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The Honorable John Shimkus
Chairman
Subcommittee on Environment and the Economy
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115

Re: Additional Questions

Dear Chairman Shimkus:

Thank you for the opportunity to testify at the Subcommittee's hearing entitled "Regulation of Existing Chemicals and the Role of Pre-Emption under Section 6 and 18 of the Toxic Substances Control Act," held on September 18, 2013. In response to your request, I am enclosing for the hearing record my responses to some additional questions posed to me in your October 29, 2013 letter.

Thank you again for the opportunity to provide testimony to your Subcommittee.

Sincerely,



Mark Greenwood
Greenwood Environmental Counsel PLLC

**U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Environment and the Economy**

**Hearing on “Regulation of Existing Chemicals and the Role of
Preemption under Sections 6 and 8 of the Toxic Substances Control Act”
September 18, 2013**

**Responses from Mark Greenwood to
Additional Questions for the Record**

Questions provided by The Honorable John Shimkus:

1. Some think that the Corrosion Proof Fittings case reflects failure of TSCA, others assert parts of TSCA, such as Section 5 dealing with new chemicals, have been a success. What is your view?

One of the unfortunate aspects of the TSCA program’s history is that EPA’s ability to use the broad regulatory authorities in Section 6 became, in the minds of many people, the sole measure of whether the larger TSCA program has been successful. The record of EPA action under Section 6 clearly indicates that this provision has not been the highly effective regulatory authority that many people thought it might be in 1976, when TSCA was passed. That conclusion, however, should not be drawn too broadly.

The historical record shows that EPA has taken many actions on chemicals in commerce, using other parts of the TSCA statute. Some examples are worth noting:

a. New Chemical Regulation under Section 5: While public records are limited on how many new chemical Pre-Manufacture Notices (PMNs) EPA has reviewed, available information suggests that EPA has evaluated approximately 40,000 chemicals through the new chemical program since 1976. Approximately 10% of those chemicals have been identified as having risk concerns warranting action by the Agency. Thus several thousand chemicals have been subject to TSCA actions that vary from Section 5(e) Orders requiring testing and control measures to voluntary withdrawal of the PMN, avoiding manufacture or import of the chemical in the United States.

b. Significant New Use Rules under Section 5: Under Section 5, EPA is able to regulate chemicals through Significant New Use Rules (SNURs) that require notification of EPA and a regulatory review of a chemical whose use is both “new” and “significant”. EPA has used this authority to establish protective conditions for the use and management of specific existing chemicals that will then avoid the notification obligations in a SNUR for those chemicals. Many of these SNURs have been issued to extend the obligations in Section 5(e) Orders to the full range of parties who might manufacture or process a particular chemical. EPA has estimated that it has issued approximately 350 of these SNURs for chemicals that are in commerce in the U.S. Thus, the SNUR authority in TSCA, rather than Section 6, is the dominant tool that EPA uses to regulate existing chemicals.

2. You suggested that the Corrosion Proof Fittings case chilled EPA’s enthusiasm for using section 6. Is your concern with how the Court interpreted the least burdensome requirement or with its inclusion in the statute?

The “least burdensome alternative” language in the TSCA statute is a reasonable, and not historically controversial, consideration for the regulation of existing chemicals. It is a key component of what policymakers call “smarter regulation” – finding effective ways to achieve regulatory objectives with strategies and tactics that minimize cost and social disruption.

EPA’s concern about the Corrosion-Proof Fittings decision was how the court interpreted the “least burdensome alternative” language in Section 6, not the fact that the provision was included in the statute. The surprising part of the court’s opinion was the language indicating that the Agency needed to assess the full costs and benefits of each option that was arguably less burdensome than the approach proposed in the TSCA rule. This requirement to examine each option was potentially an obligation to examine all options proposed by stakeholders, including those opposed to any form of regulation. This appeared to be an analytical morass for the Agency that would require major investments of resources and time to establish a record for a Section 6 rule. Such an approach contrasted with how EPA and other agencies were operating, and are operating today, under Executive Orders guiding regulatory policy. Those Executive Orders allow agencies to identify a finite set of reasonable regulatory alternatives for evaluation.

It should be noted that some commentators on TSCA have suggested that EPA should have tested the Corrosion-Proof Fittings court’s interpretation of Section 6 by initiating other rules that interpreted the “least burdensome alternative” requirement more in line with Executive Order policy. This reflects a misunderstanding of how federal agencies operate, and must operate to maintain their obligations to the public and to taxpayers. When it is acting responsibly, the federal government does not generate regulations to “test legal theories.” EPA

regulations must address and remedy environmental problems, while deploying the resources of the Agency (including the time and energy of EPA staff) in a responsible way.

In the wake of the Corrosion-Proof Fittings decision, it had to be assumed by EPA that opponents of a future TSCA Section 6 rule would try to find every way possible to bring a challenge to that rule in the Fifth Circuit Court of Appeals, where the Corrosion-Proof Fittings case would be the law of the Circuit on Section 6. In addition, there is a natural, and I would say responsible, instinct for an agency to address any arguable defect in the record for a rule, even if that meant taking more time to analyze an additional objection (or in this case option) proposed by opponents of a rule. EPA recognized that these inevitable dynamics would create a prudent path for future regulation under Section 6 that would make EPA more conservative about when it had enough information to support a rule, before facing the judicial gauntlet created by the Corrosion-Proof Fittings decision.