

Canada recognizes a right to a healthy environment and changes its process for assessing toxic substances

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On June 13, 2023, the long-in-the-making [amendments](#) to the *Canadian Environmental Protection Act* (CEPA) were passed by the Senate and received royal assent. Bill S-5, the *Strengthening Environmental Protection for a Healthier Canada Act*, makes the first substantial amendments to the CEPA since 1999.

Bill S-5 amends CEPA in two substantial ways. First, CEPA now recognizes that Canadians have a “right to a healthy environment as provided under this Act”. Second, Bill S-5 makes significant changes to the process of assessing toxic substances under CEPA.

Background

CEPA is the federal government’s primary means of regulating toxic substances. It gives the federal government the authority to regulate chemicals which meet the criteria under section 77 and are designated for regulation. This authority was recently used to enact regulations on single-use plastics (which we reported on [here](#)). Violations of CEPA relating to toxic substances can result in fines or imprisonment.

The process of amending CEPA began in 2016. In 2017, the House of Commons environment committee [unanimously agreed](#) that CEPA needed reform, but amending bills died on the order paper when federal elections were called in 2019 and 2021. Bill S-5 was introduced in the Senate on February 9, 2022, and passed with amendments by the House of Commons on May 30, 2023.

Recognition of a right to a healthy environment

Environmental groups have long advocated for the Canadian government to recognize a right to a healthy environment as is found in some provincial and territorial legislation, such as Ontario’s *Environmental Bill of Rights* and Quebec’s *Charter of Human Rights and Freedoms*. For example, the preamble to Ontario’s *Environmental Bill of Rights* recognizes that “[t]he people of Ontario have a right to a healthful environment”. However, the statute does not create a standalone substantive right to a healthy environment or prescribe a certain standard of environmental protection. Instead, it creates new procedural rights that provide for public participation and government accountability in environmental decision-making. The Canadian *Charter of Rights and Freedoms* does not provide for a specific right to a healthy environment.

After the passage of Bill S-5, CEPA’s preamble will now recognize the “right to a healthy environment as provided under this Act.” Subsection 2(1) is also amended to require the

government to protect that right “as provided under this Act, subject to any reasonable limits”. Bill S-5 also amends subsection 2(1) of CEPA to require the Government of Canada to exercise its powers in a manner that “protects the environment and human health, including the health of vulnerable populations”, which are defined for the first time in CEPA as “a group of individuals within the Canadian population who, due to a greater susceptibility or greater exposure, may be at an increased risk of experiencing adverse health effects from exposure to substances”. This is, arguably, a recognition of certain principles behind the concept of “environmental justice.”

Bill S-5 also adds a new subsection 5.1(1) that will require the federal Ministers of Environment and Health to “develop an implementation framework to set out how the right to a healthy environment will be considered in the administration of this Act” that will elaborate on:

- The principles to be considered in the administration of CEPA, “such as principles of environmental justice — including the avoidance of adverse effects that disproportionately affect vulnerable populations — the principle of non-regression and the principle of intergenerational equity, according to which it is important to meet the needs of the present generation without compromising the ability of future generations to meet their own needs”.
- Research, studies and monitoring activities to support the protection of the right to a healthy environment.
- The relevant “social, health, scientific and economic factors” taken into account in interpreting the right to a healthy environment and determining “the reasonable limits to which it is subject”, and
- Mechanisms to support the protection of this new right.

However, the impact of recognizing the right to a healthy environment in CEPA is unclear, for two reasons.

First, the statutory language in Bill S-5 is broadly worded, leaves significant discretion to the federal executive, and has no enforcement mechanism. A statute’s preamble merely sets out its purpose. On its own, it is unenforceable. And the right recognized in section 2(1) of CEPA is qualified by “reasonable limits”— a definition that is left to executive discretion and judicial interpretation.

Second, Bill S-5 does not provide a remedy for when the right is allegedly violated. For instance, Bill S-5 neither amends section 22 (an existing power under CEPA known as an “environmental protection action” which permits individuals to commence a court action under limited circumstances to seek redress for alleged offences under CEPA), nor does Bill S-5 provide an alternative remedy to enforce the new recognized right to a healthy environment. It is also apparent that an alleged violation of the right, as expressed in the preamble to CEPA, cannot lead to any regulatory enforcement action.

Amendments to the toxics assessment process

Bill S-5 also makes several changes to the process for designating substances for regulation under CEPA. This process has been criticized as too slow and unresponsive, and out of the 4,300 substances designated as a “priority” for Health Canada to review in 2006, 330 remain to be evaluated, and are not scheduled for completion until 2024. In an effort to speed up the review process, Bill S-5 creates a new subsection 77(8) requiring the Ministers of Environment and Health to release written explanations of delays lasting longer than two years.

Once a substance has been evaluated by Health Canada, it is sent to Cabinet to decide whether it should be listed for regulation under CEPA. Prior to Bill S-5, there were two lists of regulated chemicals under CEPA: Schedule 1, the List of Toxic Substances; and the Virtual Elimination List, reserved for the most dangerous pollutants. Only two chemicals were ever designated on the Virtual Elimination List, with one of the chemicals having no history of use in Canada. Because it was effectively moribund, Bill S-5 provides for the repeal of the Virtual Elimination List and related regulatory powers.

Bill S-5 also removes the name “List of Toxic Substances” from Schedule 1, at the demand of industry groups concerned about the labelling of commonly-used commercial products as “toxic.” The criteria for listing a substance under Schedule 1 in section 77(3) has been amended by Bill S-5 to reflect a broader range of potential harms, including that it may be “carcinogenic, mutagenic or toxic for reproduction”. Schedule 1 is also divided into two Parts:

- Part 1 is reserved for toxic substances of the highest risk, prioritizing total prohibition of their use. Bill S-5 stipulates 19 substances for regulation under Part 1, such as the toxic pesticide DDT (dichlorodiphenyltrichloroethane).
- Part 2 is for substances of lower risk, and regulations will prioritize pollution prevention rather than eradication. Bill S-5 designates 132 substances in Part 2, including asbestos, lead, petroleum, and single-use plastics.

Bill S-5 also aims to streamline the toxics assessment process by amending the *Food and Drugs Act* (FDA) to provide for a single assessment process for evaluating the safety of medicines and their chemical components. Previously, the assessment of the environmental risks of drug ingredients under CEPA was separate from the health and safety review conducted under the FDA.

While the amendments to CEPA's toxics control regime in Bill S-5 may speed up the process of reviewing chemicals for regulation, the regulatory powers conferred by the legislation are ultimately at the discretion of Cabinet to exercise. Whether Bill S-5 will create more or less stringent regulation of toxic substances will largely depend upon the inclinations of the government in office.

Next steps

It is too early to tell what impact these amendments to CEPA may have. Much more is “to come.” This important development should be followed closely as the federal executive develops its implementation plan for how the right to a healthy environment will be considered in the administration of CEPA and how it will approach the review and regulation of toxic substances.