Senator Spong. Thank you very much, Dr. Riseborough. We want to thank you for your testimony and appearance here this morning.

Mr. Welford, Miss Billings, Mr. Love, Mr. Rathelsburger and Mr. Pickelner. Miss Dunlap, I believe you are taking Mr. Rathelsburger's place. One of you has to leave early. So we are very pleased to have you.

Mr. Welford, we will hear from you fist.

STATEMENT OF HARRISON WELFORD, CENTER FOR THE STUDY OF RESPONSIVE LAW.

Mr. Welford. Thank you, Mr. Chairman. My name is Harrison Welford. I am an associate of the Center for the Study of Responsive Law, and I have been working on legal questions involving pesticides as well as writing on some of these questions for the past two years here in Washington.

I appreciate the invitation to appear at these timely hearings on the federal regulation of toxic substances. The hearings are timely because on July 23 it was reported that an accident in the use of only one toxic substance and in only one plant imperiled a large portion of the poultry produce in the Southeastern United States, including the States of North Carolina, Virginia, Georgia, and probably the poultry sold in D. C., although that is not certain. MONS 090263

The problem was that polychlorinated biphenyls, a toxic substance which would come under the jurisdiction of the pending

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mp2 legislation, in at least some of its uses, leaked from a heat transfer unit into fish meal which was then sold to 65 companies through the South as chicken feed. As a result of this incident, Holly Farms, which is the largest single producer of chickens in this area, has to date condemned 88,000 chickens in the last two weeks of last month.

We have done all we could in the preparation of this testimony to learn about the extent of the contamination here, and we have not received the full enthusiastic cooperation of the Federal Government, but the investigation we conducted does lead me to suggest we need answers to the following questions if we are going to understand the full extent of what has happened.

First, there is a discrepancy between what the Department of Agriculture reports about the PCB levels in the chickens it has tested and the reaction of Holly Farms. We discussed this yesterday with the company and with the USDA. Holly Farms reports that all of the chickens that they tested contained PCBs above 5 parts per million. Five parts per million is the administrative action level set by FDA as the upper limit of safe ingestion of PCBs.

The USDA reports that none of the chickens it has analyzed contained PCBs above 2 parts per million, which is below that FDA level.

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This is interesting for several reasons. First, we have

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information that USDA and Holly Farms were testing some of the same chickens. So it is not clear why the results should be different as they are.

Secondly, Holly Farms found residues up to 40 parts per million PCBs in their chickens. That is a very considerable addition of contamination compared to what the Department of Agriculture has reported.

But really I think the interesting question here is why Holly Farms has gone to the tremendous expense of condemning 80,000 chickens if the USDA is correct in saying that there is no danger to the American consumer from chickens which have been fed this feed.

The second question is whether or not the feed was fed to a large number of layers and therefore whether or not PCBs are turning up in the eggs from these layers. At this point neither FDA, which has jurisdiction over whole eggs, nor USDA, which has jurisdiction over broken eggs, has completed their test. We have no information as yet to reveal.

There is also a question about PCBs in turkeys and pigs which were also fed this contaminated feed.

The fish meal was contaminated, as I said, with PCBs which leaked from a heat transfer unit in the East Coast Terminal plant in Wilmington, North Carolina. The use of PCBs in a feed plant I think illustrates the urgency of the regulatory proposals before this Committee.

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Monsanto alleged that it has limited the use of PCBs in any form in food processing plants or any processing plant in which food can be contaminated, food or feed, and they were surprised that a heat transfer unit containing PCBs was being used in this plant in North Carolina. I think the fact of the matter is it is very difficult for Monsanto even with the very best of intentions to keep track of the PCBs once they have been sold, and in this case if a company once they have obtained PCBs, if they want to use them in a manner which Monsanto does not approve, there is really no sanction that Monsanto can bring against them, particularly since if Monsanto were to cut off their source of supply they could still buy it from foreign countries.

The proposed legislation with its provision for comprehensive monitoring of hazardous substances, its flexible arsenal of enforcement tools, and its approval of citizen suits I think will anticipate and prevent inappropriate use of these substances in the future. There are nevertheless some points with which this bill needs to be strengthened.

I think the exclusion sections, Section 209 of the bill as amended -- by the way, when I speak of the bill, I am speaking of the Spong amendments -- excluding pesticides from the substances covered by this legislation preserves the maze of overlapping and contradictory regulatory responsibilities which now embarrasses and confuses the government's efforts to monitor

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mp5 hazardous chemicals in the environment.

I did a little study of exactly who has jurisdiction over PCBs at various points, and on page 3 of my testimony I go through that. I point out that the Department of Agriculture has responsibility for looking for PCB in meat and poultry, the FDA for looking for PCBs in whole eggs, USDA for PCBs in cracked eggs, FDA for PCBs in fish meal, EPA for PCBs in pesticides and so forth.

I think looking at this conflict of jurisdiction with regard to PCBs I begin to wonder exactly how much is left for this particular proposed legislation to cover. That is one of the reasons why I am concerned about the exclusion from jurisdiction of this bill of pesticides.

A second reason is the fact that the legislation, as far as it goes, is a vast improvement over existing pesticide law and the proposed pesticide amendments to the Federal Insecticide Act which are now pending before the House Agriculture Committee as described in the House Committee's Print No. 3. I will not go into the detail on these points. I have listed them here in the testimony.

The only point that I want to mention specifically here is the interpretation or the definition of "imminent hazard" as it is stated in the bill before this Committee and as apparently is going to be stated in the bill that emerges from the House committee. The House draft requires a finding of

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mp6 "substantial adverse effects" as a likely result of continued use of a pesticide before suspension action can be taken against it.

The bill S. 1478 as amended requires only that there be a "reason to believe" that continued use will result in "serious damage" to human health or the environment. That distinction may seem subtle, but it is very important. I think it should be made clear that in the definition of "imminent hazard" in S. 1478 as amended that this definition does encompass serious potential hazards such as an increase in the incidence of birth defects or cancer which may develop months or years after an individual is exposed to a chemical.

There has been a lot of litigation on that point. At this point the law is interpreted somewhat more broadly than the Department of Agriculture did in the past, but I think you can still use some clarification as defined in this Act.

The other point I want to mention here, because we do have a number of people testifying, is what I consider to be a major omission in S. 1478 as amended, and that is while the requirement for pre-market clearance of hazardous substances is commendable and the test standards you set out in Section 203 are really an excellent step on the whole, you must remember the effectiveness of test procedures depends on the competence and the impartiality of the testers. This bill still permits the manufacturers of hazardous substances to conduct their own

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mp7 1 testing. It preserves the conflict of interest which has led
2 to abuses in the past and will lead to abuses in the future.
3 Under the proposed legislation the maker of the hazardous
4 substance, through its own laboratories or by contracts with
5 independent testing laboratories, arranges for the testing
6 necessary to satisfy safety criteria established by EPA. The
7 incentives and opportunities for abuse are obvious. The com-
8 mercial laboratory, anxious to retain its industry contracts,
9 has the incentives to choose a testing methodology which will
10 reveal the least negative characteristics of the chemical. The
11 chemical company has incentives to avoid a laboratory which is
12 embarrassingly thorough in its tests.
13 More important than that, even if the laboratory does
14 perform the EPA test conscientiously, there is much more dis-
15 cretion here than the average citizen would believe. The maker
16 of the chemical, not the laboratory that tests it, not EPA,
17 decides exactly which data to submit to the government.
18 The problem of biased and incomplete safety data will not
19 be solved until the direct connection between the chemical
20 industry and the testing laboratories is broken. One way to
21 avoid this conflict of interest is for the administrator of EPA
22 to be responsible for the conducting of all tests on hazardous
23 substances submitted for pre-market clearance. The adminis-
24 trator could then assign the required testing to laboratories
Neal Reporters, Inc. 25 certified and inspected by EPA. The test data would go direct

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from the laboratory to EPA, leaving no opportunity for a company to screen out data which might imperil the marketing of its product.

I point out in the testimony that this proposal would not lead to vast and new federal expenditures and laboratories. Basically it transfers from the maker of a substance to the EPA the assignment and regulating of testing contracts. There will have to be some additional laboratory facilities probably, but it would not be a massive expense as some of the critics of this proposal have suggested.

That is the end of my prepared statement.

Senator Spong. Thank you very much, Mr. Welford.

Since you do have to leave, I will ask you a question or two before we hear from the rest of the panel.

In your statement you mention some additional potential problems that may be present from the contamination of eggs with PCB. Could you give us an idea of how a use restriction under these bills might have prevented the widespread contamination of poultry products that has occurred in the recent past?

Mr. Welford. Yes. Basically, and I think Monsanto recognizes this, at least I understand that they have, even in a closed system, which as we have seen from Dr. Riseborough's testimony, closed systems are not really very closed, even in a closed system PCBs should not be used in any kind of plant

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environment where either food or feed which is fed to animals which produce food could be contaminated.

In this case Monsanto apparently made some efforts to keep PCBs out of these environments, but it would be in the use restrictions which are available to the administrator of EPA under the pending legislation there would be a chance to make this perfectly clear as a regulation and to make it clear that anyone who disobeys that regulation would be subject to federal penalties.

Presently, if a company -- if East Coast Terminal -- I have no idea of what their knowledge was in this case -- but suppose that they knew that Monsanto did not want them to use PCBs in their kind of plant but decided to do it anyway? There are no present sanctions that can be brought against East Coast Terminal for that use.

Under your legislation, assuming that the administrator of EPA did issue such a restriction, there would be penalties. Then this kind of incident would likely be avoided.

Senator Spong. As is apparent in S. 1478, the Administration has opted for a system of pretesting of new chemical substances rather than a requirement of pre-clearance. In your testimony you urge that the Committee include pesticides under this regulatory scheme. With the recent release of your book on pesticide regulations you have a great deal of knowledge that you can share with us this morning. In your estimation,

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mpl0 1 is there any difference in the need for pre-clearance system
2 for pesticides and for toxic substances as was suggested yes-
3 terday by Chairman Train?
4 Mr. Welford. I see no difference at all. In the first
5 place, I am a little bit disturbed by the semantics here. I
6 think that pesticides are toxic substances in the same way that
7 PCBs are, whether they are used in pesticides or heat transfer
8 units they are somewhat comparable.
9 As far as applying all the pre-marketing testing procedures
10 to anticipate human and environmental hazards that have been
11 worked out over the years for the pesticides, even though they
12 are somewhat inadequate, these procedures should definitely
13 be applied to toxic substances. I think it is really amazing
14 they have not been in the past.
15 I do not want to push that volume on you, but I do discuss
16 the subject to some degree and some of the reasons why it is
17 there.
18 Senator Spong. Thank you very much. Thank you for your
19 appearance here this morning.
20 We would be pleased to hear from the remainder of the panel
21 in any order that they wish.
MONS 090272
22 STATEMENT OF MISS LINDA BILLINGS, SIERRA CLUB.
23 Miss Billings. Mr. Chairman and members of the Committee,
24 I am Linda M. Billings, Assistant to the Washington Represen-
Ace-Federal Reporters, Inc.
25 tative of the Sierra Club, a national conservation organizatio

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Senator Spong. The hearings will come to order.

We will next hear from a panel of lawyers, I understand, if they would all come forward: Nanin Sheldon, Robert Hallman, William Rodgers, Edward Monaghan, John Dingell.

We are very pleased to have all of you here this morning.

Do you have any particular order of presentation that you prefer, or shall we just go from one side to the other?

STATEMENT OF WILLIAM RODGERS, JR., ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF WASHINGTON.

XXX Mr. Rodgers. Good morning, Mr. Chairman. My name is William Rogers. I am an associate professor of law at the University of Washington. I teach and have published in the fields of environmental and consumer law, and I have been directly involved in, among other controversies, the use of DDT and the controversy surrounding the use of phosphorous in detergents.

What I will try to do is to touch on a few of the issues that I do not believe will be dealt with in depth by some of the other experts.

At the outset I think it useful to affirm once again, this time from a lawyer's point of view, that we do not know very much about chemicals in the environment. The President when he recommended legislation on toxic substances cited PCBs as an illustration of the problem. Though his concern is now fully vindicated, I am sure he considers it no measure of

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mp2 1 success to learn that the Department of Agriculture not too
2 long ago prompted the extermination of 440,000 chickens con-
3 taminated with PCBs.
4 You heard yesterday from Robert Risebrough, unquestion-
5 ably the leading authority in the field, and he indicates
6 that with PCBs we have another DDT controversy, only a type of
7 DDT that in fact is harder hitting, and that issue I think
8 illustrates quite clearly the type of problem that this legis-
9 lation seeks to meet.
10 Also, at the general level I think it useful to affirm
11 that the Congress in recent years has been heavily besieged
12 with pleas for new approaches to technology assessment, and
13 these hearings have been liberally sprinkled with references
14 to DDT, enzymes, and the like. Senator Magnuson has talked
15 about an "early warning system." Senator Baker has urged the
16 adoption of national environmental laboratories, and so on.
17 The various proposals on toxic substances in my opinion
18 afford an opportunity to implement these broad principles on
19 a specific legislative mission basis. We are now talking about
20 action on this general proposition of technology assessment.
21 In this analysis, I am strongly in favor of your amendment
22 requiring pre-marketing clearance of chemicals of environmental
23 and public health significance. This is a classic case of
24 technology assessment, the wisdom of which is already recognized
25 with respect to drugs and pesticides. It minimizes the

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likelihood of wholesale disasters proven only after the fact with painstaking documentation. It avoids economic damage to those who otherwise would become dependent upon the product. It affords a decision before commercial commitment begins to skew our ability to evaluate scientific alarms about continued use.

Now, certainly if we have learned anything from the past controversies over cyclamates, DDT, 2,4,5-T, phosphates, that is, that once the technology is turned on and incorporated into the nation's commercial fabric, turning it off calls for economic disruption, political strife, and governmental vacillation. That I think is an important point met by this legislation.

Briefly I would like to anticipate some objections that might be made. No doubt you will be told that clearing the hurdle of a hostile bureaucracy will bleed the chemical industry of initiative and stifle development.

There is however, no First Amendment doctrine of prior restraint allowing dissemination of toxic chemicals throughout the community before the authorities step in. Progress, despite warnings to the contrary, was not noticeably set back by the adoption of the workmen's compensation laws. Paying the price of safety, in the chemical industry as elsewhere, exacts no exhorbitant toll from research and development.

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Moreover, any R&D dollars diverted away from developing

mp4 products likely to be losers under a pre-clearance scheme will probably go into developing winners, which are precisely the products a new regime of regulation is designed to encourage. A pre-clearance procedure reminds the manufacturer that his decisions cannot be pre-empted by a commercial fait accompli undone only by major conversion with widespread disruption.

A couple of other general points. I would like to affirm the wisdom, I believe, of the use of a Toxic Substances Board or another independent peer group to evaluate scientific data submitted in support of certification or proposed use restrictions. I think it useful to point out that the process we are talking about is an adversary process. Heavy investments have been made by the time the manufacturer seeks certification. Time to him is money.

This momentum contributes to politicization of the registration process and conflict of interest pressures. These can be relieved by contracting out testing or evaluative responsibilities.

One idea would be to extend the responsibilities of this toxic substances board to allow it to let contracts to previously approved testing laboratories to confirm or further evaluate the merits of the application. I would like to call this "sanitizing" the research money. I think it helps the manufacturer, because it affords credibiltiy for his data, and it assures reliability of the data for the public and the

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mp5 government.

In illustration of this, we have done this in Washington State in a related content under our Thermal Power Plant Siting Act. There, before approval is given to the building of a plant, the applicant must make a significant monetary contribution, in this case $25,000. The money is then used to search outside experts here at the behest of the government in order to evaluate the siting proposals. Once again you have the process of "sanitizing" that research money.

I would like to touch on a couple of points. One is the recurring problem of trade secrets. Now, the trade secret argument for too long has stood in the way of dissemination of legitimate scientific information. I have been told that one reason we know so little about indusrial PCBs is that they are shielded by a perpetual screen of commercialism. I believe that all data submitted in support of a certification and testing data thereafter derived should be public information, making it possible for the outsider to comment on the risks being evaluated and to pursue research.

As an aside, this trade secret argument comes up perpetually in discussions pertaining to securing environmental and consumer data. I think the Congress should take a broader look at this question, although obviously these hearings are not the appropriate forum. I would be anxious, for example, to hear about a single case where the production of environmental

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or safety data resulted in a competitive injury.

I think it is fair to say that the chemical industry is competitive, strongly propietary minded and undoubtedly opposed to opening the registration process in the interests of scientific discourse or otherwise. Given the high cost of development, one can sympathize with the industry's protective huddle. One way of meeting the objection that forced disclosure in the interests of safety inflicts competitive injury is to declare that commercial appropriation of what otherwise would be a trade secret is a tort deserving compensation. I think this could be included in the provision with very little language change.

The last general point I would like to raise pertains to the reporting requirements, and I would like to affirm that the reporting provisions here are a logical application of the same principles of divestiture of ignorance that have inspired recent initiatives to accumulate emission data on air pollution sources and effluent data on water pollution sources. This long delayed initiative on the industrial waterways inventory, and that was held up at least four or five years, helped to explode the notion that the amount and type of chemical contributions to the environment and food chain ranked as classified information. The effluent from the Hanford Nuclear Works understandably is classified information.

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It is difficult to understand how that same principle was

applied across the board for many years to industrial manufacturing establishments. Once again the trade secret argument was invoked in this context to deter the informational inquiry. I think the need for information can be affirmed by the scientific realities that have been demonstrated at this hearing by other witnesses. We know that distinguishing between what goes into the air and water and what is manufactured is impossible. Qualities of persistence, solubility and toxicity attest to the fact that controlled use is a fiction in large domains of the chemical world. One hundred forty-six thousand chickens and who knows what other damage is a persuasive indicator that Monsanto's closed system for curtailing PCBs is less than foolproof. Now, reporting by manufacturers I think is a first step towards setting regulatory priorities.

I would at this point, although several other points will be covered in my written statement, like simply to conclude at about the same point where I began. I feel this very strongly based upon the limited, I think, but quite real experiences I

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with greater trepidation, in the human population. We rush to the scene where there is a fish kill or a find of contaminated chicens and we even talk of scientific advance that would reduce residues in an affected population.

That reference is to a recent publication with respect to a potential drug that would effectively reduce levels of DDT in its metabolism in human tissues. That is why I strongly favor this legislation, and I believe that legislation on toxic substances is most commendable when it reaches into the manufacturing process to enforce human health and environmental values as an early principle of decision making.

I think the amendments you have suggested would influence R&D and marketing priorities at a stage where they have not yet succumbed to the demands of the marketplace. I believe the legislation would restore some influence over our destiny in a livable environment.

Thank you.

Senator Spong. Thank you very much, Mr. Rodgers. That was a very fine, comprehensive statement.

We will hear from all members of the panel and then the questions will be submitted to all of you.