



U.S. Ratification of the Stockholm Convention: Analysis of Pending POPs Legislation

March 13, 2006 Update

I. Summary

The U.S. Congress is considering legislation to implement an important international environmental treaty that the United States signed in 2001 but has not ratified. Before the Senate can give its “advice and consent” to the Stockholm Convention on Persistent Organic Pollutants (POPs), Congress must make modest changes to existing laws that govern pesticides and industrial chemicals. After a lull of many months the Bush Administration has shown renewed interest in quick ratification, because it wants to have a say in international decisions about adding other POPs to the treaty. Public interest advocates have challenged Congress to regain international leadership on this issue by ensuring essential elements in the implementing legislation.

Of the four POPs bills introduced in the 109th Congress to date, only the bill by Rep. Hilda Solis (H.R. 4800) would enable the U.S. to implement the letter and spirit of the Stockholm POPs Convention. Other bills pending in the House and Senate fall far short of the mark. These bills share three fatal flaws.

- 1) They would allow EPA to do nothing when Stockholm Convention parties decide to regulate an additional POP, even when the United States has supported that international decision;

- 2) They would let business profits trump the health-based standard in the POPs Convention; and
- 3) They would preempt the right of states, local governments, and Indian tribes to uphold stricter standards on POPs.

These bills will not permit the United States to fully implement the Stockholm Convention. Environmental, health, and other public voices call on Congress to reject these proposals in favor of legislation that will ensure that the United States can meet its international obligations and regain leadership in eliminating these dangerous pollutants.

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II. The Stockholm POPs Convention

The Stockholm Convention on Persistent Organic Pollutants (POPs) is an international treaty to eliminate or severely restrict a small number of the world's most dangerous environmental contaminants. POPs are toxic chemicals that can travel long distances by wind and water, linger in the environment for years, and concentrate in the food chain and in our bodies. POPs can cause cancer and neurological effects, and damage developmental, reproductive, and immune systems. POPs released anywhere in the United States can harm people thousands of miles away.

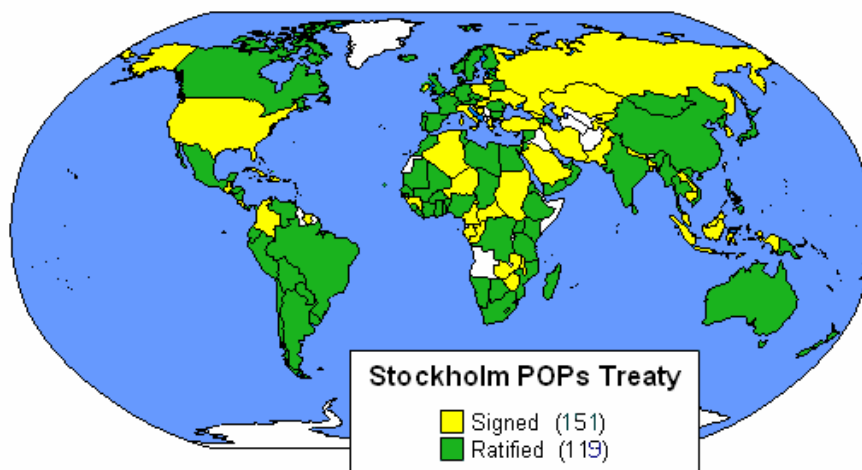
POPs released in other countries threaten Americans here at home. The Stockholm Convention identifies twelve POPs for immediate action. Nine pesticides including aldrin, chlordane, and DDT, the notorious industrial chemicals PCBs, and unintentional pollutants like dioxins are among the initial "dirty dozen." The treaty also creates an international scientific review process for adding other POPs to the list. As shown in Figure 1, as of March 1, 2006 more than 119 countries had ratified the Stockholm Convention, including almost every major U.S. ally and trading partner

The Stockholm "Adding Mechanism"

Because the dirty dozen POPs represent only a few of these life-threatening chemicals, the Stockholm Convention contains a crucial "adding mechanism" for identifying other POPs and incorporating them into the international agreement. As U.S. negotiators hammered out the treaty's terms, they insisted on a rigorous, scientific review process for evaluating potential POPs proposed by participating governments or "parties."

The international scientific experts that comprise the POPs Review Committee (POPRC) must first determine whether nominated chemicals meet the technical criteria of persistence, bio-accumulation, long range transport, and adverse effects on human health or the environment. If so, the POPRC develops a draft risk profile and evaluates socio-economic aspects of control measures for consideration by the parties. If the POPRC determines that global action is warranted, governments collectively decide whether the POPs chemical should be formally listed in the Stockholm POPs get-together. Yet the treaty contains (at the urging of U.S. negotiators) an explicit "opt in" provision for new POPs listings, ensuring that the United States can never be forced to regulate a new POP against its will.

Figure 1. The U.S. has signed, but not ratified, the Stockholm POPs Treaty.



Source: UNEP Chemicals, March 1, 2006. <http://www.pops.int>

III. U.S. POPs Ratification

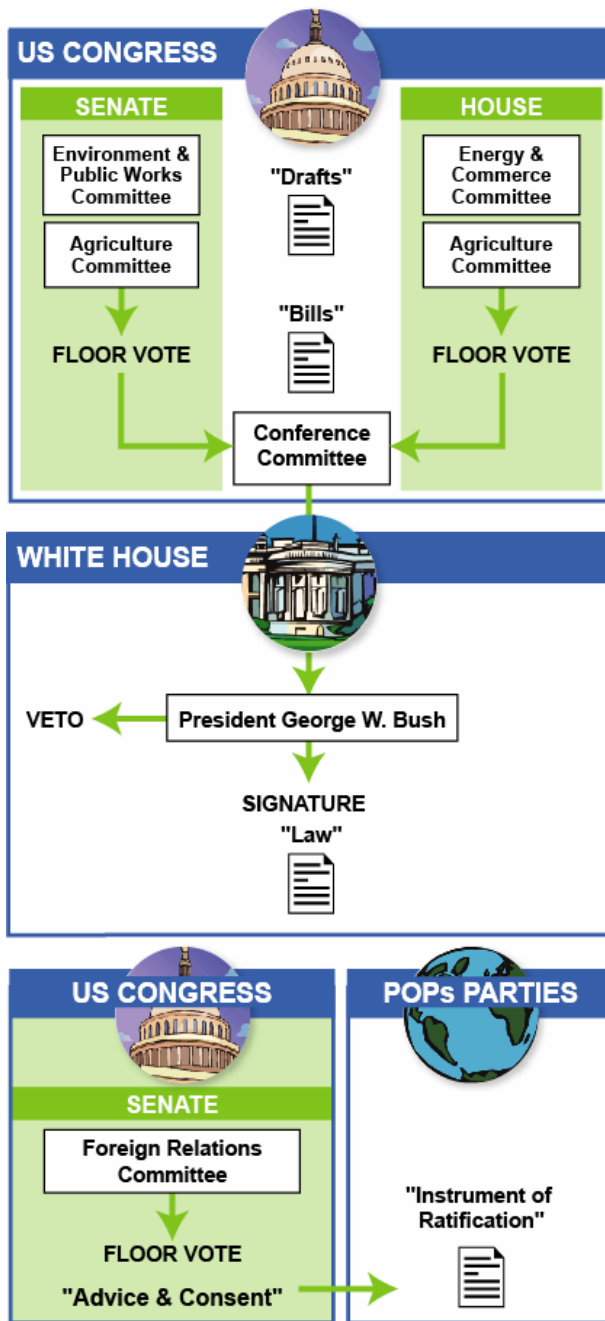
The U.S. government under President George W. Bush signed the Stockholm Convention in 2001, but has so far failed to ratify it. The President's official transmittal of the Stockholm Convention to the Senate,¹ made clear that additional legislative authority is required to ensure the United States' ability to implement the treaty. U.S. ratification of the Stockholm Convention first requires that the Congress make modest changes to two federal laws: the Federal Insecticide, Fungicide, and Rodenticide Act, or FIFRA which regulates pesticides;² and the Toxic Substances Control Act, or TSCA which regulates industrial chemicals.³

As illustrated in Figure 2, these amendments require action by two committees in the Senate and two in the House of Representatives. These bills must be approved by both houses of Congress, reconciled in conference, adopted by Congress and signed by the President. Only then may the Senate give its "advice and consent" allowing the United States to formally ratify the Convention and join other nations as a party. The United States will become a party to the treaty 90 days after submitting its formal instrument of ratification.

When President Bush called for speedy ratification of the Stockholm POPs Convention in a Rose Garden ceremony in 2001, industry groups and environmentalists applauded his commitment to international environmental law. But in the years since, Congress has made only fitful progress on the required TSCA and FIFRA amendments.

After prolonged discussions between industry, environmental groups, and committee staff, the Senate Environment & Public Works Committee (EPW) unanimously passed a TSCA bill (S. 1486) in July 2003. To date this is the only POPs bill to be voted out of a committee. The Administration circulated a draft FIFRA bill in February 2004, which was considered by the Chair and Ranking

Figure 2. Roadmap for U.S. POPs Ratification



¹ Treaty Doc. 107-5, May 7, 2002.

² 7. U.S.C § 136 et seq.

³ 15. U.S.C § 2601 et seq.



... the United States can never be forced to regulate a new POP against its will



Member of the Senate Agriculture Committee, Senator Cochran (R-MS) and Senator Harkin (D-IA) respectively, but never introduced. In June 2004, a House Energy & Commerce Subcommittee considered a “discussion draft” by Subcommittee Chair Gillmor (R-OH). The draft was roundly rejected by the minority Democrats and sharply criticized by legal, public health, and environmental experts who testified at a hearing July 13, 2004.⁴ An alternative draft by Representative Solis (D-CA) but not introduced. These drafts and bills all expired at the conclusion of the 108th Congress in December 2004.

Pending POPs Legislation

On September 21, 2005 a FIFRA POPs bill was introduced in the House and referred to the House Agriculture Committee (H.R. 3849 - Lucas, Goodlatte, and Peterson). A Senate FIFRA POPs bill was introduced Nov. 17, 2005 and referred to the Senate Agriculture Committee (S. 2042 - Chambliss and Harkin). On December 16, 2005 Representative Gillmor introduced H.R. 4591, a TSCA POPs bill nearly identical to his 2004 draft. Rep. Solis, Ranking Member of the House Subcommittee on Environment and Hazardous Materials, responded on February 16, 2006 by introducing H.R. 4800, a bill that would amend TSCA to enable the U.S. to implement its obligations under the Stockholm POPs Convention.

In addition to the Stockholm Convention on POPs, these bills also contain language to implement two related international chemicals agreements: the Long Range Transboundary Air Pollution (LRTAP) POPs Protocol, under the auspices of the United Nations Economic Commission for Europe; and the Rotterdam Convention on Prior Informed Consent (PIC) concerning international trade in certain hazardous chemicals and pesticides. In terms of implementation in the United States, the LRTAP POPs Protocol is quite similar to the Stockholm Convention. U.S. ratification of the Rotterdam PIC Convention is beyond the scope of this analysis.

POPs Bills in the U.S. Congress

Pending Bills: 109th Congress

H.R. 4800	Solis bill (TSCA)
H.R. 4591	Gillmor bill (TSCA)
H.R. 3849	Lucas-Peterson bill (FIFRA)
S. 2042	Chambliss-Harkin bill (FIFRA)

Previous Bills: 108th Congress

S. 1486	Chaffee-Jeffords bill (TSCA)
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⁴http://www.ciel.org/Chemicals/Implementation_15July04.html

IV. Essential Elements for Regaining U.S. POPs Leadership

Following the first meeting of the Stockholm Convention in May 2005, where the United States was relegated to observer status, pressure has been rising for U.S. ratification. In July 2005 Secretary of State Rice and EPA Administrator Johnson sent a joint letter to the House and Senate leadership warning of “negative repercussions for U.S. leadership” in international chemicals discussions if Congress does not act quickly to adopt necessary implementing legislation.⁵

Implementing legislation should facilitate U.S. action on POPs, not hinder it. Once the United States commits to regulating POPs that have been added to the treaty, EPA must have the legal authority to respond quickly and effectively.

On September 7, 2005 U.S. environmental and health groups responded with a set of “essential elements” of U.S. leadership on POPs Ratification.⁶ The five principles, listed below, provide a yardstick for assessing POPs bills pending in the 109th Congress.

Essential Elements of U.S. Ratification

1. **Require EPA action as POPs are added.**
2. **Adopt the POPs treaty’s health-based standard.**
3. **Respect state actions on POPs.**
4. **Avoid duplicative domestic review.**
5. **Require public notice and comment.**

1. Require EPA Action as POPs Are Added

Whenever a POPs chemical is added to the Stockholm Convention, U.S. POPs legislation should require EPA to decide in a timely manner whether to regulate it or not. The Bush Administration and some others have claimed that linking U.S. regulatory action to the decisions

of the international scientific review process would surrender U.S. sovereignty. This is a fundamental misunderstanding. The POPs implementing legislation is an expression of the will of Congress directing EPA action. The Convention does not obligate the United States to take action on each new POP that is added internationally. In fact the United States will acquire the obligation to regulate a newly listed POP only if it affirmatively “opts-in.” This ensures that the Convention can never dictate U.S. actions.

The Solis bill (H.R. 4800) strikes the right balance, requiring prompt regulatory response by EPA once the United States commits to opt-in on a new POP chemical. However, the other pending bills fall short of this essential element. None would require EPA to undertake a time-bound process to evaluate the need for regulatory action on POPs that are added to the Stockholm Convention.

2. Adopt the POPs Treaty’s Health-based Standard

One decisive component of POPs implementing legislation is the regulatory standard that EPA would apply in deciding whether to regulate POPs added to the Stockholm Convention. Under the treaty’s review procedure, a chemical is subject to a risk management evaluation when it is determined to be “likely as a result of its long-range environmental transport to lead to significant adverse human health and/or environmental effects.” The risk management evaluation then determines control measures that will mitigate those effects. Moreover, the Convention requires national control measures to be whatever “legal and administrative measures [are] necessary to eliminate” production, use, import, and export of the chemical. U.S. POPs legislation should provide EPA with sufficient authority to ensure that the United States can comply with any obligations it assumes under the Stockholm Convention. Therefore the regulatory standard in the implementing legislation should be consistent with the Convention’s standard.

⁵http://www.ciel.org/Publications/POPs_Frist_22Jul05.pdf

⁶http://www.ciel.org/Publications/POPs_Leadership_7Sep05.pdf

Under the Gillmor TSCA bill (H.R. 4591) if EPA decided to try to regulate, it could do so only “to the extent necessary to protect human health and the environment in a manner that achieves a reasonable balance of social, environmental, and economic costs and benefits.” Such a cost-benefit balancing test could make it impossible for the United States to comply with a new listing under the Convention and should be rejected. On the other hand, the Solis bill (H.R. 4800) adopts the health-based standard that is at the heart of the POPs Convention, requiring EPA to implement the control measures in a manner that protects against “significant adverse human health or environmental effects,” as specified in the treaty.

Under FIFRA two regulatory standards are potentially applicable to POPs pesticides. Traditionally, EPA has applied a risk-benefit standard in making decisions about pesticide



Implementing legislation should support state and local laws that safeguard public health and the environment from POPs.



registration. However, under the Food Quality Protection Act, pesticide residues on food are regulated according to the health-based standard of “reasonable certainty of no harm.” Since the overwhelming majority of human exposures to POPs are through food, EPA should regulate all pesticides added to the Stockholm Convention under the FQPA health protection standard, unless the pesticide registrant can affirmatively demonstrate that there is a reasonable certainty that no harm will result from aggregate exposure. Unfortunately the pending FIFRA POPs bills propose to regulate any newly listed POP pesticide under FIFRA’s weaker “risk-benefit” standard.

3. Respect State Actions on POPs

Implementing legislation should support state and local laws that safeguard public health and the environment from POPs. California, Hawaii, Illinois, Maine, Michigan, New York, Washington, and other states are already taking action on brominated flame retardants and other priority POPs. Such progress could be jeopardized by POPs legislation that preempts state and local authority to maintain stricter standards.

The twin FIFRA bills would have no direct impact on the rights of state and local governments to regulate POPs. However, the House TSCA bill (Gillmor H.R. 4591) would preempt and invalidate all state standards on a POPs chemical whenever an international listing for that chemical becomes binding for the United States. Even if the United States obtained an exemption under the international listing to avoid taking action on the chemical, the Gillmor bill would invalidate all state laws regulating the chemical. (Comparable state preemption language was recently removed from proposed legislation on chemical security.⁷) In contrast, the Solis bill would amend TSCA Section 18(b) to give states and other political jurisdictions the discretion to regulate POPs chemicals *more stringently* than federal law, without needing EPA’s approval.

4. Avoid Duplicative Domestic Review

The international procedure to add POPs to the Stockholm Convention guarantees a thorough, deliberate, science-based review over the course of years. Once the United States becomes a party to the Convention, the U.S. government is expected to participate fully in this process. Therefore, decisions reached under the treaty to ban or severely restrict additional POPs should provide the starting point for U.S. domestic regulation. The United States should utilize the information and analysis developed through the Convention’s scientific review process in future domestic regulation of POPs.

The Solis bill (H.R. 4800) would take advantage of the findings of the international POPs review process and authorize EPA to request other

⁷ “Chemical Facility Anti-Terrorism Act of 2005,” S. 2145, Sec. 10, pp. 60-61.

relevant information. This would allow EPA to consider peer-reviewed and other information submitted through public comment, but would not require EPA to embark on a fruitless search for scientific certainty before taking action.

Although the other pending POPs bills don't prohibit EPA from considering the body of evidence supporting an international POPs listing decision, they nonetheless require EPA to start from scratch. Instead of streamlining EPA's rulemaking processes after such a decision, these bills would require EPA to conduct an entirely new domestic review process that would be slow, costly, and burdensome and could delay U.S. actions on new POPs for years.

Under the House FIFRA bill (Lucas-Peterson H.R. 3849), the EPA Administrator would have

complete discretion whether to prepare a report on the costs and benefits of any prohibitions or restrictions. However, if EPA chose to prepare such a report, it would have to submit the report to "peer review." Similarly the Senate FIFRA bill (Chambliss-Harkin S. 2042) would subject EPA reports to "peer review" following POPRC decisions that POPs criteria are met and that global action is warranted. Peer review is an essential function in scientific and other research. Yet it is not appropriate to subject U.S. regulatory processes to peer review. Peer review should not be required when EPA summarizes Stockholm Convention processes or comments received in response to a Federal Register notice. This review would function solely as a procedural obstacle while doing nothing to enhance the quality of EPA's rulemaking considerations.

Table 1: Assessing U.S. POPs Implementing Legislation

U.S. POPs Legislation		Essential Elements of U.S. Leadership on POPs				
		1. Require EPA action as POPs are added.	2. Adopt the POPs treaty's health-based standard.	3. Respect state action on POPs.	4. Avoid duplicative domestic review.	5. Require public notice and comment.
House TSCA	H.R. 4800 Solis	OK	OK	OK	OK	OK
		Mandatory rule-making unless EPA decides standard isn't met	Significant adverse health, environmental effects standard	Allows more stringent state, local POPs rules		Mandatory
House TSCA	H.R. 4591 Gillmor	NO	NO	NO	NO	OK
		Discretionary rule-making, even if U.S. opts in.	Cost-benefit balancing standard	Preempts all state, local POPs rules		Mandatory
Senate TSCA	S. 1486 Chafee-Jeffords (108th Congress)	NO	NO	NO	NO	OK
		Discretionary rule-making, even if U.S. opts in.	Hazard-based standard	Preempts all state, local POPs rules		Mandatory
House FIFRA	H.R. 3849 Lucas-Peterson	NO	NO	OK	NO	NO
		Discretionary rule-making, even if U.S. opts in.	FIFRA's risk-benefit standard	No preemption of state POPs rules		Optional, but EPA report must undergo "peer review"
Senate FIFRA	S. 2042 Chambliss-Harkin	NO	NO	OK	NO	OK
		Discretionary rule-making, even if U.S. opts in.	FIFRA's risk-benefit standard	No preemption of state POPs rules		Mandatory, but EPA report must undergo "peer review."

5. Require Public Notice and Comment

POPs legislation should facilitate transparency and public participation in the international listing process by requiring EPA to solicit public notice and comment as POPs chemicals are evaluated in the international scientific review and to require information about POPs production and use.

Both the Solis bill (H.R. 4800) and the Gillmor bill (H.R. 4591) require EPA to initiate notice and comment in response to three international events: a POPRC decision that a chemical meets the POPs criteria, a POPRC decision that global action is warranted, and a Conference recommendation to list a chemical. These TSCA bills explicitly authorize EPA to request information about production or use of a chemical as it is considered for listing.

The House FIFRA bill (Lucas-Peterson H.R. 3849) does not require EPA to initiate

mandatory notice and comment at key stages during the international POPRC process. The Senate FIFRA bill (Chambliss-Harkin S. 2042) requires EPA to initiate notice and comment in response to three international events: a POPRC determination that a chemical meets the POPs criteria, a POPRC decision that global action is warranted, and a Conference recommendation to list a chemical. Neither FIFRA bill explicitly authorizes EPA to request information about current or anticipated production or use.



Implementing legislation should facilitate U.S. action on POPs, not hinder it.



V. Conclusions

When pending POPs implementing legislation is matched against the criteria for U.S. leadership on POPs, only one bill in Congress makes the grade. Of the four bills analyzed in this briefing document, the Solis TSCA bill (H.R. 4800) is the only one that embraces the letter and spirit of the Stockholm Convention. H.R. 4800 adopts the health-based standard that is at the heart of the POPs Convention, gives EPA clear authority to protect Americans from persistent organic pollutants, and allows state, local and tribal authorities to adopt more stringent health protection measures.

The health and environment community strongly supports passage of the Solis bill, and hopes that its core elements will become the standard for all future POPs implementing legislation. The Solis TSCA bill stands alone as the only proposal before Congress that will meet the expectations of Americans and put the United States on the road to regaining international leadership in eliminating these dangerous pollutants.