WHO'S SINGING THE MEXICALI BLUES:[1] HOW FAR CAN THE EPA TRAVEL UNDER THE TOXIC SUBSTANCES CONTROL ACT?

I. INTRODUCTION

Since the early 1900s, the United States and Mexico have developed a relationship primarily centered on promoting economic development and foreign investment.[2] From an economic standpoint, both countries

1. THE GRATEFUL DEAD, *The Mexicali Blues, on* THE BEST OF "SKELETONS FROM THE CLOSET" (Warner Bros. Records Inc. 1974).

2. In the early twentieth century, the Mexican government encouraged the United States to invest in Mexico. However, the American investment exceeded Mexico's domestic investment, giving the United States economic strength and political power over Mexico. M. ANGELES VILLARREAL, *Background: U.S.-Mexico Trade Relations: Historical Perspective, in* NORTH AMERICAN FREE TRADE AGREEMENT: ISSUES FOR CONGRESS 11 (Congressional Research Service Report No. 91-282E, Mar. 25, 1991) [hereinafter NAFTA: ISSUES FOR CONGRESS]. During the 1920s, under Franklin D. Roosevelt's "Good Neighbor Policy," the United States adopted a policy of nonintervention which included demonstrating respect for Mexico's national sovereignty. *Id.* Between 1952 and 1964, the United States and Mexico participated in the Bracero Program which permitted Mexican nationals to provide agricultural labor in the United States. Victoria L. Engfer et al., *By-Products of Prosperity: Transborder Hazardous Waste Issues Confronting the Maquiladora Industry*, 28 SAN DIEGO L. REV. 819, 821 (1991); M. ANGELES VILLARREAL, MEXICO'S MAQUILADORA INDUSTRY 1 (Congressional Research Service Report No. 91-706E, Sept. 27, 1991) [hereinafter MAQUILADORA INDUSTRY]. *See infra* note 22 and accompanying text. When the Bracero Program ended in 1964, Mexico sought to forestall widespread unemployment by developing the

have benefitted from this relationship.[3] From an environmental standpoint, however, the relationship has been disastrous.[4] Since the 1960s, the 2,000-mile United States-Mexico border[5] has become

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maquiladora industry. See *infra* note 7 for a description of maquiladoras.

3. See *infra* notes 22-41 and accompanying text for a discussion of the advantages and disadvantages of the past relationships between the United States and Mexico.

4. *See infra* notes 39-44 and accompanying text. *See generally* James P. Duffy, III, *The Environmental Implications of a North American Free Trade Agreement*, 10 HOFSTRA LAB. L.J. 561 (1993) (analyzing Mexico's regulatory system, international treaties, NAFTA, and current environmental enforcement in Mexico); Phillip D. Hardberger, *Industrialization in the Borderlands and the NAFTA Treaty*, 24 ST. MARY'S L.J. 699 (1993) (asserting that the United States and Mexico must work together to protect the environment); James A. Funt, Comment, *The North American Free Trade Agreement and the Integrated Environmental Border Plan: Feasible Solutions to U.S.-Mexico Border Pollution?*, 12 TEMP. ENVTL. L. & TECH. J. 77, 79 (1993) (examining the Integrated Border Plan and "its unlikely effectiveness in alleviating environmental border concerns"); Farah Khakee, Comment, *The North American Free Trade Agreement: The Need to Protect Transboundary Water Resources*, 16 FORDHAM INT'L L.J. 848 (1992-1993) (proposing additional measures to preserve and prevent pollution of transboundary water resources); Stephen M. Lerner, Comment, *The Maquiladoras and Hazardous Waste: The Effects Under NAFTA*, 6 TRANSNAT'L LAW 255 (1993) (discussing past U.S.-Mexican cooperation regarding the environment). See *infra* part II for a discussion of environmental problems on the U.S.-Mexican border.

The United States and Mexico have been working together to control pollution. *See generally* North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 (1993) (agreeing, *inter alia*, to develop and review environmental emergency preparedness, to promote education in environmental matters, and to assess environmental impacts); Agreement of Cooperation Between the United States of America and the United Mexican States for Solution of the Border Sanitation Problem at San Diego, California-Tijuana, Baja California, July 18, 1985, U.S.-Mex., Annex I, T.I.A.S. No. 11,269, at 2-3 (agreeing to cooperate "to anticipate and consider the effects and the consequences that the works planned may have" on the environment); Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827, at 3 [hereinafter La Paz Agreement] (agreeing "to adopt the appropriate measures to prevent, reduce and eliminate sources of pollution in their respective territory which affect the border area of the other").

5. *Chemical Emergency Preparedness Along U.S./Mexican Border Gets a Boost*, Int'l Env't. Daily (BNA), at D3 (Mar. 18, 1994). There are 14 pairs of United States-Mexico sister cities along the border, such as Brownsville, Texas and Matamoros, Mexico; El Paso, Texas and Juarez, Mexico; San Diego, California and Tijuana, Mexico; Calexico, California and Mexicali, Mexico. *Id. See also* SECRETARIAT OF SOCIAL DEVELOPMENT, GOVERNMENT OF MEXICO, PROTECTING THE ENVIRONMENT: MEXICO'S PUBLIC WORKS PROGRAM FOR THE BORDER REGION 1 (on file with author) (displaying a map of the sister cities located on the United States-Mexico border); Lawrence A. Herzog, *The U.S.-Mexico Transfrontier Metropolis*, BUS. MEX., Mar. 1992, at 14 (discussing the growth of cities along international boundaries).

increasingly over-populated and polluted with filthy air, overloaded sewers, and contaminated drinking water.[6] Maquiladoras—foreign-owned business located in Mexico[7]—have caused most of the border pollution.[8] The pollution, in turn, has crossed into the United States.[9]

In response to this problem, the Board of Supervisors of the County of Imperial, California, pursuant to § 2620 of the Toxic Substance Control Act (TSCA),[10] petitioned the Environmental Protection Agency (EPA) and requested that it investigate the border pollution.[11] The

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6. Casey Bukro, *On the Free-Trade Frontier: Environmental Problems Multiply on Border,* CHI. TRIB., Aug. 22, 1993, at C1. The frontier's population was 9.5 million in 1993—what it was a decade earlier—and is expected to grow by another 900,000 by the year 2000. *Id.* See *infra* notes 39-44 and accompanying text for a discussion of pollution problems on the United States-Mexican border.

7. Maquiladoras are foreign-owned export manufacturing firms located in Mexico. *See* Michael Connor, Comment, *Maquiladoras and the Border Environment: Prospects for Moving from Agreements to Solutions,* 3 COLO. J. INT'L ENVTL. L. & POL'Y 683 (1992). An international agreement allows the maquiladoras to import component parts duty-free: the assembled goods are exported, with tariffs levied only on the value added in Mexico. *See Companies Contemplate Options in Wake of Subpoenas for New River Chemical Data,* Int'l Env't. Daily (BNA), at D4 (Oct. 24, 1994) [hereinafter *Companies Contemplate*]. If the finished item is assembled in Mexico of American-made components, the taxable added value is only the labor and capital costs attributed to the assembly. Susanna Peters, Comment, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment,* 11 COMP. LAB. L.J. 226, 231-32 (1990). The bulk of the maquiladoras are located along the U.S.-Mexican border. *Companies Contemplate, supra.* Although most maquiladoras are operated by American companies, Japanese, German, Swedish, Canadian, British, French, Korean, and Taiwanese companies all operate maquiladoras in Mexico. *See* MAQUILADORA INDUSTRY, *supra* note 2, at 9. See *infra* part II for a discussion of the maquiladora industry.

8. *See* Bukro, *supra* note 6, at C1 (describing the role of maquiladoras in border pollution).

9. *Id.*

10. Pub. L. No. 94-469, § 2, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2692 (1994)). Cites to TSCA provisions will provide both the TSCA section number and the U.S.C. number. *See* TSCA § 21; 15 U.S.C. § 2620(a) (permitting any person to petition the Environmental Protection Agency (EPA) to initiate a proceeding for the issuance, amendment, or repeal of a rule under selected sections of TSCA). See *infra* part III for a discussion of TSCA.

11. Luke C. Hester, *U.S. and Mexico to Conduct Joint Effort to Clean Up New River: EPA Issues Administrative Subpoenas to U.S. Companies,* EPA ENVTL. NEWS, Sept. 23, 1994, at 1. Imperial County, the Environmental Health Coalition, Comite Ciudadano Pro Restauracion del Canon del Padre y Servicios Comunitarios, and the Southwest Network for Environmental and Economic Justice petitioned the EPA to investigate the chemicals polluting the border area. *Id.* at 1-2. In addition, the petitioners sought relief under environmental provisions of the North American Free Trade Agreement (NAFTA). *See*

petitioners were particularly concerned with the state of the New River[12] and whether the pollution posed a threat to their health or environment.[13] Specifically, the petitioners requested the EPA to issue a test rule under § 2603 of TSCA,[14] and to monitor the New River for the presence of hazardous chemicals.[15]

The EPA did not believe that a § 2603 test rule was appropriate and instead proposed additional monitoring of the river in order to adequately characterize the chemical contamination.[16] Therefore, the EPA, pursuant to § 2610,[17] issued subpoenas to ninety-five American companies

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California County's Test Rule Request Denied; EPA Offers to Help Pay for New River Monitoring, Cal. Env't Daily (BNA), at D2 (Mar. 25, 1994) [hereinafter *Test Rule Request Denied*]. They also petitioned the Agency for Toxic Substances and Disease Registry (ATSDR) for a health assessment of the New River under section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id.* In addition to seeking relief under NAFTA and TSCA, the Environmental Health Coalition sought relief under President Clinton's Executive Order 12,898 on environmental justice. *See Coalition Withdraws Petition that Urged EPA to Address Pollution in New River*, Cal. Env't Daily (BNA), at D2 (June 10, 1994).

12. The New River flows north from Mexicali, Mexico into the Imperial Valley of California. *Companies Contemplate, supra* note 7, at D4. *See also* Michael Riley, *Dead Cats, Toxins, and Typhoid*, TIME, Apr. 20, 1987, at 68 (noting sightings of dead cats, chickens, tires, slaughterhouse waste, laundry suds, human feces, and a dead body floating in the New River).

13. Hester, *supra* note 11, at 1.

14. Notice of Receipt of Petition, 59 Fed. Reg. 3687 (1994) (describing issues raised by the petition). The EPA may issue rules requiring chemical manufactures and processors to test chemical substances and mixtures to develop data regarding health and environmental effects. TSCA § 4(a); 15 U.S.C. § 2603(a) (1994).

15. *California County Supervisors File Section 21 Petition for New River Testing*, Daily Env't Rep. (BNA), at D12 (Jan. 26, 1994). The petition urged the EPA to test the chemicals in the river, and to take appropriate action under TSCA.

16. TSCA Section 21 Citizens' Petition; Response to Citizens' Petition, 59 Fed. Reg. 13,721, 13,723 (1994) [hereinafter Response to Petition].

17. TSCA § 11(c); 15 U.S.C. § 2610(c) (1994) (allowing the EPA to issue subpoenas and "require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information"). *See also* TSCA § 11(a); 15 U.S.C. §2610(a) (permitting the EPA to "inspect any establishment, facility, or other premises in which chemical substances, mixtures, or products . . . are manufactured, processed, stored, or held before or after their distribution in commerce"). *See generally* RAY M. DRULEY & GIRARD L. ORDWAY, THE TOXIC SUBSTANCES CONTROL ACT (1977) (discussing TSCA and its legislative history); MARY D. WOROBEC, TOXIC SUBSTANCES CONTROLS PRIMER: FEDERAL REGULATION OF CHEMICALS IN THE ENVIRONMENT 13 (1984) (stating that Congress intended TSCA to complete the chain of United States environmental laws passed in the previous years); COMMERCE CLEARING HOUSE, TOXIC

operating maquiladoras in Mexico, requesting information regarding the chemicals the maquiladoras were dumping into the New River.[18] The EPA hoped to determine whether the chemicals posed a risk to the environment.[19] These subpoenas were the first cross-the-border actions that the EPA undertook to control pollution.[20] The American parent companies, however, contended that the EPA's jurisdiction under TSCA did not extend to companies manufacturing or processing chemicals outside the United States.[21]

This Note examines whether the EPA has authority under TSCA to issue subpoenas to the American parent companies operating maquiladoras in Mexico. Part II describes the history of the Maquiladora Program and the environmental crisis along the United States-Mexico border. Part III analyzes TSCA's purpose, policy, and provisions. Part IV provides a brief overview of an Agency's investigative powers. Part V discusses whether the EPA properly interpreted its power under TSCA and proposes that the EPA did not have the authority to subpoena the American parent companies. In addition, Part V asserts that courts

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SUBSTANCES CONTROL ACT: LAW AND EXPLANATION (1977) (providing a comprehensive view of TSCA).

18. Marianne Lavelle, *EPA Probes Cross-Border Contamination,* NAT'L L.J., Oct. 10, 1994, at B1. Prior to issuing the subpoenas, the EPA asked the firms to report the information voluntarily; however, only four firms complied. *95 U.S. Firms Get Subpoenas for Data on Chemicals Produced Along Mexican Border,* Chem. Reg. Rep. (BNA), at 803 (Sept. 23, 1994) [hereinafter *95 U.S. Firms*]. *See also* Administrative Subpoena Duces Tecum from the Environmental Protection Agency to United States Parent Companies, at 7-9 (Sept. 21, 1994) (on file with author) (requesting the following information: data describing the chemical substances used; the quantity of chemical substances released into the environment by underground injection, stack or non-point air emissions, or catastrophic or accidental events; the quantity of chemical substances exported; the quantity transferred off-site for recycling; and any unpublished health and safety data, medical surveillance information, or allegations of significant adverse effects to health).

19. Response to Petition, *supra* note 16, at 13,723.

20. Lavelle, *supra* note 18, at B1.

21. *Industry Contests EPA Call for Data from Foreign Facilities of U.S. Firms,* INSIDE EPA, Sept. 30, 1994, at 16 (citing industry sources as calling the subpoena "an overly broad interpretation" of TSCA, used to regulate foreign commerce); Letter from Stanley W. Landfair, attorney for McKenna & Cuneo to President or General Counsel, Ralston Purina Co. (Sept. 30, 1994) (on file with author) (questioning—in a form letter to all subpoenaed parent companies—the EPA's subpoena authority; how the EPA intends to make use of the information; whether the EPA believes the U.S. companies are financially responsible for the pollution caused by other companies outside the United States; and whether the Mexican-owned factories are being ignored by the EPA).

should not enforce EPA subpoenas to the American parent companies because the EPA cannot extend TSCA regulations extraterritorially to the maquiladoras in Mexico.

II. THE MAQUILADORA INDUSTRY AND ITS IMPACT ON THE BORDER ENVIRONMENT

Prior to 1965, Mexicans could work as agricultural laborers in the United States under the Bracero Program.[22] When the Bracero Program ended, unemployment increased; the Mexican Border Industrialization Program (BIP)[23] established the Maquiladora Program to help cure the country's economic problems.[24] The BIP's goals were to (1) create new jobs, increase incomes, and improve the standard of living for border-area workers, (2) increase labor skills, and (3) decrease Mexico's trade deficit.[25]

Under the Maquiladora Program, the BIP solicited foreign-owned businesses to set up manufacturing plants in Mexico for the purpose of producing exports.[26] The Mexican government established free-trade rules that attracted foreign investment in the program.[27] Specifically, the government exempted maquiladoras from majority ownership laws and relaxed restrictions on foreign ownership of real estate near its

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22. Pub. L. No. 82-78, ch. 223, 65 Stat. 119 (1951) (permitting Mexican nationals to work in the United States to remedy domestic-labor shortage).

23. *See* Michael E. Bulson, Comment, *Mexico's Border Industrial Program: Legal Guidelines for the Foreign Investor* 4 DENV. J. INT'L L. & POL'Y 89, 89-90 (1974).

24. MAQUILADORA INDUSTRY, *supra* note 2, at 1. *See also* Elizabeth C. Rose, Note, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L L. 223, 229 (1989) (discussing the Bracero Program's effect on the employment rate in Mexico and the creation of the Maquiladora Program).

25. Peters, *supra* note 7, at 230. *See also* Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?*, 3 KAN. J.L. & PUB. POL'Y 128 (1994) (examining the advantages and disadvantages of the Maquiladora Program for Mexican workers).

26. MAQUILADORA INDUSTRY, *supra* note 2, at 1. Prior to the formal establishment of the Maquiladora Program, U.S. companies wishing to manufacture components in Mexico entered into private contracts with Mexican landowners who agreed to build industrial parks on their land. *Id.*

27. James R. Gallop & Christopher J. Graddock, Note, *The North American Free Trade Agreement: Economic Integration and Employment Dislocation*, 19 J. LEGIS. 265, 277 (1993) (examining the potential for loss of labor-intensive jobs in the United States due to NAFTA).

borders and coastlines.[28] Further, as long as the maquiladoras exported their final products, the government allowed foreign companies to import component parts duty free.[29] Once the maquiladora produced a final product, the parent company would import the goods back into the United States, paying an import tariff only on the value added in Mexico.[30] Other advantages offered to maquiladoras included the following: few restrictions on items produced for export,[31] low minimum wage paid to Mexican workers,[32] and exemption from the Mexican corporate taxes.[33]

The Maquiladora Program continues to be one of Mexico's major economic successes.[34] The maquiladora industry has been Mexico's second largest source of hard currency,[35] and is a source of new technology and training.[36] The program has already generated 600,000

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28. *Id.*

29. *Id. See* Rose, *supra* note 24, at 229. Foreign manufacturers could import, duty-free, all machinery, materials (including raw chemicals), equipment, and to-be-assembled components. *Id.* When the maquiladoras ceased operation, they were required to remove all equipment from Mexico. MAQUILADORA INDUSTRY, *supra* note 2, at 1.

30. Peters, *supra* note 7, at 231-32. *See also* Harmonized Tariff Schedule of the United States, USITC Pub. 2937, Prov. 9802.00.80 (1996) (imposing a duty on the total value of the products, less the costs of the United States components for United States components assembled in foreign countries).

31. Rose, *supra* note 24, at 229. The Mexican law has an exception for textiles because this industry competes directly with Mexican-owned industries. *Id.*

32. *Id.* Internal growth under the Maquiladora Program was slow because, due to the overvalued currency, Mexico's real wages were among the highest in developing countries. MAQUILADORA INDUSTRY, *supra* note 2, at 1. Eventually, the peso lost value and Mexican wages declined to $.98/hour, compared to $13.85, the average hourly U.S. manufacturing rate. Mary Jane Bolle, *Wage Disparities: The United States v. Mexico, in* NAFTA: ISSUES FOR CONGRESS, *supra* note 2, at 33.

33. Durand, *supra* note 25, at 129 (discussing various Mexican corporate forms available to American maquiladoras).

34. MAQUILADORA INDUSTRY, *supra* note 2, at 7. *But see* Durand, *supra* note 25, at 130-32 (examining the possible negative impact of the maquiladoras on Mexican workers). Maquiladoras produced about $12.7 billion worth of goods in 1989, providing the Mexican economy with about $2 billion in value-added income. *Id.* (citing Mariah E. DeForest, *Manufacturing in Mexico*, TWIN PLANT NEWS, June 1991, at 28).

35. Lawrence Kootnikoff, *Coming Together: Forging the World's Largest Free-Trade Zone*, BUS. MEX., Mar. 1991, at 4, 8.

36. MAQUILADORA INDUSTRY, *supra* note 2, at 7. (noting a shift from light assembly operations to sophisticated industrial processes and fully integrated manufacturing such as robotics).

jobs,[37] and the number of Mexicans employed in the industry continues to grow between ten and twenty percent annually.[38] Unfortunately, this rapid growth in population and industrial development creates additional pressures on the border's infrastructure and sewage system,[39] resulting in a serious pollution problem.[40] Mexico's relaxed environmental regulations further contribute to the border pollution.[41]

Several factors contribute to the maquiladoras' poor environmental record: plant managers are often unaware of the Mexican legislation's requirements; the companies do not formulate comprehensive compliance policies, instead relying on individual managers' decisions; and plant managers fail to monitor the practices of contractors hired to dispose of

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37. Jonathan Ferguson, *Mexicans Want Jobs, Not Exploitation*, TORONTO STAR, Feb. 7, 1993, at B4. Maquiladoras account for most of the jobs created in Mexico since 1980. *See* MAQUILADORA INDUSTRY, *supra* note 2, at 7.

38. *See* MAQUILADORA INDUSTRY, *supra* note 2, at 6 (noting that three sectors—electronics, transportation, and electrical machinery—accounted for over 50% of maquiladora employment in 1987).

39. Response to Petition, *supra* note 16, at 13,722. Domestic sewage, agricultural drainage, and industrial wastewater all enter the New River from Mexicali. *Id.* Many communities not yet connected to the sewage treatment system dump an average of eight million gallons of sewage per day into the New River. *Id.* Mexican law requires industries to treat waste prior to discharging it to minimize the impact on the sewer system and receiving waters. *Id.* However, data indicate significant industrial waste in the River. *Id. See* Francisco Alba, *Mexico's Northern Border: A Framework of Reference*, 22 NAT. RESOURCES J. 749, 750-51 (1982) (examining conditions on the U.S.-Mexico border, including shortages and deficiencies in housing, employment, and public utilities). *See also* Herzog, *supra* note 5, at 15 (detailing the growth of the border area and its unique "social system").

40. Response to Petition, *supra* note 16, at 13,722. The EPA believes that industrial discharges are only one element among several sources of pollution. *Id.* Untreated sewage and agricultural runoff also contribute to the degradation of the area. *95 U.S. Firms*, *supra* note 18, at 804. *See generally* Engfer et al., *supra* note 2 (examining the procedures for shipping hazardous wastes across the border); Mary Tiemann, *Environmental Concerns, in* NAFTA: ISSUES FOR CONGRESS, *supra* note 2, at 45 (noting health concerns for populations in Mexican border communities).

41. Daniel I. Basurto Gonzales & Elaine F. Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659 (1991) (examining the application of Mexican environmental laws and regulations to maquiladora operations). Although modeled after American laws, Mexican environmental laws are not strictly enforced. Engfer et al., *supra* note 2, at 825. A year after the Mexican government enacted environmental regulations, 6% of the maquiladoras met licensing requirements; three years later, 54.6% of the plants received licenses. Dr. Roberto A. Sanchez, *Maquila Masquerade*, BUS. MEX., Special Issue, 1993, at 13, 14; Dane Schiller, *The Maquila Industry—Where to Now?*, BUS. MEX., Dec. 1991, at 48, 51.

toxic manufacturing by-products.[42] Three major types of risks result from the maquiladoras inadequate exercise of control: (1) inadequate handling of toxic and dangerous residues poses an environmental risk; (2) storing, transporting, handling, and disposing of harmful chemicals and toxic residues creates public health risks; and (3) handling the hazardous chemicals in the plants exposes workers to increased health risks.[43] Environmentalists, private citizens, and politicians on both sides of the border now demand better environmental controls be exerted over the maquiladoras to protect public health and the environment.[44]

The governments of Mexico and the United States have concentrated several initiatives on the border region's development and consequent pollution problems.[45] Most recently, the North American Free Trade Agreement (NAFTA) negotiations have heightened national concerns regarding transborder environmental conditions, resulting in new initiatives.[46] Historically, many factors have undermined the effectiveness of past attempts to improve border conditions.[47] It is too soon to predict the success of the NAFTA-related environmental initiatives on long-standing, rapidly-worsening border conditions.[48] In the meantime,

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42. Sanchez, *supra* note 41, at 15.

43. *Id.* at 13.

44. *See id.*

45. *See* Sandford E. Gaines, *Bridges to a Better Environment: Building Cross-Border Institutions for Environmental Improvement in the U.S-Mexico Border Area*, 12 ARIZ. J. INT'L & COMP. L. 429, 444 (1995) (discussing bilateral agreements related to border issues); Arnoldo Medina, Jr., Comment, *NAFTA and Petroleum Development in the Gulf of Mexico: The Need for a Bilateral Oil Spill Response Regime Between the United States and Mexico*, 6 COLO. J. INT'L ENVTL. L. & POL'Y, 405, 411 (1995) (listing examples of bilateral agreement preceding NAFTA). *See also supra* note 4.

46. Gaines, *supra* note 45, at 431-32 (discussing NAFTA-related environmental initiatives).

47. *Id.* at 444-48. Gaines states:

> The missing ingredient [in pre-NAFTA initiatives] was a strong and well-informed concern at high levels of either government about the general pattern of environmental pollution and degradation in the border area sufficient to inspire bilateral environmental commitments to broad goals and programs and the establishment of suitable institutions for overseeing and carrying out such commitments.

Id. at 446. Gaines recommends devolving authority over environmental management to state and local governments. *Id.* He notes that the border communities have close economic and social ties and, thus, greater opportunities for transborder cooperation. *Id.* at 445.

48. *Id.* at 469.

American citizens have turned to the citizen-petition provisions in existing environmental legislation in an attempt to prod United States agencies into using their regulatory powers to redress chronic health threats caused by cross-border pollution.[49]

In January, 1994, the citizens of Southern California petitioned the EPA to issue a § 2603 rule[50] pursuant to TSCA requiring environmental testing to address the pollution problem.[51] Although the EPA declined to issue a § 2603 test ruling, it agreed to monitor the border pollution and identify the pollutants in the New River.[52] The EPA issued ninety-five subpoenas to American companies operating maquiladoras in Mexico,[53] seeking information about chemicals issued into the New River.[54] The EPA and the Mexican Secretariat for Social Development (SEDESOL)[55] both consider the clean-up of the United States-Mexican border a high priority.[56]

III. THE TOXIC SUBSTANCE CONTROL ACT

Prior to 1976, federal environmental laws focused on controlling hazardous discharge and cleaning up polluted sites.[57] Examples include the Clean Air Act,[58] the Federal Water Pollution Control Act,[59] and

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49. *See* Notice of Receipt of Petition, 59 Fed. Reg. 3687 (1994) (noting citizen-petition filed pursuant to TSCA § 21; 15 U.S.C. § 2620).

50. *See supra* note 14.

51. *Test Rule Request Denied, supra* note 11, at D2.

52. *Id.*

53. Lavelle, *supra* note 18, at B1.

54. *Id.*

55. SEDESOL was formed in 1992, replacing the Urban Development and Ecology Secretariat. Duffy, *supra* note 4, at 563. For a discussion of the impact of the restructuring on environmental oversight, see Terzah N. Lewis, Comment, *Environmental Law in Mexico*, 21 DENV. J. INT'L L. & POL'Y 159, 159 n.* (1992).

56. Response to Petition, *supra* note 16, at 13,722.

57. Andrew Hanan, *Pushing the Environmental Regulatory Focus a Step Back: Controlling the Introduction of New Chemicals Under the Toxic Substances Control Act*, 18 AM. J.L. & MED. 395, 396 (1992) (explaining the ineffectiveness of TSCA).

58. Pub. L. No. 88-206, § 1, 771 Stat. 392 (1955) (current version at 42 U.S.C. §§ 7401-7671q (1994)) (regulating the discharge of pollutants into the atmosphere).

59. Pub. L. No. 92-500, § 2, 86 Stat. 816 (1970) (current version at 33 U.S.C. §§ 1251-1387 (1994)) (regulating the discharge of pollutants into water).

the Occupational Safety and Health Act.[60] In passing these acts, Congress concentrated on discrete sources of pollution.[61] By targeting sources, the laws failed to protect public health from overall exposures to hazardous chemicals, regardless of their source.[62]

In 1976, Congress concluded that exposure to a large number of hazardous chemicals "may present an unreasonable risk of injury to health or the environment."[63] In response to this determination Congress enacted TSCA, the first comprehensive legislation to govern toxic substances.[64] Congress designed the statute to regulate the safe *use* of all raw materials, rather than the control of finished products or processed waste.[65] Under TSCA, the EPA monitors all new chemical substances entering the market.[66]

TSCA regulates[67] the manufacture,[68] processing,[69] distribution

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60. Pub. L. No. 91-596, § 2, 84 Stat. 1590 (1970) (current version at 29 U.S.C. §§ 651-678 (1994)) (monitoring occupational exposure to hazardous substances).

61. The existing environmental laws regulated discrete targets, such as discharge pipes and belching smokestacks. Richard A. Ginsburg, *TSCA's Unfulfilled Mandate for Comprehensive Regulation of Toxic Substances—The Potential of TSCA § 21 Citizens' Petitions*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10,330, 10,332 (Nov. 1986) (expressing concerns that the existing statutes "failed to account for 'the *total* human exposure to a [hazardous] substance and the *total* effect [these substances have] on the environment'") (quoting COUNCIL ON ENVIRONMENTAL QUALITY TOXIC SUBSTANCES 20 (1971)).

62. Hanan, *supra* note 57, at 396. Hazardous chemicals can enter the stream of commerce and cause serious forms of disease, including cancers, gene mutations, and birth defects. *Id.* at 397.

63. TSCA § 2(a)(2); 15 U.S.C. § 2601(a)(2) (1994).

64. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 217 (3d ed. 1992) (noting that TSCA "is hardly a masterpiece of insightful policy making or incisive drafting").

65. *See* WOROBEC, *supra* note 17, at 13 (noting TSCA purpose to control exposure to and use of raw industrial chemicals that fall outside other environmental laws). *See also* Ginsburg, *supra* note 61, at 10,332 (concluding that the EPA should not be limited to repairing environmental damage, and that humans and the environment should not be used as a "laboratory for discovering adverse health effects") (quoting COUNCIL ON ENVIRONMENTAL QUALITY, TOXIC SUBSTANCES 21 (1971)); Hanan, *supra* note 57, at 396 ("Congress sought to control hazardous inputs in order to reduce exposures, rather than exclusively focus on the outputs and by-products of the industrial process.").

66. WOROBEC, *supra* note 17, at 13.

67. TSCA § 6(a); 15 U.S.C. § 2605(a) (detailing the scope of the regulation).

68. TSCA § 3(7); 15 U.S.C. § 2602(7) (defining the term "manufacture" as "to import into the customs territory of the United States, . . . produce, or manufacture").

in commerce,[70] use, and disposal of all chemicals the EPA finds present an unreasonable risk to health or the environment.[71] Congress stated three policy goals: First, manufacturers and processors of chemical substances are required to[72] gather and develop adequate data concerning the effects their chemicals have on health and the environment.[73] Second, chemicals posing "an unreasonable risk of injury to health or the environment" should be regulated.[74] Finally, regulation should not, however, create unnecessary barriers to technological innovation.[75] Thus, in devising regulations, the EPA must balance the environmental, economic, and social impacts of its actions[76] with the risks and benefits of the chemical.[77]

Several key provisions implement TSCA's policy goals:[78] First, section 5 requires the EPA to screen all new chemicals entering the market.[79] Second, section 4 requires manufacturers to test existing and

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69. TSCA § 3(10); 15 U.S.C. § 2602(10) (defining the term "process" as "the preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce").

70. TSCA § 3(4); 15 U.S.C. § 2602(4) (defining the term "distribute in commerce" as "to sell . . .; to introduce or deliver for introduction into commerce . . .; or to hold . . . after . . . introduction into commerce"). *See also* TSCA § 3(3); 15 U.S.C. § 2602(3) (defining the term "commerce" as "trade, traffic, transportation, or other commerce between a place in a State and any place outside of such State").

71. TSCA § 2(a)(2); 15 U.S.C. § 2601(a)(2).

72. For the purpose of this Note, a manufacturer means a processor or importer of chemical substances.

73. TSCA § 2(b)(1); 15 U.S.C. § 2601(b)(1).

74. TSCA § 2(b)(2); 15 U.S.C. § 2601(b)(2).

75. TSCA § 2(b)(3); 15 U.S.C. § 2601(b)(3). Specifically, this section provides that the exercise of regulating authority should not "impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this chapter to assure that . . . such chemical[s] . . . do not present an unreasonable risk of injury to health or the environment." *Id.*

76. TSCA § 2(c); 15 U.S.C. § 2601(c).

77. WOROBEC, *supra* note 17, at 17. "The agency may decide that a substance poses no unreasonable risk, that a substance should not be controlled because its benefits outweigh its risks, or that risks posed by a substance are too great to be acceptable." *Id.* The EPA can regulate chemicals by requiring hazard warning labels; banning manufacture, use, or import; imposing specific controls on use or manufacture; or taking court action to protect the public health or the environment. *Id.* at 18.

78. *See* FINDLEY & FARBER, *supra* note 64, at 218 (discussing TSCA §§ 4, 5, and 6). *See supra* notes 72-77 (discussing TSCA's policy goals).

79. TSCA § 5; 15 U.S.C. § 2604.

new chemicals that pose a potential risk to health or the environment.[80] Third, section 6 requires the EPA to exercise regulatory control over those chemicals that pose an unreasonable risk.[81] Fourth, section 8 requires the EPA to keep an inventory of all chemicals processed or manufactured in the United States.[82] Thus, TSCA permits EPA to monitor all chemicals—existing or new—before, during, and after their manufacture.[83]

TSCA creates several benefits: First, the EPA can identify and prevent the production or use of chemicals that present an unreasonable risk.[84] Second, premanufacture notice requirements[85] prevent a manufacturer from promoting a chemical that is likely to create an impermissible danger; thus the manufacturer can avoid an unnecessary investment.[86] By stopping production of a chemical it determines poses an unreasonable risk, the manufacturer decreases its exposure to civil suits

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80. TSCA § 4; 15 U.S.C. § 2603.

81. TSCA § 6; 15 U.S.C. § 2605. TSCA does not define unreasonable risk. According to the legislative history, an unreasonable risk is determined by

> balancing the probability that harm will occur and the magnitude and severity of that harm against the effect of proposed regulatory action on the availability to society of the benefits of the substance or mixture, taking into account the availability of substitutes for the substance or mixture which do not require regulation, and other adverse effects which such proposed action may have on society.

H.R. REP. No. 1341, 94th Cong., 2d Sess. 1, 14 (1976).

82. TSCA § (8); 15 U.S.C. § 2607. The EPA must promulgate rules that require manufactures to maintain records so that the EPA can request them. TSCA § 8(a)(1)(A)-(B); 15 U.S.C. § 2607(a)(1)(A)-(B).

83. *But see* TSCA § 5(h)(3); 15 U.S.C. § 2604(h)(3) (exempting chemicals manufactured in small quantities solely for research and development); TSCA § 9(a); 15 U.S.C. § 2608(a) (exempting chemicals controlled by different environmental laws). *See, e.g.*, The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994) (controlling pesticides); The Atomic Energy Act, 42 U.S.C. §§ 2011-2297g-4 (1994) (controlling nuclear materials); The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-395 (1994) (controlling food, drugs, and cosmetics). *See also* TSCA § 3(2)(B); 15 U.S.C. § 2602(2)(B) (excluding from the definition of "chemical substance," any mixture, pesticide, tobacco, nuclear materials, and food, drugs, cosmetics, and devices regulated by the Food, Drug, and Cosmetic Act).

84. Hanan, *supra* note 57, at 407.

85. TSCA requires premanufacture notification for new chemicals or for significant new uses of existing chemicals. TSCA § 5(a)(1); 15 U.S.C. § 2604(a)(1). This requirement ensures the regulation of all potentially hazardous chemicals from their inception. Hanan, *supra* note 57, at 406. *See infra* part III.A.

86. Hanan, *supra* note 57, at 407.

and clean-up costs.[87]

A. *Section Five of the Toxic Substance Control Act*

Section 5 of TSCA is the most important section of the Act.[88] It requires a manufacturer or importer[89] to submit a premanufacture notice (PMN) to the EPA.[90] The PMN notifies the EPA that a person intends to manufacture or import a new chemical[91] or use an existing chemical in a significantly new manner.[92] The PMN must provide sufficient information for the EPA to determine whether the chemical presents an unreasonable risk of injury to health or the environment.[93]

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87. *Id.* at 408.

88. *See, e.g.*, Robert A. Wyman, Jr., Note, *Control of Toxic Substances: The Attempt to Harmonize the Notification Requirements of the U.S. Toxic Substances Control Act and the European Community Sixth Amendment*, 20 VA. J. INT'L L. 417, 426 (1980) (describing section 5 as the "keystone" of TSCA).

89. *See* TSCA § 3(7); 15 U.S.C. § 2602(7) (defining manufacture to include import); Premanufacture Notification, 40 C.F.R. § 720.22(b)(1) (1995) (defining an importer as any person intending to import a new chemical into the United States for commercial purposes).

90. TSCA § 5(a)(1)(B); 15 U.S.C. § 2604(a)(1)(B). *See* WOROBEC, *supra* note 17, at 18-23 (noting that all PMNs must include the common or trade name of the chemical, the chemical's identity and molecular structure, the estimated production levels, the proposed use of the chemical, the method of disposing of the chemical, the estimated level of exposure in the workplace, a description of the chemical's by-products, any available test data on health and environmental effects, and a description of known or reasonably ascertainable test data). *See also* Premanufacture Notification, 40 C.F.R. § 720.22 (requiring all persons intending to manufacture or import chemicals to submit a PMN); Premanufacture Notification, 40 C.F.R. § 720 (1995) (establishing procedures for reporting new chemicals); Premanufacture Notification Exemptions, 40 C.F.R. § 723 (exempting, *inter alia*, chemicals manufactured in small quantities).

91. A new chemical is any chemical substance not included on the EPA's inventory list. TSCA § 3(9); 15 U.S.C. § 2602(9).

92. TSCA § 5(a)(1)(B); 15 U.S.C. § 2604(a)(1)(B). The statute requires the EPA to consider several factors in determining whether a proposed use of an existing chemical is a "significant new use." The factors include: how much of the chemical substance the manufacturer will process; the degree to which the new use changes the type, amount, duration, or form of exposure of humans and the environment to the substance; and the methods of processing and disposing of the chemical. TSCA § 5(a)(2)(A)-(D); 15 U.S.C. § 2604(a)(2)(A)-(D).

93. *See* Wyman, *supra* note 88, at 427. *See supra* note 90 and accompanying text (discussing the required elements of a PMN). For a discussion of how the EPA determines that a chemical poses an unreasonable risk, see *infra* notes 108-13 and accompanying text.

After receiving the PMN, the EPA must evaluate the hazards that the chemical poses and make an independent risk assessment.[94] In assessing the risk, the EPA examines the toxicity of the new chemical, and the probability of exposing humans or the environment to that new chemical.[95] If a new chemical presents an unreasonable risk, the EPA has several options under TSCA. The EPA may approve the new chemical,[96] extend the notice period,[97] or seek a court order banning manufacture of the chemical.[98] If the EPA permits the new chemical's manufacture, it may require the manufacturer to maintain records of all the ill effects caused by the chemical.[99] In addition, under section 6(a), the EPA may restrict or limit the use of the new chemical, and require the manufacturer to take certain precautionary measures.[100] Finally, the EPA may permit the manufacture of the new chemical, but require further review if the conditions of production change.[101]

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94. WOROBEC, *supra* note 17, at 20 (noting that the EPA conducts evaluations by reviewing chemical literature and checking the known effects of chemicals having similar composition). *See generally* Carolyne R. Hathaway et al., *A Practitioner's Guide to the Toxic Substances Control Act: Part I*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,207, 10,215-22 (May, 1994) [hereinafter Hathaway, *Part I*] (describing TSCA § 5); Carolyne R. Hathaway et al., *A Practitioner's Guide to the Toxic Substances Control Act: Part II*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,283, 10,285-90 (June 1994) [hereinafter Hathaway, *Part II*] (discussing consent orders under TSCA § 5).

95. *See* Wyman, *supra* note 88, at 430. In addition, the EPA considers "the costs and the economic impact of reducing or eliminating the risk, . . . the impact on the national economy and small business; the economic and social benefits associated with production and use of [the chemical]; and the availability of substitute chemicals or non-chemical alternatives." *Id.* (alteration in original) (quoting TSCA § 5(f); 15 U.S.C. § 2604(f)).

96. WOROBEC, *supra* note 17, at 20. The manufacturer may then begin production and the EPA will add the new chemical to its inventory of existing chemicals. *Id.*

97. *See* Hathaway, *Part I*, *supra* note 94, at 10,216 (discussing three mechanisms by which the EPA may extend the notice periods and postpone manufacture).

98. WOROBEC, *supra* note 17, at 21-22. The EPA may seek a court order banning the production of the new chemical either until it receives further information concerning the chemical, or until a formal ban is imposed. *Id.* at 21. TSCA § 6 authorizes the EPA to seek such formal bans through the rulemaking process. TSCA § 6(c); 15 U.S.C. § 2605(c). Because this process is quite lengthy, the EPA may seek injunctive relief to bar manufacture before such a rule is promulgated. TSCA § 5(e)-(f); 15 U.S.C. § 2604(e)-(f).

99. WOROBEC, *supra* note 17, at 22. The monitoring process requires formal rulemaking, which can take up to three years. *Id.* at 23.

100. TSCA § 5(a); 15 U.S.C. § 2605(a).

101. TSCA § 6(a)(2); 15 U.S.C. § 2605(a)(2). *See also* WOROBEC, *supra* note 17, at 22-23. This is called the "significant new use" rule. *Id.* at 22. If a manufacturer changes

B. *Section Four of the Toxic Substance Control Act*

Under section 4 the EPA can require a manufacturer to test identified chemicals and mixtures[102] in accordance with applicable EPA test rules.[103] Before the manufacturer performs such tests, however, the EPA must establish that the information currently available is not sufficient to assess the chemical's ill effects,[104] and that further testing of the chemical is the only way to develop this information.[105] In addition, the EPA must establish that the chemical presents an unreasonable risk of injury to health or the environment,[106] or prove that the quantity produced is so substantial that significant exposure to humans and the environment is reasonably expected.[107]

To determine whether a chemical poses an unreasonable risk, the EPA must find that the chemical presents a hazard, as well as a risk, and that this risk is unreasonable.[108] A chemical is considered a hazard if it may potentially effect humans or the environment.[109] If the EPA

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the use of a chemical, it must notify the EPA, and the EPA must re-evaluate the substance. *Id. See* Hathaway, *Part I, supra* note 94, at 10,215-22.

102. The EPA can require testing for environmental and ecological effects, and acute or chronic health effects, including cancer, gene mutations, birth defects, and behavioral changes. WOROBEC, *supra* note 17, at 24.

103. TSCA § 4(b); 15 U.S.C. 2603(b). *See, e.g.,* Chloromethane and Chlorinated Benzenes Proposed Test Rule: Amendment to Proposed Health Effects Standards, 45 Fed. Reg. 48,524, 48,525 (1980) [hereinafter Proposed Test Rule] (imposing a test rule requires identifying the chemical substances and mixtures to be tested, providing standards for the development of test data, and designating deadlines for the submission of data developed under the rule).

104. TSCA § 4(a)(1)(A)(ii); 15 U.S.C. § 2603(a)(1)(A)(ii).

105. TSCA § 4(a)(1)(A)(iii); 15 U.S.C. § 2603(a)(1)(A)(iii).

106. TSCA § 4(a)(1)(A)(i); 15 U.S.C. § 2603(a)(1)(A)(i). *See* Hathaway, *Part II, supra* note 94, at 10,291-92 (discussing "unreasonable risk" findings).

107. TSCA § 4(a)(1)(B)(i); 15 U.S.C. § 2603(a)(1)(B)(i). *See* Hathaway, *Part II, supra* note 94, at 10,292-93 (discussing "substantial quantities" findings).

108. Marko M. G. Slusarczuk, Note, *The Environmental Implications of an Emerging Energy Technology: Photovoltaic Solar Cells—A Study of the Toxic Aspects,* 9 B.C. ENVTL. AFF. L. REV. 889, 926 (1981) (examining how TSCA affects three semiconductor materials used in solar cells).

109. Proposed Test Rule, 45 Fed. Reg. at 48,528. The EPA considers physical and chemical properties, structural similarity to chemicals with known adverse effects, results from previous testing of the compound, and anecdotal and clinical reports of injury. *Id.* Determining whether a chemical presents a hazard is not based on definitive scientific data, but on reasonable scientific assumptions, extrapolations, and interpolations. *Id. See*

finds the chemical is a hazard, it must then determine whether the chemical poses a risk.[110] The EPA will find a risk where a possibility of exposing humans or the environment to that chemical exists.[111] Finally, if the hazardous chemical poses a risk, the EPA must determine whether the risk is unreasonable.[112] In determining whether a risk is unreasonable, the EPA balances the severity and probability of harm to humans or the environment, against the likely benefits to be derived from the use of the chemical.[113]

The Interagency Testing Committee (ITC),[114] and private citizens[115] can request the EPA to order a manufacturer to test a chemical.[116] If the EPA concludes that a test is necessary, it must first

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Slusarczuk, *supra* note 108, at 926 (referring to toxic, carcinogenic, mutagenic, and teratogenic effects as "hazardous").

110. The EPA examines the toxicity and exposure to determine whether a chemical presents a risk. Proposed Test Rule, 45 Fed. Reg. at 48,528 ("The hazard potential of a chemical is only part of the risk equation. . . . There is usually an inverse relationship between hazard and exposure. . . ."). *See also* DRULEY & ORDWAY, *supra* note 17, at 30 (explaining that risk of injury may occur from a chemical's manufacture, distribution in commerce, processing, use, or disposal).

111. Slusarczuk, *supra* note 108, at 927. *See* Chemical Mfrs. Ass'n v. EPA, 859 F.2d 977, 988 (D.C. Cir. 1988) (endorsing the Agency's contention that potential human exposure is sufficient to support a § 4(a)(1)(A) finding).

112. Slusarczuk, *supra* note 108, at 926.

113. *Id.* at 927. *See, e.g.*, Proposed Test Rule, 45 Fed. Reg. at 48,528.

114. TSCA § 4(e)(1)(A); 15 U.S.C. § 2603(e)(1)(A) (establishing the ITC to make recommendations to the EPA regarding the testing of certain chemicals and granting the committee the authority to give the EPA a priority list for promulgating rules). *See generally* TSCA § 4(e)(2)(A)(i)-(viii); 15 U.S.C. § 2603(e)(2)(A)(i)-(viii) (listing the committee members); TSCA § 4(e)(1)(A); 15 U.S.C. § 2603(e)(1)(A) (granting the EPA a year to respond to the ITC's list). *See also* WOROBEC, *supra* note 17, at 25-26 (describing the committee's functions).

In establishing priority chemicals, the committee considers all relevant factors, including the quantity manufactured, the quantity emitted into the environment, the number of individuals exposed and the duration of the exposure, whether the chemical is closely related to a substance that is known to cause an unreasonable risk of injury, the amount of data available, whether testing will develop data, and the availability of facilities and personnel to conduct the testing. TSCA § 4(e)(1)(A)(i)-(viii); 15 U.S.C. § 2603(e)(1)(A)(i)-(viii).

115. TSCA § 21; 15 U.S.C. § 2620. The EPA must respond to a citizens' petition within 90 days. TSCA § 21(b)(3); 15 U.S.C. § 2620(b)(3). *See also* WOROBEC, *supra* note 17, at 26-27. *See supra* notes 10-15 and accompanying text (discussing the citizen petition regarding the New River).

116. WOROBEC, *supra* note 17, at 25-27.

promulgate a test rule for the manufacturer to follow.[117] TSCA requires that all manufacturers of a particular chemical[118] perform the test and that they all follow the standards prescribed by the test.[119] After completing such a test, the manufacturer must submit the data it gathered to the EPA for publication in the *Federal Register*.[120] If the EPA concludes that the chemical poses an unreasonable risk, it must regulate the chemical[121] by enforcing the least burdensome regulation.[122] If the EPA determines that the chemical does not pose an unreasonable risk, it must explain its findings and rationale.[123]

C. *Section Six of the Toxic Substance Control Act*

The EPA controls a chemical by promulgating a rule.[124] In doing

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117. TSCA § 4(a); 15 U.S.C. § 2603(a). *See* DRULEY & ORDWAY, *supra* note 17, at 31 (promulgating a rule requires the EPA to consider the cost of the tests and the availability of test facilities). *See also* Administrative Procedure Act, 5 U.S.C. § 553 (1994) (outlining rulemaking procedures).

118. TSCA § 4(b)(3)(B)(i); 15 U.S.C. § 2603(b)(3)(B)(i). The EPA may allow two or more manufacturers to designate one qualified tester. TSCA § 4(b)(3)(A); 15 U.S.C. § 2603(b)(3)(A). *See* WOROBEC, *supra* note 17, at 27 (discussing cost sharing). *See also* Proposed Test Rule, 45 Fed. Reg. at 48,526 (discussing TSCA § 4(b)(3)(A)).

119. DRULEY & ORDWAY, *supra* note 17, at 30-31. The testing rule prescribes standards for developing the test data, and requires testing for toxicity, persistency, and other health and environmental effects. The rule may also prescribe test protocols and methodologies. *Id.*

120. TSCA § 14; 15 U.S.C. § 2613. *See* Hathaway, *Part II*, *supra* note 94, at 10,301 (discussing requirements to submit information to the EPA).

121. TSCA § 6(a); 15 U.S.C § 2605(a) (permitting the EPA to control or ban specific chemicals that pose an unreasonable risk to health or the environment); TSCA § 7; 15 U.S.C. § 2606 (permitting the EPA to regulate imminent hazards).

122. TSCA § 6(a); 15 U.S.C. § 2605(a). *See, e.g.*, TSCA § 6(a)(1) (prohibiting or limiting the amount of a chemical which may be manufactured, processed, or distributed); § 6(a)(2) (prohibiting or limiting the chemical to a particular use); § 6(a)(3) (requiring that a chemical be marked with adequate warnings and instructions); § 6(a)(4) (requiring the manufacturer or processor to retain records of the process used to manufacture the chemical); § 6(a)(5)-(6) (prohibiting or regulating the method of commercial use and disposal of the chemical); § 6(a)(7) (requiring the manufacturers or processors of the chemical to give notice of unreasonable risks to persons in possession of the chemical, to give public notice of such risk, and to replace or repurchase the chemical). *See generally* Carolyne R. Hathaway et al., *A Practitioner's Guide to the Toxic Substances Control Act: Part III*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,357, 10,358-63 (July 1994) (discussing TSCA § 6).

123. DRULEY & ORDWAY, *supra* note 17, at 33.

124. *Id.*

so, the EPA must consider the chemical's effect on health and the environment, its benefits, the availability of substitutes, and the economic consequences of the rule.[125] If the EPA determines that another federal law could eliminate or reduce the risk of injury to health or the environment, it will not promulgate a rule, unless it is in the public's interest to regulate the risk under TSCA.[126] Under TSCA section 6, the EPA may take a number of actions with regard to a hazardous chemical that poses unreasonable risks: the EPA may prohibit or limit manufacture, use, or disposal; and require warnings, instructions, and notices of risk of injury to distributors.[127]

D. *Section Eight of the Toxic Substance Control Act*

Section 8,[128] the general information-gathering provision, allows the EPA to regulate a manufacturer's actions[129] and make reasoned judgments on the safety and hazards of all existing chemicals.[130] The section requires chemical manufacturers to submit detailed reports regarding the chemicals they make.[131] The EPA uses this information, along with the PMNs,[132] to compile an inventory of every chemical

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125. TSCA § 6(c)(1); 15 U.S.C. § 2605(c)(1). *See also* TSCA § 2(c); 15 U.S.C. § 2601(c) (requiring the EPA to "consider the environmental, economic, and social impact of any action the [EPA] takes").

126. TSCA § 6(c)(1); 15 U.S.C. § 2605(c)(1). To determine whether it is in the public's interest to promulgate a rule, the EPA must consider all relevant aspects of the risk, such as the relative costs and efficiency of complying with TSCA and other federal laws. *Id. See, e.g.*, Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1229-30 (5th Cir. 1991) (rejecting the EPA's rule prohibiting asbestos use because the agency did not give manufacturers sufficient opportunity to challenge the EPA's data, did not consider less burdensome alternatives, and did not evaluate toxicity or available substitutes).

127. TSCA § 6(b); 15 U.S.C. § 2605(b). *See supra* note 122.

128. TSCA § 8; 15 U.S.C. § 2607.

129. *See* Slusarczuk, *supra* note 108, at 923 ("[Section 8's] record-keeping requirements are stringent.").

130. TSCA § 8; 15 U.S.C. § 2607. WOROBEC, *supra* note 17, at 28. Under § 8 the EPA may require manufactureres to maintain records and report the name; the molecular structure; the categories of use of the chemical; the amount to be manufactured; the byproducts resulting from the manufacture, use, or disposal of the chemical; the existing data on health or environmental effects; the number of occupational exposures; and the method of disposal. TSCA § 8(a)(2); 15 U.S.C. § 2607(a)(2).

131. TSCA § 8(a); 15 U.S.C. § 2607(a).

132. *See supra* part III.A.

manufactured in or imported to the United States.[133] In addition, section 8 requires manufacturers to keep records of all chemicals alleged to cause a significant adverse reaction to health or the environment.[134] Finally, manufacturers must notify the EPA immediately if they obtain information that shows a particular chemical creates a substantial risk of injury.[135]

E. *The Enforcement Provisions of the Toxic Substance Control Act*

TSCA has several enforcement provisions.[136] Section 11 authorizes the EPA to inspect any establishment, facility, or other premises that manufactures, processes, or stores chemicals.[137] The EPA has extensive authority to inspect premises to determine whether a manufacturer is complying with TSCA.[138] The EPA also has the power to subpoena both the testimony of witnesses and the production of various reports.[139] Section 15 ensures a manufacturer complies with section 11.[140]

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133. TSCA § 8(b)(1); 15 U.S.C. § 2607(b)(1). *See also* DRULEY & ORDWAY, *supra* note 17 at 58 (stating that the EPA will consider any chemical not on the inventory list a new chemical and thus will require a PMN).

134. TSCA § 8(c); 15 U.S.C. § 2607(c). Manufacturers must keep records of consumer allegations of personal injury, reports of occupational disease or injury, and complaints of injury to the environment submitted to the manufacturer. *Id.*

135. TSCA § 8(e); 15 U.S.C. § 2607(e).

136. *See, e.g.*, TSCA § 11; 15 U.S.C. § 2610 (allowing the EPA to inspect and subpoena manufacturers); TSCA § 16; 15 U.S.C. § 2615 (authorizing civil and criminal penalties for TSCA violations); TSCA § 20; 15 U.S.C. § 2619 (permitting citizens' civil actions); TSCA § 21; 15 U.S.C. § 2620 (permitting citizens to petition the EPA to ensure compliance with TSCA). *See generally* DRULEY & ORDWAY, *supra* note 17, at 48-54 (discussing enforcement). TSCA also contains a provision authorizing judicial review of any rule promulgated under TSCA. TSCA § 19; 15 U.S.C. § 2618. *See* DRULEY & ORDWAY, *supra* note 17, at 55-57.

137. TSCA § 11(a); 15 U.S.C. § 2610(a). The EPA also has authority to inspect any conveyance used to transport the chemicals. *Id.* The EPA must provide written notice of the inspection. *Id.*

138. TSCA § 11(b)(1); 15 U.S.C. § 2610(b)(1) (extending inspections to include "records, files, papers, processes, controls, and facilities"). *But see* TSCA § 11(b)(2); 15 U.S.C. § 2610(b)(2) (prohibiting inspection of financial data, sales data, pricing data, personnel data, and research data unless such information is described with reasonable specificity in the written notice of the inspection).

139. TSCA § 11(c); 15 U.S.C. § 2610(c).

140. TSCA § 15(4); 15 U.S.C. § 2614(4) (making it unlawful for a manufacturer to refuse to permit entry or inspection pursuant to section 11). *See also* TSCA § 16(a); 15 U.S.C. § 2615(a) (permitting the EPA to impose a civil penalty up to a maximum of

Another enforcement provision, section 21, allows a citizen to petition the EPA to commence a rulemaking proceeding under sections 4, 5, 6, and 8.[141] A citizen may also petition the EPA to amend, issue, or repeal an existing rule.[142] The EPA, upon receiving a petition, has ninety days to grant or deny the petition.[143] If the EPA grants the petition, it must commence a proceeding in accordance with sections 4, 5, 6, and 8.[144] If the EPA denies the petition or fails to make a decision, the petitioner has sixty days to file a civil action to compel the EPA to issue a rule.[145]

Finally, section 13 of TSCA[146] applies to importers.[147] Importers must certify, either on the entry documents or invoices, that any shipment of chemicals complies with TSCA.[148] Customs and the EPA work together to ensure that all imported chemicals comply with the certification requirements of the statute.[149] In addition, the Secretary of the Treasury may refuse entry to imports if the importer fails to comply with TSCA's requirements.[150] The Secretary may either dispose of the chemicals or store them until the manufacturer exports them.[151]

$20,000 for each day the manufacturer violates section 15). Criminal penalties for violating § 11 include $25,000 for each day of violation and up to one year imprisonment. TSCA § 16(b); 15 U.S.C. § 2615(b).

141. TSCA § 21; 15 U.S.C. § 2620.

142. TSCA § 21(a); 15 U.S.C. § 2620(a).

143. TSCA § 21(b)(3); 15 U.S.C. § 2620(b)(3).

144. *Id.*

145. TSCA § 21(b)(4)(A); 15 U.S.C. § 2620(b)(4)(A). *See* § 21(b)(4)(B)(i)(I) (authorizing the reviewing court to order the EPA to issue a rule or order under §§ 4 or 5 if the EPA does not have sufficient information to permit a reasoned evaluation of the chemical's effects on health or the environment); § 21(b)(4)(B)(ii) (authorizing a court to order the EPA to initiate a proceeding under §§ 6 or 8 if such a rule is necessary to protect health or the environment).

146. TSCA § 13; 15 U.S.C. § 2612.

147. *See* TSCA § 3(7); 15 U.S.C. § 2602(7) (defining the term "manufacture" to include importing into the customs territory of the United States).

148. Chemical Substances Import Policy, 40 C.F.R. § 707.20(c)(1)(i) (1995).

149. 40 C.F.R. § 707.20 (c)(2)(i) (allowing customs officials to refuse entry to any shipment not complying with TSCA and to detain any shipment if there is reasonable grounds to believe it violates TSCA).

150. TSCA § 13(a)(1); 15 U.S.C. § 2612(a)(1).

151. TSCA § 13(a)(2); 15 U.S.C. § 2612(a)(2). The consignee may export the chemical within 90 days of receiving notice of entry refusal. *Id.* The Secretary may release the chemical to the consignee pending a review by the EPA; however, the

Following the enactment of TSCA, the EPA and the public generally ignored it.[152] Rather than using TSCA to prevent pollution, the EPA focused its attention on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[153] which embodies an after-the-fact approach to pollution.[154] CERCLA grants the EPA the authority to *clean up* the pollution already in the air, water, and soil, whereas TSCA grants the EPA authority to *prevent* the introduction of harmful substances into the environment.[155]

IV. DOES AN ADMINISTRATIVE AGENCY HAVE THE AUTHORITY TO ISSUE SUBPOENAS?

Prior to 1940, federal agencies had limited investigatory powers.[156] The Supreme Court asserted that Congress did not intend to permit agencies to engage in "fishing expeditions into private papers on the possibility that they may disclose evidence."[157] During this period, the Court protected businesses from administrative investigations.[158] Beginning in 1943, however, the Supreme Court began to expand

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consignee must execute a bond for the full value of the substance and the duty on the substance. *Id.*

152. Hanan, *supra* note 57, at 408-09 (noting that the EPA regulated or banned "an insignificant number" of chemicals from 1979 to 1983). *See also* Ginsburg, *supra* note 61, at 10,335-36 (discussing the potential of TSCA § 21). For a discussion of the EPA's enforcement of TSCA, see U.S. COMPTROLLER GEN., ASSESSMENT OF NEW CHEMICAL REGULATION UNDER THE TOXIC SUBSTANCES CONTROL ACT 20 (1984) (concluding that the EPA has fallen short of achieving TSCA's goals for new chemicals); *What Ever Happened to the Toxic Substances Control Act?: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 200 (1988) (statement of Charles L. Elkins, Director of the Office of Toxic Substances Committee, EPA).

153. 42 U.S.C. §§ 9601-9675 (1994).

154. Ginsburg, *supra* note 61, at 10,336-37.

155. *See id.* at 10,337.

156. KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 4:1-4:2 (2d ed. 1978).

157. FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924) ("It is contrary to the [Fourth Amendment] to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."). In *American Tobacco*, the FTC issued petitions for writs of mandamus to two corporations under selected provisions of the Antitrust Acts. *Id.* at 303-04. The petition requested the "production of records, contracts, memoranda and correspondence for inspection and making copies." *Id.* The Court noted that a corporation's affairs should not be made public merely because it engages in interstate commerce. *Id.* at 305.

158. *See* DAVIS, *supra* note 156, §§ 4:1-4:2.

agencies' investigatory powers.[159]

In *Endicott Johnson Corp. v. Perkins*,[160] the Supreme Court considered the validity of a subpoena the Secretary of Labor issued during an administrative proceeding.[161] The Court enforced the subpoena because it determined that Congress had granted the Secretary of Labor, and not the courts, the power to administer the Walsh-Healey Act.[162] Three years later, when the Supreme Court decided *Oklahoma Press Publishing Co. v. Walling*,[163] it extended the rationale of *Endicott* to the Fair Labor Standards Act (FLSA) and enforced the subpoenas at issue.[164] The Court upheld language in the statute authorizing the Administrator to "enter and inspect such places and such records . . . and investigate such facts . . . as he may deem necessary or appropriate."[165] The Court held that no constitutional provisions prohibited the Administrator from exercising this congressionally granted subpoena authority.[166]

In *EEOC v. Children's Hospital Medical Center of Northern California*,[167] the EEOC sought enforcement of subpoenas it had issued.[168] The Ninth Circuit noted that the scope of judicial review in

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159. *Id.* at 229.

160. 317 U.S. 501 (1943).

161. *Id.* at 501-02. The Secretary of Labor issued the subpoena pursuant to the Walsh-Healey Public Contracts Act. *Id.* The recipient did not comply with the subpoenas and the district court declined to enforce them. *Id.* at 502. The circuit court of appeals reversed, and the Supreme Court granted certiorari. *Id.*

162. *Id.* at 507. The Court noted that, without the requested information, the Secretary was unable to fulfill the purposes of the Act. *Id.* at 508-09.

163. 327 U.S. 186 (1946). The Administrator of the Wage and Hour Division of the Department of Labor issued subpoenas seeking the production of various documents, so that the Administrator could determine whether petitioners violated the Fair Labor Standards Act (FLSA). *Id.* at 189.

164. *Id.* at 211.

165. *Id.* at 199 (quoting § 11 of the FLSA) (internal quotations omitted).

166. *Id.* at 214. Congress was authorized to grant such powers under the "Necessary and Proper" clause. *Id.*

167. 719 F.2d 1426 (9th Cir. 1983). Three black employees filed a racial discrimination claim with the EEOC. Pursuant to its investigation, the EEOC requested information from the hospital; however, the hospital refused to comply. *Id.* at 1427.

168. *Id.* The hospital resisted the subpoenas, claiming that the EEOC lacked jurisdiction because of a prior consent decree entered to settle a private class action suit. *Id.* The Ninth Circuit decided the case on the issue of the EEOC's authority to investigate, setting aside the effect of the consent decree. *Id.* at 1428.

an agency subpoena enforcement proceeding is "quite narrow."[169] The court held that prior to enforcing an agency subpoena, a court must determine whether (1) Congress granted the agency authority to investigate; (2) the agency followed procedural requirements; and (3) the agency seeks evidence that is relevant and material to the agency's investigation.[170] If an agency meets these three requirements, a court must enforce the subpoena, unless the opposing party can establish that the inquiry is unreasonably overbroad or unduly burdensome.[171]

In *EPA v. Alyeska Pipeline Service Co.*,[172] the EPA issued a subpoena under TSCA to Alyeska Pipeline and sued for its enforcement.[173] The EPA issued the TSCA subpoena while it was reviewing Alyeska Pipeline's application to renew its permit to operate a ballast water treatment (BWT) plant under the Clean Water Act (CWA).[174] Alyeska contended that the EPA "improperly used the investigatory powers under the TSCA to further its CWA investigation of the BWT plant" because the EPA does not have "the power to issue subpoenas under the CWA."[175] In response, the EPA argued that it was investigating alleged dumping violations, and that this was "outside the scope of a CWA relicensing investigation."[176]

The Ninth Circuit held that the EPA could exercise its subpoena authority without having to show a violation of TSCA.[177] The court stated that an administrative agency has "the power to obtain the facts requisite to determining whether it has jurisdiction over the matter sought to be investigated."[178] In addition, the court noted that an agency did

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169. *Id.*

170. *Id.* (citing Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946)).

171. *Children's Hospital*, 719 F.2d at 1428.

172. 836 F.2d 443 (9th Cir. 1988).

173. *Id.* at 445.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Alyeska Pipeline*, 836 F.2d at 447. The court distinguished *Children's Hospital*, noting that the EEOC's subpoena power may be exercised only in connection with an investigation of a charge. *Id.* TSCA does not comparably limit the EPA's subpoena power. *Id.*

178. *Id.* (citation omitted).

not have to allege a violation of TSCA in order to investigate.[179] In reaching its decision, the district court applied, and the Ninth Circuit affirmed, the *Children's Hospital* test[180] and concluded that the EPA had the authority to issue subpoenas to the BWT plant under TSCA.[181]

V. UNDER THE *CHILDREN'S HOSPITAL* TEST THE EPA DOES NOT HAVE THE AUTHORITY TO ISSUE SUBPOENAS TO THE MAQUILADORA PARENT COMPANIES

After the EPA receives a citizens petition, it must decide whether to grant or deny the petitioner's request for TSCA proceedings whether within ninety days.[182] In Southern California, petitioners have alleged that the maquiladoras in Mexicali, Mexico dump chemicals into the New River.[183] The petitioners have further alleged that the parent companies, through the maquiladoras, import these chemicals into the United States.[184] Thus, they assert, section 13 applies to the maquiladoras.[185] Section 13 requires that all chemicals entering the United States comply with TSCA.[186] However, if another federal law administered by the EPA applies to the complaint, the EPA is to defer to that authority, unless it believes that it is in the public interest to

179. *Id.*

180. *Id.* at 446. *See supra* text accompanying note 170 (detailing the *Children's Hospital* test).

181. *Alyeska Pipeline*, 836 F.2d at 446. Alyeska argued that the EPA's requests for documents were not relevant to an investigation under TSCA. *Id.* at 445-46. Specifically, it argued that only PCBs and "imminently hazardous" chemicals, not oil spills, are within the scope of TSCA. *Id.* The court, however, determined that Congress designed TSCA to cover the "regulation of all chemical substances," and concluded the requested documents were relevant to the TSCA investigation. *Id.* (citing Environmental Defense Fund, Inc. v. EPA, 636 F.2d 1267, 1271 (D.C. Cir. 1980)).

182. TSCA § 21(b)(3); 15 U.S.C. § 2620(b)(3). Because TSCA § 21 does not specify how the EPA is to decide whether to grant the petition, the EPA turns to the specific TSCA provisions and determines whether the specific standard are met. *See* Response to Petition, *supra* note 16, at 13,722 (discussing § 4 standards to determine whether to grant a citizens' petition).

183. Response to Petition, *supra* note 16, at 13,721.

184. *Id.*

185. *See id.*

186. TSCA § 13(a)(1); 15 U.S.C. § 2612(a)(1). *See supra* notes 146-51 and accompanying text.

protect against an unreasonable risk by enforcing TSCA.[187]

Although the maquiladoras are located in Mexico, the EPA, pursuant to its subpeona power in section 11,[188] issued subpoenas to the parent companies in the United States.[189] Under section 11, the EPA has the power to obtain the essential facts of an allegation prior to determining whether it has jurisdiction over that action,[190] and prior to proving a manufacturer has violated TSCA.[191] The EPA can request the production of reports, papers, documents, answers to questions, and other information it deems necessary.[192] The actual subpoenas issued to the American parent companies sought information to determine whether their chemicals were entering the New River.[193] This Note proposes that, under the *Children's Hospital* test,[194] the EPA did not have the authority to issue these subpoenas.

Even though the companies have already responded to the subpoenas,[195] the subpoenas were not self-enforcing,[196] and the recipients

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187. TSCA § 9(b); 15 U.S.C. § 2608(b).

188. TSCA § 11; 15 U.S.C. § 2610 (granting the EPA the power to inspect and subpoena). *See supra* notes 137-40 and accompanying text.

189. Telephone Interview with Michele Price, Environmental Assistance Division, Office of Pollution Prevention and Toxics, EPA (Feb. 21, 1995).

190. EPA v. Alyeska Pipeline Serv. Co., 836 F.2d 443, 447 (9th Cir. 1988) ("An independent regulatory administrative agency has the power to obtain the facts requisite to determine whether it has jurisdiction over the matter sought to be investigated.") (internal quotations omitted) (citing Federal Maritime Comm'n v. Port of Seattle, 521 F.2d 431, 434 (9th Cir. 1975)).

191. *Id.* (permitting the EPA to exercise its subpoena authority merely on the suspicion of a violation) (quoting United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950)).

192. TSCA § 11(c); 15 U.S.C. § 2610(c).

193. Letter from Lynn R. Goldman, M.D., EPA, to the 95 Subpoenaed Companies (Sept. 21, 1994) (on file with author). The EPA asked 26 questions. Administrative Subpoena Duces Tecum, *supra* note 18, at 7-9. The EPA requested the name of each chemical substance likely to be released into the water; a brief description of its use and the quantity used, manufactured, or processed by the facility during 1993; and the maximum amount of the chemical on-site at any one time during 1993. *Id.* at 7. The EPA additionally requested the name and quantity of each chemical substance exported to the maquiladora during 1993, whether it was released into the water, and whether the export continued in 1994. *Id.*

194. *See supra* notes 167-71 and accompanying text.

195. *See, e.g.*, Letter from Stanley W. Landfair, Counsel representing Ralston Purina Company, to Lynn R. Goldman, Assistant Administrator for Prevention, Pesticides and Toxic Substances, EPA (Jan. 6, 1995) (on file with author) (accepting the EPA's offer to withdraw the subpoena in exchange for voluntary answers to questions).

did not have to comply without federal court orders.[197] This Note proposes that if a federal court had been asked to enforce the subpoenas, it could not have ordered compliance for two reasons: First, Congress did not grant the EPA the authority to use TSCA as a vehicle to investigate the chemicals polluting a foreign river. Second, even if Congress did grant the EPA the authority to use TSCA to investigate the chemicals, the EPA did not follow the proper procedural requirements.

A. *Congress Did Not Grant the EPA the Authority to Investigate Chemicals Polluting Foreign Water Systems Under TSCA*

Section 11 explicitly authorizes the EPA to make inspections and issue subpoenas.[198] It may inspect any facility that manufacturers or stores chemical substances before or after the company distributes the chemicals into commerce.[199] Section 11 also permits the EPA to subpoena the testimony of witnesses and the production of reports and other information necessary to enforce TSCA.[200] The critical issue, however, is whether Congress intended to give the EPA authority to subpoena the American parent companies for information that only the maquiladoras operating in Mexico possess.

Traditionally, "federal statutes apply only to conduct within, or having effect within, the territory of the United States, unless the contrary is *clearly* indicated in the statute."[201] This general presump-

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196. *See* EPA v. Alyeska Pipeline Serv. Co. 836 F.2d. 443, 446 (9th Cir. 1988) ("An EPA subpoena is not self-enforcing.").

197. *Id. See also* TSCA § 11(c); 15 U.S.C. § 2610(c).

198. TSCA § 11; 15 U.S.C. § 2610.

199. *See* TSCA § 11(a); 15 U.S.C. § 2610(a) (extending power to inspect to any conveyance being used to transport chemical substances in connection with distribution in commerce). *But see* TSCA § 11(b)(2); 15 U.S.C. § 2610(b)(2) (exempting from inspection financial data, sales data, pricing data, personnel data, or research data).

200. TSCA § 11(c); 15 U.S.C. § 2610(c).

201. Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 589, 630 (1990) (citing Westinghouse Elec. Corp., 11 N.R.C. 631, 637 (1980)) (emphasis added) (internal citations omitted). *See, e.g.*, United States v. Wright-Barker, 784 F.2d 161, 166 (3d Cir. 1986) (applying statutes prohibiting narcotics importation to conduct occurring entirely outside the United States, based on an explicit provision in the statute). *See generally* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965) (stating that United States statutory law applies only to conduct occurring within the territory of the United States, unless the contrary is clearly indicated by the statute).

tion against the extraterritorial application[202] of federal statues honors national sovereignty and avoids unintended clashes between the laws of the United States and those of another nation.[203] Before a court can determine that a statute extends extraterritorially, it must find "a clear expression of congressional intent."[204]

In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*,[205] the Court of Appeals for the District of Columbia considered whether, in granting Westinghouse a license to export a nuclear reactor to the Philippines, the Nuclear Regulatory Commission (NRC) erred by failing to comply with the National Environmental Policy Act (NEPA).[206] The court had to determine whether the NRC was required to consider consequences in a foreign land[207] and whether such consideration constitutes an extraterritorial application of United

202. Extraterritoriality is a jurisdictional concept regarding one nations' authority to adjudicate the rights of particular parties and to establish the norms of conduct outside its borders. Environmental Defense Fund, Inc. v. Massey, 986 F.2d 528, 530 (D.C. Cir. 1993), *rev'g* 772 F. Supp. 1296 (D.D.C. 1991).

203. *Massey*, 986 F.2d at 530; Boureslan v. Aramco, Arabian Am. Oil Co., 892 F.2d 1271, 1272 (5th Cir. 1990) (refusing to apply Title VII extraterritorially because "respect for the right of nations to regulate conduct within their own borders is a fundamental concept of sovereignty"), *aff'd sub nom.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991). *See also* Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949) (finding no indication that other sovereigns gave the United States authority to regulate labor laws or customs in Iran or Iraq); American Banana Co. v. United Fruit Co., 213 U.S 347, 356 (1909) ("For another jurisdiction . . . to treat [a criminal] according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign. . . ."). *But see* Blackmer v. United States, 284 U.S. 421, 439 (1932) (finding that the actual service of a subpoena to a United States citizen in a foreign country does not invade the foreign government's sovereignty); Branch v. FTC, 141 F.2d 31, 35 (7th Cir. 1944) (exercising the United States sovereign control over its commerce and the acts of its resident citizens is not an invasion of the sovereignty of any other country or an attempt to act beyond the territorial jurisdiction of the United States).

204. *See* Turley, *supra* note 201, at 627.

205. 647 F.2d 1345 (D.C. Cir. 1981).

206. *Id.* at 1353. The Nuclear Regulatory Commission (NRC) authorized Westinghouse to export the reactor. *Id.* at 1348. The petitioners argued that the NRC did not prepare a "site-specific environmental impact statement" which is required under the National Environmental Policy Act of 1969 (NEPA). *Id.* at 1355. The Commission, however, argued that this statement was required only for "major federal actions occurring within, or having effects upon, the United States itself." *Id.*

207. *Id.*

States law.[208] Courts will uphold such an application given "an unequivocal mandate from Congress" that an agency consider foreign environmental impacts.[209] After examining NEPA's legislative history and judicial precedent, the court concluded that NEPA did not apply extraterritorially in this instance to prevent the NRC's action in granting the export license.[210]

In *Environmental Defense Fund, Inc. v. Massey*,[211] the D.C. Circuit noted two other exceptions to the presumption against the extraterritorial application of a federal statute.[212] First, the presumption is surmounted if the failure to extend the statute to a foreign setting will adversely effect the United States.[213] Second, one can overcome the presumption if the conduct that the agency wants to regulate occurs within the United States.[214] In order for the EPA to subpoena records

208. *Id.* at 1356.

209. *Id.* at 1357.

210. *Id.* at 1366-68.

211. 986 F.2d 528 (D.C. Cir. 1993).

212. *Id.* at 531.

213. *Id. See also* Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952) (applying the Lanham Trade-Mark Act extraterritorially to a United States national because his operations and their effects were not confined within the territorial limits of the foreign nation); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921-22 (D.C. Cir. 1984) (extending United States antitrust laws extraterritorially because the economic consequences of the alleged actions significantly impaired American interests).

Congress has enacted legislation to permit the government to defend itself against obstruction or fraud committed by its own citizens abroad. *See* United States v. Harvey, 2 F.3d 1318, 1329 n.13 (3d Cir. 1993) (extending the Protection of Children from Sexual Exploitation Act extraterritorially because the dissemination of child pornography relies heavily on the mail system, and other instrumentalities of interstate and foreign commerce); Schoenbaum v. Firstbrook, 405 F.2d 200, 208 (2d Cir. 1968) (extending the Securities Exchange Act extraterritorially to protect American investors who purchase foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities), *cert. denied*, 395 U.S. 906 (1969), *aff'd in part and rev'd in part*, 405 F.2d 215 (1968). *See generally* CHARLES C. HYDE, 1 INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 240 (1922) (noting that a State may punish its nationals for disobeying its commands while within a foreign country); L. OPPENHEIM, INTERNATIONAL LAW § 145 (Arnold D. McNair ed., 4th ed. 1928) ("The Law of Nations does not prevent a State from exercising jurisdiction over its subjects travelling or residing abroad, since they remain under its personal supremacy.").

214. *Massey*, 986 F.2d at 531. This exception does not apply in the scenario presented in this Note because the conduct, disposing chemicals into the New River, occurs outside of the United States.

located in Mexico, it must prove that TSCA extends extraterritorially. Although Congress does not have to state explicitly that the statute applies extraterritorially,[215] there must be an "unequivocal mandate from Congress" prior to extending the statute beyond United States borders.[216]

TSCA does not compel extraterritorial application. Its purpose is to prevent the manufacture, processing, and distribution of chemicals that pose an unreasonable risk to health and the environment.[217] TSCA does not give the EPA jurisdiction over the movement of all chemicals that cross the borders via rivers, air, or other natural means.[218] Congress adopted this statute to regulate the safe use of all raw materials rather than to control the finished products or waste.[219] Congress intended TSCA to require the EPA to examine all chemicals prior to their manufacture.[220] The EPA can enforce TSCA without extending the statute to the maquiladoras in Mexico by regulating the chemicals the maquiladoras intend to import into the United States. The EPA issued the subpoenas in order to identify the pollutants in the New River. This purpose, however, did not coincide with the goals of TSCA. The subpoenas act as an after-the-fact approach to solving the pollution problem, whereas Congress designed TSCA to be preventive.[221]

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215. United States v. Bowman, 260 U.S 94, 98-99 (1922) (holding that the false claims provision of the Criminal Code applies on the high seas even though the statute does not explicitly mention extraterritorial application).

216. Turley, *supra* note 201, at 630-31 (citing Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1357 (D.C. Cir. 1981)). *See, e.g.*, Private Correspondence with Foreign Governments, 18 U.S.C. § 953 (1994) (forbidding U.S. citizens, wherever they may be, from corresponding with foreign governments to influence or defeat U.S. measures); Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001(5)(A) (1988) (repealed 1993) (defining a national of the United States as any natural person who is a citizen of the United States); *Id.* § 5055(a) (forbidding any national of the United States to make or approve loans to the government of South Africa); Export Administration Act of 1979, 50 U.S.C. § 2415(2) (1988) (defining a "United States person" to mean any United States resident or national, any domestic concern and any foreign subsidiary or affiliate of any domestic concern).

217. See *supra* part III for a discussion of the purposes of TSCA.

218. Comments of the American Automobile Manufacturers Association on Section 21 Petition Filed by the Environmental Health Coalition 2 (May 23, 1994) (on file with author) (arguing that TSCA applies only to conventional import activities).

219. *See supra* note 65 and accompanying text.

220. *See supra* note 79 and accompanying text.

221. *See* Ginsburg, *supra* note 61, at 10,336-37.

The petitioners alleged that Congress intended TSCA to apply in this case because the chemicals in the New River were imports.[222] Section 13 gives the EPA authority to examine all chemicals entering the United States.[223] Prior to importing any chemicals, an importer must comply with all provisions of TSCA; if it fails to comply, the Secretary of the Treasury may refuse the chemicals entry.[224] Therefore, TSCA does not require extraterritorial application because the statute provides a mechanism for regulating imported chemicals.

In *Cunard Steamship Co. v. Mellon*,[225] the Supreme Court concluded that courts should apply the ordinary meaning of importation rather than a technical meaning.[226] Under TSCA, an importer is any person who imports a chemical substance, whether part of a mixture or article, into the customs territory of the United States.[227] An import is a product manufactured in a foreign country, and then shipped to and sold in the United States.[228] Thus, the purpose of importation is to sell

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222. Response to Petition, *supra* note 16, at 13,721.

223. TSCA § 13; 15 U.S.C. § 2612. *See supra* notes 146-51 and accompanying text.

224. TSCA § 13; 15 U.S.C. § 2612. See *supra* notes 146-51 and accompanying text.

225. 262 U.S. 100 (1923).

226. *Id.* at 121-22 (defining importation to mean bringing into the United States an article from outside, regardless of the mode). *See also* Biddle Sawyer Corp., No. II-TSCA-TST-88-0244, 1991 WL 209856, EPA at *3 (E.P.A. Aug. 21, 1991) (rejecting EPA's argument that importation does not cease with the act of entering the United States, but continues until the importer sells or otherwise no longer has control or possession of the substance); BLACK'S LAW DICTIONARY 755 (6th ed. 1990) (defining importation as the act of bringing goods and merchandise into a country from a foreign country).

227. Premanufacture Notification, 40 C.F.R. § 720.3(l) (1995) ("Importer includes the person primarily liable for the payment of any duties on the merchandise."). *Id.* "Importer" includes the consignee, the importer of record, the actual owner if an owner's declaration and superseding bond has been filed, or the transferee if the right to draw merchandise in a bonded warehouse has been transferred. *Id.* TSCA § 3 includes importing in the definition of "manufacture." TSCA § 3(7); 15 U.S.C. § 2602(7).

228. BLACK'S LAW DICTIONARY 755 (6th ed. 1990). *See* North American Free Trade, 19 U.S.C. § 3421(i)(1)(A) (1994) (defining imports to mean "any meat, poultry, other food, animal, or plant that is imported into the United States in commercially significant quantities"); Drug Abuse Prevention and Control, 21 U.S.C. § 951(a)(1) (1994) (defining import to mean "any bringing in or introduction of [any] article into any area"); Waring v. Mayor of the City of Mobile, 75 U.S. (8 Wall.) 110, 117 (1868) ("Imported goods may be entered for consumption or for warehousing. . . ."); Income Taxes, 26 C.F.R. § 1.1059A-1(b)(1) (defining import as the "filing of the entry documentation required by the U.S. Customs Service to secure the release of imported merchandise from custody of the U.S. Customs Service"); General Reporting and Record Keeping Requirement, 40 C.F.R. § 704.3 (defining "import for commercial purposes" as import

products in the United States.

Pollution in a foreign river does not have the same attributes as an import. The definition of an import clearly implies that it is a tangible and physical product.[229] Pollution, on the other hand, is defined as the "[c]ontamination of the environment by . . . hazardous substances, organic wastes and toxic chemicals."[230] Pollution in a river is not a good—an article or a piece of merchandise—nor is it sold in the United States. Likewise, pollution is not subject to customs duties[231] or inspections;[232] nor is it shipped to an importer of record for collec-

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"with the purpose of obtaining an immediate or eventual commercial advantage for the importer"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1135 (3d ed. 1986) (defining import as "to bring from a foreign or external source"). *See also* Tariff Act of 1930, 19 U.S.C. § 1332(e) (1994) (defining "article" to mean any "commodity, whether grown, produced, fabricated, manipulated, or manufactured"); *Id.* § 1401(c) (defining "merchandise" as "goods, wares, and chattels of every description," including prohibited imports); The Conqueror, 166 U.S. 110, 114 (1897) (referring to articles, goods, wares, and merchandise as words having a similar meaning under tariff acts); United States v. Kushner, 135 F.2d 668, 670 (2d Cir.) (defining gold bullion as merchandise), *cert. denied*, 320 U.S. 212 (1943); Sturges v. Clark D. Pease, Inc., 48 F.2d 1035, 1037 (2d Cir. 1931) (defining property brought in for the importer's personal use and consumption as merchandise under the Tariff Act); Lozano v. United States, 17 F.2d 7, 8-9 (5th Cir. 1927) (defining a foreign coin as merchandise under the Tariff Act); United States v. Mattio, 17 F.2d 879, 880 (9th Cir. 1927) (restricting the definition of merchandise under the Tariff Act to exclude personal effects and jewelry). *Cf.* Letter from Warren U. Lehrenbaum, Shaw, Pittman, Potts & Trowbridge, to Mark A. Greenwood, Director, Office of Pollution Prevention and Toxics, EPA 3 (May 25, 1994) (on file with author) (arguing that a person is not an importer of a substance if he utilized the substance abroad and it comes back into the United States as a pollutant).

229. *See supra* note 228.

230. BLACK'S LAW DICTIONARY 1159 (6th ed. 1990). *See also* Clean Water Act, 33 U.S.C. § 1362(6) (1994) (defining "pollutant," *inter alia*, as chemical wastes, biological materials, radioactive materials, and heat); National Wildlife Fed'n v. Gorsuch, 530 F. Supp. 1291, 1306 (D.D.C.) (extending the definition of pollution under the National Pollution Discharge Elimination System to include "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water"), *rev'd on other grounds*, 693 F.2d 156 (D.C. Cir. 1982); State, Dept. of Ecology v. PUD No. 1 of Jefferson County, Wash., 849 P.2d 646, 650 (Wash. 1993) (defining pollution under state's Water Quality Standards to mean man-induced alteration of streamflow level), *aff'd*, 114 S. Ct. 1900 (1994).

231. "Customs duties" are defined as "[t]axes on the importation and exportation of commodities, merchandise and other goods." BLACK'S LAW DICTIONARY 386 (6th ed. 1990).

232. *See* United States v. Uricoechea-Casallas, 946 F.2d 162, 164 (1st Cir. 1991) (providing that "all persons, baggage, and merchandise arriving in the Customs territory of the United States from places outside . . . are liable to inspection and search by a

tion.[233]

The language of the statute does not support the argument that pollution is an import. TSCA presupposes that the regulated substance is exported from a foreign location to a port of entry located in the United States, where the "importer of record"[234] collects the shipment after Customs certifies the shipment complies with TSCA.[235] Under section 13 of TSCA, Customs must inspect the importer's certified statement, entry documents, or invoices.[236] If the Secretary of the Treasury refuses entry to a chemical because the manufacturer failed to comply with TSCA, the Secretary must either dispose of or store the chemical until it is exported back to the originating country.[237] Thus, by implication, the agents in the "customs territory" has the capacity to separate, detain, and store banned imports.

Congress did not intend for the Secretary of the Treasury to detain the rivers flowing into the United States if they contain hazardous chemical substances. Furthermore, Congress did not direct the Secretary to examine every river, stream, lake, or ocean shore bordering the United States for chemicals that may pose an unreasonable risk to health or the environment. Rather, TSCA requires the Secretary to examine only the invoices, documents, and imports for compliance with the statute.[238]

If Congress wants legislation to extend to other jurisdictions, it must make a clear statement of the statute's extraterritorial application.[239] TSCA does not mention international or foreign concerns. Except for section 12,[240] TSCA does not use the words "foreign," "international,"

Customs officer") (quoting 19 C.F.R. § 162.6 (1990)).

233. *See* 40 C.F.R. § 720.3(l) (1995) (defining importer to include the importer of record).

234. *Id.*

235. TSCA § 13; 15 U.S.C. § 2612 (directing Secretary of the Treasury to refuse entry to chemical substances that fail to comply with TSCA); 40 C.F.R. § 707.20(c)(1)(i) (1995) (same); Reporting Requirements, 19 C.F.R. § 12.121(a) (1995) (requiring importers to certify that chemical shipments comply with TSCA).

236. 19 C.F.R. § 12.121(a) (1995).

237. 19 C.F.R. §§ 12.122-12.127 (discussing procedures to prevent entry).

238. 19 C.F.R. § 12.121(a) (requiring the importer to certify compliance with TSCA with the director of the port of entry prior to shipment).

239. *See supra* notes 201-16 and accompanying text.

240. TSCA § 12(b)(1); 15 U.S.C. § 2611(b)(1) (requiring a person who plans to export chemicals substances into a foreign country to notify the EPA of their intentions so that the EPA can notify the foreign government).

or "extraterritorially." In addition, courts have held that TSCA deals with the national, not international, economic impact of rules issued under TSCA.[241] International concerns are "conspicuously absent" from the statute.[242] Thus, a court must give great weight to the EPA's decision to ignore the international effects of its actions.[243]

In addition, Congress, when promulgating environmental legislation, is presumed to respect other sovereigns' authority to protect and exploit their own resources.[244] Other sovereigns "may strike balances of interests that differ substantially" from those of Congress.[245] The international community should resolve environmental problems through negotiation and agreement rather than through the extraterritorial imposition of one nation's laws.[246]

B. *Even if Congress Intended TSCA to Apply Extraterritorially, the EPA Must Follow the Proper Procedural Requirements to Meet Children's Hospital's Second Requirement*

After the EPA receives a citizens petition requesting a section 4 test, it has ninety days to decide whether it will grant the petition.[247] In the New River case, the EPA denied the petition because it believed it first had to characterize the chemical contamination in the river, and that a section 4 test rule was not the best or most expeditious way to obtain the

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241. *See, e.g.*, Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1209-10 (5th Cir. 1991) (holding that foreign entities lack standing under TSCA to challenge a rule). *See generally* Laura M. Helinski, Casenote, *Corrosion Proof Fittings v. Environmental Protection Agency: Compliance with Rulemaking Procedures*, 2 U. BALT. J. ENVTL. L. 203 (1992) (analyzing the Fifth Circuit's decision and holding).

242. *Corrosion Proof Fittings*, 947 F.2d at 1209.

243. *Id.* at 1210. *See also* Investment Co. Inst. v. Camp, 401 U.S. 617, 626-27 (1971) ("It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.").

244. United States v. Mitchell, 553 F.2d 996, 1002 (5th Cir. 1977).

245. *Id.* Some theorists argue that underdeveloped countries cannot simultaneously address economic growth and environmental protection. *See* H. Jeffrey Leonard, *Overview*, *in* ENVIRONMENT AND THE POOR: DEVELOPMENT STRATEGIES FOR A COMMON AGENDA 3, 4 (H. Jeffrey Leonard et al. eds., 1989). Thus, the argument goes, poor countries must accept "long-term environmental degradation to meet their immediate needs for food and shelter." *Id.*

246. *Id.*

247. TSCA § 21(b)(3); 15 U.S.C. § 2620(b)(3).

necessary information.[248] Due to the complexity of the various legal issues, the EPA first concluded that it would take several years to initiate and complete the test rule.[249] In addition, section 4 rulemaking would delay tracking the planned improvements in the maquiladoras' treatment facilities.[250] Finally, a test rule may not cover all of the petitioners' concerns because of the limited scope of TSCA.[251] The EPA also denied the petitioners' request to impose a test rule to evaluate the ecological and health risks of the river's pollutants.[252] The EPA agreed instead to work with the Agency for Toxic Substances and Disease Registry (ATSDR) to gather the data necessary to assess the ecological and health effects of the New River.[253]

A section 4 test is necessary when: (1) insufficient information exists to assess the effects of the chemicals; (2) the test will develop the necessary information; and (3) the chemical presents an unreasonable risk of injury to health or the environment.[254] If the EPA is unable to determine whether the chemical poses a risk because the available information is inadequate and insufficient, it must promptly commence an appropriate proceeding under TSCA.[255] In addition, once the EPA proceeds under TSCA, it should comply with the policy of TSCA, which holds the chemical manufacturers responsible for gathering the data necessary to determine whether the chemical poses an unreasonable

248. Response to Petition, *supra* note 16, at 13,723. If the EPA denies a petition it must publish its reasons in the *Federal Register.* TSCA § 21(b)(3); 15 U.S.C. § 2620(b)(3).

249. Response to Petition, *supra* note 16, at 13,723.

250. *Id.* The section 4 test rule would also prevent the EPA from immediately identifying possible unknown risks currently in the New River. *Id.*

251. *Id.* For example, the section 4 test ruling may not permit E. coli testing because it would be difficult to identify manufacturers, importers, or processors who would be subject to a rule. *Id.*

252. *Id.* at 13,721.

253. *Id.* at 13,723. In accordance with the La Paz Agreement, *supra* note 4, the EPA is taking other actions regarding the United States-Mexican border. The EPA will provide financial assistance to monitor the New River, and will discuss a monitoring program with Mexico. Response to Petition, *supra* note 16, at 13,723. The EPA will also work with Mexico on the wastewater treatment plant in the Mexicali area. *Id.* at 13,724. Finally, the EPA is taking action to collect information on the nature of the pollutants from California-based parent companies of maquiladoras, and is seeking information from SEDESOL. *Id.*

254. TSCA § 4(a); 15 U.S.C. § 2603(a).

255. *Id.*

risk.[256] Congress intended that the EPA would exercise its subpoena power only after it concluded that the information obtained through voluntary means was inadequate to enforce compliance with TSCA.[257]

The EPA denied a section 4 test even though it had insufficient information, and even after it concluded that the New River may present an unreasonable risk.[258] The EPA acknowledged that the information it had was several years old and did not reflect the present conditions of the New River, and that the previous samples could not definitively determine the identity or source of the pollution.[259] The EPA admitted that it could only determine whether a section 4 test was appropriate after it received and evaluated the up-to-date monitoring information on the identities, levels, and environmental partitioning of the pollutants in the river.[260] Because the EPA determined that it did not have sufficient information, under section 4, it should have granted a test rule. By failing to do so, the EPA violated TSCA procedures.

TSCA's purpose is to grant the EPA proper authority to regulate, prior to manufacturing, chemicals that may present an unreasonable risk to health and the environment. All manufacturers who want to develop or introduce a new chemical into the market must submit a PMN,[261] and if the EPA does not have sufficient information concerning the chemical, it can, under TSCA section 4, require the manufacturer to test the chemical and supply the necessary information to the EPA. In this instance, the EPA instead agreed to gather this necessary information by other means, violating TSCA's policy of requiring manufacturers to supply the information.[262]

When a manufacturer fails to comply with TSCA, the EPA can utilize TSCA's enforcement provisions. Section 11 gives the EPA the ability to inspect any establishment or facility that manufactures chemicals. Section 11 also allows the EPA to subpoena the production

256. TSCA § 4(b)(3); 15 U.S.C. § 2603(b)(3).

257. COMMERCE CLEARING HOUSE, TOXIC SUBSTANCES CONTROL ACT: LAW AND EXPLANATION ¶ 611 (1977).

258. Response to Petition, *supra* note 16, at 13,723 ("[T]he Agency recognizes that the New River may be a significant source of human exposure to an unquantified mixture of industrial and chemical pollutants.").

259. *Id.*

260. *Id.*

261. *See supra* part III.A.

262. *See supra* note 72 and accompanying text.

of documents it deems necessary to oversee TSCA.[263] Congress designed this section to help the EPA administer and enforce TSCA; however, because the EPA declined to grant a section 4 screen test, it was not administering or enforcing a provision under TSCA. Therefore, the EPA had no basis on which to issue subpoenas to the parent companies.[264]

C. *Even if the EPA Followed the Proper Procedures, it Does Not Have the Power to Enforce TSCA Regulations*

Although *Alyeska Pipeline* permits the EPA to exercise its subpoena authority without showing a violation of TSCA,[265] in that case the EPA had jurisdiction to enforce any TSCA regulations because Alyeska was located in the United States, and was thus subject to the EPA's regulations under TSCA. The maquiladoras, by contrast, are located in Mexico, incorporated under Mexican law, and are citizens of Mexico. Therefore, even if the EPA received valuable information from the American parent companies that the chemicals the maquiladoras discharged into a water system created an unreasonable risk, the EPA could not extend its regulations beyond the borders of the United States.[266]

VI. CONCLUSION

The American parent companies operating maquiladoras should not have complied with the EPA's subpoenas because the EPA violated the *Children's Hospital* test.[267] Although Congress granted the EPA the authority to subpoena companies who have not complied with TSCA, Congress did not intend for the TSCA regulations to extend extraterritorially. The plain language does not extend the statute extraterritorially, and the nature of the statute does not require extraterri-

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263. *See supra* notes 137-40 and accompanying text.

264. *But see* United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) ("[An agency] can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."); EPA v. Alyeska Pipeline Serv. Co., 836 F.2d 443, 447 (9th Cir. 1988) (imposing no requirement that subpoenas issue only to investigate discrete charges of violations of the law).

265. *Alyeska Pipeline*, 836 F.2d at 447.

266. See *supra* part V.A for a discussion of the extraterritorial application of TSCA.

267. *See supra* note 170 and accompanying text.

torial application. Finally, the EPA did not follow the procedures and underlying policies of TSCA.

The courts should only enforce EPA subpoenas where the EPA establishes that it would have jurisdiction to regulate under TSCA. Otherwise, the EPA would have the power to subpoena American parent companies without having the power to enforce its regulations. In effect, this would give the EPA unlimited authority to gather information concerning American subsidiaries located abroad.

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