comes down firmly on the side of precaution.<sup>12</sup>

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

#### *EPA discretion*

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

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

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

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

*Duplication of scientific effort*

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

*"Sound science"*

The Discussion Draft provides:

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

§ 502(e)(4).

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



Administrative Procedure Act's injunction against arbitrary and capricious agency decision making.

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

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

### *Cost-benefit analysis*

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

publishing a statement comes from the part of TSCA that is otherwise quoted quite closely in the Discussion Draft.

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

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

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

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<sup>13</sup> See generally Lisa Heinzerling, *Environmental Law and the Present Future*, 87 Geo. L.J. 2025 (1999).

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

- Many of the benefits of reducing these pollutants cannot be quantified. In many cases, avoiding cancer is the only benefit that can be quantified. This leaves all other causes of death, plus all nonfatal illnesses avoided and all ecological effects, left out of the numerical tally of costs and benefits. When a benefit is not quantified, its worth is typically treated as if it were zero in a cost-benefit balancing.
- The costs of regulating environmental risks are often overstated, and often by a large amount.<sup>15</sup>
- Even when benefits can be quantified, the process of fitting values like human lives and health into a cost-benefit balance is fraught with difficulty. Sometimes, monetary values are attached to benefits such as human lives. These values are generally based on the amount of extra income male workers in the 1970s were willing to accept in exchange for increased workplace risks. The monetary values arising from this context not only tell us little about these workers' own values (there is no evidence they actually knew the precise risks they faced, or could afford to turn down a risky job even if they did know), but tell us even less about the monetary values one might attach to risks of cancer, risks that are involuntarily imposed, risks to future generations, and so forth. They tell us little, in other words, about the value of controlling the risks of POPs.
- The technique of discounting – required by the court in *Corrosion Proof Fittings* despite the absence of a statutory mandate for it – belittles desires to protect this and future generations against long-term and persistent risks. Discounting would easily trivialize the benefits of regulating POPs. Yet protection of the future – for our own generation, our children's generation, and generations yet to

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

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

come – is one of the basic principles animating a document like the POPs treaty. Discounting, through an arcane and seemingly technical process, silently undermines this animating principle.<sup>16</sup>

- Cost-benefit balancing typically relies on a starkly impoverished view of what matters when it comes to risk. Frequently, cost-benefit analysis looks solely at the probability and magnitude of harm, in numerical terms, rather than also at the cultural and moral context in which that harm might be inflicted. Thus cost-benefit analysis most often ignores the kinds of considerations – an aversion to involuntary and uncontrollable risks, a preference for an equitable distribution of risk, a desire to avoid consequences that threaten whole communities – that most people take into account in judging risk.

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

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

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

economy. § 502(e)(2)(D). In other words, even if the cost-benefit profile tilted in the direction of regulation, EPA must nevertheless go on to consider whether an industry would be too hard-hit by a regulation to proceed. Finally, EPA must, according to the Discussion Draft, also consider not only the national, but also the international, consequences of a regulatory action. § 502(e)(2)(E).

This is a research agenda and analytical program to fill several lifetimes. Even under the relatively “streamlined,” pre-*Corrosion Proof Fittings* version of TSCA, it took EPA ten years and 45,000 pages to justify its asbestos ban. And even then the court overturned the rule for lack of sufficient analysis. The Discussion Draft dumps even more analytical requirements on EPA, with the likely result that no rule would ever see the light of day under this framework.

### **III. The Administration’s Constitutional Arguments Regarding Implementation of the POPs Conventions Are Without Merit**

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

First, the Department of Justice has argued, in a letter to Senator Tom Harkin dated March 25, 2004, that mandatory notice-and-comment procedures in POPs implementing legislation (there, the Department was discussing amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)), would “raise constitutional concerns.” Letter from William Moschella, Assistant Attorney General, Office of Legislative Affairs, to The Honorable Tom Harkin (March 25, 2004). It appears that the Department was under the impression that merely seeking out the views of the public, while international proceedings on whether to add pollutants to the list of POPs were ongoing, would interfere with the Executive’s treaty-making powers. The letter is exceedingly thin on legal authority, and even thinner on common sense: it provides no sensible reason to think that merely requiring notice and an opportunity for comment, without any obligation to change one’s international negotiating position, interferes with the Executive’s prerogatives. The letter is of a piece with the Administration’s other recent, extravagant claims of Executive prerogatives, offered in contexts ranging from its refusal to make public information concerning

Vice-President Cheney's Energy Task Force, to its arguments concerning the treatment of detainees in Cuba, to its alarming claims, in memoranda on the treatment of prisoners in the ongoing "war on terror," regarding the Executive's immunity from the requirements of the Geneva Convention. A detailed and persuasive refutation of the Department's analysis is attached to CIEL senior attorney Glenn Wiser's written testimony for today's hearing. Although the Discussion Draft does indeed provide an opportunity for public notice and comment, the rebuttal to the Department of Justice's constitutional arguments is important to keep in mind if future implementing bills do not require notice and comment early in the international process.

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

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

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

If the Executive chooses not to take the last route – that is, it does not select the opt-in option – then there would seem to be no meritorious constitutional complaint about being bound by international decisions on new POPs. The Executive's assent to such decisions would be embedded in the original treaty itself. Likewise, if Congress embodied this assent in

implementing legislation which required EPA to take action to control newly listed chemicals, there would be no constitutional problem. Indeed, many laws implementing international obligations take this general form. The Montreal Protocol on ozone-depleting substances, for example, provides that the original standards of the Protocol may be strengthened by a majority vote of the parties, and that vote is binding on the parties. The Clean Air Act implements this agreement by requiring EPA to take the actions required by the stricter standards. 42 U.S.C. § 7671e(a)(3). Similarly, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) provides for international decisions adding endangered species to the list of protected species, and the Endangered Species Act prohibits trade in internationally listed species. 16 U.S.C. § 1538(c). Other examples may be found in the memorandum attached to Glenn Wiser’s written testimony for this hearing.

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

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

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

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