



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

U.S. Law and the Stockholm POPs Convention: Analysis of Treaty-Implementing Provisions in Pending Legislation

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SUMMARY

The Safe Chemicals Act of 2011 (S. 847), a bill introduced by Senator Frank Lautenberg to modernize U.S. chemicals policy, includes implementing authority to permit the United States to ratify the Stockholm Convention on Persistent Organic Pollutants (POPs) and two other international agreements on dangerous chemicals. This analysis examines provisions of the bill that are required for implementation of the Stockholm Convention, particularly prohibitions on the production, use, import, and export of new and existing POPs, new reporting requirements, and other considerations. The analysis concludes that the Safe Chemicals Act of 2011 allows the United States to regulate newly listed POPs to whatever extent may be necessary for U.S. compliance with its international obligations. This analysis also considers other provisions that are relevant to U.S. regulation of POPs, such as federal preemption and notice and comment procedures, provisions that are not specifically required by the treaties. Finally, it reviews provisions to create a process for identifying and initiating risk reduction measures on chemicals that exhibit POPs characteristics, and finds that the bill empowers the United States to demonstrate global leadership on POPs in advance of global consensus.

I. INTRODUCTION

For several years, the Center for International Environmental Law (CIEL) has supported U.S. ratification of the Stockholm Convention on Persistent Organic Pollutants and two related international agreements on dangerous chemicals.¹ This analysis assesses the Safe Chemicals Act of 2011 (S. 847), a bill introduced by Senator Frank Lautenberg to reform U.S. chemicals policy.² This bill proposes to amend the Toxic Substances Control Act (TSCA), which is the principal federal law for regulating tens of thousands of chemicals used in industrial, commercial, and consumer products.

The Lautenberg bill authorizes the Environmental Protection Agency (EPA) to assign chemicals to three priority classes on the basis of available information and require

¹ Center for International Environmental Law (CIEL), *Analysis of POPs treaty implementing provisions in Senate and House TSCA reform bills* (2010), available at: http://www.ciel.org/Publications/TSCAPOPs_May10.pdf ; Center for International Environmental Law (CIEL), *U.S. Ratification of the Stockholm Convention: Analysis of Pending POPs Legislation* (2006), available at: http://www.ciel.org/Publications/POPs_Bills_28Feb2006.pdf

² For brevity, in this analysis the "Safe Chemicals Act of 2011" is also referred to as the "Lautenberg bill," the "Safe Chemicals Act," and "S. 847."

manufacturers and processors of chemicals to submit to EPA a “minimum data set” for every chemical substance that they place in commerce. Priority class 1 includes persistent, bioaccumulative and toxic chemicals (PBTs) that have the potential for widespread exposure. Chemicals in this class would be subject to expedited risk management. Chemicals in priority class 2 are required to undergo a safety determination, which may require the submission of additional data. Priority class 3 contains chemicals that EPA determines require no immediate action. The Safe Chemicals Act also provides greater public access to information, funding and other incentives for green chemistry, and other significant improvements over the existing TSCA.

The Lautenberg bill also provides implementing authority to allow the United States to ratify two treaties on persistent organic pollutants (POPs): The Stockholm Convention on POPs (Stockholm Convention), a global treaty that now includes 173 countries as Parties; and the POPs Protocol to the Convention on Long-Range Transboundary Air Pollution (LRTAP POPs Protocol), a regional accord among 51 countries including the United States, Canada, Russia and most of Europe. The bill also includes enabling legislation for the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention). The United States has signed but not ratified these three agreements, pending necessary implementing legislation.

All three of these chemicals treaties cover industrial chemicals and pesticides. In order for the United States to effectively ratify them, Congress must amend TSCA and the U.S. pesticides law, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Unless indicated otherwise, this analysis applies only to chemicals subject to TSCA jurisdiction. As described below, the 2009 listing of the pesticide lindane to the Stockholm Convention raises another jurisdictional issue for U.S. implementation on that agreement because lindane is registered for pharmaceutical use under the Federal Food, Drug and Cosmetics Act (FFDCA).

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This analysis centers on specific provisions of the Safe Chemicals Act that pertain to POPs implementing authority. It offers recommendations to ensure that the United States can meet its obligations under the two POPs treaties and can provide leadership on this pressing global issue. Part II provides background information about earlier

debates in Congress over U.S. implementing legislation for chemicals treaties. Part III analyzes provisions of the Safe Chemicals Act related to U.S. ratification and implementation of the two POPs agreements. It does this by (A) evaluating specific provisions that provide the implementing authority necessary to enable the United States to ratify the two agreements; (B) reviewing provisions that are integral to U.S. regulation of POPs chemicals, but not required for ratification; and (C) arguing for specific EPA authority to eliminate chemicals that exhibit POPs characteristics but have not yet been listed in the global treaties, empowering the United States to protect present and future generations of Americans and demonstrate international leadership. The analysis closes in Part IV with a summary of recommendations and conclusions.

II. BACKGROUND

From 2002 to 2006, Congress considered several legislative proposals intended to enable the United States to ratify the Stockholm Convention, LRTAP POPs Protocol, and Rotterdam Convention. These proposals were offered as standalone amendments to TSCA and FIFRA. There was little controversy over the twelve POPs chemicals originally named in the Stockholm Convention.³ Instead, the most contentious debates concerned EPA's authority to regulate POPs that would be added to the Stockholm Convention or the LRTAP POPs Protocol in the future. While most stakeholders publicly concurred that POPs implementing legislation should not be used to reform TSCA more broadly, some of the tactical posturing around those POPs bills anticipated how changes could influence eventual TSCA reform. Because fully fledged TSCA reform proposals have been introduced in Congress, POPs implementing legislation should no longer be seen as a proxy for fundamental reform. The POPs implementing passages in the Lautenberg bill are far shorter than earlier proposals, with fewer procedural requirements and less emphasis on creating obstacles to EPA regulation of POPs that are newly listed in the treaties.

Another factor justifying this leaner approach for implementing legislation is that all three treaties have developed a significant track record over the past several years. During earlier debates about POPs implementing legislation, many stakeholders had somewhat unrealistic expectations of the impacts that these treaties would have on U.S. regulation of chemicals. Some public interest groups envisioned international action under the Stockholm Convention as a primary driver for U.S. domestic POPs regulation, and a catalyst to help the United States overcome TSCA's dysfunction. Industry representatives cited the prospects of a "wacky" United Nations decision—whereby the Stockholm Convention Parties could, hypothetically, decide to ban gasoline—as reasons why U.S. law needed to establish barriers between international decision-making and domestic regulation.

In fact, the consensus-driven decision making process of the Stockholm Convention has proved to be extremely conservative: Seven years after the treaty's entry into force, just ten POPs have been added to the original "dirty dozen."⁴ When the Parties have agreed to list a POP that is still widely used in commerce, they have allowed exemptions for

³ The Stockholm Convention contains three annexes that list POPs that are subject to its controls. Annex A lists POPs destined for elimination. Nine of the original "dirty dozen" POPs were listed in Annex A, including the agricultural chemicals aldrin, chlordane, dieldrin, endrin, heptachlor, mirex, and toxaphene, as well as the industrial chemicals hexachlorobenzene (HCB) and polychlorinated biphenyls (PCBs). Annex B lists POPs subject to restrictions on production and use. It originally contained only the pesticide DDT. Annex C lists unintentionally produced POPs, which include polychlorinated dioxins, polychlorinated furans, PCBs, and HCB.

⁴ At the Fourth Conference of the Parties (COP4) in May 2009, nine additional POPs were added to the Stockholm Convention, bringing the total of chemicals or mixtures listed under the Convention to twenty-one. Eight POPs chemicals or mixtures were added to Annex A: alpha and beta hexachlorocyclohexane (HCH); two mixtures of poly-brominated diphenyl ethers, commercial octaBDE and commercial pentaBDE; and chlordane, hexabromobiphenyl (HBB), lindane, and pentachlorobenzene (PeCB). Perfluorooctane sulfonic acid (PFOS), along with its salts and perfluorooctane sulfonyl fluoride, was added to Annex B with multiple exemptions and acceptable purposes. At the Fifth Conference of the Parties (COP5) in May 2011, Parties agreed to add the pesticide endosulfan to Annex A, with specific exemptions.

most of its known uses. In practice, the international decision-making process for regulating POPs tends toward the lowest common denominator, so it is very likely to result in decisions with which the United States can easily comply.

Since the adoption of the Stockholm Convention in 2001, the United States has made clear that it will declare its right to abide by future POPs listings only when it affirmatively “opts in” to the listing amendment, as allowed under Article 25 of the Convention. With the opt-in declaration, the United States cannot be compelled to act on newly listed POPs against its wishes. In the context of TSCA reform, the most salient reasons for the United States to ratify the Stockholm Convention is to give the United States and EPA the authority needed to negotiate credibly with other countries to eliminate or reduce POPs that threaten human health and the environment, and to pressure other Convention Parties to more rigorously regulate chemicals that endanger the health of Americans at home.

III. ANALYSIS OF PROVISIONS RELATED TO U.S. RATIFICATION AND IMPLEMENTATION OF THE POPs AGREEMENTS

Several provisions in the Lautenberg bill provide implementing authority necessary to enable the United States to ratify the Stockholm Convention and LRTAP POPs Protocol. These are analyzed in Section A. Other important provisions that are central to U.S. regulation of POPs but not required by the treaty are assessed in Section B. Finally, Section C argues for stronger authorities in the Safe Chemicals Act to eliminate chemicals that exhibit POPs characteristics.

Unless described otherwise, section numbers are those that the bill indicates would appear in the re-authorized Act.

A. Provisions required to enable U.S. ratification of the POPs agreements

1. General Implementing Authority: The scope must be broad enough to ensure general authority to fully implement the intended treaties.

Safe Chemicals Act: As indicated in its section heading (“Implementation of [the] Stockholm Convention, the LRTAP POPs Protocol, and the Rotterdam Convention”), the scope of section 36 applies specifically to implementation of the three international agreements mentioned above. All of the section’s provisions are designed to do that and only that.

Section 36 gives EPA general authority to fully implement the two POPs treaties to the extent required. First, the definition of “chemical” for the purpose of implementing the POPs treaties is broader than the definition of “chemicals substance” used in the remainder of TSCA. Section 36(a)(1) at 174. Second, the bill states that EPA shall implement provisions of the POPs treaties for listed chemicals that are applicable to the United States, notwithstanding any other provision of law. Sections 36(b)(1)-(b)(2) at 176.

Comment: The scope is appropriately limited to the three international agreements mentioned above. This ensures the effectiveness of the general implementing authority granted to EPA, provided by the definition of “chemical” in section 36. This definition departs from TSCA’s original exemptions for chemical substances

under section 3(5)(B) such as pesticides, cosmetics, and pharmaceuticals. Further clarification in the bill could help to ensure that EPA has authority to act on POPs chemicals that fall outside the traditional jurisdiction of TSCA. Irrespective of this, the approach taken allows for effective implementation of the Stockholm Convention and LRTAP POPs Protocol with procedures that are attuned to these treaties.

2. **Exports:** Section 12(a) of TSCA currently exempts chemicals intended for export from nearly all of TSCA's provisions.

Safe Chemicals Act: Closes the export exemption by deleting section 12(a), and by expanding the Act's definition of "distribute in commerce" to include the export of a chemical substance, mixture, or article. Section 3(8) at 10 and section 12(1).

Comment: These amendments are necessary to allow the United States to comply with the Stockholm Convention, because the Convention prohibits the export of listed POPs, in most cases.⁵

3. **Prohibitions on listed POPs:** In order to ratify the Stockholm Convention, the United States must have the authority to prohibit production, use, import, and export of POPs that are both originally and subsequently listed in the Convention. This and the next paragraph cover provisions applicable to the original "dirty dozen" POPs listed in the Convention; paragraph 6, below, covers provisions applicable to POPs that have been added to the Convention or may be added in the future.⁶

Safe Chemicals Act: Prohibits manufacture, processing, use, distribution in commerce, etc. of a chemical if inconsistent with "applicable obligations" of the three treaties. Section 36(b)(2) at 177. All listings of POPs that have entered into force for the United States are subject to this requirement. Section 36(a)(3), (7) at 175-76. This approach avoids the need to name specific POPs chemicals in the legislation. EPA can promulgate implementing rules "to ensure compliance with any obligations under [the three treaties]." Section 36(b)(4) at 181.

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⁵ This and other provisions of the Senate bill are also relevant to implementation of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

⁶ This analysis is silent on whether the United States, in ratifying the Stockholm Convention, must accept all of the listed POPs as of the date of U.S. ratification, or may instead agree only to the "dirty dozen" that were listed in the original Convention that the United States signed in 2001. The Convention text is not clear on the point. The United States Government has expressed the view that it can ratify by agreeing only to the original twelve, and then could, if it chooses to do so, "opt in" to some or all of those POPs subsequently added to the Convention.

Comment: The Safe Chemicals Act extends the Stockholm Convention's prohibitions on all of the original POPs chemicals to U.S. law and thus allows the United States to ratify the Convention and LRTAP POPs Protocol in respect to those POPs.

- 4. Polychlorinated biphenyls (PCBs):** The Stockholm Convention and LRTAP POPs Protocol include PCBs among the original POPs listed for elimination.⁷ Due to the widespread, ongoing use of PCBs, especially in electrical equipment, both treaties provide for an extended phase-out period, rather than immediate elimination. TSCA section 6(e) generally prohibits the manufacture (including import), processing, and distribution in commerce of PCBs, unless the Administrator is petitioned for, and grants, an exemption. In considering the exemption, the Administrator must find that it will not result in an unreasonable risk of injury to health or environment. TSCA section 6(e)(3)(B). These prohibitions do not apply to the distribution in commerce of PCBs that were "sold for purposes other than resale" no later than April 1979. *Id.* However, all such distribution in commerce must be carried out in a "totally enclosed manner" unless the Administrator by rule authorizes otherwise. TSCA section 6(e)(2)(A). As currently written, section 6(e) could provide sufficient authority to allow the United States to comply with the PCB provisions of the two treaties *provided* that (A) PCB exports are prohibited except for the purposes of environmentally sound disposal, and (B) the terms of any exemptions granted under section 6(e)(3)(B) comply with applicable requirements of the treaties.

Safe Chemicals Act: Expands the Act's definition of "distribute in commerce" to include the export of a chemical substance, mixture, or article, thereby closing the TSCA export loophole. Section 4(8) at 10. The bill amends subsection 6(e) and redesignates it as subsection 6(f). Exemptions to the prohibition on manufacture, process, or distribution and to the "totally enclosed manner" requirement are allowed only upon the Administrator's finding that "a substantial endangerment to health or environment would not result." Section 7(f)(2)(C) and 7(f)(3)(B) at 88-89.

Comment: The Safe Chemicals Act generally enables U.S. compliance with the PCB provisions of the two POPs treaties. However, it allows possible conflicts where it retains the possibility of exemptions to PCB prohibitions and the potential of alternatives to the "totally enclosed manner" requirement. These possible conflicts can be avoided by inserting language requiring any exemptions or alternatives to comply with section 36.

Recommendation: The Safe Chemicals Act should be amended as follows to avoid possible conflicts between the applicable provisions of the two POPs treaties and rules or orders authorizing PCB exemptions and alternatives. Section 7(f)(2)(C) should be amended at page 88 to read:

"(C) ALTERNATIVE MANNER.—The Administrator may by order or rule authorize the manufacture, processing, distribution in commerce, or use (or any combination of such activities) of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that the manufacture, processing,

⁷ Unintentional production of PCBs from thermal processes such as incineration is also listed in Annex C of the Stockholm Convention. The United States regulates these types of emissions under the Clean Air Act, not TSCA.

distribution in commerce, or use (or combination of such activities)—

- (i) will not present a substantial endangerment to health or the environment; and
- (ii) will comply with section 36(b) of this Title and any regulations prescribed thereunder.”

Section 7(f)(3)(B) (“EXEMPTIONS”) should be amended at page 89 by deleting the word “and” at the end of subclause (I); replacing the period at the end of subclause (II) with “; and”; and adding a new subclause (III) at the end:

“(III) the terms of the exemption will comply with section 36(b) of this Title and any regulations prescribed thereunder.”

5. **Prohibitions on new POPs listings:** In addition to the original listings, U.S. implementing legislation must also provide regulatory authority for POPs that have been added to the treaties or may be added in the future. This issue was at the heart of previous disputes in Congress over POPs implementing legislation.

Safe Chemicals Act: Prohibits the manufacture, processing, use, distribution in commerce, etc. of a chemical if inconsistent with “applicable obligations” of the three treaties. Section 36(b)(2) at 177. All listings of POPs that have entered into force for the United States are subject to this requirement. Section 36(a)(4), (9) at 176. EPA can promulgate implementing rules “to ensure compliance with any obligations under [the three treaties].” Section 36(b)(4) at 181.

Comment: This language allows EPA to ensure U.S. compliance with its treaty obligations for newly listed POPs, if the United States decides to opt-in to a particular listing.

B. Provisions related to U.S. regulation of POPs, but not required for U.S. ratification

1. **Preemption:** In previous POPs implementing legislation, preemption was a key issue for public interest organizations and many state governments, because some proposals would have required federal action on POPs chemicals to preempt stronger action by the states. The Safe Chemicals Act amends TSCA section 18 so that TSCA generally will not preempt state or municipal chemicals laws and regulations.

Safe Chemicals Act: State laws are not preempted “unless compliance with both [the Act] and the State . . . regulation . . . is impossible.” Section 18 at 141.

Comment: The approach accommodates and respects different approaches by state and federal regulators, unless a state chemical law directly contradicted the federal standard. This approach protects state interests regarding POPs.

2. **Notice and comment requirements for new POPs listings:** In earlier POPs bills, there was bipartisan support for public notice and comment during the treaty considerations of new listings of a chemical. Unfortunately, these provisions became excessively detailed and burdensome, as industry and their congressional allies crafted complex procedures that could provide a basis for later legal challenges. In

the Safe Chemicals Act, these procedures are significantly streamlined, with fewer opportunities for delay.

Safe Chemicals Act: Includes notice and comment requirements at three points of the new listing process: submission/proposal of a chemical for listing, recommendation by the expert committee to list it, and (for Stockholm only) the decision of the Conference of the Parties to list. Throughout the process, EPA may require information from manufactures, users, or others involved with the chemical. Section 36(b)(3) at 177-81.

Comment: The streamlined notice and comment requirements in the Safe Chemicals Act are superior to notice and comment requirements that appeared in previous proposals for POPs implementing legislation. The bill's requirements are tailored to the specific procedures of the three conventions and thus allow more timely and relevant input by stakeholders.

3. **Savings clause:** EPA needs statutory authority to regulate a newly listed POP in a timely fashion to enable U.S. compliance with the Stockholm Convention and LRTAP POPs Protocol. However, because these international agreements tend to be negotiated at the lowest common denominator, it will be important for EPA to have

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the ability to regulate beyond the minimum requirements of the treaties.

Safe Chemicals Act: Section 36 does not speak to whether EPA can use additional authorities to regulate POPs chemicals more ambitiously than required under the Stockholm Convention.

Recommendation: The Safe Chemicals Act should clearly indicate that EPA could regulate a new listing beyond the requirements of the treaty, by including a savings clause in section 36 such as:

“Effect on other provisions of law. Nothing in this section shall affect the authority of the Administrator to regulate a chemical under any other provision of law, provided that such regulation—

“(1) does not conflict with regulations prescribed under this section, and

“(2) does not impair the ability of the United States to comply with its obligations under the Stockholm Convention, LRTAP POPs Protocol, or Rotterdam Convention.”

Additionally, the Safe Chemicals Act should include a provision in which a new treaty listing would require EPA to place the chemical on the section 6(a)(2) priority class 1 list, if it is not already there. Such a requirement would be in addition to the section 36(b)(2) requirement that manufacture, use, etc. of a chemical is prohibited if it is inconsistent with applicable obligations of the three treaties. The added provision could apply in the event that the new POP listing that triggered EPA regulation allowed continued use of the POPs substance. In that situation, such a provision

would ensure that the substance would be placed on track for possibly stricter domestic treatment than that required for compliance under either POPs agreement.

C. Provisions to restore U.S. leadership on persistent, bioaccumulative and toxic chemicals

The Stockholm Convention and LRTAP POPs Protocol are founded on a shared international understanding that chemicals that are especially persistent, bioaccumulative, toxic and prone to long distance environmental transport may warrant global action. The treaty provides a framework for reaching agreement among the various Parties to eliminate production, use, and trade, except under exceptional circumstances. This understanding continues to inform Stockholm Convention and LRTAP POPs Protocol Parties in their treatment of chemicals that are no longer widely used in commerce. However, for those POPs that are still widely used, the consensus-driven international decision-making process has difficulty taking strong action. Americans should not anticipate that the Stockholm Convention will drive strong domestic regulation of POPs. Instead, the authority to deal decisively with POPs must be grounded in domestic law that authorizes EPA to take prompt action against dangerous chemicals, including those with POPs characteristics. Such U.S. action can help inform and strengthen the prospects for global consensus through this important international agreement.

While the United States once led the way internationally, unfortunately the United States is often viewed now as a stumbling block, rather than champion, for effective global action on chemicals. The Safe Chemicals Act provides an important opportunity to enable the United States to demonstrate international leadership on these global pollutants. Renewed U.S. leadership serves the national interest by reducing exposure to extremely toxic chemicals that are produced and used both at home and abroad.

Safe Chemicals Act: Sections 6(a)(2)(B)-(C) require EPA to classify, within one year, 20 to 30 persistent, bioaccumulative and toxic substances with the potential for widespread exposure to humans and other organisms (i.e. "priority class 1"). Within eighteen months of classification, EPA shall impose conditions necessary to achieve the "greatest practicable reductions in human or environmental exposure to the chemical substance." Section 6(a)(2)(D). If, after one year, the applicable safety standard is not met, further conditions shall be imposed as necessary to meet the standard. Section 6(a)(2)(D). Read together with section 36(b)(4), section 6(a)(2)(D)(ii) allows EPA to take prompt action on POPs that have not yet been added to one of the treaties.

Comment: The Safe Chemicals Act allows EPA to take action on POPs and other persistent, bioaccumulative and toxic chemicals, whether or not a substance has been added to one of the POPs treaties. This represents a major improvement over the placeholder language in Senator Lautenberg's 2010 Safe Chemicals Act.

Recommendation: A savings clause would clarify the power of EPA regulate beyond what the two POPs treaties require.

IV. CONCLUSION

Senator Lautenberg's Safe Chemicals Act contains necessary provisions to allow the United States to ratify and implement the Stockholm Convention and LRTAP POPs Protocol for chemicals under TSCA jurisdiction. The bill provides the public with reasonable opportunities for notice and comment when chemicals are considered for addition to the treaties. It allows continued state action on POPs in most situations.

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Additionally, the bill closes the existing TSCA loophole that allows U.S. exports of domestically banned or restricted chemicals.

The Safe Chemicals Act bans all of the intentionally produced POPs chemicals originally listed in the Stockholm Convention and the LRTAP POPs Protocol, and thus allows the United States to ratify the treaties in respect to those POPs.

Similarly, the bill gives EPA broad

authority to regulate newly listed POPs to whatever extent may be necessary to ensure U.S. compliance with its obligations under the treaties. The Lautenberg bill provides EPA with sufficient authority to restrict POPs and other persistent, bioaccumulative and toxic chemicals, empowering the United States to lead global action on these chemicals at the international level.