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Codifying Prior Informed Consent to Govern Unregistered Pesticide Export

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Despite binding international law and congressional authority to the contrary, the U.S. Environmental Protection Agency (EPA) continues to allow U.S. chemical manufacturers to export dangerous and unregistered pesticides to poorer countries through a regulatory loophole that must close. EPA should immediately initiate rulemaking to require “prior informed consent” (PIC) for the export of pesticides unregistered in the United States under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). PIC is a widely accepted legal concept defined by U.S. domestic statutes and multilateral treaties and agreements.

FIFRA section 17 governs pesticide import and export and states that any pesticide that is prepared and packaged to the specifications of a foreign purchaser, intended solely for export, will not be deemed in violation of FIFRA. 7 U.S.C. § 136o. If an unregistered pesticide is prepared solely for export, then the foreign purchaser must sign a statement acknowledging that the purchaser understands that the pesticide in question is not registered under FIFRA. The last sentence of section 17(a) reads: “A copy of that statement shall be transmitted to an appropriate official of the government of the importing country.”

FIFRA section 17(b) and (c) further incorporate and embrace the “notice” function. Section 17(b) reads: “Whenever a registration, or a cancellation or suspension of the registration of a pesticide becomes effective, or ceases to be effective, the Administrator shall transmit through the State Department *notification thereof to the governments of other countries and to appropriate international agencies.*” (Emphasis added.) This section of FIFRA specifically requires that foreign governments and international agencies be notified if the registration status of a pesticide changes and that, upon request, the notification “include all information related to the cancellation or suspension of the registration of the pesticide and information

concerning other pesticides that are registered under section 136a of this title and that could be used in lieu of such pesticide.” Section 17(c) also incorporates a PIC-like process for importation of pesticides and devices into the United States, and the pesticide may be refused admission into the country.

When FIFRA section 17 was amended in 1978, Congress did not explicitly address the issue of “prior informed consent” because, at the time, PIC did not exist as an international legal principle or doctrine. Nonetheless, the commonsense notion of informing the government of an importing nation regarding dangerous pesticides before the harm occurs is consistent with statutory language. Amending EPA’s export regulations requiring PIC is now legally necessary because of binding international law on the issue and the harm that ignoring PIC imposes on innocent parties, both in the United States and abroad.

The present regulations do not sufficiently ensure safe export of pesticides from the United States. Under the current incarnation of 40 C.F.R. section 168.75(c), EPA only requires communication between the exporter, EPA, and foreign purchaser regarding the purchasing agreement as currently outlined in the regulations. Section 17(a)(2) of FIFRA, however, states that “a copy of the statement [(the foreign purchaser agreement)] be transmitted to an appropriate official of the government of the importing country.” Currently, EPA regulations do not clearly define “foreign purchaser.” Under FIFRA section 2, “foreign purchaser” is not included in the list of definitions, and thus EPA has some discretion to clarify this central term.

Relevant Legal Background of FIFRA

Originally enacted in 1947, FIFRA was created with the express goal of regulating the registration, distribution, sale, and use of pesticides in the United States. Crucially, FIFRA creates a requirement that before a pesticide can be distributed or sold,

the pesticide in question must first be registered with EPA. For a pesticide to be registered under FIFRA, the applicant in question must show that using the pesticide according to specifications “will not generally cause unreasonable adverse effects on the environment.” 7 U.S.C. § 136bb. The term “unreasonable adverse effects on the environment” is defined as “(1) 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, or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under section 346a of title 21 [(of the Federal Food, Drug, and Cosmetic Act)].”

In 1972, Congress amended FIFRA, transferring the authority to regulate pesticides from the Department of Agriculture to EPA. This shift in pesticide law was spurred, in part, because of the increasing congressional concern regarding the short-term and long-term effects of the application of pesticides on workers, consumers, and wildlife not targeted by pesticides. The new 1972 FIFRA amendments required that pesticides be registered prior to use. Under the current FIFRA regulations, registration of pesticides occurs when, based on the scientific data and assessment of the risks and benefits, it is determined that the product’s use is acceptable.

In 1978, the U.S. General Accounting Office (GAO) delivered a report on the “Need to Notify Foreign Nations of U.S. Pesticide Suspension and Cancellation Actions,” detailing serious and systemic deficiencies in the implementation of that provision by EPA and the State Department. Henry Eschwege, Gen. Acct. Off., *CED-78-103, Need to Notify Foreign Nations of US Pesticide Suspension and Cancellation Actions, Report to Environmental Protection Agency* (Apr. 20, 1978). Beyond simply documenting these failures, however, GAO observed that informing potential importing countries regarding the regulatory status of pesticides they might import had significant value for both the country of import and for the people of the United States:

[Countries of import] benefit because they are alerted to some pesticides’ unreasonable hazards and often follow the U.S. lead, which lessens exposure of their workers and citizens. The U.S. benefits when a nation restricts using these pesticides on U.S. food and fiber imports.

The GAO recommended that EPA develop an appropriate system with the State Department for timely and efficient dissemination to foreign nations of information on pesticide suspensions and cancellations.

The GAO also testified directly to Congress on the matter in July 1978 before Congress passed its amendments. In a detailed statement before the House Committee on Government Operations, Henry Eschwege summarized GAO’s finding that the existing notification process was ineffective, inconsistent, and poorly implemented. *Federal Efforts to Notify Foreign Nations Regarding Pesticide Suspensions and Cancellations, Testimony of Henry Eschwege, Dir., Cmty. & Econ. Dev. Div., GAO, before the House Committee on Government Operations: Commerce, Consumer and Monetary Affairs Subcommittee* (July 11, 1978). GAO was clear that the export regulatory actions at issue had

“both national and international implications [for which] notifications should have been made.” Eschwege informed the Committee that “inherent problems in predicting changes in significant worldwide pesticide usage patterns underscores [sic] the very real need to notify foreign nations of virtually all pesticide suspension and cancellation actions.” GAO reiterated the recommendations from its earlier reports, along with the observation that the “most effective way would be to have EPA provide direct notifications to appropriate foreign officials, concurrent with notification to the Department of State.”

EPA’s current implementation of FIFRA section 17 is incompatible with applicable legal standards under both international and domestic law.

FIFRA was amended that December and reflected Congress’s desire to streamline the pesticide registration process. Congress was very much aware of both this GAO Report and testimony and, indeed, the final legislative language reflects Eschwege’s caution on this topic. Pursuant to the 1978 amendments, FIFRA directs EPA to suspend the registration of certain products if the producer fails to submit the required testing data by a specified time. The 1978 amendments created the current FIFRA section 17 language.

Why Prior Informed Consent Matters

The proportion of pesticides shipped in international trade has increased exponentially. Since 1960, for example, the value of global pesticide exports has increased by 15,000 percent—reaching \$41 billion in 2020. *CIEL, Fossils, Fertilizers, and False Solutions—How Laundering Fossil Fuels in Agrochemicals Puts the Climate and the Planet at Risk* (Oct. 2022). More fundamentally, as pesticide usage in North America and Europe has leveled off in recent decades as consumers and regulators seek safer alternatives, pesticide exports have shifted heavily to countries in the Global South. At the same time, U.S. imports of agricultural produce also have grown exponentially. Agricultural products treated with exported pesticides are often imported into the United States, creating a significant exposure pathway for domestic populations as well. Amid this fundamental change in circumstances, EPA’s current implementation of FIFRA section 17 is incompatible with applicable legal standards under both international and domestic law.

A study in *The International Journal of Occupational and Environmental Health* concluded that between 1996 and 2000,

the United States exported nearly 1.1 billion pounds of pesticides that have been identified as harmful carcinogens. Between 2001 and 2003, the United States exported around 28 million pounds of pesticides that were not allowed to be used in the country. Carl Smith et al., *Pesticide Exports from U.S. Ports, 2001–2003*, 14 Int'l J. Occupational & Env't Health 176 (2008). Research has found that most unregistered pesticides are exported from the United States to developing nations, prompting the UN Special Rapporteur on Toxic Waste to call out the United States on its “immoral” practice of exporting banned pesticides. Recent research has estimated that around 385 million occupational pesticide-related injuries occur every year around the world, the bulk of which happen in developing countries. Wolfgang Boedeker et al., *The Global Distribution of Acute Unintentional Pesticide Poisoning: Estimations Based on a Systematic Review*, 20 BMC Pub. Health 1875 (2020).

PIC has become *the* relevant international standard in circumstances where a state’s peoples, sovereign rights, or native ecosystems may be harmed by dangerous international activity.

Addressing the continued improper export of banned and unregistered pesticides would also serve to protect the people of the United States from an important source of exposure to those pesticides. Often, pesticides that have been banned in the United States are used in developing nations, whose crops are then sold back in the United States. This fact has created what is known as the “circle of poison,” whereby unregistered pesticides exported to developing nations are applied to agricultural products that are then imported back into the United States with toxins. To eliminate this danger, it is important to ensure that the governments of the foreign purchasers are informed—prior to the export of a U.S. pesticide—of the risks so that the government of the foreign purchaser can make an informed decision. U.S. companies, in 2019 and likely other instances, exported the neurotoxic pesticide carbofuran to the African country of Mauritius despite that country’s specific request to the Rotterdam Convention that it does not consent to carbofuran imports. Nathan Donley et al., *Pesticides and Environmental Injustice in the USA: Root Causes, Current Regulatory Reinforcement and a Path Forward*, 22 BMC Pub. Health 708 (2022). PIC could have allowed Mauritius to prevent these incidents.

U.S. International Legal Obligations to Implement PIC

Through various international agreements, PIC has become *the* relevant international standard in circumstances where a state’s peoples, sovereign rights, or native ecosystems may be harmed by dangerous international activity.

The Basel Convention of 1992 was borne from a realization in the 1980s that “toxic trade” in hazardous wastes and related items was killing and harming people, particularly in poorer countries. The United States, Europe, and the Organization for Economic Cooperation and Development (OECD) were behind the effort to regulate toxic trade with PIC.

In 1984, OECD asserted “that if a chemical is banned or severely restricted in an Adherent, and that chemical is exported, information should be provided from that country to the importing country to enable the latter to make timely and informed decisions concerning that chemical.” OECD, *Recommendation of the Council Concerning Information Exchange related to Export of Banned or Severely Restricted Chemicals*, OECD/Legal/0210 (adopted Apr. 4, 1984). The OECD Council explicitly recognized “that OECD Member countries are among the major producers, exporters and importers of chemicals and that, by virtue of the experience and expertise they possess concerning chemicals control, they can assist each other as well as non-member importing countries to make timely and informed decisions about chemicals entering their territories.” Accordingly, it adopted a series of Guiding Principles on Information Exchange related to exports of banned or severely restricted chemicals based on PIC.

Under these principles, the exporting country must provide to relevant officials in the country of import information sufficient to alert the country that trade in a banned or severely restricted chemical is occurring. To the extent practicable, such notice should occur before export. At minimum, the provided information should alert the importing country that an export is expected, identify the chemical, and summarize safety control actions taken in the exporting country. Significantly, the OECD’s updated background note for this instrument expressly confirms that “[t]he subsequent Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention) codifies the principles laid down in the Recommendation.” OECD, *Recommendation of the Council, Legal Instruments Concerning Information Exchange Related to Export of Banned or Severely Restricted Chemicals* (2022).

The United States agrees that these OECD decisions are substantially equivalent to the Basel (and Rotterdam) system, including the central legal requirement of PIC, which the United States acknowledges is binding. The U.S. State Department website explicitly notes:

Article 11 of the Basel Convention provides that, notwithstanding the Convention’s non-Party trade restriction, Parties may enter into agreements or arrangements allowing transboundary movement of hazardous wastes or other wastes with Parties or non-Parties, provided that

such agreements or arrangements (1) do not derogate from the Convention's requirements for environmentally sound management and (2) stipulate provisions which are not less environmentally sound than those provided for by the Convention. Such Article 11 agreements or arrangements enable Basel Parties to trade in waste and scrap covered by the Convention's PIC procedures with non-Parties (like the United States)[.] The U.S. has entered into several such agreements or arrangements. ... *The Organization for Economic Co-operation and Development (OECD) Council Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations serves as an Article 11 agreement that enables the United States to trade certain Basel Convention covered wastes with other OECD countries.* [Emphasis added.]

Member countries, including the United States, explicitly agreed at a Working Group in Vienna in October 1998 to further harmonize PIC procedures and requirements of the OECD with those of the Basel Convention. OECD, *Decision of the Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations* (OECD/LEGAL/0266) (adopted Mar. 29, 1992; amended Dec. 31, 2020).

The Basel Convention itself is among the most widely ratified multilateral environmental agreements, having been ratified by 190 nations to date. The United States signed the treaty in 1990, and the U.S. Senate provided its advice and consent to ratification in 1992. EPA currently has the statutory authority necessary to implement the provisions of the Basel Convention concerning exports of wastes—or at a minimum to avoid further action inconsistent with the spirit and purpose of that Convention. Legal experts have concluded that exports of banned or unregistered pesticides from any Basel party to any party would unequivocally violate Basel, binding OECD standards, and regional agreements that implement Basel. Ctr. for Int'l Env't Law, *Legal Analysis: The Export of Banned Pesticides to Africa and Central America* (2022). Domestic legislation in developing countries such as Angola, Cameroon, Costa Rica, Egypt, Ethiopia, Guatemala, Morocco, Nicaragua, Panama, Senegal, Tanzania, Tunisia, and others considers unapproved pesticides to be hazardous wastes. Thus, exports of these pesticides to these Basel parties violate the Convention's prohibitions.

Building off Basel, the international community next sought to universalize and codify the implementation of PIC procedures with respect to hazardous chemicals and substances through the 1998 Rotterdam Convention, as envisioned in the Agenda 21 Plan of Implementation agreed upon by over 180 nations, including the United States, at the 1992 United Nations Rio Conference on Environment and Development. The Rotterdam Convention was designed to facilitate information exchanges between nations regarding hazardous chemicals. To achieve these goals, the convention created a list of hazardous chemicals requiring exporting nations to secure the informed consent of the importing nations before hazardous chemicals could be exported.

Annex III of the Rotterdam Convention contains a list of hazardous chemicals that are subject to the legal obligation of

PIC before an importing nation can decide whether to allow the importation of a chemical listed under Annex III, and a decision guidance document must be prepared. Under Article 12 of the Rotterdam Convention, “[w]here a chemical that is banned or severely restricted by a Party is exported from its territory, that Party shall provide an export notification to the importing Party. The export notification shall include the information set out in Annex V.” Specifically, under Article 7, decision guidance documents are designed to inform the importing party of the dangers associated with the handling of hazardous chemicals listed under Annex III, pursuant to the guidelines listed under Annexes I and V. Importing nations are required to utilize the information contained in the decision guidance documents to ensure that informed decisions regarding the import of hazardous chemicals can be made.

If an importing nation . . . determines that it will no longer consent to the importation of a chemical listed in Annex III, then the exporting nation must ensure that no further export of the chemical in question occurs without consent.

If an importing nation, based on information contained in the decision guidance documents, determines that it will no longer consent to the importation of a chemical listed in Annex III, then the exporting nation must ensure that no further export of the chemical in question occurs without consent. Currently, 165 parties have ratified the Rotterdam Convention. The United States has signed the Convention and is bound to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) at art. 18.

The Stockholm Convention on Persistent Organic Pollutants came into effect in 2004. The objective of the Stockholm Convention is to protect human health and environmental well-being by limiting human exposure to hazardous chemicals. This is achieved under the Stockholm Convention by prohibiting the production and use, as well as the import and export, of persistent organic pollutants. Article 3, paragraph 2(b) of the Stockholm Convention makes direct reference to PIC

procedures. The United States signed this Convention in 2001, meaning it accepts an obligation to refrain from acts that would defeat its purpose.

The 2017 Minamata Convention on Mercury has been ratified by 140 nations. This treaty focuses on the human health and environmental impacts from dangerous mercury emissions through provisions that relate to the life cycle of mercury, investigating the mining of mercury, and regulating industries where mercury is used and released. Article 4(1) of the Convention requires parties to prohibit the manufacture, import, or export of mercury-added pesticides from 2020 onward. Under Article 3(6), each party shall not allow the export of mercury except to a party that has “provided the exporting Party with its written consent,” and to a nonparty who has provided the exporting party with written consent including certification that shows “the non-Party has measures in place to ensure the protection of human health and the environment and to ensure its compliance with the provisions of Articles 10 and 11.” The United States has signed and accepted this treaty.

PIC procedures can also be found in free trade agreements such as the U.S.-Mexico-Canada Agreement (USMCA). Entered into force on July 1, 2020, the USMCA is a trade agreement between the United States, Mexico, and Canada, designed to replace the North American Free Trade Agreement. Under Article 24.15, USMCA makes specific reference to PIC procedures, stating that the parties to the trade agreement acknowledge the importance of genetic resources and agree to honor national laws that establish PIC procedures. By signing and ratifying the USMCA, the United States has officially recognized the legitimacy of PIC as a legal principle in the regulation of trade between states in the context of trade in genetic materials.


How EPA Should Clarify Its Pesticide Export Regulations

EPA has known for over a decade that its FIFRA export regulations are not working. U.S. EPA Off. of Inspector Gen., *EPA Needs to Comply with the Federal Insecticide, Fungicide, and Rodenticide Act and Improve Its Oversight of Exported Never-Registered Pesticides*, at 1 (Nov. 10, 2009). To address this situation, EPA should take action to amend its regulations in three key respects. First, EPA should amend the regulations to include, under 40 C.F.R. section 152.3, a definition of “foreign purchaser” that includes explicit prior approval by the relevant national government of the importing nation of the pesticide. Second, EPA’s regulations should be amended to include, under 40 C.F.R. section 168.75(c)(1)(v), a requirement to inform the

foreign purchaser whether any active ingredients in the product are not allowed for use in any product in the United States; are considered by the EPA to be hazardous to humans, known water or air contaminants, or hazardous to aquatic or terrestrial animals; are currently listed, or a candidate for listing, on Annex III of the Rotterdam Convention or Annexes A or B on the Stockholm Convention; and have any other known public health or environmental impacts that are reasonably known to occur from the use of the product. And third, EPA should amend its regulations to include, under 40 C.F.R. section 168.75(c)(1), a requirement for the signature and consent of the relevant government agency or office of the foreign purchaser agreeing to the importation of the product with all prior statements.

Congress has clearly authorized PIC to apply to domestically unregistered pesticides exported from the United States abroad under FIFRA. The United States has also entered into international agreements that make PIC binding upon the EPA. By amending its regulations, EPA would ensure that the government of the importing nation would receive information critical to determining whether a pesticide should enter its country.

Furthermore, by amending the definition of “foreign purchaser,” no export would be permitted until EPA receives a written purchaser acknowledgment statement, signed by the government of the importing nation. This would ensure that the government of the importing nation is informed of the ingredients of the pesticide and the known hazards prior to the import. By so correcting and clarifying the regulations, EPA would bring the United States into compliance with internationally recognized PIC procedures.

Over the past century, the use and sale of harmful pesticides have increased. The current regulatory standard by which the United States regulates the export of pesticides is inadequate to properly maintain the health and well-being of humans both in and outside this country. The “circle of poison” is greatly exacerbated by unregulated pesticide exports. Current regulations enabling the export of dangerous pesticides are responsible for disproportionate harms to already vulnerable communities. By amending EPA regulations regarding pesticide exports, EPA can further promote environmental justice principles and better protect us all from exposure to dangerous chemicals. 

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