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Persistent Organic Pollutants (POPs): Background and Issues in the 107th Congress

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Summary

Persistent organic pollutants (POPs) are chemicals that can harm human health and wildlife, do not break down easily in the environment, and tend to accumulate as they move up the food chain. Many POPs are transported in the air and water across international boundaries. In the last four years, the United States has joined in negotiations of three international agreements to address POPs:

- the 2001 Stockholm Convention on Persistent Organic Pollutants (POPs Convention), negotiated under the auspices of the United Nations (UN), “to protect human health and the environment from persistent organic pollutants” worldwide;
- the 1998 Aarhus Protocol on Persistent Organic Pollutants to the 1979 Geneva Convention on Long-Range Transboundary Air Pollution (POPs Protocol), a regional agreement that seeks to “to control, reduce or eliminate discharge, emissions and losses of persistent organic pollutants” in Europe, some former Soviet Union countries, and the United States; and
- the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention), negotiated under the auspices of the UN, that requires exporting countries to provide prior notification to potential importing nations of substances that are banned or severely restricted in the exporting country.

Although the United States has signed all three agreements, prior to U.S. ratification of the POPs and PIC Conventions, the Senate must give its advice and consent, and Congress must enact enabling (also known as “implementing”) legislation. The POPs Protocol does not require Senate approval; however legislation is needed to resolve inconsistencies between provisions of all three agreements and existing U.S. laws.

This report compares two Senate proposals in the 107th Congress to implement the agreements, S. 2118 and S. 2507, as introduced. Both would amend two environmental statutes, the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Although both bills would have provided EPA the necessary authority to implement the POPs Convention and Protocol, the bills differed in the extent to which they would have facilitated full compliance with the agreements, especially with respect to any future amendments that might add chemicals to be regulated. If similar proposals are introduced into the 108th Congress, concerns about the domestic and international ramifications of each approach may be a focal point for debate.

This report does not constitute a legal analysis of the bills or of amendments to existing law. Instead, it summarizes bill provisions, highlights key differences, and considers the implications of those differences for policy development with respect to POPs. This report will not be updated (For more recent information, see CRS Report RL32150, *International Agreements on Persistent Organic Pollutants (POPs): Background and Issues for Congress*).

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Persistent Organic Pollutants (POPs): Background and Issues in the 107th Congress

Introduction

Persistent organic pollutants (POPs) are chemicals that can harm human health and wildlife, do not break down easily in the environment, and tend to accumulate as they move up the food chain. Many POPs are transported in the air and water across international boundaries. Most POPs are synthetic, industrial chemicals or pesticides, but a few are unintentional byproducts, for example, of combustion.

In the last four years, the United States has participated in the negotiation of three United Nations-sponsored international agreements to address global problems associated with POPs:

- the 2001 Stockholm Convention on Persistent Organic Pollutants (POPs Convention);
- the 1998 Aarhus Protocol on Persistent Organic Pollutants (POPs Protocol), an amendment to the 1979 Geneva Convention on Long-Range Transboundary Air Pollution (LRTAP); and
- the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention).

The United States has signed all three agreements, but before the POPs Convention and the PIC Convention may be ratified by the United States, the Senate must give its advice and consent to ratification, and both Houses of Congress must enact enabling (also known as “implementing”) legislation. The POPs Protocol does not require Senate approval; however legislation is needed to resolve inconsistencies between provisions of all three agreements and two U.S. laws: the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹

In April 2002, Senator Jim Jeffords (I-VT), Chairman of the Senate Committee on Environment and Public Works, introduced S. 2118, which would enable implementation of the POPs Convention and the LRTAP POPs Protocol. In May 2002, the Bush Administration drafted its own version of legislation to enable implementation of all three agreements; a similar but reorganized version of the

¹ For summaries of these laws, see CRS Report RL30022, *Environmental Laws: Summaries of Statutes Administered by the Environmental Protection Agency*, updated January 4, 2001.

Administration's bill was introduced by Senator Bob Smith (R-NH) as S. 2507. The Administration's bill was introduced in the House by Representative Paul Gillmor (R-OH) the following month as H.R. 4935. Recognizing that H.R. 4935 and S. 2507 are the same in substance, this report will discuss the similarities and differences between the Senate bills – S. 2118 and S. 2507.

Two key issues were reflected in the differences in the two bills:

- whether Congress should amend TSCA and FIFRA at this time to authorize EPA to regulate pollutants added in any future amendments to the agreements, eliminating the need for future enabling legislation, and if so, whether Congress should exempt regulations for POPs chemicals from certain statutory requirements, so as to expedite rulemaking; and
- whether legislation should include ancillary provisions that are not strictly necessary to implement the agreements.

Although both bills would have provided EPA the necessary authority to implement the POPs Convention and Protocol, the bills differed in the extent to which they would have facilitated full compliance with the agreements, especially with respect to any future proposals to add chemicals to be regulated. If similar proposals are introduced into the 108th Congress, concerns about the domestic and international ramifications of each approach may be a focal point for debate.

This report does not constitute a legal analysis of the bills or of amendments to existing law. Instead, it summarizes bill provisions, highlights key differences, and offers comments to assist the reader in understanding the differences.

Background on the Agreements

Stockholm Convention

The United States was heavily involved in negotiations leading to the Convention on Persistent Organic Pollutants, a global treaty negotiated under the auspices of the United Nations (UN). The treaty was opened for signature in Stockholm, Sweden in 2001. Known as the POPs Convention, this treaty seeks “to protect human health and the environment from persistent organic pollutants.”

The Stockholm Convention would restrict production, import, export, use, release, and disposal of eight chlorinated pesticides (aldrin, chlordane, DDT, dieldrin, endrin, heptachlor, mirex, and toxaphene), polychlorinated biphenyls (PCBs), hexachlorobenzene (HCB), polychlorinated dibenzo-p-dioxins (dioxins), and polychlorinated dibenzo-p-furans (furans). Specific exemptions from restrictions are allowed, for example, for use of DDT to fight malaria-carrying mosquitos.²

² Exemptions are listed in Annex A of the Stockholm Convention. Text is available at [<http://www.chem.unep.ch/sc/>], visited Sept. 27, 2002.

The Stockholm Convention would require each participating country to create a national implementation plan; establish a monitoring network; ensure public awareness of the problems posed by POPs; and compile inventories of POP use and storage. Developing countries would be assisted in these tasks between 2002 and 2005 by up to \$500 million in funding from the Global Environment Facility (GEF), which is administered by the United Nations and the World Bank.

The Convention allows new chemicals to be added to the list by amendment to treaty Annexes A, B, and C. Any party to the Convention may propose an amendment to list additional chemicals. Amendments may be adopted at a meeting of the Conference of the Parties (COP), after being circulated to all parties at least six months in advance of the meeting. Parties at the meeting must try to reach agreement by consensus, but when consensus cannot be reached, a vote by three-fourths of the parties present and voting is sufficient to adopt the amendment. Article 8 requires that before chemicals may be added to the annexes:

- chemicals must meet criteria listed in Annex D, with respect to chemical characteristics and environmental and human health effects;
- a risk profile is prepared according to Annex E, based on information submitted by the Parties or observers;
- a review committee decides, on the basis of the risk profile, that “the chemical is likely, as a result of its long-range environmental transport, to lead to significant adverse human health and/or environmental effects such that global action is warranted”;
- a risk management review is conducted according to Annex F, including evaluation of possible alternative control measures in terms of their feasibility, efficacy, risk, availability, accessibility, costs, and positive and negative impacts on health, agriculture, living things, economy, progress toward sustainable development and social costs; and
- the COP decides, taking into account any scientific uncertainty, “in a precautionary manner,” to list the chemical and to adopt associated control measures.

The amendment enters into force for all parties one year after adoption, except for any party which either –

- “opts out” by notifying the depositary within the year that it does not accept the amendment, or
- makes a declaration at the time it deposits its instrument of treaty ratification that any amendment to Annexes A, B, or C will enter into force for it only if it affirmatively accepts that amendment (i.e., “opts in”).

The United States particularly favored inclusion of the latter treaty provision.³ Canada made such a declaration when it deposited its instrument of ratification.

³ Treaty Doc. No. 107-5, p. 15.

As of May 22, 2002, the last day the POPs Convention was open for signature, 151 countries and regional economic integration organizations had signed, including the United States. By September 3, 2002, 21 countries had ratified the POPs Convention, but not the United States.⁴ The treaty will enter into force when 50 countries have deposited their instruments of ratification. The President transmitted the POPs treaty document (Treaty Doc. No. 107-5) to the U.S. Senate on May 7, 2002, where it was referred to the Committee on Foreign Relations. The Committee took no action on the POPs treaty during the 107th Congress.

POPs Protocol

The 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP) is a regional agreement among countries that are members of the U.N. Economic Commission for Europe (UNECE), including the United States. It was negotiated to deal with air pollution problems through air quality monitoring, cooperative research and exchanges of information, and development of national policies and strategies aimed at reducing emissions of pollutants. The UNECE has 55 members, mainly European and former Soviet Union countries, as well as the United States and Canada. The United States signed the LRTAP Convention on Nov. 13, 1979, and deposited its instrument of acceptance on Nov. 30, 1981. The LRTAP Convention is treated as an executive agreement, rather than a treaty, under U.S. law. Therefore, the President did not submit the agreement to the Senate for formal advice and consent. The LRTAP Convention entered into force in 1983. It has been ratified, accepted, approved, or acceded to by 49 parties.

Amendments to the Convention may be proposed by any party and may be adopted by consensus among representatives of the parties. Amendments enter into force for parties which have accepted it 90 days after two-thirds of the parties have deposited their instruments of acceptance, and for any other party 90 days after it has deposited its instrument of acceptance of the amendment.

In 1998, a POPs Protocol to LRTAP was concluded in Aarhus, Denmark. The objective of the amending protocol is “to control, reduce or eliminate discharges, emissions and losses of persistent organic pollutants.” It requires parties to take “effective measures ... to eliminate the production and use of substances listed in Annex I” (aldrin, chlordane, chordecone, DDT, dieldrin, endrin, heptachlor, hexabromobiphenyl, hexachlorobenzene [HCB], mirex, PCB, and toxaphene) and to ensure that when such substances are destroyed, disposed of, or moved across international boundaries, it is in an “environmentally sound manner.” The POPs Protocol requires countries to restrict uses of substances listed in Annex II (DDT, hexachlorocyclohexane (HCH)⁵, and PCB); to ensure environmentally sound disposal of substances listed in Annex I, II, or III (polyaromatic hydrocarbons (PAHs),

⁴ United Nations Environment Program. “List of Signatories and Parties to the Stockholm Convention as of 3rd Sept. 2002.”

[<http://www.chem.unep.ch/sc/documents/signature/signstatus.htm>], visited Sept. 27, 2002.

⁵ Lindane is HCH in which at least 99% of the isomer is in the gamma form. Technical HCH consists of mixed isomers.

dioxins/furans, and HCB); and, if possible, to reduce total annual emissions of each substance in Annex III.

The POPs Protocol allows new chemicals to be added by amendment to the lists in treaty Annexes I or II. Any party may propose an amendment adding a chemical, which may be adopted by consensus of the parties represented at a session of the executive body in the same manner as amendments to the LRTAP Convention. However, before chemicals may be added to the annexes, the POPs Protocol requires:

- a risk profile on the substance and information demonstrating that the substance meets selection criteria specified in Executive Body Decision 1998/2, with respect to chemical characteristics and the potential for environmental and human health effects;
- a summary report and information on production, uses, emissions, levels in the environment, degradation processes, rates, and products, bioavailability, and socio-economic factors related to alternatives for reducing emissions, including costs and benefits of each;
- an Executive Body decision that the risk profile is acceptable and further action is warranted;
- one or more technical reviews of the risk profile; and
- evaluation of the proposal, on the basis of the risk profile and technical review(s), in light of the objective of the POPs Protocol in Article 2: “to control, reduce or eliminate discharges, emissions and losses of persistent organic pollutants.”

The POPs Protocol will enter into force for the countries that accept it when 16 countries have deposited their instruments of acceptance. As of September 30, 2002, 36 countries (including the United States) and the European Union had signed the POPs Protocol, and 12 countries had accepted it, but not the United States.⁶

The LRTAP POPs Protocol contains specific exemptions to the prohibitions on production, use, and disposal. For instance, quantities of chemicals used in laboratory research are exempted from the prohibitions. Another exemption allowed under the POPs Protocol as well as the POPs Convention is the use of DDT for controlling vectors of disease.

PIC Convention

The PIC Convention, another global treaty negotiated under the auspices of the UN, was concluded in Rotterdam, the Netherlands in 1998. The PIC Convention has as its objective:

... to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human

⁶ United Nations Economic Commission for Europe. “Status of Ratification of the 1998 Aarhus Protocol on Persistent Organic Pollutants (POPs) as of 20 September 2002.” [http://www.unece.org/env/lrtap/status/98pop_st.htm], visited Sept. 27, 2002.

health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties.

The PIC Convention provides for prior notification to potential importing nations by countries exporting substances that have been banned or severely restricted in the exporting country. Parties exporting certain chemicals listed in the convention must generally ensure that the importing party has consented to import the chemical.

At the close of the signature period on September 10, 1999, 73 countries (including the United States) and the European Union had signed the convention. As of September 10, 2002, 33 countries had ratified the PIC Convention, but not the United States.⁷ There must be 50 parties to the convention before it can enter into force. The President transmitted the treaty (Treaty Doc. No. 106-21) to the Senate on February 9, 2000. The treaty is awaiting action by the Committee on Foreign Relations.

Legislation to Implement the Agreements

S. 2118 and S. 2507/H.R. 4935 were introduced in the 107th Congress to amend existing U.S. statutes, TSCA and FIFRA, to authorize EPA implementation and to resolve inconsistencies with provisions of the three international agreements.

Brief Summary of Existing Statutes

TSCA. TSCA (15 USC 2601-2671) authorizes EPA to identify potentially dangerous products or uses of chemicals in manufacturing and commerce that should be subject to federal control. TSCA mandates the screening of new and existing chemicals in commerce to determine whether their production, importation, processing, distribution, use, or disposal might pose an unreasonable risk of injury to health or the environment. To that end, EPA is authorized to require companies manufacturing chemicals to provide data on each chemical's characteristics and use.

Under TSCA, EPA is required to regulate a chemical if the Administrator finds that "there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal ... presents, or will present an unreasonable risk of injury to health or the environment." The Act directs EPA to regulate a chemical "to the extent necessary to protect adequately against such risk using the least burdensome requirements." TSCA authorizes a wide range of regulatory options to reduce chemical risks, from a requirement for labeling to a total ban on production and distribution in commerce.

⁷ United Nations Environment Program. "Status of Signature and Ratification, Acceptance, Approval and Accession as of 10 September 2002." [http://www.pic.int/en/viewpage.ASP?ID=265], visited Sept. 27, 2002.

TSCA Section 6 specifies the rule-making procedure for chemicals in detail. It combines an informal notice and comment procedure similar to that applied to most administrative rules (5 U.S.C. §553) with an opportunity for an “informal” hearing. It also requires that EPA consider and publish a statement with respect to the health and environmental effects of the chemical; the magnitude of human and environmental exposure to the chemical; the benefits of the chemical for various uses and availability of substitutes; and “reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health.”

The final chemical rule must be based on “the matter in the rulemaking record (as defined in section 19(a)),” which includes the rule, the Administrator’s finding that the chemical presents an unreasonable risk, the cost-benefit statement, the hearing transcript, any written submission of interested parties, and other relevant material. TSCA Section 19 authorizes any person to file a petition for judicial review of a final rule within 60 days of its promulgation.

FIFRA. FIFRA requires EPA to regulate the sale and use of pesticides in the United States through registration and labeling of pesticide products. The Act directs EPA to restrict the use of pesticides “to the extent necessary to prevent unreasonable adverse effects on the environment.” The statute defines this to mean “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.” FIFRA prohibits sale in the United States of any pesticide unless it is registered and labeled, indicating approved uses and restrictions. It is a violation of the law to use a pesticide in a manner that is inconsistent with the label instructions. EPA registers each pesticide for each approved use, for example, to control boll weevils on cotton. Pesticides may not be registered for use on food, unless any pesticide residues remaining on the food would be “safe,” as defined by the Federal Food, Drug, and Cosmetic Act.⁸ However, EPA may not cancel an existing pesticide registration for use on food, even if such use is not “safe,” if the pesticide use avoids other greater risks to consumers or is necessary to avoid significant disruption in domestic production of an adequate, wholesome, and economical food supply.⁹

FIFRA does not regulate production of pesticides intended solely for export. However, Section 17 requires that pesticide exports must be “prepared or packed according to the specifications or directions of the foreign purchaser; and if the pesticide is not registered for use in the United States, “prior to export, the foreign purchaser has signed a statement acknowledging that the purchaser understands that such pesticide is not registered for use in the United States.” A copy of that

⁸ The Federal Food, Drug, and Cosmetic Act was amended by the Food Quality Protection Act in 1996. It defines “safe” to mean that there is “a reasonable certainty of no harm” from pesticide exposure.

⁹ Such higher tolerance levels may be set only for pesticides that are potential carcinogens (or have some other health effect) for which there is no known level of exposure at which no harm is anticipated (known as a non-threshold effect). For more on these provisions of FIFRA, see CRS Report 96-759 ENR, *Pesticide Legislation: Food Quality Protection Act of 1996, P.L. 104-170*.

statement must be transmitted to the government of the importing country. EPA is required to notify, through the State Department, governments of other countries whenever a U.S. pesticide registration, or cancellation or suspension of a registration, becomes effective, or ceases to be effective.

Bill Similarities and Key Differences

Similarities. Both S. 2118 and S. 2507 would have amended TSCA to prohibit manufacture, processing, distribution in commerce, use, and disposal of the chemicals listed in annexes to the POPs Convention and the LRTAP POPs Protocol. The bills would have amended FIFRA to prohibit sale, distribution, use, production, and disposal “that may lead to recovery, recycling, reclamation, reuse, or an alternative use” of listed POPs and LRTAP POPs pesticides. Both bills would have amended the existing statutes to provide for exemptions found in the Convention and the Protocol. The bills also would have created a process for EPA to notify the public when chemicals and pesticides were proposed for listing under either international agreement. S. 2507 would have authorized such notification, while S. 2118 would have mandated it.

Differences. S. 2118, but not S. 2507, would have given EPA standing authority to regulate chemicals that might be added by future amendments to the annexes of the POPs Convention or the POPs Protocol, if and when such amendments came into force with respect to the United States. EPA could have proposed regulations under TSCA to prohibit or restrict manufacturing, processing, distribution in commerce, use, or disposal of chemicals, if such activity were inconsistent with provisions of the international agreement, as amended. (Because the Senate Committee on Foreign Relations has not yet reported its views with respect to the POPs Convention, it is not clear whether any proposed amendments to treaty annexes will be submitted to the Senate for advice and consent. Proposed amendments to the POPs Protocol will not be submitted to the Senate, because the LRTAP Convention and protocols are executive agreements, rather than treaties under U.S. law. However, the President may prevent any proposed amendments from coming into force with respect to the United States, in the case of the POPs Convention through either the “opt-in” or “opt-out” procedure discussed on page 3 above, or in the case of the POPs Protocol, by refusing to agree to the proposal.) In contrast, under provisions of S. 2507, EPA could not fully regulate a new chemical even if the amendment adding it came into force with respect to the United States, unless Congress enacted additional implementing legislation.

S. 2118 would have facilitated EPA regulation by exempting rules from the existing requirement of TSCA Section 6(c)(1) that EPA prepare a statement of costs and benefits associated with a rule. Regulation would have been further facilitated by the S. 2118 provision that any activity inconsistent with the POPs Convention or the LRTAP POPs Protocol (as they might be amended) would be deemed to “present an unreasonable risk of injury to health or the environment.” (An “unreasonable risk” determination triggers EPA regulatory action under TSCA.) However, S. 2118 would have exempted from this determination any activity “necessary to prevent significant harm to an important sector of the economy,” if significantly greater risks were found to be associated with each substitute chemical (i.e., a chemical that could serve a similar function) evaluated by EPA. (This last provision would have aligned

regulation of POP chemicals with that of other chemicals under TSCA, which provides that a significant risk may not be unreasonable (and required to be reduced through regulation) due to the economic impacts and other risks that might follow from the proposed regulation.)

S. 2118 would have amended the TSCA definition of “chemical substance” to include pesticides, unless they “may, under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*) be lawfully sold or distributed for use in the United States.” The effect of the amendment would have been to subject unregistered pesticides, e.g., pesticides intended only for export, to TSCA requirements. Pesticides covered by the POPs Convention and the LRTAP POPs Protocol, as they might be amended, may or may not be registered for use in the United States.

With respect to FIFRA, S. 2118 would have authorized EPA regulation of production of pesticides that may be added in future amendments to the POPs Convention or LRTAP POPs Protocol. This authority would be necessary to implement the agreements.

S. 2118 would have facilitated regulation by expanding the FIFRA definition of “unreasonable adverse effect on the environment” (the trigger for FIFRA regulation) to include any production or use of a pesticide inconsistent with an amendment to an annex of the POPs Convention or LRTAP POPs Protocol. Thus, EPA would have been able to cancel registrations for newly listed pesticides in order to ensure U.S. compliance with the amended agreements, after amendments entered into force with respect to the United States. (As noted above, the role of the Congress in accepting such amendments to the POPs Convention is unclear, but the President may reject proposed chemical amendments to either the POPs Convention or the LRTAP POPs Protocol.) S. 2118 would not have authorized EPA to cancel pesticide registration, if production or use of the pesticide were necessary “to prevent significant adverse effects on human health or the environment that would pose significantly greater risks than the risks associated with the production or use of the pesticide,” or “to avoid a significant disruption in domestic production of an adequate, wholesome, and economical food supply.” This exception probably was intended to make regulation of POPs pesticides more consistent with existing FIFRA authority.¹⁰

If EPA were to cancel a pesticide’s registration to comply with an amendment to either the POPs Convention or the LRTAP POPs Protocol, S. 2118 would have prohibited (with certain exemptions allowed under the POPs Convention or LRTAP POPs Protocol) use, production, and disposal “that could lead to recovery, recycling, reclamation, reuse, or an alternative use” of the pesticide. If a pesticide were registered in the United States for uses not prohibited by an amendment to the Convention or Protocol, S. 2118 still would have prohibited use, production, and

¹⁰ However, the provision in S. 2118 seems to apply more broadly to any pesticide, rather than only to the “non-threshold” pesticides addressed by the existing FIFRA provision. See footnote 9.

disposal that could lead to recovery or reuse of that pesticide, under certain conditions.¹¹

S. 2118 also included several provisions that would not amend TSCA or FIFRA. First, the bill would have required EPA to submit a final exposure and human health reassessment of dioxin to the House Committee on Energy and Commerce and the Senate Committee on Environment and Public Works within 90 days of the bill's enactment. EPA has been conducting this reassessment for more than 11 years.

S. 2118 would have required EPA to develop a strategy "that will reduce public exposure to persistent, bioaccumulative toxic substances." POPs are persistent, bioaccumulative, and toxic, but other chemicals besides POPs also have these characteristics.

S. 2118 would have authorized an EPA contract with the National Academy of Sciences (NAS) to "conduct a research program in support of the POPs Convention." Under the contract, NAS would have to screen potential POPs, provide scientific data on the POPs, and recommend those POPs that should be nominated for addition to the POPs Convention. The bill specified numerous chemicals that the NAS would be required to screen.

Finally, S. 2118 did not address inconsistencies between U.S. laws and the PIC Convention, while S. 2507 would have amended both TSCA and FIFRA to authorize implementation of that international agreement. These amendments would implement the export notification requirements, labeling requirements, and importer consent terms of the PIC Convention. This difference between the bills seemed relatively non-controversial.¹²

Policy Issues

In a hearing held by the Senate Committee on Environment and Public Works on May 15, 2002, bill differences were highlighted with respect to two policy issues: 1) whether Congress should amend TSCA and FIFRA to authorize EPA regulation of pollutants added in any future amendments to the agreements, eliminating the need for future enabling legislation; and 2) whether legislation should include provisions that some argued were not necessary to implement the agreements.

Addition of New Chemicals. Until recently, the Administration opposed inclusion in implementing legislation of authority for EPA to regulate chemicals added by future amendments to the POPs Convention or LRTAP POPs Protocol. EPA Administrator Whitman argued that consideration of implementation issues should be deferred until the Conference of the Parties (COP) develops a detailed

¹¹ EPA would have to issue a statement (after public comment) that there were no existing U.S. registrations preventing compliance with the amended international agreements and identify any U.S. permitted uses that would not prevent compliance.

¹² Susan Bruninga, "Broad Support Seen for POPs Treaty, But Witnesses Differ on Adding Chemicals." *Daily Environment Report* (15 May 2002): A-9.

procedure for adding chemicals under the Convention.¹³ Thus, S. 2507 did not contain an “adding mechanism.” Senator Jeffords’ bill did propose a mechanism for regulating chemicals that might be added by amendment. (See description of S. 2118 above.) However, early in October 2002, Administrator Whitman sent a letter to Senator Jeffords proposing to work with him toward development of a legislative provision for regulating additional chemicals under the POPs Convention. The approach she proposed in her letter differed from that found in S. 2118, but “should not be construed as a final opinion on the proposed POPs bills, nor should this information be interpreted as a final Administration position.”¹⁴

As introduced, S. 2118 would have authorized EPA to propose regulations under TSCA or FIFRA to prohibit or restrict manufacturing, processing, distribution in commerce, use, or disposal of chemicals, if such activity were inconsistent with provisions of the international agreement, as amended. In addition, regulation would have been facilitated, because certain TSCA requirements for chemical regulation would have been eliminated (i.e., the cost-benefit statement), and other TSCA and FIFRA requirements would have been satisfied by the international listing process, without the need for additional data collection or analysis (i.e., to meet an “unreasonable risk” criterion for regulation). Furthermore, S. 2118 appeared to modify the TSCA requirement that EPA must propose a rule that is the “least burdensome” regulatory alternative to prevent or reduce risk “to a sufficient extent,” since the choice of regulatory action would have been determined (at least in part) by EPA’s authority to regulate chemical activities that were inconsistent with treaty provisions.

S. 2118 gives EPA discretion to determine the location and process of deliberations about whether and to what extent regulation of new POPs chemicals is justified: the Agency could follow normal TSCA or FIFRA rule-making procedures, or defer to the COP and the decision-making processes specified in the POPs Convention and POPs Protocol. The key to understanding the potential impact of S. 2118 is recognizing that although it would have facilitated rule making for chemicals that might be added to the international agreements, it did not mandate regulation of new chemicals under the POPs Convention or Protocol. The bill’s provisions would not have prevented the United States from acting (or not) on its own authority under TSCA or FIFRA to regulate new POPs chemicals domestically. Nor would the provisions have allowed the international agreements to impose new restrictions on the United States with regard to new chemicals without its consent: the United States would have retained the power to accept or reject any amendment adding a new chemical (through either the opt-in or the opt-out procedure described in the POPs Convention and summarized on page 3 of this report). S. 2118 provided that EPA rules would become final only after an amendment adding the chemical to the international agreement entered into force with respect to the United States.

¹³ Johnson, Stephen L. Testimony Before the Environment and Public Works Committee, United States Senate, May 9, 2002.
[http://www.senate.gov/~epw/Johnson_051402.htm]

¹⁴ Whitman, Christine Todd. Letter to The Honorable James M. Jeffords, Oct. 9, 2002.

S. 2118 might have affected the review and oversight processes of proposed and final regulations, however, because S. 2118 would have allowed EPA to choose which criteria and process to use in deciding whether and how to regulate new POPs chemicals: either existing TSCA and FIFRA criteria and processes, or criteria and processes that will be established at some future date by the COP. If EPA chose to employ the latter, the influence of the criteria established by Congress in TSCA and FIFRA might have been reduced with respect to POP chemicals. In addition, the influence of the public in general, and of the regulated community in particular, might have been reduced in selecting chemicals to be regulated and the degree of regulation, if substantive deliberations about the costs, benefits, alternatives, and risks were conducted and resolved by the COP. By removing these subjects as topics of discussion during domestic rulemaking, opportunities for the public to challenge final rules in U.S. courts also might also be diminished. (The public role would not have been eliminated, however, because the bill (and the international agreements) provided for public notice and comment at two points in the decision-making process for chemicals proposed to be added to either agreement: under the POPs Convention, when a new chemical is proposed for listing in Annex A, B, or C and meets the screening criteria in Annex D; under the POPs Protocol, when a risk profile for a chemical proposed for listing in Annex I or II is submitted to the Executive Committee; and again when a chemical ultimately is listed in an annex of the POPs Convention or Protocol.)

Another potential concern if S. 2118 had been enacted is whether there would have remained any role for Congress in approving (through either the opt-in or the opt-out procedure) proposed amendments to annexes of the POPs Convention or the LRTAP POPs Protocol. Because the Senate Committee on Foreign Relations has not yet reported its views with respect to the POPs Convention, it is not clear whether any proposed amendments to the annexes will be submitted to the Senate for advice and consent. If not, chemicals proposed for addition through amendments to annexes of the POPs Convention might have been added and regulated in the United States, or not, at the President's discretion (subject to expedited regulatory procedures and congressional review). The Senate will not be asked to advise the President or to consent to an amendment adding a chemical to the POPs Protocol, because the LRTAP Convention and protocols are executive agreements, rather than treaties under U.S. law.

On the other hand, S. 2507 could have prevented EPA from fully implementing the POPs Convention for any chemical added to the treaty, until Congress enacted new legislation amending TSCA and FIFRA. This would have ensured a role for Congress, but could have significantly delayed implementation of treaty amendments.

Language proposed by the EPA Administrator late in the 107th Congress addressed some of these concerns. It would have provided a mechanism for regulating chemicals added to the international agreements by amendment (eliminating the need for additional TSCA and FIFRA amendments), but would not have facilitated the regulatory process by treating new POPs chemicals in a different, more streamlined way than non-POPs chemicals under TSCA and FIFRA.

Arguably Non-essential Provisions. The second key difference between the bills and a source of controversy was that S. 2118 included provisions that

critics¹⁵ argued were not necessary to implement the POPs Convention and the LRTAP POPs Protocol:

- Authority for EPA to contract the National Academy of Sciences to identify and recommend chemicals for possible addition to the POPs Convention and to recommend designs for a monitoring program to identify persistent, bioaccumulative toxics (PBTs);
- Mandate to EPA to submit to Congress a reassessment of dioxin risk within 90 days of enactment; and
- Mandate to EPA to report to Congress on strategies to reduce public exposure to PBTs.

Although the United States could implement the POPs Convention and the LRTAP POPs Protocol without the benefit of NAS studies or an EPA report on PBTs, advocates of these provisions noted that they were “consistent with the spirit and goals” of the POPs Convention, and the research program would satisfy the requirements of Article 11 of the POPs Convention. That article requires parties to encourage or undertake research, development, monitoring, and cooperation pertaining to POPs and to candidate POPs.¹⁶ Because all existing and candidate POPs are PBTs, the bill’s reference to PBTs also might have been considered consistent with (though not strictly necessary in order to implement) the international agreements. In addition, PBTs are the focus of a binational agreement between the United States and Canada, the U.S.-Canada Strategy for the Virtual Elimination of Persistent Toxic Substances in the Great Lakes. Finally, advocates noted that the NAS recommendations would put the United States in a “proactive” stance toward chemical additions to the agreements.¹⁷ On the other hand, others would have preferred a “clean bill” authorizing U.S. regulatory activity consistent with the international agreements without imposing any particular procedural or other requirements.

Similarly, the United States could implement the POPs Convention and the LRTAP POPs Protocol without reference to the dioxin risk reassessment. The reassessment has been under way for more than 10 years. It includes an inventory of sources of dioxin emissions, as well as an evaluation of human exposure, available control measures, and estimates of risks to human health and the environment. Some have questioned the accuracy and objectivity of the draft EPA dioxin assessment and would like it reviewed by the National Academy of Sciences prior to public release. However, advocates for the dioxin provision in S. 2118 noted that dioxin is listed in Annex C of the POPs Convention, which requires parties to develop an action plan for the chemical, promoting measures to minimize releases, substitutes to prevent releases, and use of best available techniques and best environmental practices, as

¹⁵ Walls, Michael. Testimony Before the Environment and Public Works Committee, United States Senate, May 9, 2002.

[http://www.senate.gov/~epw/Walls_051402.htm]

¹⁶ Phibbs, Pat. “Environmental Group Supports Bill to Require Development of Organic Pollutants Strategy.” *Daily Environment Report*, Apr. 17, 2002. p. A-4.

¹⁷ Ibid.

defined in Article 5(f). Environmental and public health groups want EPA's dioxin risk reassessment published to facilitate development of the action plan.¹⁸

Conclusion

Competing bills were introduced into the 107th Congress to implement international agreements that would restrict production, trade, use, and disposal of 12 persistent organic pollutants. Although both bills would have provided EPA the necessary authority to implement the POPs Convention and Protocol, the bills differed in the extent to which they would have facilitated full compliance with the agreements, especially with respect to any future amendments that might add chemicals to be regulated. If similar proposals are introduced into the 108th Congress, the domestic and international ramifications of these differing approaches may be further discussed.

¹⁸ Ibid.

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