



environmental
defence



FONDATION
DAVID SUZUKI
Un monde. Une nature.

DAVID SUZUKI
FOUNDATION
One nature.



CAPE
Canadian Association
of Physicians
for the Environment
Association canadienne
des médecins
pour l'environnement
ACME

ecojustice



ACTION CANCER DU SEIN DU QUÉBEC
BREAST CANCER ACTION QUEBEC

April 25, 2022

Standing Senate Committee on Energy, the Environment and Natural Resources
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4
VIA EMAIL: enev@sen.parl.gc.ca

Honourable Members of the Senate Standing Committee on Energy, the Environment and Natural Resources,

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

On behalf of Ecojustice, Environmental Defence, Breast Cancer Action Quebec, the David Suzuki Foundation and the Canadian Association of Physicians for the Environment, we present to the Standing Committee on Energy, the Environment and Natural Resources our submission on Bill S-5, Strengthening Environmental Protection for a Healthier Canada Act.

Ecojustice uses the power of the law to defend nature, combat climate change and fight for a healthy environment. Environmental Defence is a leading Canadian environmental advocacy organization that works with government, industry and individuals to defend clean water, a safe climate and healthy communities. Breast Cancer Action Quebec is a feminist, environmental health organization whose mission is the prevention of breast cancer, with a particular focus on environmental factors linked to the disease. The David Suzuki Foundation is a leading Canadian environmental non-profit organization whose mission is to protect nature's diversity and the well-being of all life, now and for the future. The Canadian Association of Physicians for the Environment is a physician-directed non-profit organization working to secure human health by protecting the planet.

As organizations concerned with environmental health, we have long advocated for the modernization of the *Canadian Environmental Protection Act* (CEPA) and recognition in law of the right to a healthy environment. We therefore welcome the committee's consideration of Bill

S-5, the Strengthening Environmental Protection for a Healthier Canada Act. This brief outlines our comments on the strengths of Bill S-5 and provides recommendations for improvements.

We focus on two areas that we consider to be the most significant aspects of Bill S-5:

- New provisions recognizing the right of all people in Canada to a healthy environment; and,
- Changes to CEPA Part 5 — Controlling Toxic Substances.

CEPA provides the legislative framework for protecting human health and the environment from pollution and toxic substances. The law has not been significantly amended for more than two decades, yet sources of pollution and our scientific understanding of risks and impacts on communities have changed dramatically over this time. With the improvements discussed below, Bill S-5 will close this gap by strengthening legal protections from pollution and toxic substances.

Although Bill S-5 is not a comprehensive update to CEPA — some important issues identified by environmental and health advocates remain to be addressed — we believe the bill offers a workable starting point for many much-needed improvements to the act, with respect to recognition of the right to a healthy environment and controlling toxic substances. We have identified several opportunities to strengthen these provisions to truly deliver on the promise of a stronger environmental protection law that confronts 21st-century dangers with 21st-century science.

In particular, we recommend the Senate committee amend Bill S-5 to provide for:

- 1. Meaningful recognition of the right to a healthy environment.**

Bill S-5 would recognize the human right to a healthy environment for the first time in Canadian federal law, a long-overdue step that has been taken by 156 of 193 members of the United Nations.¹ Bill S-5 requires that the implementation of the right to a healthy environment be set out by a framework that includes the principles of environmental justice — including the avoidance of adverse effects that disproportionately affect vulnerable populations — and non-regression.² This is an essential inclusion given the continuing legacy of environmental

¹A/HRC/43/53.Right to a healthy environment: good practices. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Human Rights Council 43 Session .December 30, 2019

<<https://www.ohchr.org/en/special-procedures/sr-environment/annual-thematic-reports>>

² Morin, J.-F., & Orsini, A. (2020). Essential Concepts of Global Environmental Governance (2nd ed.). Routledge. <https://doi.org/10.4324/9780367816681>. In the chapter titled “Principle of non-regression” Lynda Collins explains the “[t]he principle of non-regression has both ecological and legal dimensions: it can be defined as a prohibition on state conduct that results in environmental degradation or in the weakening of environmental laws. The non-regression principle originates in international human rights law and may be viewed as “a negative obligation inherent in all positive obligations associated with fundamental rights” including human and environmental rights.”

racism in Canada, as documented by McMaster University professor Ingrid Waldron³ and UN experts⁴.

Relatedly, Bill S-5 also specifies the duty of the government to protect the health of vulnerable populations in the administration of CEPA, and adds an explicit requirement to consider vulnerable populations when assessing substances that may be toxic. The definition in the bill of vulnerable populations recognizes that vulnerability may pertain to greater biological susceptibility or greater exposure.⁵ While greater exposure is important with some substances, others have adverse impacts even in small doses. Vulnerability may also be due to combinations of exposures or timing of exposures such as during windows of developmental vulnerability, particularly for certain populations who are already marginalized and vulnerable including Indigenous people, women, workers, racialized communities, infants, children and people with disabilities. For example, exposure to endocrine disrupting chemicals in small amounts at particular windows of vulnerability during development may lead to health harms such as breast cancer⁶.

Two of the many examples of biological susceptibilities are exposure to hormone-disrupting chemicals linked to cancer and infertility for women of child-bearing age and exposure to air pollution for people with asthma. Vulnerabilities because of higher exposures may also constitute an environmental injustice when a marginalized community such as a predominantly racialized, Indigenous or communities of low socioeconomic status has disproportionately higher exposures to toxic chemicals or pollution.

We strongly support the integration of a human rights lens in decision-making under CEPA. However, the language used in the bill to describe the right to a healthy environment requires amendment. Subclause 3(2) of bill amends subsection (2)(1) of the Act by adding paragraph 3(2)(a.2) (emphasis added):

³ Dr. Waldron, Professor, HOPE Chair in Peace and Health at McMaster University. <<https://experts.mcmaster.ca/display/waldroni?msclkid=ab77ff95ac9211eca925234944528f0c>>. Dr. Waldron is also the founder of The ENRICH Project.

<<https://www.enrichproject.org/about/team/?msclkid=e3b3c7c9ac9211ec97ecf5693eea8fc5>>

⁴ Baskut Tuncak 2020 report of the Special Rapporteur on toxics, Baskut Tuncak, to the UN Human Rights Council regarding Canada. In the report, the Special Rapporteur shares his findings and recommendations from his official country visit, from 24 May to 6 June 2019.

<<http://www.srttoxics.org/resources/reports/canada/>> and Professor David Boyd, Special Rapporteur on human rights and the environment, in his study of sacrifice zones

<[>>](https://sppga.ubc.ca/news/prof-david-boyd-millions-suffering-in-deadly-pollution-sacrifice-zones/?msclkid=0fc78b31ac9511ec911db8ee8950c029)

⁵ Dayna Nadine Scott and Sarah Lewis, "Sex and Gender in Canada's Chemicals Management Plan." In *Our Chemical Selves. Gender, Toxics and Environmental Health*. Ed. Dayna Nadine Scott. Vancouver: UBC Press, 2015, pp 78-104.

⁶ Terry, M.B., Michels, K.B., Brody, J.G. *et al.* Environmental exposures during windows of susceptibility for breast cancer: a framework for prevention research. *Breast Cancer Res* 21, 96 (2019). <https://doi.org/10.1186/s13058-019-1168-2>

3(2)(a.2) protect the right of every individual in Canada to a healthy environment as provided under this Act, *which right may be balanced with relevant factors, including social, economic, health and scientific factors*;

Similar language repeats in clause 5 of the bill.

This is an unusual and problematic formulation, which could limit application of the right to a healthy environment to such an extent as to render it largely meaningless. This would be a cynical and regrettable outcome of Canada's first recognition of the right in federal statute.

Provincial laws recognizing the right to a healthy environment (such as Quebec's *Charter of Human Rights and Freedoms* and *Environmental Quality Act*⁷) do not qualify the right in these terms. We are not aware of any other country that uses this formulation to recognize the right to a healthy environment.⁸ The UN Human Rights Commission's Resolution 48/3 recognizes an unqualified right "to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights."

We strongly recommend the committee amend subclause 3(2) of Bill S-5 to remove the "balancing" clause.

We recognize, of course, that the right to a healthy environment, like other human rights, and indeed like other duties listed in section 2 of CEPA, will be subject to reasonable limits as may be justified in light of the purpose of the act.

However, as drafted, the "balancing" in subclause 3(2) and clause 5 effectively kneecaps the right *a priori*. Furthermore, it inappropriately elevates "other factors" — including economic factors — to the same status as the right to a healthy environment. This is inconsistent with the basic conception of human rights as foundational and also directly contradicts the duty set out in paragraph 2(1)(b) of CEPA to "take the necessity of protecting the environment into account in making social and economic decisions."

Moreover, the "balancing" clause misrepresents the concept of the right to a healthy environment by juxtaposing it against social, health and scientific factors. These factors and others may *inform the application of the right*. The term "balancing" implies that these factors

⁷ Quebec law C-12 - Charter of human rights and freedoms, s46.1.: "Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law." <<https://www.legisquebec.gouv.qc.ca/en/document/cs/C-12>>

⁸ Of the 156 UN member states that recognize the fundamental human right in law, here are 110 states where this right enjoys constitutional protection. In addition, the right to a healthy environment is explicitly included in regional treaties ratified by 126 states. Refer to: A/HRC/43/53.Right to a healthy environment: good practices. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Human Rights Council 43 Session.December 30, 2019.
<<https://www.ohchr.org/en/special-procedures/sr-environment/annual-thematic-reports>>

can only limit the scope of the right to a healthy environment. This is misleading, as in many cases these factors may in fact support the right to a healthy environment.

In any case, this is more appropriately addressed in the implementation framework required under clause 5 of Bill S-5. The final paragraph of subclause 5.1(2) of Bill S-5 could be rephrased to require the implementation framework to elaborate on *how relevant factors may inform application of the right*.

We also recommend including an explicit requirement for the implementation framework to specify the process for considering the right to a healthy environment in substance assessments under CEPA section 76.1. While the right applies appropriately to all aspects of the act, this amendment would ensure the framework includes specific guidance for its application to assessments. A parallel can be drawn to the precautionary principle, which is referenced in the CEPA preamble, the section 2 duties, and also as a requirement in section 76.1.

Finally, we suggest reinforcing the principles of environmental justice⁹ and non-regression in CEPA by incorporating them in section 2 of the Act. Bill S-5 references these principles in clause 5, in relation to the framework for implementing the right to a healthy environment, which is a start. Incorporating them also in section 2 would give them greater force.

2. Greater certainty in the new regime to prioritize prohibition of toxic substances of particular concern.

Bill S-5 adopts a new regime that prioritizes prohibiting substances that pose the ‘highest risk’ (Part 1 substances). The classification of substances of “highest risk” to human health is to be left to future regulation. The stated intention of “highest risk” to human health is to prescribe thresholds for substances where “carcinogenicity, mutagenicity and reproductive toxicity (CMR), and any other relevant circumstances or conditions”¹⁰ are present. This would address a critical gap in the current virtual elimination regime. CEPA 1999 requires “virtual elimination” of substances determined to be persistent, bioaccumulative and inherently toxic in the environment but includes no parallel requirements for substances that are of high concern to human health.

To provide greater certainty, Bill S-5 should be amended to reflect this stated intention. In addition, the term “highest risk” is problematic given it could be interpreted to apply to only the very “highest” risk substance. We recommend that the term “poses the highest risk” be replaced in subclause 15(2) and related subparagraph 21(3)(b)(ii) of the bill with more specificity of the

⁹ Dr. Ingrid Waldron. Environmental Racism in Canada. July 2020.

<<https://en.ccunesco.ca/-/media/Files/Unesco/Resources/2020/07/EnvironmentalRacismCanada.pdf>>

¹⁰Government of Canada. Web Page titled “Bill S-5, Strengthening Environmental Protection for a Healthier Canada Act - Summary of Amendments.”

<<https://www.canada.ca/en/services/environment/pollution-waste-management/strengthening-canadian-environmental-protection-act-1999/bill-c-28-strengthening-environmental-protection-healthier-canada-act-summary-amendments.html?msclkid=b891fe16adf211eca8391e6883362457#toc1>>

substances to be classified in the regulation as substances that are carcinogenic, mutagenic, toxic to reproduction or pose other risks of equivalent concern.

Currently, clause 29 of the bill provides broad discretion to the Ministers when recommending a mandatory prohibition regulation for highest risk substances. Given that these substances are “highest risk,” it would be more appropriate to provide criteria to limit this discretion; otherwise the regime risks producing arbitrary decisions that are not rooted in environmental and human health science. We recommend that clause 29 be amended to specify that exceptions to the mandatory prohibition regulations only be granted:

- if the activity or release of that substance is not ongoing,
- if it can be undertaken in a manner that eliminates all harmful effects on the environment and human health, or
- for essential uses for which there are no less harmful alternatives.

3. Assessment of cumulative risks to the environment, as well as to human health.

We strongly support the requirement to assess cumulative effects that may result from exposure to a substance in combination with exposure to other substances. Currently, CEPA requires only assessment of individual substances in isolation, which does not represent real-life exposures, potentially underestimating the total risk. We recommend a clarification of the requirement to consider cumulative effects to ensure it applies to effects on human health and the environment. However, we are concerned that it could be interpreted as only applying to human health exposures because it is in the same paragraph of the bill as the requirement to consider vulnerable populations (section 20). It is our understanding that the term “cumulative effects” includes the consideration of aggregate and synergistic exposure as used in scientific literature.¹¹

4. Clear timelines for assessing substances and implementing measures to address substances assessed as toxic; integration of “safer substitution” as a tool in chemicals management

Legislating timelines requirements will improve accountability and prevent lengthy delays in finalizing assessments and implementing the risk-management regulations and instruments necessary to protect human health and the environment from toxic substances. In the absence of timeline requirements under the current act, lengthy delays of years or even decades are not uncommon as substances move through the various steps under CEPA. These delays result in years of unnecessary risk to human health and the environment, and uncertainty for industry.¹²

¹¹ For an understanding of the terminology and concepts as applied in testing and assessment,, see Chapter 2 of:

<<https://www.oecd.org/chemicalsafety/risk-assessment/considerations-for-assessing-the-risks-of-combined-exposure-to-multiple-chemicals.pdf>>

¹² For example, the draft screening assessments for hydrogen sulfide was published in September 2017 and has yet to be finalized although it was anticipated in September 2018.

<<https://www.canada.ca/en/health-canada/services/chemical-substances/other-chemical-substances-interest/hydrogen-sulfide.html>>. The draft screen assessment for naphthenic acids was published in August

To address the multi-year delays between proposed and final substance assessments, we recommend subclause 21(2) of the bill be amended to set a one-year time limit to finalize an assessment after the public consultation on the proposed assessment. The one-year limit should only be extended if additional data collection or studies are required to finalize the assessment, and the public is notified of the reasons for the extension.

To address delays in the implementation of risk-management measures, we recommend clause 22 of Bill S-5 provide greater certainty with respect to timelines for the subsequent regulations or instruments. CEPA requires that a regulation or instrument to manage risk be proposed within two years¹³ after a substance is recommended to be added to Schedule 1, the Toxic Substance List, and then finalized within 18 months¹⁴. These timelines for the first measure are often referred to as the “CEPA-clock”. However, no timelines apply to any subsequent risk management measures.

Bill S-5 introduces a new requirement in clause 22 for the ministers to publish a statement respecting the development of subsequent proposed regulations or instruments that specifies “to the extent possible” an estimated timeframe. While a start, this provision is inexplicably much less rigorous than the planning requirements under the new Net Zero Accountability Act. Bill S-5 must be strengthened to require timelines for every planned risk management action, and to ensure those timelines are respected. These are the basic requirements for accountability. We further recommend amendments to clause 22 of the bill to require that the specified time frames be no longer than two years to provide greater certainty and prevent lengthy delays. A provision for extensions could be considered for situations in which it is not possible to meet the two-year limit, but this should be tightly constrained.

A potentially meaningful change introduced by Bill S-5 is the replacement of a person’s ability to request a substance be added to the Priority Substance List (PSL) with an ability to request that a substance be assessed to determine if it is toxic. The PSL is a dated, unused aspect of CEPA that Bill S-5 will remove.¹⁵ However, clause 20 of the bill maintains some of the same problematic language that is in CEPA today. For public participation to be substantive and meaningful, clause 20 should be amended to specify that the minister’s response to a public

2018 and has yet to be finalized, although it was anticipated in August 2019.

<<https://www.canada.ca/en/health-canada/services/chemical-substances/chemicals-management-plan-3-substances/commercial-naphthenic-acids-group.html>>. It took over eight years for the first regulation to be finalized from when triclosan was first assessed and found to be toxic.

<<https://www.canada.ca/en/health-canada/services/chemical-substances/other-chemical-substances-interest/triclosan.html>>. What each of these substances has in common is that ENGOs submitted comments on the assessments.

¹³ Subsection 91(1) of CEPA

¹⁴ Subsection 92(1) of CEPA

¹⁵ The first Priority Substance List was published in 1994 and the second PSL list was published in 1995. There have been no substances added to the PSL to our knowledge since 1995. Both of these lists predate CEPA, 1999.<

<https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/substances-list/priority-list.html>>

request for assessment must include a clear decision to grant or deny the request and prescribe a six-month time limit for initiating an assessment and a two-year time limit to complete an assessment if granted. In practice, the current wording has been used to issue a vague and overly general response without making a decision on the request, thereby rendering the mechanism of public participation essentially meaningless.¹⁶

Safer substitution

Bill S-5 requires the ministers to maintain a non-statutory list of substances capable of becoming toxic or that have been determined to be capable of becoming toxic (the “Watch List”). The Watch List is a welcome addition to CEPA that addresses the complex problem of regrettable substitution. Regrettable substitution occurs when manufacturers or producers replace a banned or restricted toxic substance with another hazardous substance that may also be found to be toxic. By flagging substances of potential concern, manufacturers and producers can voluntarily avoid substances on the Watch List and use safer alternatives. In addition, by prioritizing chemical group assessments, regrettable substitutions within a class of chemicals can be avoided.¹⁷

To reinforce the signal for safer substitution, we recommend that clause 19 of the bill be amended to recognize that assessing substances by class is an advantageous means to avoid regrettable substitution within the class of substances and a reason to consider undertaking a class assessment.

In addition, we recommend that clause 29 of the bill be amended to recognize that risk-management actions can lead to the use of safer or more sustainable alternatives to help prompt a shift in the chemicals management regime from a reactive to a proactive model of protection that does not simply replace one harmful substance with another.

5. A higher bar for confidentiality claims to expand public access to data about environmental and health risks.

The lack of transparency with respect to the assessment of substances is an ongoing problem not corrected by Bill S-5. It is particularly problematic for the assessment of new substances and organisms under parts 5 and 6 because there are no mandatory requirements for consultation and publication of assessments. To expand public access to relevant data related to

¹⁶ A request made in 2018 by Ecojustice on behalf of 10 organizations under CEPA section 76(3) was not properly answered by the minister. The minister missed the deadline to respond and responded in a manner that did not answer the question as to whether the substance was to be added to the PSL. <<https://ecojustice.ca/pressrelease/statement-feds-miss-opportunity-to-use-law-to-tackle-plastic-pollution-ecojustice-says/>>

¹⁷ For example, polybrominated diphenyl ethers (PBDEs) are an entire class of organohalogen flame retardants in decline due to bans and restrictions and being replaced by organophosphate ester flame retardants (OPFRs). See: Arlene Blum, Mamta Behl, Linda S. Birnbaum, Miriam L. Diamond, Allison Phillips, Veena Singla, Nisha S. Sipes, Heather M. Stapleton, and Marta Venier, Organophosphate Ester Flame Retardants: Are They a Regrettable Substitution for Polybrominated Diphenyl Ethers? Environ. Sci. Technol. Lett. 2019, 6, 11, 638–649, October 21, 2019 <<https://pubs.acs.org/doi/abs/10.1021/acs.estlett.9b00582>>

environmental and health risks, we recommend amendments to clause 50 of the bill to require a reverse onus on claims of confidentiality. A presumption of non-confidentiality not only requires reasons to accompany a request but puts the onus on the party requesting confidentiality to demonstrate the necessity for confidentiality as is done in other comparable jurisdictions such as the U.S. and European Union.¹⁸

Thank you for considering these recommendations to strengthen Bill S-5. It has been five years since the House Standing Committee on Environment and Sustainable Development reviewed CEPA and recommended strengthening the act. At the time, all parties agreed CEPA should be modernized. We must not let another year go by without bringing Canada's cornerstone environmental law into the 21st century. We encourage the committee to improve and report Bill S-5 as soon as possible. It is our hope that the Senate will be able to complete its consideration of S-5 before the summer recess.

Jane E. McArthur, Toxics Campaign Director, Canadian Association of Physicians for the Environment ([CAPE](#))

Elaine MacDonald, Program Director - Healthy Communities, [Ecojustice](#)

Jennifer Beeman, Executive Director, Breast Cancer Action Québec, [Breast Cancer Action Québec](#)

Cassie Barker, Senior Program Manager, Toxics, [Environmental Defence](#)

Lisa Gue, National Policy Manager, [David Suzuki Foundation](#)

¹⁸ The US Toxic Substance Control Act (TSCA) requires CBI claims be accompanied by a specific supporting statement. In addition TSCA requires the U.S. EPA to review and make determinations of all CBI claims regarding chemical identity and 25 percent of claims not pertaining to non-chemical identity. Frequent Questions about TSCA CBI <<https://www.epa.gov/tsca-cbi/frequent-questions-about-tsca-cbi#Q2>>. In Europe under the Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) the default is to publish information it holds on registered substances. If a registrant submits information it wishes to keep confidential it must justify as to why it is potentially harmful to their commercial interest. Such justifications are assessed by the European Chemical Agency (ECHA) and must be accepted as valid for the information not to be published. See Dissemination and Confidentiality under the REACH Regulation October 2021 <https://echa.europa.eu/documents/10162/1804633/manual_dissemination_en.pdf/7e0b87c2-2681-4380-8389-cd655569d9f0>