

BILL S-5 Amends the Canadian Environmental Protection Act

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With the recent passing of Bill S-5, CEPA underwent its first significant changes in over 20 years — sweeping changes that give the government more power, and a stated obligation to ensure a clean environment for its citizens.

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CEPA (the Canadian Environmental Protection Act) is the primary statute through which Canada’s federal government regulates and protects the environment through pollution prevention.

This past summer, on June 13, 2023, Royal Assent was granted to Bill S-5, the “Strengthening Environmental Protection for a Healthier Canada Act”. This new act extensively alters 1999’s CEPA with amendments that add explicit new environmental rights for Canadians, expand public processes, and revise longstanding chemical regulations.

The Minister of the Environment and Climate Change (the Minister) administers most of these revised provisions, although some also target the Minister

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of Health. In addition to the Ministers and targeted (regulated) entities, these amendments will affect business conditions for many Canadian entities that work with commercially available chemicals.

This article provides a summary of changes, with some helpful thoughts about their impact.

Establishing a legal right to a healthy environment

S-5 amends CEPA to state that “...the Government of Canada recognizes that every individual in Canada has a right to a healthy environment as provided under this Act,” defining “healthy environment” to mean one that is “clean, healthy and sustainable.” Within two years, the Minister is to work with the Minister of Health to develop an “implementation framework” for their activities affecting this new right. This sweeping framework is planned to reflect all the following:

- Other CEPA policy principles, including environmental justice and inter-generational equity,
- “Relevant factors” to apply when interpreting and applying that right and determining any reasonable limits, including social, health, scientific and economic factors,

“Within two years, the Minister is to work with the Minister of Health to **DEVELOP AN ‘IMPLEMENTATION FRAMEWORK’**”

- Research, studies or monitoring activities to support the protection of the right, and
- Legal and procedural mechanisms to support the protection of that right.

The Ministers are to consult with “any interested persons” while developing the framework. Although the nature and extent of these consultations is unexplained, it’s clear that this may have broad impact.

We won’t know the practical extent of this new right until the Ministers complete their implementation framework. (Note that S-5 only establishes this right for the purposes of the government’s administration of CEPA — which covers a broad set of federally-relevant environmental topics but doesn’t address any provincial rights or how individual Canadians might attempt to enforce this new right.) However, governmental and private litigants are likely to reference this new right when bringing a lawsuit.

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Enhancing consultation with and consideration of Indigenous peoples

Several provisions direct the Minister to expand activities with Indigenous peoples, including consultations, research, and follow-ups. These activities must be discussed in annual reports to Parliament on CEPA activities. It’s not possible to predict how this enhanced attention may change the outcomes of any agency activities or directives.

Changing the lists of “toxic substances” and some applicable requirements

CEPA Part 5 applies to “toxic substances,” including assignments to the Minister to prepare and promulgate several lists to be subject to at least some of Part 5’s provisions. To date, these lists have included:

- “Toxic Substances” subject to controls under CEPA,
- “Domestic Substances” manufactured or imported and used in Canada (as of 1986 or subsequently added),
- “Non-Domestic Substances” in international commerce but not in Canada above threshold quantities (these cannot enter domestic commerce without approval),
- Priority Substances identified for assessment whether they are or can become toxic, and a

- Virtual Elimination list of persistent and bio accumulative substances and those specifically recommended by the Minister of Health (the goal means reduction to levels below detection limits).

S-5 makes two major changes here:

- It repeals the Virtual Elimination list.
- It creates a list of “substances that the Ministers have reason to suspect are capable of becoming toxic or that have been determined to be capable of becoming toxic” (to be known as the Watch List) and specifies how the Ministers can evaluate chemicals and list them with recommendations for further action. Decision criteria include whether a substance is “inherently toxic,” persistent and bio accumulative, or may pose a danger to human life or health. The Ministers must give priority to the total, partial or conditional prohibition of activities involving these substances.

“ (S-5) ...specifies how the Ministers can evaluate chemicals and list them with **RECOMMENDATIONS FOR FURTHER ACTION** ”

S-5 also makes several changes to administrative and procedural standards, to expedite agencies’ ability to review and act on emerging scientific information. It is widely assumed that these changes will accelerate the pace of chemical reviews and regulatory changes, likely in the direction of reducing use of and exposures to particularly hazardous materials.

Expanding Pollution Prevention (P2) planning requirements

CEPA empowers the Minister to issue Pollution Prevention Notices requiring targeted entities to prepare P2 Plans designed to improve management of any listed “Toxic Substance” to reduce environmental impacts. Each P2 Planning Notice identifies targeted substance(s) and entity(ies), defines activity(ies) and chemical hazard(s) to be addressed, and sets timelines, release reduction targets and other plan-specific details.

As examples, existing P2 plans address bisphenol A discharges, discharges of mercury-containing dental amalgam wastes, and air emissions of halocarbons from refrigeration activities. S-5 provides the Minister with additional explicit authority to require P2 Plans to prioritize the identification, development, or use of “safer or more sustainable alternatives” to the targeted substance(s) or product(s), and to focus on releases. Collectively, these

changes should also lead to faster and more effective efforts to reduce potential exposures.

What changes are coming, and when?

S-5 points at two different types of federal approaches to chemical hazards in the environment. The new right to a healthy environment and the increased attention to Indigenous peoples' concerns target public consultations and planning, to enhance consideration of the communities' concerns.

“ S-5 points at **TWO DIFFERENT TYPES OF FEDERAL APPROACHES** to chemical hazards in the environment ”

In contrast, changes to toxic chemical regulation apply directly to entities that manufacture, import and use chemicals, to encourage — and sometimes require — changes in chemical selection and management. While there are no important immediate changes, a wide variety

of Canadian entities will be affected, directly if subject to new regulations or indirectly as the selection of chemicals available in the market changes because of these efforts, after required rulemakings are completed.

“ Changes to toxic chemical regulation apply directly to entities that **MANUFACTURE, IMPORT AND USE CHEMICALS** ”

Summary thoughts

With the recent passing of Bill S-5*, CEPA underwent its first significant changes in over 20 years - sweeping changes that give the government more power, and a stated obligation to ensure a clean environment for its citizens. Companies involved with any area regulated under CEPA need to be aware that the Government now has an explicit duty to protect the right to a clean environment - and will have substantial new tools at its disposal. 📖

[*For more details, see the Canadian Government's S-5 web portal here.](#)

ABOUT JON ELLIOTT

Jon's multifaceted career spans consulting, managing compliance projects for organizations like Applied Materials and the City of Berkeley; writing, including the creation of legal handbooks and blogs, and contributions to 24 book-length resources for attorneys, EH&S managers, and trainers; and teaching, with a distinguished record of instructing courses and delivering presentations on EH&S compliance, earning him the "Outstanding Teacher" title in 1994. Jon has a diverse educational background, including a Juris Doctor from the University of California's Boalt Hall School of Law (1981), a Master of Public Policy from UC Berkeley's Goldman School of Public Policy (1980), and a Bachelor of Science in Mechanical Engineering from Princeton University (1977). He actively contributes to professional and community organizations, having served as Chairman of the Board of Directors of the GSPP Alumni Association and as a member of the Executive Committee of the State Bar of California's Environmental Law Section, where he chaired the Legislative Committee.

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