



MEMORANDUM

Via E-Mail

DATE: July 20, 2004

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: Summary of Hearing on POPS, PIC, and LRTAP Draft Legislation

On July 13, 2004, the House Subcommittee on Environment and Hazardous Materials¹ of the House Committee on Energy and Commerce convened a hearing to discuss “POPs, PIC, and LRTAP: The Role of the US and Draft Legislation to Implement These International Conventions.” The Draft Legislation, referred to as the “Stockholm and Rotterdam Toxics Treaty Act of 2004” (the Act), has yet to be introduced into the House of Representatives. The Act is available at <http://gillmor.house.gov/pdf/pops.PDF>. This memorandum summarizes the discussion at the hearing.

The Act concerns the role of the United States in implementing the Stockholm Convention on POPs, the Long-Range Transboundary Air Pollution (LRTAP) POPs Protocol, and the Rotterdam Convention on Prior Informed Consent (PIC). The Stockholm Convention

¹ Subcommittee members present included: Chair Paul E. Gillmor (OH), Honorable John Dingell (MI), Honorable Hilda Solis (CA), Honorable Bobby Rush (IL), Honorable Tom Allen (ME), Honorable Lois Capps (CA), Honorable Bart Stupak (MI), Honorable Gene Green (TX), Honorable Charlie Gonzalez (TX), Honorable Darrell Issa (CA), Honorable C.L. Otter (ID), and Honorable Mike Rogers (MI). Save Gillmor, Issa, and Otter, the members discussed the following concerns regarding the “Stockholm and Rotterdam Toxics Treaty Act of 2004”: (1) that it needed to be bipartisan and, as drafted, it was not; (2) that federal measures would and could pre-empt state-enacted measures to curb or eliminate persistent organic pollutants (POPs); (3) that it lacked a precautionary approach (as was a principle in the Stockholm Convention) to POP reduction in favor of a reasonable balance of socio-economic costs; and (4) that it relied on a new cost/benefit standard and level of analysis and assessment on the U.S. Environmental Protection Agency (EPA) that ignored the issue of a least burdensome approach.



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lists twelve substances as POPs and provides additional listing of chemicals based upon a process of formal nomination, the preparation of a chemical dossier, a risk profile, and a socio-economic analysis. Exemptions for certain uses are provided. In implementing the Convention, governments will attempt to eliminate or reduce the release of POPs into the environment. The LRTAP Protocol binds the actions of 54 countries, including the United States, on an initial group of 16 POPs. It also contains a process for adding new POPs to the list. The Rotterdam Convention requires Senate advice and consent to ratification and Congressional action on implementing legislation to amend the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

The first panel group considering the Act consisted of Claudia McMurray, United States Department of State, Deputy Assistant Secretary for Environment, Bureau of Oceans and International and Scientific Affairs, and Susan Hazen, EPA Principal Deputy Assistant Administrator, Office of Prevention, Pesticides, and Toxic Substances. Due to the LRTAP and Rotterdam meetings within the next few months, McMurray expressed the need for the United States to join the international community as soon as possible, so that the United States does not remain on the sidelines at these meetings. She echoed Chair Gillmor's concern that the United States needed to utilize the "opt-in" alternative² of the Stockholm Convention in order to assure that international decisions regarding POPs would not prejudice any domestic decision-making processes. Hazen also agreed that the United States needed to be an active player and added that the Act provided EPA with the authority necessary to implement *all* of the TSCA-related obligations of the three agreements, helping to ensure that the U.S. remains at the forefront of world-wide efforts to reduce or eliminate the use of POPs.

Mike Walls, Senior Council, American Chemistry Council, and Steve Goldberg, CropLife America, opened the second panel with support for the Act. Each agreed that it was prudent to consider the POPs addition mechanism and reiterated that the United States needed to be afforded an independent look at those decisions. Walls said that the Act provided for a risk-based, science-justified standard for POPs additions and therefore ensured that the relevant social, economic, environmental, and health information would be considered in reaching a domestic decision regarding regulation of POPs chemicals. He also expressed confidence that the Act relied on provisions of TSCA, thereby complementing EPA's already existing regulatory authority. Goldberg added that a jurisdictional split between FIFRA and TSCA was an

² The "opt-in" option means that the United States declares that any amendment recommended by the Convention's Conference of Parties shall enter into force for the United States only upon our deposit of the U.S. instrument of ratification, acceptance, or approval.



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important distinction to maintain. He did not want to see pesticide provisions added to TSCA and insisted that FIFRA is the only appropriate statute through which United States decisions on POPs and PIC pesticides should be made.

Dr. Lynn Goldman, former Assistant Administrator to EPA, current professor of Environmental and Health Sciences at the Bloomberg School of Public Health at John Hopkins University, however, objected to the Act for numerous reasons. She disagreed with proponents of the “opt-in” strategy; and she expressed her view that it bestowed a new standard on EPA that allowed the United States a choice to “opt-in” to regulation of a new POP if EPA believed it achieved a reasonable balance of social, economic, environmental, and health issues. Goldman stated that the Act carried no presumption that EPA would implement the recommendation or decisions of the POPs Convention and that it placed a burden on EPA to explain why EPA would *not* accept the Convention’s decisions rather than placing the burden on EPA to regulate the new POPs. Goldman concluded that EPA would not be held to as high a standard as international parties in decisions for regulation. Lastly, Goldman stated that the Act used language that was far weaker than that of current law and would serve to make EPA an inefficient regulator.

Mr. Brooks Yeager, Vice-President of Global Threats for the World Wildlife Fund and leading negotiator for the U.S. at the Stockholm POPs Convention, objected that the Act afforded EPA complete discretion to decide whether or not it should prohibit or restrict an additional POP. He also stated that the Act lacked the POPs Convention’s reliance on a precautionary approach to regulation, insisting that, instead, the language of cost/benefit analysis used in the Act nearly always resulted in an over-evaluation of the costs of regulation and a dramatic under-evaluation of the benefits -- benefits that rarely have a strict monetary value (health, life, etc). Yeager took issue with the Act’s reliance on “sound science” requirements used during EPA’s weighing of scientific information because he worried that these requirements would prolong the regulatory process by acting as unnecessary or duplicative analyses or acting as “litigation fodder” rather than improving the quality of EPA’s decision-making. Yeager also objected that the Act decoupled the international process and the domestic regulatory process by not requiring EPA to act (no timeline, no statement of reasons for inaction, no citizen petition process) after an international decision had been made.

Ms. Lisa Heinzerling, a professor at the Georgetown University Law Center, echoed Mr. Yeager’s concerns and added that TSCA was an ineffective regulator of toxic chemicals and that the Act did nothing to ameliorate this problem. Rather, it allowed EPA the discretion to regulate or not regulate -- and, if it chose to regulate, it would only meet with more regulatory hurdles.



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Mr. Glenn Wiser, Senior Attorney and Intern Coordinator at the Center for International and Environmental Law, reiterated Goldman, Yeager, and Heinzerling's arguments, and added that the Act worked against efficient implementation of treaty provisions and acted as a "radical, regressive reshaping" of United States environmental and health law.

Mr. Scott Slesinger, Vice-President of Government Affairs and the Environmental Technology Council, and Mr. Jim Roewer, Executive Director at the Utility Solid Waste Activities Group, addressed the Act in regard to its potential effects on the polychlorinated biphenyl (PCB) industry. Slesinger argued that the POPs Convention allowed PCBs to be imported into America for proper disposal, but the Act did not recognize this. The PCB industry wanted the Act changed to reflect the POPs treaty in its entirety. Slesinger expressed his view that TSCA should be amended to allow U.S.-exported PCBs back into the United States for proper disposal. Roewer wanted to ensure that the treaties did not supersede already existing United States law or cede decision-making authority regarding the domestic regulation of POPs to international communities; he felt that the Act should allow Congress to exercise its authority to establish how the U.S., through U.S. domestic laws, would meet the international obligations. Slesinger said that, if existing laws did not allow the United States to meet international obligations, then TSCA and/or FIFRA should be amended in order for it to do so.

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We hope this information is helpful. As always, please let us know if you have any questions.