

Canada enacts into law the right to a healthy environment and more stringent chemical management requirements

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The Government of Canada has passed amending legislation enshrining the right to a healthy environment, while strengthening federal environmental regulations. On June 13, 2023, Bill S-5, [*Strengthening Environmental Protection for a Healthier Canada Act*](#), received Royal Assent. Bill S-5 modernizes the *Canadian Environmental Protection Act*, 1999 (CEPA), one of Canada's core environmental laws regulating toxic substances and pollution and provides for increased regulation of specific toxic substances and chemicals. This is the first set of comprehensive amendments to CEPA since it was enacted over 20 years ago.

What you need to know

- For the first time in federal law, CEPA recognizes that every individual in Canada has a right to a healthy environment and the Government of Canada must protect that right.
- The amendments to CEPA establish a new duty on the federal government to uphold the principles of environmental justice, intergenerational equity, and non-regression.
- The government must develop a *Plan of Chemicals Management Priorities* to better understand and protect Canadians and the environment from chemicals of concern.
- Priority will be given to prohibiting activities involving toxic substances that pose the highest risk.
- In undertaking assessments, the Government must consider any available information on vulnerable populations, vulnerable environments and cumulative effects.

A right to a healthy environment

While Bill S-5 enshrines the right to a healthy environment in federal law, how that right will be implemented and enforced is left to be determined.

The Government of Canada, in consultation with industry and other interested Canadians, must develop an implementation framework over the next two years. The framework will identify and include research, studies, and monitoring activities necessary to support the government's role in protecting that right.

The new right to a healthy environment may be used to bolster rights-based arguments in future climate litigation against government climate inaction, which courts in both [British Columbia](#) and [Ontario](#) have recently confirmed can be a justiciable issue. However, the right is not absolute and must be balanced with relevant factors, including social, health, scientific and economic factors. The authors note that the enactment of Ontario's [Environmental Bill of Rights](#) in 1994 did not open the floodgates to litigation, as many thought might happen at the time, despite removing barriers to claims for public nuisance and creating a cause of action for harm to a public resource.

Prioritizing the prohibition of high-risk substances

The prior regime of virtual elimination of toxic substances has been replaced with a requirement that toxic substances of highest risk be managed by prioritizing their prohibition. The responsible Ministers have two years to establish a plan to specify the substances to which priority should be given in assessing whether they are toxic or capable of becoming toxic (the "Plan of Chemical Management Priorities"). While consultation is likely, it is not required, though government must publish the draft for a 60 day comment period before it is finalized. The Plan of Chemical Management Priorities will be reviewed every 8 years.

Management of current and potential toxic substances

Following an assessment of whether a substance is toxic or capable of becoming toxic, the Minister may take a number of approaches depending on the level of risk.

These amendments allow for tailored approaches to risk management depending on the substance's properties or characteristics. Some substances may only face partial or conditional prohibitions. However, for substances considered to be of highest risk, such as perfluorooctane sulfonate, a man-made chemical substance that has been used in stain-resistant fabric and household cleaning products (and part of the broader class of per- and polyfluoroalkyl substances (PFAS), often referred to as the '[forever chemicals](#)', due to their persistent nature), the priority is prohibition.

Schedule 1 to CEPA will now be divided into two parts. Part 1 contains toxic substances for which the Minister will give priority to the total, partial, or conditional prohibition of activities in relation to the substance or release of the substance. Part 2 contains all other CEPA toxic substances for which pollution prevention will be the priority.

In addition, the amendments require the Minister of Environment to maintain a "Watch List" of substances that can pose a risk if uses change or exposure increases. The Watch List is aimed at helping importers and manufacturers select safer alternatives and avoid replacing one problem chemical with another. The substance will be removed from the Watch List if later added to Part 1 or 2 of Schedule 1 or if the Minister no longer has reason to suspect that it can become toxic.

In addition to the changes outlined above, the amendments include the expansion of the Minister's powers to compel information and make regulations.

Protecting vulnerable populations and environments

The identification and protection of vulnerable populations - those that may be disproportionately impacted due to greater susceptibility or the potential for higher exposure to environmental and health risks - is a major theme throughout the amendments.

The federal government must now consider any available information on vulnerable populations, vulnerable environments and cumulative effects in considering environmental and toxic substances assessments under CEPA. This includes the development and implementation of the Plan of Chemical Management Priorities.

The amendments also support Canada's commitments to implement the United Nations Declaration on the Rights of Indigenous Peoples. The Minister of the Environment will be required to report annually on the administration of CEPA in respect of Indigenous peoples and governments, including measures taken to advance reconciliation as reflected in section 35 of the *Constitution Act, 1982* and in the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

Implications and next steps

Those who use chemicals in their business will want to keep abreast of these developments and pay keen attention to whether a chemical they are using, manufacturing, or importing falls under the Watch List or Part 1 of Schedule 1. The Watch List will act as an early indicator of substances that may be restricted by the federal government in the future.

In the coming years, the Government of Canada will develop the Plan of Chemical Management Priorities and specify how the new right to a healthy environment will be considered in the administration of CEPA. Industry, and other persons affected, will have opportunities to provide input on these developments through consultative processes.

Much will occur over the next two years as the federal government implements the right to a healthy environment and the Plan of Chemical Management Priorities. BLG will continue to monitor and report on these developments.

If you have any questions on how any of these amendments may impact you or your business please contact any of the authors or the key contacts below.

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