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Beyond the Dirty Dozen: The Bush Administration's Cautious Approach to Listing New Persistent Organic Pollutants and the Future of the Stockholm Convention

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BEYOND THE DIRTY DOZEN:

THE BUSH ADMINISTRATION'S CAUTIOUS APPROACH TO LISTING NEW PERSISTENT ORGANIC POLLUTANTS AND THE FUTURE OF THE STOCKHOLM CONVENTION

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INTRODUCTION

The petrochemical revolution that promised "Better Living through Chemistry"[1] for the developed world in the aftermath of World War II brought with it a number of products that were, in retrospect, of dubious value and byproducts that have reduced the value of the products associated with the industrial processes that produced them. Close on the heels of the dawning of the "green revolution," Rachel Carson's *Silent Spring* drew the nation's attention to the faustian bargain that modern society made with persistent organochlorine pesticides like DDT, aldrin/dieldrin, endrin, heptachlor/ chlordane, and toxaphene.[2]

A decade later, the newly created Environmental Protection Agency ("EPA") began the long and, for the agency, excruciatingly burdensome process of canceling the registrations of those pesticides and a closely related newcomer, mirex.[3] Because the agency had to prove in a formal administrative adjudication that the risks of these pesticides outweighed their admitted benefits, the cancellation proceedings themselves went on for years.[4]

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[1] This slogan is a variant of DuPont's slogan from 1939 through 1999. *See* Better Things . . . ; 1939, http://heritage.dupont.com/touchpoints/tp/_1939/overview.shtml (last visited Nov. 14, 2003).

[2] *See generally* RACHEL CARSON, SILENT SPRING (1962).

[3] Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 YALE J. ON REG. 369, 432 (1993).

[4] *Id.* at 432-33.

Meanwhile, scientists discovered that the constituents of a commonly used electrical insulator, polychlorinated biphenyls ("PCBs"), were turning up in high levels in fish and sediments of rivers and lakes.[5] After an aborted multi-year attempt by EPA to regulate PCB-laden effluent under section 307 of the Clean Water Act, Congress came to the rescue and statutorily banned most uses of PCBs in 1976 as part of the newly enacted Toxic Substances Control Act.[6]

Two especially toxic byproducts of chlorine-related industrial processes, dioxin and furans, do not possess any intrinsic value, but could not be banned without eliminating the useful products that yielded them and eliminating such difficult or impossible to control combustion as forest fires and back yard burning.[7] They wound up on many lists of toxic chemicals and have occasionally driven cleanup efforts to very expensive lengths.[8] For this reason, huge battles, spanning more than a decade, have been waged over attempts to prepare formal risk assessments for dioxins.[9]

By the early 1990s, most of the above-mentioned persistent organic pollutants ("POPs") had been banned or stringently regulated in the United States.[10] The same could not be said, however, for the developing world.[11] For countries facing the serious threat of malaria, there was a perceived need for persistent pesticides to reduce that threat.[12] In other countries, strong econ-omic pressure from the United States and European countries prevented

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[5] Lauren MacLanahan, Note, *Polychlorinated Biphenyls and the "Mega Rule"—Will it have the Mega-Impact the EPA Desired?*, 24 WM. & MARY ENVTL. L. & POL'Y REV. 345, 346 (2000).

[6] William L. Andreen, *Defusing the "Not in My Back Yard" Syndrome: An Approach to Federal Preemption of State and Local Impediments to the Sting of PCB Disposal Facilities*, 63 N.C. L. REV. 811, 811-12 & n.5 (1985).

[7] Todd Paddock, Acad. of Nat. Sci., *Dioxins and Furans: Where They Come From* (July 1989), *available at* http://www.acnatsci.org/research/kye/diox2.html.

[8] *See, e.g.*, Clarke Morrison, *Taxpayers May Shoulder Cost of Ecusta Cleanup*, CITIZEN-TIMES (Asheville, N.C.), Nov. 17, 2002 (reporting that remediating paper mill site contaminated with dioxins could cost as high as $400 million), *at* http://cgi.citizen-times.com/cgi-bin/story/news/23776.

[9] Natural Res. Def. Council v. Envtl. Prot. Agency, 806 F. Supp 1263, 1269 (E.D. Va. 1992).

[10] *See* Peter L. Lallas, *The Role of Process and Participation in the Development of Effective International Environmental Agreements: A Study of the Global Treaty on Persistent Organic Pollutants (POPs)*, 19 UCLA J. ENVTL. L. & POL'Y 83, 90 n.21 (2000/2001).

[11] *Id.* at 99-100.

[12] *Id.* at 100.

effective regulatory action. Nevertheless, many countries demanded that the international community take action to restrict the production and marketing of POPs.[13]

On May 25, 1995, the United Nations Environment Programme ("UNEP") Governing Council called for an assessment to consolidate information on the chemistry, toxicology and global origin, transport and deposition, source of production, use, benefits and risks, the availability of substitutes, and mechanisms for reducing/eliminating emissions of the twelve above-mentioned chemicals (the so called "dirty dozen").[14] In paragraph 17 of the November 3, 1995 *Washington Declaration on Protection of the Marine Environment from Land-Based Activities*, governments agreed to develop a "global, legally binding instrument" for reducing/eliminating emissions and production of the "dirty dozen."[15] Finally, at the end of contentious multi-year negotiations in Montreal, Nairobi, Geneva, Bonn, and Johannesburg, the Stockholm Convention on Persistent Organic Pollutants ("Stockholm Convention") became available for signing in May, 2001.[16]

The United States has signed the Convention, and the Bush Administration has sought Senate ratification of the protocol and introduced implementing legislation in the 107th Congress. Unfortunately, the proposed implementing legislation is silent on the critical issue of adding new chemicals to the "dirty dozen" list of POPs. Although the Bush Administration has accepted in principle the possibility of adding new POPs through the international procedures contemplated by the Stockholm Convention, it appears unwilling in practice to acquiesce in the decisions of the international body empowered by the Stockholm Convention to make additions to the

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[13] *See Final Report of the IFCS ad hoc Working Group on Persistent Organic Pollutants*, U.N. Env't Programme, at 2, U.N. Doc. IFCS/WG.POPs/Report.1 (July 1, 1996), *available at* http://www.chem.unep.ch/pops/indxhtms/manwgrp.html [hereinafter *Final Report*].

[14] Governing Council Dec. 32, U.N. Env't Programme, 18th Sess., 9th mtg., Agenda Item 4, U.N. Doc. UNEP/GC.18/32 (1995), *available at* http://www.pops.int/documents/background/gcdecision/18_32/gc1832en.html [hereinafter Decision 18/32].

[15] *Status Report on UNEP's and Other Related Activities on Persistent Organic Pollutants (POPs)*, U.N. Env't Programme, 19th Sess. (Mar. 15, 1998), *available at* http://www.chem.unep.ch/pops/indxhtms/status.html.

[16] Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, pmbl., 40 I.L.M. 532, U.N. Doc. No. UNEP/POPs/CONF/2 [hereinafter Stockholm Convention]; *see* Joel A. Mintz, *Two Cheers For Global POPs: A Summary and Assessment of the Stockholm Convention on Persistent Organic Pollutants*, 14 GEO. INT'L ENVTL. L. REV. 319, 320 (2001).

POPs list.[17] Moreover, in recent negotiations over the implementing legislation, the Bush Administration took the position that no action should be taken against new POPs domestically unless it can be demonstrated that the action passes the same quantitative cost-benefit test that so greatly delayed EPA's efforts to cancel the registrations of POPs that are pesticides.[18]

This article will analyze the Bush Administration's very cautious approach toward implementing the Stockholm Convention in light of the Convention's history and purpose. Part I of the Article describes the dynamics of the negotiations surrounding the adoption of the Stockholm Convention over a five-year period. Part II will contrast the Bush Administration's approach to implementing legislation with the approach taken during the 107th Congress in the competing Jeffords Bill. Part III will analyze and critique the positions that the Office of Management and Budget ("OMB") adopted in subsequent negotiations concerning the scientific and policy underpinnings of implementing legislation. Finally, Part IV will explain why the more precautionary approach outlined in the Jeffords Bill is more consistent with the language and spirit of the Stockholm Convention and more sensible as a matter of domestic law.

I. THE PROBLEM WITH POPS

The "dirty dozen" are by no means the only POPs that are of concern to the international community and should be of concern to the United States. By definition POPs are toxic, manmade chemicals that resist photolytic, chemical, and biological degradation and therefore accumulate and persist in the environment.[19] Because they are hydrophobic and lipid soluble, they tend to accumulate in human and animal fat and biomagnify as they move up the food chain.[20] Because they can travel great distances in both air and water, POPs can be found throughout the planet, including places where they have never been used.[21] Although the chronic toxicity of most POPs has been a controversial subject through the years, many are probably carcinogenic in

[17] Eric Pianin, *White House Move on Toxic-Chemicals Pact Assailed*, WASH. POST, Apr. 12, 2002, at A13.

[18] *Id.*

[19] *Final Report*, *supra* note 13, at 2; *see also* Christina S. Chen, Comment, *Persistent Organic Pollutants: Regime Formation and Norm Selection*, 13 CONN. J. INT'L L. 119, 120 (1998).

[20] Chen, *supra* note 19, at 120.

[21] *Id.*

humans and cause adverse reproductive and endocrine effects.[22] For all of these reasons, POPs warrant special attention by environmental regulators. Prime candidates for addition to the "dirty dozen" are chlordecone, hexabromobiphenyl, HCH (including lindane), and PAHs,[23] but others will no doubt arise in the future.

The international negotiations over the Stockholm Convention took more than four years and involved more than one hundred and twenty governments. In the United States these negotiations ran concurrently with an extensive series of consultations with domestic agencies, representatives from industry, environmental nongovernmental organizations ("NGOs"), Native Americans, and state governments.[24] It is fair to say that the consultation and negotiation process was an open one and that many different competing views were considered.

Two important developments greatly facilitated the relatively smooth POPs negotiation process. First, the POPs negotiators were building on the already considerable foundation of the successful Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the "PIC Agreement").[25] The PIC Agreement evolved over years as a vehicle for putting developing countries on notice of the identities of the banned and restricted chemicals in other countries, providing them with information on the hazards and risks of such chemicals so that they might make informed decisions as to the actions to be taken in their own countries. As a practical matter, it helped developing countries enforce their decisions to ban imports of banned or severely restricted chemicals in certain developed countries.

The logic behind not simply banning the export of such chemicals was the understanding that neither the United States nor other developed countries

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[22] *Persistent Organic Pollutants Implementation Act of 2002: Hearing on S. 2118 Before the Senate Comm. on Env't & Pub. Works*, 107th Cong. (May 14, 2002) (statement of Brooks B. Yeager, Vice President for Global Threats, World Wildlife Fund), LEXIS Comm. Hearing Transcripts [hereinafter Yeager Statement].

[23] *See* U.N. ECON. COMM. FOR EUROPE, 1979 CONVENTION ON LONG-RANGE TRANSBOUNDARY AIR POLLUTION AND ITS 1998 PROTOCOLS ON PERSISTENT ORGANIC POLLUTANTS [POPS] AND HEAVY METALS, U.N. Sales No. E.99.II.E.21 (1998); *see also* Yeager Statement, *supra* note 22.

[24] *See* Yeager Statement, *supra* note 22.

[25] Message from the President of the United States transmitting the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, S. TREATY DOC. NO. 106-21 (2000).

could appropriately weigh the costs and benefits of such chemicals for other countries. Regulators in developed countries would not be familiar with the various factors in a particular developing country that might warrant a regulatory approach short of a ban. These include the need to combat diseases not endemic to the United States, different climatic conditions, different life expectancy, and different lifestyles which might, for example, prohibit the effective use of protective clothing required in the United States for safe use of a substitute chemical. Since the risk posed by the chemical was assumed to be limited to the health and environment of the user country, it made sense for that country alone to determine what course to follow. Hence, the objective of the Convention was not to ban production and use worldwide, but to "promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals . . . by providing for a national decision-making process on their import and export . . . ."[26]

During the many years of development and operation of the voluntary PIC Agreement process and the negotiations toward a binding convention, it became increasingly apparent that a subset of chemicals banned in certain developed countries were toxic, persistent in the environment, accumulated in the tissue of living creatures, and were capable of long range transport.[27] Since the risk posed by these chemicals could not be confined to national boundaries, the risks of continued manufacture and use were risks to all nations. The international goal, therefore, shifted toward a total ban of the manufacture and use of such chemicals worldwide. The decision to take action on such chemicals could not simply be based on an assessment of the costs and benefits by any individual nation. Only through collective action of all nations could the environmental risks presented by such chemicals be properly addressed. Thus, the Stockholm Convention represented a logical extension of the PIC Agreement.

Second, the POPs negotiators could draw upon the considerable expertise of the Intergovernmental Forum on Chemical Safety ("IFCS"). IFCS is a non-institutional arrangement through which representatives from governments (generally senior chemicals regulators) deliberate together with representatives of concerned intergovernmental organizations (FAO, ILO,

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[26] *See* Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, art. 1, S. TREATY DOC. NO. 106-21 (2000).

[27] *See* Greenpeace, POPs: Poisoning Our Planet, *at* http://www.greenpeace.org.au/toxics/pops (last visited Sept. 23, 2003).

UNEP, and WHO)[28] and NGOs (environmental and public health groups and the chemical industry) to provide analysis and advice on the environmentally sound management of the risks posed by chemicals.[29] The UNEP Governing Council asked IFCS to carry out an assessment of the risks posed by the initial list of twelve POPs, draw conclusions, and make recommendations. Following an intensive series of deliberations in Manilla in June, 1996, IFCS transmitted its conclusions and recommendations to the UNEP Governing Council, which, in turn, endorsed them in their entirety.[30] This process served as an important underpinning for the Governing Council's decision in February 1997 to request the Executive Director of UNEP to convene an international negotiating committee with a mandate to prepare an international legally binding instrument.[31]

The Stockholm Convention that resulted requires nations that become parties to eliminate or restrict the production, use, and/or release[32] of the twelve listed chemicals. The implementing countries must eliminate production and use of all of the ten intentionally produced POPs except DDT, which may continue to be produced and used for disease vector control, primarily to fight malaria, while development of effective and economically viable alternatives continue. The parties must develop national action plans to address the two byproduct POPs, dioxins and furans, and use best available technologies to reduce emissions from certain new sources of these POPs.[33] Parties must also control handling of POPs wastes and trade in POPs chemicals. The Convention contains a well articulated process for adding new chemicals when a panel employing a science-based process determines

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[28] *See* Food and Agricultural Organization of the United Nations ("FAO"), *at* http://www.fao.org; International Labor Organization ("ILO"), *at* http://www.ilo.org; United Nations Environment Program ("UNEP"), *at* http://www.unep.org; World Health Organization ("WHO"), *at* http://www.who.int/en/.

[29] Intergovernmental F. on Chem. Safety, In Partnership for Global Chemical Safety, *at* http://www.who.int/ifcs/index_pag2.htm (last visited Sept. 23, 2003).

[30] *See* Decision 18/32, *supra* note 14.

[31] Governing Council Dec. 13C, U.N. Env't Programme, 19th Sess., para. 8 (1997), *available at* http://www.chem.unep.ch/pops/gcpops_e.html.

[32] Stockholm Convention, *supra* note 16, art. 3, 40 I.L.M. at 534-35.

[33] *Id.* art. 5, 40 I.L.M. at 536-38.

that a chemical possesses the characteristics of a POP and the Conference of the Parties concurs.[34]

Any party may nominate additional chemicals for the list of POPs to a technical expert panel called the Persistent Organic Pollutants Review Committee ("POPROC").[35] POPROC is composed of technical experts in chemical assessment and management designated by the various governments and selected by the Conference of the Parties on the basis of their technical expertise with the goal of an equitable geographical distribution.[36] Based upon "screening criteria" articulated in Annex D to the Convention, POPROC must decide whether a nominated compound is an appropriate candidate for listing.[37] If the Conference of the Parties ("COP") agrees that a chemical is an appropriate candidate, then POPROC must prepare a "risk profile" analyzing seven different types of information set out in Annex E.[38]

Relying on the risk profile, the Committee must then determine whether the chemical "is likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects such that global action is warranted . . . ."[39] If so, the listing proposal goes to COP, accompanied by a POPROC-prepared risk management "evaluation" that includes an analysis of possible control measures for the chemical, prepared pursuant to Annex F.[40] Of critical importance for the viability of the new chemical listing procedure, "[l]ack of full scientific certainty shall not prevent the proposal from proceeding."[41] Finally, COP, "taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical . . . ."[42]

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[34] Message from the President of the United States Transmitting the Stockholm Convention on Persistent Organic Pollutants, S. TREATY DOC. NO. 107-5, at VI (2002) [hereinafter S. TREATY DOC. NO. 107-5].

[35] Stockholm Convention, *supra* note 16, art. 8(1), 40 I.L.M. at 540.

[36] *Id.* art. 19(6)(a), 40 I.L.M. at 547.

[37] *Id.* arts. 8(1), 8(3), Annex D, 40 I.L.M. at 540, 560.

[38] *Id.* art. 8(6), Annex E, 40 I.L.M. at 540, 561. The seven kinds of data include: (1) sources of the chemical; (2) hazard assessment for endpoints of concern; (3) environmental fate data; (4) monitoring data; (5) data on exposure due to long-range transport; (6) available national and international risk evaluations; and (7) status of the chemical under international conventions. *Id.* Annex E, 40 I.L.M. at 561.

[39] *Id.* art. 8(7)(a), 40 I.L.M. at 540.

[40] Stockholm Convention, *supra* note 16, Annex F, 40 I.L.M. at 562.

[41] *Id.* art. 8(7)(a), 40 I.L.M. at 540.

[42] *Id.* art. 8(9), 40 I.L.M. at 541.

Newly listed chemicals are then placed in the Convention's annexes, along with specific information on their identity, persistence, bio-accumulation, potential for long-range environmental transport, and adverse effects.[43] Once on the list, they become subject to the hortatory aspirations of the POP Convention's preamble, its requirements for the use of "best available techniques and best environmental practices" for environmental control and release limitation,[44] and its requirements for POP stockpiles.[45]

Shortly before Earth Day in April, 2001, President Bush announced that the United States would sign the Stockholm Convention.[46] The Head of the American Delegation to POPs negotiations described the Convention as "the most important effort by the global community, to date, to reign in and ultimately halt the proliferation of toxic chemicals."[47] Senator James M. Jeffords noted that although the intentionally manufactured POPs are no longer produced in the United States, they are still in use in a number of developing countries and therefore "come back to us on our food, in our water, and through our air," thereby creating "a circle of pollution requiring a global solution."[48]

II. THE COMPETING IMPLEMENTATION BILLS

The Stockholm Convention is not self-executing, and no federal agency in the United States possesses sufficient authority to implement the convention in full. In his report transmitting the Convention to the Senate, Secretary of State Colin Powell explained that "additional legislative authority" would be required "to ensure the United States' ability to implement effectively the export–related obligations" of the treaty, and he suggested that Congress provide additional authority "to address certain narrow exceptions in FIFRA [Federal Insecticide, Fungicide, and Rodenticide

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[43] *Id.* Annex D, 40 I.L.M. at 560.
[44] *Id.* arts. 5(d), 5(e), 40 I.L.M. at 537.
[45] *Id.* art. 6(1)(d), 40 I.L.M. at 539.
[46] *See* Pianin, *supra* note 17, at A13.
[47] Yeager Statement, *supra* note 22.
[48] *Persistent Organic Pollutants Implementation Act of 2002: Hearing on S. 2118 Before the Senate Comm. on Env't & Pub. Works*, 107th Cong. (May 14, 2002) (statement of James M. Jeffords, Chairman, Senate Committee on Environment and Public Works), LEXIS Comm. Hearing Transcripts [hereinafter Jeffords Statement].

Act] and TSCA with respect to the import-related obligations" of the Convention.[49]

A. *The Bush Administration Bill*

On April 11, 2002, the Bush Administration announced that it had prepared a bill to implement the Stockholm Convention.[50] The Bill, submitted to Congress along with a request that the Senate ratify the POPs and PIC treaties,[51] was drafted by an interagency task force that included officials from the Office of Information and Regulatory Affairs ("OIRA") of OMB.[52] The Administration dropped the provision for listing new POPs from the original draft of the bill on the assumption that EPA had sufficient authority to ban or otherwise regulate any troublesome POPs under the Toxic Substances Control Act ("TSCA") and the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").[53]

The Administration Bill's approach to new POPs was thus quite straightforward—it did not provide for listing new POPs.[54] Hence, any new nominees from the United States would have to come from Congress itself by way of amendments to FIFRA or TSCA, the two statutes that the Administration would have amended to implement the Stockholm Convention. Should the Conference of the Parties decide to add new POPs to the "dirty dozen," the Administration had already signaled its intention to declare that the United States would, at the time of formal ratification, invoke the automatic opt-out provision of the Stockholm Convention that would make the listing inapplicable to the United States unless it affirmatively opted in.[55]

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[49] S. TREATY DOC. NO. 107-5, *supra* note 34, at VII.

[50] Pianin, *supra* note 17, at A13. The Administration's Bill would have implemented three different, but related treaties: the Stockholm Convention on Persistent Organic Pollutants ("POPs"), the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade ("PIC") and the Protocol on Persistent Organic Pollutants negotiated under the UN Economic Commission for Europe's Convention on Long Range Transboundary Air Pollution ("LRTAP POPs Protocol"). *See* POPs and PIC Implementation Act of 2002, S. 2507, 107th Cong. (2002).

[51] *See* S. 2507.

[52] Pianin, *supra* note 17, at A13.

[53] Yeager Statement, *supra* note 23; Pianin, *supra* note 17, at A13.

[54] Pianin, *supra* note 17, at A13.

[55] Stockholm Convention, *supra* note 16, art. 25 (4), 40 I.L.M. at 550; *see* Letter from Christine Todd Whitman, Administrator, EPA, to the Honorable J. Dennis Hastert, Speaker of the House of Representatives (undated), *available at* http://www.epa.gov/oppfead1/cb/

Given the absence of a provision in the Administration's bill for opting in, however, it appeared that the Administration was taking the position that a separate statute would be required for each newly listed chemical explicitly acceding to the application of the POPs implementation legislation for that chemical.[56]

EPA Administrator Christine Todd Whitman announced that the Administration did not necessarily oppose generic legislation providing for adding chemicals to the list without a separate act of Congress.[57] It preferred, however, to "work with Congress to jointly develop" legislation for listing new chemicals.[58]

A trade association for the United States chemical industry announced that it supported the "criteria and risk-based process" that the Stockholm Convention set out for listing new chemicals, and the industry thought it would be "possible to craft appropriate amendments to TSCA and FIFRA to reflect the treaty additions process."[59] Noting that use of most of the "dirty dozen" chemicals had been discontinued or extremely limited in the United States, the industry was confident that the Administration could "work out with Congress" suitable implementing language for adding new chemicals to the list.[60] Environmental groups, however, were not nearly as enthusiastic about the Administration's Bill. One group that had been active in the negotiation of the convention found it "shameful that the Bush administration [was] attempting to only partially implement" the Convention.[61]

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csb_page/updates/popsletters.htm (last visited Nov. 14, 2003); Letter from Christine Todd Whitman, Administrator, EPA, to the Honorable Richard Cheney, President of the Senate (undated), *available at* http://www.epa.gov/oppfead1/cb/csb_page/updates/popsletters.htm (Last visited Nov. 14, 2003).

[56] Neil Franz, *Senate Heats Up Debate on POPs Treaty*, CHEM. WK., May 22, 2002, at 37 (quoting EPA Assistant Administrator for Prevention, Pesticides, and Toxic Substances Stephen Johnson).

[57] EPA Administrator Christine Todd Whitman says that the Bush Administration "still embrace[s] the idea that there are going to be future chemicals that are going to be added . . . ." Pianin, *supra* note 17, at A13.

[58] Glenn Hess, *Bush Seeks Senate Support for Chemical Pact: Toxic Chemicals*, CHEM. MKT. REP., Apr. 15, 2002, at 1.

[59] *Id.* (quoting Michael Walls, an attorney for the American Chemistry Council).

[60] *Id.*

[61] Pianin, *supra* note 17, at A13 (quoting Jeremiah D. Baumann of the U.S. Public Interest Research Group).

B. *The Jeffords Bill*

On April 11, 2002, the same day that the Bush Administration announced its Bill, Senator James M. Jeffords introduced Senate Bill 2118, the POPS Implementation Act of 2002.[62] Like the Bush Administration Bill, the Jeffords Bill would have amended FIFRA and TSCA to make the Stockholm Convention binding on United States citizens as a matter of domestic law.[63] The Jeffords Bill would not have affected the announced decision of the Bush Administration to invoke the automatic "opt out" provision at the time of ratification.[64] Invocation of that provision would mean that the United States would still have to support a COP-approved POP by way of an amendment to the treaty, but the Jeffords Bill would have eliminated the need for domestic implementing legislation at the time of the approval of the amendment. More importantly, it would have initiated the process of EPA consideration of the new chemical at the same time that the international POPROC was evaluating the chemical.[65]

In addition, the Jeffords Bill would have permitted, but not required, EPA to initiate the process of canceling the registration of a pesticide or prohibiting the manufacture, distribution, use, and disposal of newly listed POPs without making and supporting a finding that any particular use of the chemical presented an unreasonable risk of injury to health or the environment.[66] The prohibition would go into effect, thereby implementing the Stockholm Convention, unless EPA determined that continued manufacture, distribution, use or disposal was necessary to prevent "significant harm to an important sector of the economy" and that each available substitute presented "risks to health or the environment that are significantly greater than the risks presented by the chemical substance or mixture."[67] In effect, the Jeffords Bill would have permitted, but not required, EPA to effectuate a rebuttable presumption that a newly listed POP should be regulated.[68] Because the Jeffords

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[62] POPs Implementation Act of 2001, S. 2118, 107th Cong. (2002). Like the Bush Administration Bill, the Jeffords Bill would have implemented three separate, but related conventions. *Id.*; *see* Jeffords Statement, *supra* note 48.

[63] S. 2118.

[64] *Id.*; *see also* sources cited *supra* note 55.

[65] S. 2118 § 103.

[66] *Id.* §§ 102(f)(2)(B), 201(1).

[67] *Id.* § 102(f)(2)(B)(ii)(II).

[68] *See Persistent Organic Pollutants: Hearing on S. 2118 Before the Senate Comm. on Env't & Pub. Works*, 107th Cong. (May 14, 2002) (statement of Karen L. Perry, Deputy Director

Bill preserved the Administration's ability to "opt out" of a "crazy COP" decision and because an Administration that declined to "opt in" for a COP-listed POP would presumably exercise its discretion not to initiate the rebuttable presumption process, the overall impact of this provision in the Jeffords Bill would have been to make it much easier for the Administration to regulate a newly listed POP over the objections of affected companies.

Finally, the Jeffords Bill would have required EPA to contract with the National Academy of Sciences ("NAS") to screen chemical substances and mixtures for possible nominees from the United States to the POPs list. It also listed eight classes of chemicals to be included in the NAS evaluation.[69] This provision would have made the United States a proactive participant in implementing the Stockholm Convention, rather than a passive implementer of decisions made by the relevant international bodies.[70]

C. *The Debate over the Competing Bills*

In hearings before the Senate Environment and Public Works Committee on May 14, 2002, Stephen L. Johnson, EPA's Assistant Administrator for Prevention, Pesticides, and Toxic Substances, the office which would be implementing the Convention in the United States through its responsibilities for TSCA and FIFRA, stated that "[t]he Bush Administration [was] committed to working closely with all members of this Committee and the U.S. Senate to ensure quick enactment of the implementing legislation . . . ."[71] He noted, however, that the Bush Administration's legislative proposal did not include provisions to address the listing of additional chemicals.[72] In his view, a provision addressing the listing of new POPs was "not required to bring the U.S. [sic] into compliance [with] . . . these agreements."[73]

Assistant Administrator Johnson recognized that the procedures set out in the Stockholm Convention were "rigorous and science based," and the

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for Environment & Health Programs, Physicians for Social Responsibility), LEXIS Comm. Hearing Transcripts [hereinafter Perry Statement].

[69] S. 2118 § 107.

[70] *See* Perry Statement, *supra* note 68.

[71] *Persistent Organic Pollutants: Hearing on S. 2118 Before the Senate Comm. on Env't & Pub. Works*, 107th Cong. (May 14, 2002) (statement of Stephen L. Johnson, Assistant Administrator for Prevention, Pesticides and Toxic Substances), LEXIS Comm. Hearing Transcripts [hereinafter Johnson Statement].

[72] *Id.*

[73] *Id.*

Bush Administration was confident that those procedures would "identify strong candidates for listing based on a scientific risk assessment."[74] The Bush Administration believed, however, that "the parties must still work through the details of a decision process for evaluating *cost* and other information for listing additional substances under POPs."[75] At that time, the Administration did not possess "enough experience with how, after a decision that a chemical meets certain scientific criteria for listing, the [international community] . . . will weigh and balance risk assessment, socioeconomic and other factors . . . when making final listing decisions and deciding on appropriate control measures for the chemical."[76] John Buccini, Chairman, United Nations Environment Programme's Intergovernmental Negotiating Committee on POPs, assured the committee that the process would be "science-based" and that "[c]onsiderable attention was paid to the need for openness and transparency in this process to ensure that all candidates will be fully and fairly evaluated."[77]

Committee Chairman Jeffords concluded that the Administration had adopted "the easy way out with respect to our international environmental commitments."[78] He feared that the failure to include an "adding mechanism" in the implementation act would be "perceived by the international community as withdrawing from our commitment."[79] Because the United States was a "major producer of persistent, biological toxics," it had "a responsibility to lead the world in eliminating known deadly pesticides and chemicals, as well as those yet to be manufactured."[80]

Representatives of the environmental groups who worked on the treaty were likewise disappointed in the Bush Administration's failure to provide for the addition of new POPs.[81] They stressed that "[f]rom the very start of the negotiations, the international community envisioned a dynamic instrument that could take into account emerging scientific knowledge about chemicals

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[74] *Id.*

[75] *Id.* (emphasis added).

[76] *Id.*

[77] *Persistent Organic Pollutants: Hearing on S. 2118 Before the Senate Comm. on Env't & Pub. Works*, 107th Cong. (May 14, 2002) (statement of John Buccini, Chairman, United Nations Environmental Programme's Intergovernmental Negotiating Committee on POPs), LEXIS Comm. Hearing Transcripts [hereinafter Buccini Statement].

[78] Jeffords Statement, *supra* note 48.

[79] *Id.*

[80] *Id.*

[81] Perry Statement, *supra* note 68.

beyond the initial 12."[82] Case-by-case amendments to the POPs treaty, as envisioned by the administration, would risk "politicizing decisions that would otherwise be based on sound science."[83] One representative assured the committee that since the list of potential POPs was "not vast," a procedure for listing new POPs did not pose a serious threat to the United States chemical industry.[84] In her view "[t]he failure to amend TSCA and FIFRA now to allow EPA to regulate new POPs in the future would amount to a failure to implement Article 8 of the convention."[85]

Industry groups generally supported POPs implementation and recognized the importance of including a process for addressing newly listed POPs in the implementing legislation.[86] The affected industries, however, generally preferred the Administration's cautious approach to listing new POPs. In particular, the industries urged Congress to adopt the same "risk/benefit" decision criterion for newly listed POPs that currently governs regulatory decisions under TSCA, for chemicals, and under FIFRA, for non-food use pesticides.[87] Industry therefore opposed the rebuttable presumption provision in the Jeffords Bill.[88] Otherwise, it feared that the Stockholm Convention could be used to "impose a competitive disadvantage on U.S. growers."[89]

The Chairman of the United Nations Environment Programme's Intergovernmental Negotiating Committee on POPs told the committee that the process for "[evaluating] future candidates for addition to the treaty" was one of the "three key provisions in the treaty."[90] Karen Perry, deputy director of Physicians for Social Responsibility, stated that the "science-based"

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[82] *Id.*; Yeager Statement, *supra* note 23.

[83] Yeager Statement, *supra* note 23.

[84] Perry Statement, *supra* note 68.

[85] Perry Statement, *supra* note 68; *see also* Yeager Statement, *supra* note 23 (arguing that the failure to include specific authority to regulate new POPs "jeopardizes U.S. participation in the Convention, and will injure the credibility of the United States in this context").

[86] *Persistent Organic Pollutants: Hearing on S. 2118 Before the Senate Comm. on Env't & Pub. Works*, 107th Cong. (May 14, 2002) (statement of Michael Walls, American Chemistry Council), LEXIS Comm. Hearing Transcripts [hereinafter Walls Statement]; *Persistent Organic Pollutants*, *supra* (statement of Jay J. Vroom, President, CropLife America) [hereinafter Vroom Statement].

[87] *See* Walls Statement, *supra* note 86; Vroom Statement, *supra* note 86.

[88] *See* Vroom Statement, *supra* note 86.

[89] *Id.*

[90] Buccini Statement, *supra* note 77.

screening criteria were "hammered out" by an experts group during a series of intersessional meetings.[91]

The President of the National Academy of Sciences testified that the Academy's Operating Arm was fully prepared to conduct the initial screening provided for in the Jeffords Bill.[92] Specifically, it was prepared both to recommend scientific criteria for preparing risk profiles, similar to those to be prepared by POPROC, and to create risk profiles in accordance with those criteria.[93] The Academy was hesitant, however, to make particular recommendations for the addition of specific chemicals to the Stockholm Convention list.[94] Because the decision to list a POP required the application of other socioeconomic factors, NAS believed it should be made by politically accountable entities, and not by the Academy.[95]

The Bush Administration had, as of May 2002, appeared to acknowledge: (1) that POPROC screening and evaluation process was sufficiently "rigorous and science based," and (2) that additional "strong candidates" for the "dirty dozen" list existed.[96] The testimony of Mr. Johnson a high-level EPA official, however, may not have represented the position of other important actors within the Bush Administration.[97] Moreover, even Mr. Johnson expressed concern about the weight that POPROC and COP would give to the socioeconomic costs involved in adding a new chemical to the POP list.[98] Apparently, the Bush Administration did not fully trust the international process to take sufficient account of countervailing factors, such as costs, in listing its decisions.

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[91] Perry Statement, *supra* note 68.

[92] *Persistent Organic Pollutants: Hearing on S. 2118 Before the Senate Comm. on Env't & Pub. Works*, 107th Cong. (May 14, 2002) (statement of Bruce Alberts, President, National Academy of Sciences), LEXIS Comm. Hearing Transcripts [hereinafter Alberts Statement].

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Johnson Statement, *supra* note 71. Indeed, the Administration also supported the POPS Protocol to the Convention on Long-Range Transboundary Air Pollution ("LRTAP"), a related treaty that included four additional persistent organic pollutants to its list. *Id.*; *see also* Jeffords Statement, *supra* note 48.

[97] *See, e.g.*, Jeffords Statement, *supra* note 48.

[98] *See* Johnson Statement, *supra* note 71.

III. OMB TAKES CHARGE

In the months following the Senate hearings, the responsible agencies and the affected parties undertook extensive negotiations aimed at producing an implementing bill to provide for domestic implementation without case-by-case amendments to FIFRA and TSCA. OMB's OIRA became an active player in the negotiations. That agency's agenda was apparently two-fold. First, it wanted to ensure that the recently enacted Data Quality rider to the 2001 Appropriations Bill and the regulations that OMB and EPA promulgated to implement that statute played a prominent role in any domestic implementation of the Stockholm Convention.[99] Second, it wanted to ensure that any domestic implementation applied a cost-benefit decision criterion.[100] OMB's ultimate goal may be to ensure that the chemical and pesticide industries have an ample procedural opportunity to derail any Administration opt-in decision with which they disagree.

A. *OMB's "Sound Science" Demands*

Section 515 of the Consolidated Appropriations Act of 2001[101] requires OMB to issue guidelines that "provide policy and procedural guidance" to federal agencies for "ensuring and maximizing the quality, objectivity, utility, and integrity of information" that the agencies "disseminated."[102] OMB-issued guidelines, in turn, must require federal agencies to issue their own

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[99] *See generally* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8,452 (Jan. 3, 2002) (outlining OMB's standards for data quality regulations); Frederick R. Anderson, *Peer Review of Data*, NAT'L L.J., Sept. 29, 2003, at 22 (discussing OMB implementation of data quality requirements); Mary Beth Polley, *Researchers Call New EPA Guidelines for Third Party Research Vague and Useless*, PESTICIDE & TOXIC CHEM. NEWS, Jan. 27, 2003, at 9 (discussing conflict between EPA's data quality guidelines and OMB's desired guidelines); Hugh O'Riordan, *Hazardous Materials: Task Force Update*, NORTHWEST PUB. POWER ASS'N BULL., Sept. 1, 2002, *available at* 2002 WL 11902363 (discussing differences between POPs bills in the Senate and OMB implementation of data quality standards, but not OMB's concerns about the Stockholm Convention); Bryant Urstadt, *One-Act Farce*, HARPER'S MAG., June 1, 2003, at 52 (discussing passage of the Data Quality Act and problems it poses for government regulation).

[100] *See* sources cited *supra* note 99.

[101] Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763A-153, 2764A-153 to 2764A-154 (2001).

[102] *Id.* § 515(a), 114 Stat. at 2763A-154.

guidelines that not only ensure and maximize the quality, objectivity, utility, and integrity of disseminated information,[103] but also establish administrative mechanisms for "allowing affected persons to seek and obtain correction of information maintained and disseminated by [those] agenc[ies]."[104]

To implement the statute, OMB promulgated guidelines for the agencies.[105] The Guidelines require agencies to "adopt a basic standard of quality (including objectivity, utility, and integrity) as a performance goal," and to "take appropriate steps to incorporate information quality criteria into agency information dissemination practices."[106] In addition, agencies must "develop a process for reviewing" the quality of information that will sufficiently enable the agency to "substantiate" the quality of the information it distributes "through documentation or other means appropriate to the information."[107]

OMB guidelines describe objective information as "accurate, reliable, and unbiased" in both substance and form.[108] Upholding this standard may require the agency to disseminate additional information "in order to ensure an accurate, clear, complete, and unbiased presentation."[109] To be "objective," information must have been developed "using sound statistical and research methods."[110] In the preamble to the Guidelines, OMB observes that the 1996 amendments to the Safe Drinking Water Act ("SDWA")[111] direct EPA to ensure that the information upon which it bases SDWA standards is "comprehensive, informative, and understandable," and the statute goes further, to prescribe detailed criteria for meeting that requirement.[112] OMB's

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[103] *Id.* § 515(b)(2)(A), 114 Stat. at 2763A-154.

[104] *Id.* § 515(b)(2)(B), 114 Stat. at 2763A-154.

[105] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Republication, 67 Fed. Reg. 8,452, 8,458 (Feb. 22, 2002).

[106] *Id.* at 8,458-59.

[107] *Id.* at 8,459.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] The Safe Drinking Water Act, 42 U.S.C. § 300g-1(b)(3)(A), (B) (2000).

[112] The detailed criteria are:

> (i) each population addressed by any estimate [of applicable risk effects]; (ii) the expected risk or central estimate of risk for the specific populations [affected]; (iii) each appropriate upper-bound or lower-bound estimate of risk; (iv) each significant uncertainty identified in the process of the assessment of [risk] effects and studies that would assist in resolving the

guidelines state that agencies "shall either adopt or adapt" the SDWA standards.[113]

It is unclear why OMB insists upon superimposing its data quality guidelines on the new POPs implementation process. The data upon which POPROC and COP rely will be of sufficiently high quality to satisfy the scientists sitting on POPROC. OMB's guidelines suggest that EPA will independently evaluate the data that POPROC and COP use to make regulatory determinations and to decline to implement the Stockholm Convention's requirements with respect to certain chemicals when EPA and POPROC data quality assessments differ. In addition, OMB guidelines may envision EPA providing companies with an opportunity to challenge the data upon which the POPROC relies at the implementation stage. In any event, OMB guidelines suggest that POPs decisions under TSCA and FIFRA incorporate data quality criteria prescribed under an entirely different statute—the SDWA.

This separate data evaluation step at the implementation stage will, at best, provide companies opposed to the new POP listing with an opportunity to delay implementation through data quality challenges. In such challenges, data quality itself, and not the integrity of the underlying decision to list the new POP, becomes the goal. If OMB insists that EPA establish a separate procedure for data quality act challenges, apart from challenges to the final agency determination, the implementation process could go on for years. At worst, OMB's position risks "death by data quality" for the new POPs implementation process.[114]

If OMB's goal is to require that EPA rely upon the "best science" in implementing the Stockholm Convention for newly listed POPs, its approach is dramatically different from the first implementation of the North American

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> uncertainty; and (v) peer-reviewed studies known to the [agency] that support, are directly relevant to, or fail to support any estimate of [risk] effects and the methodology used to reconcile inconsistencies in the scientific data.

42 U.S.C. 300g-1(b)(3)(B).

[113] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Republication, 67 Fed. Reg. at 8,458.

[114] Comment from Thomas O. McGarity, President, Center for Progressive Regulation, to Envtl. Prot. Agency, Docket ID No. OEI-10014 (May 31, 2002) (expressing concern for "death by data quality"), *at* http://www.epa.gov/oei/qualityguidelines/dockets/ivb1105-053102-mcgarrity.pdf.

Free Trade Agreement ("NAFTA")[115] and the General Agreement on Tariffs and Trade ("GATT").[116] Both treaties require sanitary and phytosanitary measures to be based upon "scientific principles."[117] The legislative history of the implementation of these treaties in the United States, however, specifically rejected the position that the treaties incorporated some externally articulated principles of "best science."[118] The President sent Statements of Administrative Action ("SAA") to Congress as an integral part of a package that contained NAFTA and the Uruguay Round Trade Agreements ("URTA") Implementing Bills.[119] Congress relied on these SAAs as definite statements of how the United States would understand the language of and administer the NAFTA and WTO agreements.[120] The NAFTA SAA spoke directly to the "best science" requirement:

> The question is . . . *not* whether the measure was based on the "best" science or the "preponderance" of science or whether there was conflicting science. The question is only whether the government maintaining the measure has *a* scientific basis for it. This is because [the sanitary and phytosanitary agreement] is based on a recognition that there is seldom, if ever,

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[115] North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., art. 712(3), 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[116] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 308 [hereinafter GATT].

[117] NAFTA art. 712(3), 32 I.L.M. at 378; GATT Agreement on the Application of Sanitary and Phytosanitary Measures, Uruguay Round, Apr. 15, 1994, art. 2(2), LT/UR/A-1A/12, *available at* http://www.sice.oas.org/Trade/ur_round/UR14AE.asp. Sanitary and phytosanitary measures include, *inter alia*, regulations intended to protect human or animal life or health in a government's territory from risks arising from the presence of a contaminant or toxin in a food or beverage. *See* FASonline, Sanitary and Phytosanitary Measures and International Agricultural Trade, *at* http://www.fas.usda.gov/itp/spsregs.html (last updated June 20, 2003) (describing governing international and domestic regulations).

[118] *See* S. MAJORITY LEADER GEORGE J. MITCHELL, NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, at 93 (1993).

[119] *See generally* H.R. DOC. NO. 103-159.

[120] *See* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1594 (2003); *see also* TRADE AGREEMENTS ACT, S. REP. NO. 96-249, at 33 (1979).

> scientific certainty and consequently any scientific determination may require a judgment among differing scientific opinions.[121]

Similarly, the SAA for the URTA stated that "by requiring measures to be based on scientific principles (rather than, for instance, requiring measures to be based on the 'best' science) . . . the S&P Agreement recognizes the fact that scientific certainty is rare and many scientific determinations require judgments between differing scientific views."[122]

Like both of these important treaties, the Stockholm Convention recognizes "[l]ack of full scientific certainty shall not prevent the proposal from proceeding" through the new POPs identification process that the treaty envisions.[123] For OMB to insist that EPA delay domestic implementation of the Convention's requirements for newly listed POPs is arguably inconsistent with this precautionary injunction. OMB should recognize that the best science is frequently very expensive and sometimes unobtainable, and it should allow sound regulatory implementation of COP-approved POPs to proceed even in the absence of complete scientific certainty.

The procedure provided for in the Jeffords Bill under which the National Academy of Sciences would perform an initial screening of chemicals for suitability for listing should alleviate any legitimate concerns of OMB about whether or not listing recommendations coming from the United States meet the sound science requirement. NAS would accomplish this task with panels of experts who "are carefully chosen to provide an appropriate range of expertise and a balance of perspectives while avoiding conflicts of interests."[124]

B. *OMB's Insistence on a Cost-Benefit Decision Criterion*

OMB has apparently taken the position that any decision to add a chemical to the POPs list must, as a matter of domestic law, pass a cost-benefit decision criterion. The interagency committee that dropped a provision for listing new POPs from the original Bush Administration Bill took

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[121] H.R. DOC. NO. 103-159, at 93.

[122] URUGUAY ROUND AGREEMENTS ACT STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-316, vol. 2, at 90 (1994).

[123] Stockholm Convention, *supra* note 16, art. 8(7)(a), 40 I.L.M. at 540.

[124] Alberts Statement, *supra* note 92.

the position that EPA had sufficient authority under FIFRA and TSCA to regulate persistent organic pollutants.[125] Both of those statutes adopt a cost-benefit decision criterion.[126] In addition, Assistant Administrator Johnson's congressional testimony strongly suggested that one of the primary reasons that the Administration did not want to amend domestic law to allow new POPs to be listed pursuant to the Stockholm Convention's procedures was the failure of those procedures to weigh costs against benefits in listing new POPs.[127]

On the surface, OMB's insistence that EPA weigh costs and benefits in implementing new POPs listings would not appear to be especially controversial. A considered weighing of pros and cons sounds like the essence of common sense decision making. The history of the cost-benefit decision criterion in the regulation of toxic chemicals, however, suggests that OMB's ambitious plan is aimed not so much at achieving sound regulatory decisions as at ensuring that EPA never implements the Stockholm Convention for the thirteenth POP. Both TSCA and, until recently, FIFRA required EPA to adopt a cost-benefit decision criterion in deciding whether and how to regulate pesticides and other chemical substances, and largely because of that requirement both statutes proved to be dismal failures in reducing or eliminating human and environmental exposures to those chemicals.[128]

OMB interference in the statutory authority of EPA to regulate chemicals is long standing. In October 1985, a report by the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce "chronicles the OMB's secret and heavy-handed interference with two draft proposed EPA rules designed to protect the public against the cancer risks posed by ongoing asbestos production, use, and disposal . . . . It shows how OMB sought to impose, behind closed doors, a discounting of lives approach, which would severely restrict the Federal government's ability to protect the American public against cancer causing chemicals."[129]

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[125] *See* Pianin, *supra* note 17, at A13.

[126] Toxic Substance Control Act, 15 U.S.C. § 2601 (2000); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136a (2000).

[127] *See* Johnson Statement, *supra* note 71; *see also supra* notes 36-45, 54-61 and accompanying text.

[128] *See, e.g.*, William Boyd, Note, *Controlling Toxic Harms: The Struggle over Dioxin Contamination in the Pulp and Paper Industry*, 21 STAN. ENVTL. L.J. 345, 358-59 (2002).

[129] SUBCOMM. ON OVERSIGHT & INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY & COMMERCE, 99TH CONG., REPORT ON A CASE STUDY ON OMB INTERFERENCE IN AGENCY RULEMAKING, at III (Comm. Print 1999) (Rep. John D. Dingell Letter of Transmittal).

The Chairman of the Subcommittee, John D. Dingell, went on to state that "[i]f the OMB's unlawful interference is not restrained, we will continue to legislate to protect the public from hazardous chemicals but our hard-won battles will be nullified by faceless bureaucrats in the Office of Management and Budget."[130]

Until 1996, section 6 of FIFRA allowed EPA to cancel the registration of a pesticide only if it determined that in accordance with "widespread and commonly recognized practice" it presented an "unreasonable adverse" risk to the environment.[131] The term's definition required EPA to balance costs against benefits. Since a pesticide registration was a license under the Administrative Procedure Act, EPA cancellation hearings were full-fledged adjudications.[132] This meant that a registrant that wanted to resist an EPA attempt to cancel its product could demand that EPA present a case for the proposition that the benefits of the pesticide outweighed the risks for every use for which the pesticide was registered. As a practical matter, this meant that EPA had to spend years preparing its case, and the hearings could go on for years as well. Even the abbreviated hearings accompanying an immediate suspension of a pesticide's registrations could go on for months.[133]

A young EPA had the energy in the mid-1970s to pursue cancellation actions against some of the most notoriously dangerous pesticides, most of which are now listed as POPs in the Stockholm Convention, and it was generally successful.[134] Even then, however, it never had sufficient data to make a case for canceling every minor use, and some survived to come back to haunt the agency in subsequent years. For example, when EPA suspended and later canceled heptachlor/chlordane, it failed to make a case for canceling heptachlor for pineapple use in Hawaii.[135] Several years later, heptachlor turned up at dangerous levels in commercial milk because leaves from heptachlor-treated pineapples had been fed to milk cows.[136]

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[130] *Id.* at V.

[131] Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136d(b) (2000).

[132] *See* Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729 (1979).

[133] The heptachlor/chlordane suspension went on for more than three months. *See* Envtl. Def. Fund v. Envtl. Prot. Agency, 548 F.2d 998, 1003 (D.C. Cir. 1976).

[134] *See, e.g.*, *Shell Battles to Save Dieldrin and to Weaken Federal Controls on Cancer Producing Chemicals*, [1974] 4 Envtl. L. Rep. (Envtl. L. Inst.) 10,164 (Oct. 1974).

[135] *Envtl. Def. Fund*, 548 F.2d at 1002.

[136] Albert H. Meyerheff, *Toxics Law: An Effort to Comply or Obstruct?*, L.A. TIMES, Jan. 3,

EPA's early vigorous attempts to cancel dangerous pesticides precipitated a strong reaction on the part of the pesticide chemical industry and related agricultural interests. Industry argued that additional scientific and political review procedures were necessary because "EPA [was] not maintaining the objective approach called for in the benefit-risk equation" that the existing FIFRA mandated.[137] After Congress amended FIFRA in 1975 in response to these demands, the agency abandoned any serious efforts to cancel pesticides.[138] Instead, EPA put into place an internal administrative mechanism for determining whether to issue a notice of intent to cancel pesticides that allowed the agency staff to negotiate voluntary cancellations of some uses of some pesticides.[139]

After two decades of inaction, Congress amended FIFRA to provide a less demanding test for canceling a food use pesticide and its accompanying food tolerances. The 1996 Food Quality Protection Act ("FQPA")[140] establishes a different threshold for regulatory action for food use pesticides. Rather than forcing EPA to prove that the risks of all food uses of a pesticide outweigh the benefits, the FQPA allows EPA to revoke a tolerance and cancel a pesticide for that food use if the registrant fails to demonstrate "that there is a *reasonable certainty that no harm* will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information."[141] The new test explicitly omits any reference to the cost of canceling the pesticide, for example, the benefits of the pesticide, and the agri-chem groups concede that it precludes the previously employed cost-benefit balancing approach to

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1988, at V.5.

[137] *Extension of the Federal Insecticide, Fungicide, and Rodenticide Act: Hearing on S. 1629 Before the Subcomm. on Agric. Research & Gen. Legislation of the Senate Comm. on Agric. & Forestry*, 94th Cong. (1975) (statement of Dr. Jack D. Early, Vice President, National Agricultural Chemical Association).

[138] *See* Act of Nov. 28, Pub. L. No. 94-140, 89 Stat. 751 (1975) (codified as amended at 7 U.S.C. § 136 (2000)); CHRISTOPHER J. BOSSO, PESTICIDES AND POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE 191-93 (1987); William E. Reukauf, *Regulation of Agricultural Pesticides*, 62 IOWA L. REV. 909, 918 (1977).

[139] *See* BOSSO, *supra* note 138, at 194-97.

[140] Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (codified as amended in 7 U.S.C. § 136 (2000)).

[141] Federal Food, Drug and Cosmetic Act of 1938, § 408(b)(2)(A)(ii), 52 Stat. 1040 (as amended by the Food Quality Protection Act of 1996, Pub. Law. No. 104-170, 110 Stat. 1516); 21 U.S.C. § 346a(b)(2)(A)(ii) (2000) (emphasis added).

setting tolerances.[142] Although the current EPA appears reluctant to exercise this newly acquired power, the FQPA amendments clearly have the potential to facilitate the process of reducing human exposure to risky pesticides in the hands of a more proactive agency.[143]

EPA's experience in attempting to reduce exposures to toxic substances under TSCA is even less encouraging. Section 6 of the TSCA provides that when EPA finds that the manufacture, processing, distribution, use or disposal of a chemical substance presents an "unreasonable risk of injury to health or the environment," it must issue a rule applying "one or more" of eight requirements "to the extent necessary to protect adequately against such risk using the least burdensome requirements."[144] Again, the unreasonable risk

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[142] Kenneth Weinstein et al., *The Food Quality Protection Act: A New Way of Looking at Pesticides*, [1998] 28 Envtl. L. Rep. (Envtl. L. Inst.) 10,555, 10,556 (Oct. 1998) ("The new standard does not generally allow for the consideration of benefits."). A limited cost-benefit balancing is available in the presumably rare case of an eligible pesticide. Federal Food, Drug and Cosmetic Act of 1938, § 408(b)(2)(B)(ii)-(iv). An eligible pesticide is one for which EPA cannot establish an exposure level "at which the residue will not cause or contribute to a known or anticipated harm to human health, [and] the lifetime risk of experiencing the nonthreshold effect is appropriately assessed by quantitative risk assessment," and the exposure is below the level associated with any threshold effects. § 408(b)(2)(B)(i). The House Report on the FQPA suggests that the eligible pesticide provision should be invoked only in "exceptional situations." H.R. REP. NO. 104-669, pt. 2, at 42 (1996). As a practical matter, the limitations upon issuing tolerances for eligible pesticides are so stringent that the category is likely to have very little impact upon EPA tolerance setting. *See* Dominic P. Madigan, Note, *Setting an Anti-Cancer Policy: Risk, Politics, and the Food Quality Protection Act of 1996*, 17 VA. ENVTL. L.J. 187, 204 (1998) (concluding that "the criteria for eligible residues are sufficiently stringent that the standard for tolerance approval will be exclusively risk-based").

[143] *See* Thomas O. McGarity, *Politics by Other Means: Law, Science, and Policy in EPA's Implementation of the Food Quality Protection Act*, 53 ADMIN. L. REV. 103 (2001) (focusing on science and policy issues upon passage of FQPA, notably concentrating on the impact on fetuses, infants, and children).

[144] 15 U.S.C. § 2605(a) (2000). The statute lists the following requirements:

> (1) A requirement (A) prohibiting the manufacturing, processing, or distribution in commerce of such substance or mixture, or (B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce.
>
> (2) A requirement—
>
> (A) prohibiting the manufacture, processing, or distribution in commerce of such substance or mixture for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement, or

decision criterion connotes cost-benefit balancing.[145]

The demise of section 6 of TSCA came dramatically at the end of a massive rulemaking effort in which EPA decided to ban virtually all remaining uses of asbestos. Based on the expertise of its own scientists and an EPA-appointed panel of experts that examined more than one hundred toxicological studies, the agency concluded that "asbestos is a highly potent carcinogen" and that "severe health effects occur after even short-term, high-

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(B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement.

(3) A requirement that such substance or mixture or any article containing such substance or mixture be marked with or accompanied by clear and adequate warnings and instructions with respect to its use, distribution in commerce, or disposal or with respect to any combination of such activities. The form and content of such warnings and instructions shall be prescribed by the Administrator.

(4) A requirement that manufacturers and processors of such substance or mixture make and retain records of the processes used to manufacture or process such substance or mixture and monitor or conduct tests which are reasonable and necessary to assure compliance with the requirements of any rule applicable under this subsection.

(5) A requirement prohibiting or otherwise regulating any manner or method of commercial use of such substance or mixture.

(6) (A) A requirement prohibiting or otherwise regulating any manner or method of disposal of such substance or mixture, or of any article containing such substance or mixture, by its manufacturer or processor or by any other person who uses, or disposes of, it for commercial purposes. (B) A requirement under subparagraph (A) may not require any person to take any action which would be in violation of any law or requirement of, or in effect for, a State or political subdivision, and shall require each person subject to it to notify each State and political subdivision in which a required disposal may occur of such disposal.

(7) A requirement directing manufacturers or processors of such substance or mixture (A) to give notice of such unreasonable risk of injury to distributors in commerce of such substance or mixture and, to the extent reasonably ascertainable, to other persons in possession of such substance or mixture or exposed to such substance or mixture, (B) to give public notice of such risk of injury, and (C) to replace or repurchase such substance or mixture as elected by the person to which the requirement is directed.

Id.

[145] Corrosion Proof Fittings v. Envtl. Prot. Agency, 947 F.2d 1201, 1222-23 (5th Cir. 1991).

level or longer-term, low-level exposures to asbestos."[146] After detailing in the preamble to the final rule how it considered several alternatives, the agency determined that an outright ban was the only option that adequately protected human health, and it decided to implement that option.[147] The Court of Appeals for the Fifth Circuit, however, had other ideas. The court remanded the rule to the agency in part because of flaws that the court found in "the manner in which the EPA conducted some of its analysis."[148]

The court criticized the agency for comparing only a world in which nearly all asbestos was banned to a world in which EPA took no regulatory action.[149] The court held that "the agency bears a heavier burden when it seeks a partial or total ban of a substance than when it merely seeks to regulate that product."[150] According to the court, EPA should have first "calculat[ed] how many lives a less burdensome regulation would save, and at what cost."[151] According to the Court, before EPA could ban a chemical under TSCA it had to calculate and monetize the costs and benefits of all less burdensome alternatives.[152] Despite very strong arguments that future health benefits should not be discounted to present value,[153] the court required EPA

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[146] Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions, 54 Fed. Reg. 29,460, 29,467 (July 12, 1989) (to be codified at 40 C.F.R. pt. 763).

[147] *Id.* at 29,460. The agency concluded:

> EPA has determined that, within the findings required by section 6 of TSCA, only the staged-ban approach employed in this final rule will adequately control the asbestos exposure risk posed by the product categories affected by this rule. Other options either fail to address significant portions of the life cycle risk posed by products subject to the rule or are unreasonably burdensome. EPA has, therefore, concluded that the actions taken in this rule represent the least burdensome means of reducing the risk posed by exposure to asbestos during the life cycles of the products that are subject to the bans.

54 Fed. Reg. at 29,468.

[148] *Corrosion Proof Fittings*, 947 F.2d at 1216.

[149] *Id.*

[150] *Id.* at 1214.

[151] *Id.* at 1216.

[152] *Id.* at 1217.

[153] Despite the court's glib assurance that discount rates can be applied to non-monetary goods, it is not at all clear why saving one hundred lives today is preferable to saving one hundred lives in the future. *See generally* Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39 (1999) (discussing how to value decisions for the future, today); Douglas E. MacLean, *Comparing Values in Environmental Policies: Moral Issues and*

to do just that and offered a single article from *The Economist* "explaining use of discount rates for non-monetary goods."[154]

Faced with the foreboding prospect of "a potentially endless analytical crusade in search of the holy grail of *the* least burdensome alternative that still protected adequately against unreasonable risk," EPA abandoned the effort to regulate asbestos.[155] Indeed, EPA in the dozen intervening years has failed to initiate a single regulatory action under section 6 of TSCA. The agency's response seems entirely rational, if not especially courageous. Given the strong likelihood that any aggressive regulatory action will be challenged by the affected industry in the Fifth Circuit and given the fact that that court was unwilling to allow the agency to regulate even such a notorious bad actor as asbestos under the existing cost-benefit balancing approach prescribed in section 6, the agency cannot be faulted for deciding that its limited resources are better devoted to other activities. Until Congress amends TSCA, as it amended FIFRA, to eliminate its cost-benefit decision criterion, it can safely be predicted that EPA will never take another action under section 6 over the objection of the affected industry.

The implications of EPA's attempts to implement TSCA and the pre-1976 FIFRA are instructive in assessing OMB's insistence that POPs implementing legislation adopt a cost-benefit decision criterion. First, a full-fledged cost-benefit analysis of the sort that OMB has in mind is an analytical nightmare. In the context of implementing newly listed POPs, it would require EPA to gather information on all of the uses of the chemical throughout the world, estimate human and environmental exposures attributable to those uses both directly and indirectly through bioaccumulation and biomagnification, conduct a hazard assessment relating exposures to adverse health and environmental outcomes, assess the human and environmental risks based on the exposure and hazard assessments, monetize the human and environmental risks, determine the benefits of the existing and potential

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Moral Arguments, *in* VALUING HEALTH RISKS, COSTS, AND BENEFITS FOR ENVIRONMENTAL DECISION MAKING 83, 95 (P. Hammond & R. Coppock eds., 1990) (debating saving lives today versus tomorrow dilemma). Nor is it clear "why the later born should have to pay interest to induce their predecessors not to exhaust [depletable resources]." Thomas C. Heller, *The Importance of Normative Decisionmaking: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development*, 1976 WIS. L. REV. 385, 462.

[154] *Corrosion Proof Fittings*, 947 F.2d at 1218.

[155] Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEXAS L. REV. 525, 548 (1997).

future uses of the chemical in all of the places throughout the world where it is or could be used, monetize those benefits, discount both monetized risks and monetized benefits to present value, compare the two calculations, and provide some accounting of the uncertainties that the agency encountered during the analytical process.[156] Since such extreme analytical exercises are altogether inaccessible to all but the most sophisticated outside observers, the only entities looking over EPA's shoulder as it attempts to apply the cost-benefit decision criterion to new chemicals are likely to be those with an economic stake in the future of those chemicals.[157]

Second, OMB's position apparently counts as worthless the rigorous scientific evaluation that will take place in the POPROC prior to the addition of any chemical to the POPs list, a process that the Bush Administration apparently concedes is rigorous and "science-based."[158] Once the rigorous multi-year international process has identified a chemical as a POP, it should be clear that it poses a serious risk to health and environment in the United States as well as elsewhere in the world and that unilateral action cannot eliminate that risk. If EPA must apply a cost-benefit decision criterion, it will necessarily have to undertake just the sort of hazard assessment analysis that the POPROC will have performed in deciding whether to list the new POP. It is not at all clear that EPA could simply incorporate the POPROC hazard assessment, given the requirements of the OMB cost-benefit guidelines.

Third, the extreme form of cost-benefit analysis that OMB advocates discounts future benefits, a deeply problematic exercise that makes little sense in the context of regulating pollutants that are, by definition, persistent and will therefore remain in the environment for long periods of time.[159] As

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[156] Readers who suspect that the description of the analytical process provided above may be unduly pessimistic are invited to consult OMB's recently proposed Draft Guidelines for conducting cost-benefit analysis. Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations, 68 Fed. Reg. 5,492, 5,514 (Feb. 3, 2003). For a more elaborate description of the analytical difficulties that agencies encounter in attempting to assess and quantify health and environmental risks and benefits, see Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7 (1998).

[157] *See* Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the Paradigms and Politics of Environmental Law Reform*, 10 YALE J. ON REG. 369, 415 (1993) (observing that "the often drawn-out process of making risk-based decisions is more accessible to those, such as special interests, that can consistently deploy technically competent scientists, economists, attorneys, and public relations firms to represent their interests at all important decisional points").

[158] Johnson Statement, *supra* note 71.

[159] *See* Heinzerling, *supra* note 153, at 72-74.

Professor Heinzerling has observed, the empirical evidence in support of discounting future risks by no means supports OMB's unequivocal assertion that people ordinarily discount future risks in their day-to-day activities.[160] Even if that were true, discounting cannot be justified in contexts, such as regulation of persistent chemicals, where one generation obtains the benefits of the activity and the next generation suffers the consequences.[161]

Fourth, at the same time that cost-benefit analysis belittles benefits, it exaggerates costs. Although surprisingly little empirical research has been undertaken on the validity of agency cost estimates in cost-benefit analyses, the research that does exist suggests that "ex ante cost estimates have usually been high, sometimes by orders of magnitude, when compared to actual costs incurred."[162] This conclusion is not at all surprising, because "agencies are heavily dependent upon the regulated entities for information about compliance costs."[163] "[T]he regulatees have every incentive to err on the high side" of these estimates.[164] Outsiders "can complain about the magnitude of cost projections, but they rarely have the wherewithal to second-guess regulatee-generated estimates."[165] Occasionally, independent vendors of the safety and environmental cleanup technologies weigh in, but they are frequently subsidiaries of the regulatees and "in any event cannot risk alienating their potential customers by demonstrating the excessiveness of their cost projections in a public forum."[166] The bottom line is that the cost estimates employed in the domestic regulatory process are likely to be biased upward.[167]

Fifth, cost-benefit analysis is singularly inappropriate for the kinds of global hazards that the Stockholm Convention addresses. The benefits of

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[160] *Id.* at 57-64.

[161] *Id.* at 65 (asserting that discounting is not supportable in the "intragenerational context, if the preferences invoked in support of discounting are based on the implicit assumption that the people doing the preferring are not themselves going to be the ones affected by their preferences").

[162] Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety and Environmental Regulation*, 80 TEX. L. REV. 1997, 1998 (2002).

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.* at 1998-99.

[167] *See id.* at 1999; *see also* William K. Reilly, *The EPA's Cost Underruns*, WASH. POST, Oct. 14, 2003, at A23 (stating that the electric power industry estimated it would cost $1,300 to eliminate a ton of sulfur dioxide, when in fact, "[o]ver the ensuing decade the cost proved to be less than $200 per ton").

implementing the Convention are generally global in nature while the costs are generally local.[168] It would therefore be neither efficient nor fair to allow one country's domestic costs to justify a refusal to implement a Convention to protect the health and environment of the world's inhabitants. The adoption of a cost-benefit decision criterion in United States domestic legislation may well inspire similar action in other countries. Because the manufacturers of most newly listed POPs will, in all likelihood, be located in countries other than the United States, adopting a cost-benefit decision criterion will probably redound to the detriment of United States citizens.

Finally, OMB's position is the antithesis of the precautionary approach that clearly underlies the Stockholm Convention. The Convention does not require the POPROC to engage in a full-fledged cost-benefit analysis prior to listing a new POP; indeed, the benefits of the chemical are not considered at all.[169] The key consideration for the POPROC is whether the chemical "is likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects such that global action is warranted . . . ."[170] The COP must then "decide, in a precautionary manner, whether to list the chemical . . . ."[171] The regulatory philosophy underlying the Convention is that the global community should err on the side of safety in regulating persistent chemicals that can cause significant adverse health or environmental effects, and that can be transported throughout the world.[172] To insert a cost-benefit decision criterion in the domestic implementation legislation is in a very real way to reject the philosophy underlying the bill. It would, in fact, be more honest to reject the Convention outright than to undermine it during the implementation stage.[173]

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[168] *See supra* Part I.A.

[169] *See generally* Stockholm Convention, *supra* note 16 (lacking language requiring consideration of benefits of a pesticide).

[170] *Id.* art. 8(7)(a), 40 I.L.M. at 540.

[171] *Id.* art. 8(9), 40 I.L.M. at 541.

[172] *See generally id.*

[173] *Id.* art. 4, 40 I.L.M. at 536 (describing the process in the POPs agreement allowing countries to seek a special exemption for up to five years for certain uses should the United States consider them essential, which could be used in the rare instances that the United States determines that in spite of the science-based identification by the international process of a POP there is a valid reason for continuing a certain use for a limited period of time).

IV. TOWARD A PRECAUTIONARY APPROACH TO LISTING NEW POPS

The Bush Administration's failure to include a new listing provision in its implementation bill has seriously undermined the efforts of those who have for years been working to make the Convention a reality. In the absence of generic implementing amendments to FIFRA and TSCA, each addition to the POPs list acceded to by the Administration would require not only the advice and consent of the Senate, but also an amendment to TSCA and perhaps FIFRA.[174] Given that both of the statutes have been rarely amended over the years, this is a prescription for failure. Given the difficulty of enacting environmental legislation over the opposition of one of the major interest groups, the Administration's position effectively gives the domestic chemical industry a veto over additions to the POPs list.

The Jeffords Bill represents a great improvement over the Administration's position in its provision for a proactive procedure, involving the input of NAS, for having the United States propose new POPs to the COP. The Jeffords Bill also provides an administrative procedure for implementing domestically the decision to opt in with respect to new COP-approved POPs. Domestic implementation would not require full-fledged rulemaking under TSCA or adjudication under FIFRA in which the costs of regulatory action are delicately balanced against the benefits.[175] Instead, there would be a rebuttable presumption that the chemical would be banned.[176] Although this may make domestic action possible—it would otherwise be impossible over the affected industry's opposition—it is unclear why a rebuttable presumption is necessary. If the United States is willing to adopt a COP-listed POP, it is not clear why regulatory action should not be automatic.[177] The regulatory proceeding should be limited to the timing of the ban and the nature of the export restrictions that would accompany the ban.

Whether or not Congress adopts a rebuttable presumption approach toward implementation of a new POPs listing, it should reject attempts to impose a cost-benefit decision criterion on the process. That approach is virtually guaranteed to result in no domestic implementation of any restriction against a newly listed POP over the objections of any significant economic interest. The Convention negotiators, who consulted with rep-

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[174] *See supra* Part II.

[175] Yeager Statement, *supra* note 22.

[176] *See id.*

[177] *See id.*

resentatives from the United States industry, adopted a cautious approach of erring on the side of safety in addressing persistent chemicals that posed significant health risks on a global level. Congress should not undermine the precautionary approach embodied in the Convention by forcing EPA to justify implementing action under a cost-benefit decision criterion.

V. CONCLUSION

POPs respect no boundaries. They insidiously work their way into the food and ultimately the bodies of the rich and the poor, the strong and the weak. Once there, they can cause great harm. The best way to keep POPs out of our food supply is to keep them out of international commerce, and the Stockholm Convention offers a vehicle for doing just that, if effectively implemented. One of the critical implementation issues is how to extend the regulatory protections that the Stockholm Convention should afford with respect to the original "dirty dozen" POPs to other persistent chemicals that pose similar global risks. The Convention provides a rigorous, science-based mechanism for this function, but individual countries must be receptive and diligently implement its conclusions.

Within the United States, important economic actors with interests in international trade in pesticides and industrial chemicals are willing to accept the precautionary principles underlying the Stockholm Convention insofar as it applies to old chemicals that have been banned or abandoned in this country. It is unclear whether they are willing to tolerate a process under which those principles are extended to more economically viable chemicals. The United States government can protect those interests, if need be, by opting out of any COP decision to list a new POP that poses a significant threat to those interests.[178] Once the United States government has decided to opt in with respect to a new POPs listing, however, domestic economic interests should not be allowed to frustrate the precautionary approach that

[178] The United States would not be alone in choosing to invoke opt in provisions. For example when Canada ratified the POPs agreement on May 23, 2001, it declared, "[p]ursuant to Article 25, paragraph 4, of the Stockholm Convention on Persistent Organic Pollutants, Canada hereby declares that any amendment to Annex A, B or C shall enter into force for Canada only upon the deposit by Canada of its instrument of ratification, acceptance or approval with respect thereto." Stockholm Convention, *supra* note 15, List of Declaration, Canada, *at* http://www.pops.int/documents/signature/signstatus.htm (last visited Oct. 4, 2003).

the Stockholm Convention adopts through artful manipulation of domestic statutes that throw caution to the wind.