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LEGISLATIVE HEARING BEFORE THE HOUSE SUBCOMMITTEE ON ENVIRONMENT & HAZARDOUS MATERIALS ON "LEGISLATION TO IMPLEMENT THE POPs, PIC, and LRTAP POPs AGREEMENTS"

March 2, 2006

Good morning. My name is James Roewer. I am the Executive Director of the Utility Solid Waste Activities Group (or "USWAG") and I would like to thank the Subcommittee for the opportunity to present this statement on behalf of USWAG and the Edison Electric Institute ("EEI") regarding the important issue of implementing legislation to enable the United States to fulfill its obligations as a party to the Stockholm POPs Convention, LRTAP POPs Protocol, and Rotterdam PIC Convention (which I refer to collectively as the " POPs Convention" or "Convention").[1]

The utility industry has a substantial interest in the development of legislation implementing the POPs Convention because, among other reasons, polychlorinated biphenyls or PCBs are one of the 12 persistent organic pollutants ("POPs") identified in the Convention. Therefore, let me commend the Subcommittee for holding this hearing. EEI and USWAG support the leading role that the United States has played in helping to forge the POPs Convention, and we share the view of others that it is extremely important for the United States to continue to play a leading role regarding the implementation and future strategic decisions involving the Convention.

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[1] EEI is an association of U.S. shareholder-owned electric companies, international affiliates, and industry associates worldwide. EEI's U.S. members serve roughly 90 percent of the ultimate customers in the shareholder-owned segment of the industry and nearly 70 percent of all electric utility ultimate customers in the nation, and generate nearly 70 percent of the electricity produced in the United States. USWAG is a consortium of EEI, the American Public Power Association ("APPA"), the National Rural Electric Cooperative Association ("NRECA"), the American Gas Association ("AGA"), and approximately 80 electric utility operating companies located throughout the country. APPA is the national association of publicly owned electric utilities. NRECA is the national association of rural electric cooperatives, many of which are small businesses. AGA is the national association of natural gas utilities. Together, USWAG members represent more than 85 percent of the total electric generating capacity of the United States and service more than 95 percent of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

We are concerned, however, that further delay in enacting implementing legislation is seriously compromising the interests of the United States in playing a meaningful and constructive role in this process. As you know, the first Conference of the Parties was held last May, with the second Conference scheduled for this May in Geneva. Put simply, the game is underway and the United States is not a player in a process where important decisions affecting the future use of chemicals in this and other countries are being made. The time has come for Congress to both ratify the Convention and enact implementing legislation so the United States can fully and effectively participate as a Party in this important process.

Fortunately, the introduction of H.R. 4591 is a critical first step in achieving this objective. It would establish the appropriate statutory structure for implementing the United States' obligations under the Convention in a manner that is faithful to the Convention's goals, while at the same time preserving the sovereign role of the United States in establishing laws within its borders. As an initial matter, it correctly recognizes that PCBs are already subject to a mature and comprehensive regulatory program under section 6(e) of the Toxic Substances Control Act ("TSCA"), which allows for the limited use of PCBs in a manner ensuring that their use will not pose an unreasonable risk of injury to health or the environment. The United States' PCB regulatory program, which has been in place for over a quarter of a century, is among the most comprehensive and effective in the world and is the product of considerable regulatory scrutiny and development and has undergone extensive legal review.

Recognizing this, H.R. 4591 appropriately removes PCBs from the legislation's blanket prohibition on the manufacture, processing, use and disposal of POP chemicals because our existing regulatory controls already meet the Convention's objectives for PCBs. This approach is consistent with Secretary of State Powell's letter transmitting the POPs Convention to the President, where he explained that "[t]he United States has already taken strict measures to regulate PCBs" and that "[e]xisting statutory authority allows the United States to implement each of these obligations [applicable to PCBs], nearly all of which are currently addressed under existing PCB regulations." See *Message from the President of the United States Transmitting Stockholm Convention on*

Persistent Organic Pollutants, With Annexes, Done at Stockholm, May 22-23, 2001, Treaty Doc. 107-5, 107th Congress, 2d Session, at XX.

The manner in which H.R. 4591 addresses PCBs is a good example of how the POPs implementing legislation should be structured. Nothing in the Convention directs – let alone suggests – that the United States rewrite its existing laws to meet its Convention obligations. Rather, the purpose of the implementing legislation is to allow Congress to exercise *its* authority to establish how the United States, *through our existing domestic laws,* will meet its obligations as a Party to the Convention. Where an existing domestic regulatory program already enables the United States to meet its Convention obligations – as is the case with PCBs – there is no need to amend U.S. law.

Indeed, given that the United States already is one of the world's leaders in chemical regulation, it is not remarkable that in his letter transmitting the Convention to the President, Secretary Powell also explained that "the United States *could implement nearly all Convention obligations under existing [U.S.] authorities"* with the exception of certain gaps that can be addressed by *targeted* legislative amendments to TSCA and FIFRA. *Id.* at XXII (emphasis added). Thus, POPs implementing legislation should reflect a deliberate and thoughtful analysis regarding whether existing U.S. laws allow the United States to meet its Convention obligations. To the extent that such laws are deficient in any particular area, implementing legislation should be comprised of targeted amendments to fill such gaps. H.R. 4591 reflects this thoughtful and targeted approach to implementing the United States' obligations under the Convention.

We are concerned, however, that some may view the implementation process as an opportunity to revisit more generally the scope of TSCA, as opposed to focusing solely on the targeted amendments necessary to fulfill our Convention obligations. Attempting to reopen the scope and structure of TSCA under the guise that such amendments are necessary to fulfill our goals under the Convention is unnecessary and would result only in further delay in getting the United States into the game. I respectfully submit that the Subcommittee ***not*** let this legislative effort become a

"Christmas tree" of amendments to TSCA; if it does, other issues that have long been resolved – such as the established ban on importing PCBs into this country – could be reopened.

In this regard, H.R. 4591 also takes the right approach with respect to the so-called "listing process" – namely, whether or not the United States should issue rules further regulating a chemical newly identified as a POP under the Convention. Rather than establishing a statutory presumption in favor of automatically deferring to the decision of the Conference of the Parties – many of whom have less developed environmental controls than does the United States – H.R. 4591 would establish a structured process whereby new POP listing decisions are thoroughly monitored and evaluated by EPA and the public throughout the listing process. In this way, if a new POP is identified by the Conference of the Parties, the United States will have a robust record to evaluate the technical soundness of the listing decision upon which it could decide whether additional domestic controls are required for the new POP.

This type of checks and balances is necessary because, despite the rather detailed procedures in the Convention for rendering listing decisions, the United States should not presume that each new listing decision will adequately adhere to these procedures or will be technically sound; unfortunately, technical mistakes and/or procedural lapses have been known to occur in rendering determinations under the Convention. Therefore, it is important that implementing legislation retain a mechanism for the United States to independently evaluate and determine on its own whether and how to further control a newly identified POP. H.R. 4591 does this, and thereby preserves the sovereign role of the United States in enacting domestic legislation applicable to its citizens.

Finally, we want to touch briefly on the issue of preemption. Since it original enactment in 1976, TSCA section 18 has included a federal preemption provision prohibiting any State or political subdivision from regulating a chemical substance already controlled under TSCA unless the State or local law is identical to TSCA's control provision or is adopted under the authority of another federal law. Congress

included this provision in TSCA because it wanted to ensure uniformity in the regulation of chemical substances, as opposed to a patchwork of 50 differing State regulations. At the same time, TSCA authorizes EPA to grant petitions from State and local governments to regulate a particular chemical more stringently than otherwise required under federal law if such State or local regulation does not, among other things, unduly burden interstate commerce. This structure has worked well for nearly 30 years, and there is no need to modify this provision.

H.R. 4591 is consistent with TSCA's long-standing statutory structure by prohibiting any State or political subdivision from establishing or continuing in effect any requirement applicable to a POPs chemical listed in the Convention. However, consistent with TSCA, nothing in H.R. 4591 prohibits any State or political subdivision from petitioning EPA to seek approval for adopting or continuing in effect a State or local law applicable to a POP that is more stringent than federal law.

Unfortunately, H.R. 4800 turns TSCA's existing preemption provision on its head by directing that any new POP regulation become the regulatory "floor" for any State or political subdivision, while at the same time *not* prohibiting a State or local regulation from being more stringent than federal law. This effectively would allow any State or political subdivision to end-run TSCA's petitioning process, where EPA must first approve any State or local regulation that is more stringent than federal law. The net result would be a patchwork of differing State and local chemical regulation laws; precisely the opposite result of what Congress intended in enacting TSCA. This attempted gerrymandering with TSCA's established structure is neither necessary nor constructive in forging implementing legislation, and we respectfully submit that the Subcommittee not go down this path.

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I would like to thank the Subcommittee for the opportunity to present the views of EEI and USWAG on legislation for implementing the Stockholm Convention. I would be glad to answer any questions you have concerning my testimony.