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Moving forward on CEPA modernization: Key provisions in Bill S-5

About CEPA

The *Canadian Environmental Protection Act*, 1999, is Canada's cornerstone environmental law. CEPA provides the **legislative framework for protecting human health and the environment from pollution and toxic substances**. For example, under CEPA the federal government regulates activities related to air and water quality, toxic ingredients in consumer products, movement of hazardous waste, protection of biodiversity, climate action and plastic pollution.

Sources of pollution and scientific understanding of its effects on the environment and human health have evolved over the past 24 years, yet CEPA has not been updated since 1999. In 2017, a parliamentary review of CEPA made 87 recommendations for strengthening the Act.

Bill S-5, *Strengthening Environmental Protection for a Healthier Canada Act*

Bill S-5 is an important step toward modernizing CEPA. It was introduced in the Senate in February 2022, and then in the House in September 2022. Senate and House committees studied the bill and passed amendments that improve its core provisions, addressing some, though not all, of our recommendations.

While Bill S-5 does not address all aspects of CEPA in need of modernization, it makes important progress in relation to recognizing the right to a healthy environment, and updating Canada's legislative framework for assessing and managing toxic substances.

Key provisions in Bill S-5:

Right to a healthy environment – a first in Canadian law

- **Recognition of the right to a healthy environment** in the CEPA preamble, the first recognition of this right in federal law.
- A new **duty of government to protect the right** to a healthy environment in the administration of CEPA, and uphold the principles of environmental justice — including the avoidance of adverse effects that disproportionately affect vulnerable populations —

intergenerational equity and non-regression. A healthy environment “means an environment that is clean, healthy and sustainable.”

- Requirement for the Ministers of the Environment and Health to develop a **framework for implementation** of the right to a healthy environment under CEPA, including the process for considering the right in substance assessments.
- New requirements for consideration of available information on the **cumulative effects** on the environment and human health and on any **vulnerable populations** when assessing toxic chemicals and other substances.

A stronger framework for action on toxics

- **Prioritizing prohibition** of substances that are carcinogenic, mutagenic or toxic to reproduction (CMRs), as well as those that are persistent, bioaccumulative and inherently toxic (PBiT). CEPA 1999 required “virtual elimination” only of PBiT substances, but this approach failed to deliver results.
- New requirements for consideration of **cumulative effects** and **vulnerable populations and environments** when assessing toxic chemicals and other substances, as noted above.
- Removing the requirement for CEPA regulations to apply everywhere in Canada, which enables regulations to more easily address “**pollution hot spot**” situations.
- Provides additional authority to request information regarding releases of substances that may contribute to pollution, and specifically references **hydraulic fracturing and tailings ponds**, signaling to the government that these activities are of particular concern requiring attention.
- New requirement to compile a “**watch list**” of substances that the Minister of Environment and the Minister of Health have reason to suspect are capable of becoming toxic; e.g., chemicals known to have hazardous properties that have yet to be assessed, or that are not currently in widespread use. This will provide an early signal to companies and help prevent regrettable substitution (replacing one toxic chemical with another).
- New **planning requirement** to establish priorities and timelines for substance assessments and control actions within two years of royal assent, and updates at least every eight years; this will improve transparency and help prevent delays.
- New requirements for the Minister to publish in the Environmental Registry the **reasons for delay** and estimated timeframe if finalizing a substance assessment takes longer than two years – an accountability mechanism lacking in CEPA 1999. This will help put a stop to lengthy, unexplained delays in finalizing assessments and enable control measures to proceed.
- New requirements for **risk management plans to include estimated time frames** for developing regulations and instruments, and for updates to be included in the CEPA annual report, including reasons for any delay. This will improve accountability for control actions after a substance is assessed as “CEPA-toxic” and help keep risk management plans on track.
- Ensure prevention and control measures include actions that lead to use of “**safer or more sustainable alternatives**” within risk management plans.

- Clearer requirement for the Minister to respond to **public requests** for the assessment of substances by adding the substance to the plan of priority substances for assessment or denying the request.
- **Better control of confidential business information claims**, to expand public access to data. New requirements for confidentiality requests to be accompanied by reasons and for review of a subset of granted requests each year. A similar audit requirement exists in the U.S.

Unfinished business

While Bill S-5 marks a major milestone, there is more to do. CEPA is broad legislation and updates are needed to other aspects of the act as well as in its implementation, including:

- **Remove barriers to bringing citizen lawsuits.** CEPA's "citizen enforcement" provisions are supposed to enable people in Canada to hold polluters to account for violations of CEPA and its regulations. However, this is a rarely used aspect of CEPA because of the legal limitations and cost barriers. CEPA should be updated to remove these barriers and update the options for citizens to bring lawsuits to uphold the right to a healthy environment.
- **Action on air quality.** Canadian Ambient Air Quality Standards for some key pollutants have been established under CEPA, but air quality remains degraded in some communities where the CAAQS are exceeded. Canada currently is the only G-8 country without enforceable national air quality standards.
- **Labelling of hazardous substances in consumer products.** Often there is no way to know which chemicals consumer products contain. Ingredients that may harm human health or the environment should be identified on the package label, including substances *capable of becoming "CEPA-toxic"* but not yet listed on Schedule 1. This would better align with the approach to labelling in Europe and some U.S. states.
- **Stronger control of genetically modified animals.** CEPA's outdated process for approving genetically engineered animals with wild counterparts like salmon raises concerns about genetic pollution. Nature Canada has proposed amendments to narrow discretion for approval of genetically engineered animals, and improve transparency and public participation. The Assembly of First Nations also recommended amendments to this part of CEPA, noting the interplay with First Nations' Inherent and Treaty Rights to fish and hunt.
- **Closing loopholes on ocean dumping,** as recommended by West Coast Environmental Law. The prohibition on ocean dumping under CEPA only addresses intentional dumping and does not prevent the significant pollution that results from accidents or negligence. This loophole means that protections from pollution are weaker in the ocean than on land and allows pollution like plastics and toxics, including accidental discharges like spills, into the ocean unsanctioned.
- **Environmental protection on First Nations reserve lands.** Most First Nations do not benefit from the same level of environmental protection as other communities in Canada, due to regulatory and capacity gaps (including resourcing). This has negatively impacted the exercise of First Nations' Inherent and Treaty rights. While CEPA contains provisions

related to “Aboriginal lands,” a comprehensive approach to environmental protection and management is needed that is not possible with existing federal environmental laws.¹ The AFN has recommended amendments to CEPA in relation to environmental protection on reserve and consistency with UNDRIP, noting the need for reforms to be co-developed with First Nations.

- **Restricting export of plastic wastes.** CEPA controls on the movement of hazardous waste should be updated to reflect recent plastics amendments to the Basel Convention and better enable enforcement to prevent illegal exports of plastic waste. CEPA and its regulations should also enable Canada to fully implement the Basel Ban amendment and align with best practice when it comes to stopping exports of hazardous wastes to non-OECD member countries.

In addition, Bill S-5 requires the Ministers of Health and Environment to develop, within two years, a framework for implementing the right to a healthy environment. Environment Minister Steven Guilbeault stated, “The implementation framework will clarify the right to a healthy environment lens for all programs under CEPA, including the clean air agenda and the chemicals management program.” A robust framework will be key to meaningful integration of the right in decision-making under CEPA.

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¹ <https://chiefs-of-ontario.org/environmental-regulatory-and-capacity-gap-project/>