

envi@parl.gc.ca

November 2022

Alexandre Longpré
Clerk of the committee
Standing Committee on Environment and Sustainable Development
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Dear M. Longpré

Re: Bill S-5, An Act to Amend the Canadian Environmental Protection Act, 1999, etc.

We are enclosing proposed testimony for the Committee on the above matter.

We would ask that the attached be posted on the Committee website in addition to being distributed to Committee members.

Should Committee members have any questions arising from the attached, please feel free to contact either myself or Ms. de Leon.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Joseph F. Castrilli
Counsel

c.c. Fe de Leon, CELA

Encl. CELA Testimony on Bill S-5

**TESTIMONY OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION
BEFORE THE HOUSE OF COMMONS STANDING COMMITTEE ON
ENVIRONMENT AND SUSTAINABLE DEVELOPMENT ON BILL S-5
AMENDMENTS TO THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999**

Introduction

The emission of toxic substances to the environment is a serious and growing problem globally, as well as in Canada. In materials we submitted to members of the Committee,¹ the Canadian Environmental Law Association (CELA) focused on the emission of cancer-causing agents to illustrate that Bill S-5 will not help solve the problem unless the Bill improves the approach of the Canadian Environmental Protection Act (CEPA) to pollution prevention.

The Problem the Pollution Data Reveals

CELA analyzed 15 years of national pollution data (2006-2020) derived from the National Pollutant Release Inventory (NPRI) authorized under CEPA. These 15 years coincide with the period the federal government's Chemicals Management Plan was being applied under CEPA. In particular, we reviewed the data for thirty-two known or suspected cancer-causing agents listed in CEPA's Schedule 1 List of Toxic Substances. What we found nationally was that while federal requirements are reducing by millions of kilograms on-site air releases of some of the most harmful chemicals to human health and the environment, on-site disposal and land releases of the same chemicals have been dramatically increasing (in the tens of millions of kilograms) over the same period (Table 1 of the CELA September 2022 submissions).

A similar picture emerges in several of the provinces CELA examined. In **Quebec**, for example, the CELA review found that while on-site air releases of these 32 cancer-causing agents decreased by 55 percent during the period 2006 to 2020, on-site disposal and land release of the same substances increased **234** percent during the same period (Table 2 of the CELA September 2022 Submissions). In **British Columbia**, it was a 48 percent decrease in on-site air releases, but a **186** percent increase in on-site disposal and land releases (Table 5 of the CELA September 2022 submissions). In **Alberta**, it was a 46 percent decrease in on-site air releases, but an **89** percent increase in on-site disposal and land releases (Table 4 of the CELA September 2022 submissions).

For certain substances, the trends are even more dramatic. For example, the CELA review found that nationally and in Quebec, with respect to **arsenic** and its compounds, known cancer-causing agents designated as toxic under CEPA, on-site air emissions decreased 67 and 8 percent, respectively, during the period 2006 to 2020. However, on-site disposal and land releases of arsenic and its compounds increased nationally by over **400** percent, and in Quebec by almost **2,000** percent during the same period (Tables 6 and 7 of the CELA September 2022 Submissions).

¹ Canadian Environmental Law Association, *Submissions to the House of Commons Standing Committee on Environment and Sustainable Development on Bill S-5, An Act to Amend the Canadian Environmental Protection Act, 1999, etc.* (September 2022); and Canadian Environmental Law Association, *Proposed Amendments to the House of Commons Standing Committee on Environment and Sustainable Development on Bill S-5, An Act to Amend the Canadian Environmental Protection Act, 1999, etc.* (September 2022).

Appendix A to our September 2022 submissions reproduces the NPRI definitions for on-site air releases and on-site disposal and land releases. What is clear from particularly the on-site disposal and land releases definitions is that these environmental management methods do not in any way hermetically seal off pollutants from the environment. In fact, in the case of waste rock and tailings impoundment areas (one of the management methods the NPRI program identifies as an on-site disposal measure) catastrophic releases to the environment of contaminated materials from such areas have occurred in Canada in the recent past.²

The bottom line: moving a known or suspected carcinogen from one environmental pathway (air) to another (land) does not represent progress in protecting human health and the environment. It merely represents putting a different part of the environment and a different group of people at risk. It is not a solution to the problem for the 150 chemicals the federal government has designated as “toxic” and placed in Schedule 1 of CEPA, let alone the dozens of cancer-causing agents in that Schedule.

A Proposed Solution From the 1995 House Standing Environment Committee Report

What is needed is a strategy of prevention and elimination of Schedule 1 toxic substances from Canadian commerce to the maximum extent possible. This was the expectation for CEPA as described in a 1995 House Standing Environment Committee report, summarized in our September 2022 submissions. The goal was not simply to shift emissions of toxics from one environmental pathway to another. In particular, the 1995 Committee said:

“... the Committee believes that pollution prevention should be the priority approach to environmental protection. In addition, the Committee firmly believes that CEPA should provide a key legislative base for promoting pollution prevention in Canada. ...a major shift in emphasis is required in the legislation, from managing pollution after it has been created to preventing pollution in the first place. We believe that pollution prevention will avoid, eliminate and reduce more pollution than “react and cure” strategies and that it will do so more cost-effectively. To this end, we contend that emphasis should be placed on a variety of pollution prevention strategies and tools that encourage more decisions to be made at the point of manufacture or use....

...we reiterate the need to emphasize preventive measures and to phase out pollution control methods. Pollution-control strategies should be considered only as interim measures until pollution-prevention strategies are put in place.”³

² A 2014 tailings impoundment failure at the Mount Polley gold and copper mine in British Columbia released approximately 25 million cubic meters of contaminated water and waste containing arsenic, copper, lead, and other heavy metals into two lakes and a creek. See Patrick Byrne, et al “The long-term environmental impacts of the Mount Polley mine tailings spill, British Columbia” EGU General Assembly 2015, held 12-17 April 2015, Vienna, Austria, 2015EGUGA.17.6241B; and Winston Szeto, “Ecological impact of Mount Polley mine disaster confirmed by new study”, *CBC News* (25 May 2022) (research showing higher levels of metals in invertebrates taken from Polley and Quesnel Lakes eight years later).

³ Canada, House of Commons Standing Committee on Environment and Sustainable Development, “It’s About Our Health! Towards Pollution Prevention – CEPA Revisited” in *Debates*, No. 81 (13 June 1995) at 83.

Why CEPA Contributes to the Problem and Bill S-5 Does Not Help

In our submission, there are three things wrong with CEPA that Bill S-5 does not correct on the issue of pollution prevention:

1 – The authority for pollution prevention under Part 4 of CEPA is discretionary not mandatory for toxic substances listed in Schedule 1. This situation has resulted in only one-sixth of all substances in the Schedule in the last 20 years having a pollution prevention plan, a rate that, if continued, will mean that all existing toxic substances in Schedule 1 will not have a plan until the 22nd century;

2 - The pollution prevention plan authority under Part 4 of the Act is meant to control the creation and use of toxic substances. However, because of the approach that has been taken by the federal government under Part 4, pollution abatement has become the predominant measure employed by industry (i.e., only emission concentrations of a substance are sought to be controlled). This is something the 1995 House Standing Environment Committee report warned against doing. The result has allowed such substances to stay in Canadian commerce and the environment;

3 - Bill S-5 does not make substitution of safer alternatives to toxic substances a central focus of amendments to the Act thus placing Canadians and the environment at risk, and Canada at a disadvantage relative to other countries that have done so.

Additional problems include:

4 - Bill S-5 proposes to recognize what many regard as a too limited right to a healthy environment. What is even more concerning is that Bill S-5 fails to provide an enforceable remedy under Part 2 of the Act for even this limited right that could make the right effective. The existing remedy provision in CEPA (section 22) has been unused for over 20 years because of a wide variety of procedural barriers to its use recognized as a problem by previous house standing environment committees that have examined the issue.⁴ This problem so concerned the Standing Senate Committee on Energy, the Environment and Natural Resources that in its June 2022 Observations Report that accompanied its amendments on Bill S-5 it stated that:

“4. This committee would like to state their concern that the right to a healthy environment cannot be protected unless it is made truly enforceable. This enforceability would come by removing the barriers that exist to the current remedy authority within Section 22 of CEPA, entitled ‘Environmental Protection Action.’ There is concern that Section 22 of CEPA contains too many procedural barriers and technical requirements that must be met to be of practical use. As Bill S-5 does not propose the removal or re-evaluation of these barriers, this Committee is concerned that the right to a healthy environment may remain unenforceable.”⁵

⁴ Canada, House of Commons Standing Committee on Environment and Sustainable Development, “Healthy Environment, Healthy Canadians, Healthy Economy: Strengthening the *Canadian Environmental Protection Act, 1999*” in *Debates*, No. 8 (June 2017) at 37-39.

⁵ See *Journals of the Senate* (20 June 2022) at 761.

5 - Bill S-5 would allow the Minister to: (1) collect data and conduct investigations as to whether a substance has the ability to disrupt the endocrine system⁶; and (2) consider available information on vulnerable populations and cumulative effects of substances. However, Bill S-5 does not authorize the Minister to require testing by industry in these instances when information is inadequate and, in fact, is severely constrained in this regard by existing provisions of CEPA unless the Ministers already have reason to suspect the substance is toxic or capable of becoming toxic. These failures of Bill S-5 also concerned the Standing Senate Committee on Energy, the Environment and Natural Resources in its June 2022 Observations Report:

“5. This committee wishes to convey their concern surrounding industry data collection where information gaps exist on the toxicity of substances they use or emit. Bill S-5 authorizes collection of data on whether a substance is an endocrine disruptor. Bill S-5 also authorizes the Minister to consider available information on vulnerable populations and the cumulative effects of a potential toxic substance. However, in none of these cases does Bill S-5 direct the Minister to require testing by industry when data gaps exist on whether a substance is toxic or is capable of becoming toxic. In such instances, this committee believes that testing should be done by industry where and when available information on substance toxicity is unavailable or inconclusive.”⁷

6 - Bill S-5 also proposes to:

- no longer identify Schedule 1 of the Act as a list of toxic substances – a change a 2007 House Standing Environment Committee report did not support because of concern that it would invite litigation on whether the Act continued to be a valid exercise of the federal criminal law power under the Constitution;⁸ and
- divide the list of 150 substances in Schedule 1 into two classes (Parts 1 and 2) with the larger class (Part 2), consisting of almost 90 percent of the full list of substances in the Schedule, including dozens of carcinogens in this group, being made subject to less stringent measures that on their face do not include prohibition, or examination of safer alternatives, compared to those proposed to be listed in the smaller class (Part 1).

Both these Schedule 1 proposals, if enacted, could together sow the seeds of constitutional confusion, divert government resources to defending lawsuits on designation decisions, and have a chilling effect on needed regulation of toxic substances going forward.

⁶ The endocrine system consists of glands and organs that produce hormones, which are released into the blood system to the body’s tissues and organs, and control growth, development, metabolism, and reproduction. United States Department of Health and Human Services, National Cancer Institute, Endocrine System, undated < www.cancer.gov >; and United States Environmental Protection Agency, Endocrine System, (Last updated 7 March 2022) < www.epa.gov >.

⁷ *Journals of the Senate* (20 June 2022) at 752-762.

⁸ Canada, House of Commons Standing Committee on Environment and Sustainable Development, “The Canadian Environmental Protection Act, 1999 – Five-Year Review: Closing the Gaps” in *Debates*, No. 5 (April 2007) at 46.

7 - Bill S-5 also fails to address the continued absence of legally binding national ambient air quality standards for certain Schedule 1 toxic substances (e.g., lead) that puts Canada behind the United States and every other industrialized country in the world and is contrary to the 2017 House Standing Environment Committee report to Parliament on amending CEPA.⁹

How Should Bill S-5 Amend CEPA?

CELA proposals to amend the Act, as set out in our September 2022 set of proposed amendments provided to members of the Committee, would:

- (1) make pollution prevention mandatory for all chemicals Canada has designated as toxic under the law;
- (2) enshrine analysis of safer alternatives to chemicals as a central pillar of CEPA;
- (3) impose mandatory chemical testing obligations on the private sector where information is not available to determine if a substance is toxic or capable of becoming toxic;
- (4) retain certain measures Bill S-5 would repeal (such as virtual elimination authority and identification of substances as toxic to protect CEPA's authority to address such substances under the criminal law power of the Constitution);
- (5) provide a clear right to, and effective remedy for, a healthy environment; and
- (6) authorize development of legally binding and enforceable national ambient air quality standards for selected Schedule 1 toxic substances (e.g., lead).

Attachment 1 to CELA's testimony summarizes these and other of our concerns with Bill S-5 and CEPA, identifies our suggestions for reform and where our proposed statutory language can be found, so as to better protect human health and the environment from the adverse impacts of industrial chemicals.

Thank you.

⁹ Canada, House of Commons Standing Committee on Environment and Sustainable Development, "Healthy Environment, Healthy Canadians, Healthy Economy: Strengthening the *Canadian Environmental Protection Act, 1999*" in *Debates*, No. 8 (June 2017) at 42.

ATTACHMENT 1 - SELECTED SUMMARY OF CELA CONCERNS WITH BILL S-5 AND PROPOSED SOLUTIONS

Concerns	Proposed Solutions
<p>1. Changes to Schedule 1 of CEPA, 1999</p> <ul style="list-style-type: none"> ◆ Sch. 1 no longer to be identified as list of “toxic substances” ◆ S-5 divides Sch. 1 into two Parts; placing small number of chemicals in new Part 1 (19) - only these may be prohibited from Canadian commerce; ◆ Most Sch. 1 chemicals to be in new Part 2 (132) and not subject to prohibition; ◆ Removing title to Schedule and two-tiered approach risks Act’s constitutionality 	<ul style="list-style-type: none"> ◆ Restore “List of Toxic Substances” title to Schedule 1; ◆ Do not create two Parts to Sch. 1; ◆ Any substance in Sch. 1 should be eligible for full risk management (e.g., bans, substitution, etc.) ◆ For further discussion see CELA September 2022 submissions on Bill S-5, pages 15-19; and CELA September 2022 proposed amendments to Bill S-5, Tab 6, pages 1-2.
<p>2. Pollution Prevention Planning Still Discretionary</p> <ul style="list-style-type: none"> ◆ Minister still not required to compel persons to create pollution prevention plans (PPP) for every substance in Sch. 1 ◆ Since 2000, only one-sixth of Sch. 1 toxic substances have a PPP (25 out of 150) ◆ At the rate of 25 substances every 20 years it will take Canada well into 22nd century to impose PPP on existing Sch. 1 chemicals, let alone those added over next 80+ years 	<ul style="list-style-type: none"> ◆ Make PPP mandatory for all Sch. 1 substances ◆ For further discussion see CELA September 2022 submissions on Bill S-5, pages 21-22; and CELA September 2022 proposed amendments to Bill S-5, Tab 3, pages 1-13.
<p>3. Pollution Abatement is Not Pollution Prevention</p> <ul style="list-style-type: none"> ◆ PPP is about eliminating creation and use of toxic substances ◆ Pollution abatement is about controlling releases, emissions, discharges ◆ Canada has allowed industry to use pollution abatement as a substitute for PPP majority of time a PPP has been prepared under <i>CEPA, 1999</i> ◆ Some substances subject to PPP have still seen their overall emissions increase in certain environmental media 	<ul style="list-style-type: none"> ◆ Strictly limit use of pollution abatement measures as substitutes for PPP ◆ For further discussion see CELA September 2022 submissions on Bill S-5, pages 22-29; and CELA September 2022 proposed amendments to Bill S-5, Tab 3, page 12 of 13.
<p>4. Bill S-5 Repeals Virtual Elimination Authority</p> <ul style="list-style-type: none"> ◆ Authority for virtual elimination of toxic substances under <i>CEPA, 1999</i> to be repealed ◆ “Failure” of virtual elimination authority due to federal government wanting to reduce releases of toxic substances instead of eliminating their generation and use ◆ Government’s substitute approach of using existing prohibition regulations has in fact permitted uses of toxics to continue in commerce and industry 	<ul style="list-style-type: none"> ◆ Retain virtual elimination authority; ◆ Make it focus on elimination of substances, not releases below level of quantification ◆ Inorganic substances (e.g., lead, mercury, arsenic) should be eligible for virtual elimination from industrial-commercial activity ◆ For further discussion see CELA September 2022 submissions on Bill S-5, pages 31-35; and CELA September 2022 proposed amendments to Bill S-5, Tab 4, pages 1-4 and Tab 3, pages 7-8, 10.

SELECTED SUMMARY OF CELA CONCERNS WITH BILL S-5 AND PROPOSED SOLUTIONS

Concerns	Proposed Solutions
<p>5. Substitution of Safer Alternatives Not Central Focus of Bill S-5</p> <ul style="list-style-type: none"> ◆ Few references to alternatives in Bill ◆ Only 19 substances (Sch. 1, Part 1) eligible for substitution under Bill S-5 = 13% of all toxic substances in Sch. 1 ◆ 87% of toxic substances in Sch. 1 (i.e., those in Part 2) are not – these only subject to PPP (and as PPP regime has been applied by government, they're generally only subject to pollution abatement) 	<ul style="list-style-type: none"> ◆ Make substitution central focus of <i>CEPA, 1999</i> ◆ For further discussion see CELA September 2022 submissions on Bill S-5, pages 41-44; and CELA September 2022 proposed amendments to Bill S-5, Tab 3, pages 6-9, 11.
<p>6. Recognizing Right to Healthy Environment But No Remedy</p> <ul style="list-style-type: none"> ◆ Bill S-5 proposes a RTHE but with caveats (e.g., subject to “reasonable limits” based on economic or other factors and 2-year development of administrative implementation framework) ◆ Existing citizen suit remedy in <i>CEPA, 1999</i> never been used in over 20 years because too many procedural barriers to its use in Act ◆ Government does not propose removal of these barriers so RTHE not likely enforceable – a concern shared by 2022 Senate Committee that reviewed Bill S-5 	<ul style="list-style-type: none"> ◆ Remove caveats ◆ Clarify RTHE and make enforceable by removing barriers to existing remedy authority ◆ For further discussion see CELA September 2022 submissions on Bill S-5, page 35-41; and CELA September 2022 proposed amendments to Bill S-5, Tab 2, pages 1-8.
<p>7. Lack of Mandatory Testing</p> <ul style="list-style-type: none"> ◆ Bill S-5 authorizes collection of data on whether a substance an endocrine disruptor; Bill also authorizes Minister to consider available information on vulnerable populations and cumulative effects of a potential toxic substance ◆ In none of these cases does Bill S-5 direct Minister to require testing by industry when there are information gaps on whether substance toxic – a concern shared by 2022 Senate Committee that reviewed Bill S-5 	<ul style="list-style-type: none"> ◆ Make testing mandatory where available information inadequate to determine if substance toxic, or capable of becoming toxic ◆ For further discussion see CELA September 2022 submissions on Bill S-5, pages 44-47; and CELA September 2022 proposed amendments to Bill S-5, Tab 5, pages 1-2.
<p>8. Ambient Air Quality Problems Posed by Toxics Not Addressed</p> <ul style="list-style-type: none"> ◆ Several Sch.1 toxic substances pose national ambient air quality environmental / health problems (e.g., lead) ◆ 2017 Standing Committee report on <i>CEPA, 1999</i> recommended government develop legally binding and enforceable national air quality standards in consultation with provinces, territories and other stakeholders ◆ Bill S-5 silent on this issue 	<ul style="list-style-type: none"> ◆ Develop legally binding and enforceable national ambient air quality standards for selected Sch. 1 toxic substances (e.g., lead) ◆ For further discussion see CELA September 2022 submissions on Bill S-5, pages 30-31; and CELA September 2022 proposed amendments to Bill S-5, Tab 7, pages 1-7.

SELECTED SUMMARY OF CELA CONCERNS WITH BILL S-5 AND PROPOSED SOLUTIONS

Concerns	Proposed Solutions
<p>9. Repeal of Geographically Focused Regulatory Authority Hides Ability to Address Toxic Hot Spots</p> <ul style="list-style-type: none"> ◆ Bill S-5 would repeal <i>CEPA, 1999</i> sections 330(3) and (3.1) that authorize geographically targeted regulatory action; ◆ government says this will help address toxic hot spots because government can still rely on general provisions in <i>Interpretation Act</i> ◆ however, reliance on generic provisions obscures, not highlights, authority to act 	<ul style="list-style-type: none"> ◆ Retain and expand existing <i>CEPA, 1999</i> authority ◆ For further discussion see CELA September 2022 submissions on Bill S-5, page 20; and CELA September 2022 proposed amendments to Bill S-5, Tab 8, page 1 of 1.