

May 17, 2006

The Honorable Paul E. Gillmor
Chair, Subcommittee on Environment
and Hazardous Materials
1203 Longworth House Office Building
Washington, DC 20515

The Honorable Hilda L. Solis
1725 Longworth House Office Building
Washington, DC 20515

RE: POPs Implementing Legislation & TSCA Preemption

Dear Chairman Gillmor and Ranking Member Solis:

We write on behalf of the following twelve Associations to express our concern with a May 1, 2006 letter sent to Chairman Gillmor by various State Attorneys General (“AGs”) requesting that legislation implementing the United States’ obligations under the Stockholm Convention on Persistent Organic Pollutants (the “POPs Treaty”) amend TSCA's long-standing preemption provision by allowing states under all circumstances to regulate persistent organic pollutant (“POP”) more stringently than the federal government. The AGs are asking Congress to fundamentally alter the federal/state relationship implemented by section 18 of TSCA with respect to the regulation of chemicals in this country. There is neither a legal nor logical basis for such a change. TSCA’s preemption provision has worked well for nearly 30 years to balance the legitimate need for a uniform federal program for chemical regulation in this country, with the opportunity for individual states to regulate specific chemicals more stringently when necessary and warranted. As USWAG/EEI explained in its testimony before the Subcommittee on March 2nd regarding POPs legislation, nothing in the POPs Treaty suggests, let alone compels, altering this successful and balanced federal/state relationship under TSCA.

As an initial matter, section 18 of TSCA already provides for *four* separate circumstances under which any state can regulate a chemical substance covered by TSCA’s preemption provision (which is limited to only those chemicals regulated under TSCA sections 5 and 6) more stringently than EPA. These circumstances include where the state regulation (1) is identical to the federal regulation, (2) is adopted pursuant to the authority of any federal law, which includes the host of federally delegated environmental programs, including, but not limited to, the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act, or (3) prohibits the use of a covered chemical substance. *See* TSCA § 18(a)(2)(B). All of these exceptions are self-implementing; meaning that any state wishing to regulate a chemical more stringently under any one of these three measures can do so *without* seeking EPA’s approval. Further, TSCA also includes a “catch-all” provision whereby any state wishing to regulate a chemical more stringently can seek a variance from EPA and the Agency may grant the request provided, among other things, the state regulation provides a significantly higher degree of protection to health and the environment than that otherwise provided for under TSCA. *See* TSCA § 18(b).

It is clear that TSCA already provides ample opportunities for states to regulate chemicals more stringently than EPA. In fact, as the AGs’ letter itself points out, a number of states *already* regulate a host of chemical substances more stringently than the federal government (*See* AG letter at 2). Put simply, TSCA’s existing preemption provision has not served as a bar to states enacting more stringent

regulations for chemicals of concern if and when necessary. Under the AGs' position, however, any state would be allowed to regulate any POP – which will increase in number as the POPs Treaty matures – more stringently than any applicable federal control, notwithstanding the nature or comprehensiveness of the federal regulatory program or the sound policy reasons supporting the need for a uniform federal approach.

The only U.S. Court of Appeals that has construed TSCA's preemption provision has made clear that, when enacting TSCA in 1976, Congress correctly believed that federal preemption in the field of chemical regulation – with room for exceptions as set forth in the statute – was an absolute necessity “if the federal government is to be a federal government.” *Rollins Environmental v. St. James Parish*, 775 F.2d 627, 638 (5th Cir. 1985). The Court explained that Congress had provided in TSCA “an orderly procedure by which exemptions from its preemption provisions can be sought and obtained.” *Id.* at 637. Nonetheless, the AGs now insist that the POPs implementing legislation be used as the vehicle to alter this long-standing federal/state relationship when nothing in the POPs Treaty warrants such a fundamental change in U.S. law. Nor is the AGs' request wise from a policy perspective. Such a change would, in the words of the 5th Circuit “change the whole constitutional structure of our country and [] bury federalism many feet below the surface of a babbling group of states and an utterly ineffective federal government. The Constitution of the United States prevents the erection of 50 Towers of Babel.” *Id.* at 638

The Fifth Circuit's admonition for properly maintaining TSCA's existing preemption structure holds equally true today. For example, in the case of polychlorinated biphenyls (“PCBs”), a POP chemical, EPA has established a comprehensive regulatory program that is nearly 30 years old which regulates virtually every aspect of PCB use, distribution and disposal in this country. *See* 40 C.F.R. Part 761. This federal program authorizes the limited use of PCBs in certain electric and gas utility equipment provided such uses do not present an unreasonable risk to the public health or the environment. The uniform federal regulation of PCBs has allowed energy companies to develop and maintain PCB-control programs that are consistent from state to state and has enabled these companies to provide cost-effective power in a reliable and consistent manner. Under the AGs' position, however, any state could immediately disregard, for whatever reason, EPA's long-standing and environmentally protective PCB regulatory program and immediately prohibit the use of PCBs in federally authorized electric and gas utility equipment. Such a state law would, of course, wreak immediate operational havoc for utility systems operating in that state – and most likely surrounding states as well – and would no doubt critically threaten and/or disrupt the continued provision of reliable and cost-effective power to potentially millions of consumers.

In the end, there are clearly circumstances where some degree of federal preemption is warranted in the context of chemical regulation. Recognizing this, section 18 of TSCA draws the appropriate balance between recognizing the general need for federal uniformity in the case of chemical substances regulated under TSCA, while at the same time allowing any state to regulate a chemical more stringently when and if necessary. The AGs offer no credible policy or legal basis for abandoning this well-established and balanced approach to chemical regulation. For the above reasons, the undersigned associations strongly urge you to reject the AGs' request to abandon TSCA's long-standing and successful preemption provision. Rather, we urge you to pursue the reasonable compromise offered by Chairman Gillmor after the March 2nd hearing that would regulate POPs in the same manner as all other chemicals under TSCA's preemption provision.

Very truly yours,

American Chemistry Council
American Gas Association
Chlorine Chemistry Council
Council of Great Lakes Industries
CropLife America
Edison Electric Institute
The Fertilizer Institute
National Rural Electric Cooperative Association
North American Metals Council
Rubber Manufacturers Association
Utility Solid Waste Activities Group
United States Council for International Business