

CANADA CATCHING UP ON REGULATION OF PFAS SUBSTANCES

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Per- and polyfluoroalkyl substances ("**PFAS**"), a group of several thousand man-made chemicals that include perfluorooctanoic ("**PFOS**"), perfluorooctanoic acid ("**PFOA**"), perfluoroalkyl carboxylic acid ("**PFCA**") and perfluorobutane sulfonic acid ("**PFBS**"), are receiving increased attention globally for their negative effects on human and environmental health.^[1] Developed for and used in a variety of household, commercial and industrial products for their stain resistant and water repellent qualities, PFAS are known as "forever chemicals" given the slow rate at which they break down in the environment. PFAS have been found in concerning levels in the blood of humans and animals as well in the natural environment throughout the world, including drinking water.^[2]

Common uses for PFAS substances include food packaging and takeout containers, non-stick pans, stain resistant furniture and rugs, personal care products and water-repellent outdoor gear. While not every product in these categories contains PFAS substances, Canadians have been directly exposed to them for decades without much awareness of their potential adverse effect on human health.

As PFAS makes headlines, Canadians are becoming more interested and concerned about their long term effects and, as a result, regulators in Canada are paying attention. This bulletin provides an overview of PFAS regulation within Canada today and shows where it lags behind the United States and Europe.

PFAS Regulation in Canada

The regulation of PFAS in Canada is in its infancy and exists currently only at the federal level and in a limited way in British Columbia and Ontario. In the remaining provinces and territories, PFAS substances remain unregulated.

Canada (Federal)

In 2008, Canada enacted regulations under the *Canadian Environmental Protection Act, 1999* ("**CEPA**")^[3] restricting the use, sale and import of PFOS or a product containing PFOS unless the substance was incidentally present or fell into one of the categories of allowable uses (the "**2008 PFOS Regulation**").^[4] This was the first regulation of any PFAS substance in Canada.

CEPA requires Health Canada and Environment Canada to prepare a Virtual Elimination List setting out the allowable quantity and concentration of a toxic substance that may be released into the environment, taking into account environmental or health risks and any other social, economic or technical matters.^[5] In 2009, PFOS was added to the Virtual Elimination List,^[6] which signifies the federal government's intention to virtually eliminate the substance because it poses a significant risk to the health and environment of Canadians.^[7]

The 2008 PFOS Regulation was repealed in 2016 and replaced with amendments to the *Prohibition of Certain Toxic Substances Regulations, 2012* (the "**2016 Toxic Substances Regulation**")^[8] which contains tighter restrictions than its predecessor on PFOS and also regulates other PFAS substances. Generally, the 2016 Toxic Substances Regulation prohibits PFAS substances from being manufactured, used, sold, offered for sale or imported into Canada. There are exceptions for certain uses involving fire-fighting foam, photolithography and photographic film as well as where the presence of the substance is incidental.

In 2018, Health Canada introduced drinking water guidelines for various PFAS substances.^[9]

On April 4, 2021, the federal government issued a *Notice of intent to address the broad class of per- and polyfluoroalkyl substances*, which efforts will involve research and monitoring of PFAS substances, the collection and examination of information on PFAS substances, and a review of policy developments in other jurisdictions. The government has indicated that it will publish a "state of PFAS report" within two years.^[10] This is indicative of further regulation to come at the federal level.

Canada has recently released a proposed new *Prohibition of Certain Toxic Substances Regulation, 2022* which would replace the 2016 Toxic Substances Regulation currently in effect and eliminate the various exemptions allowing the use, sale, or import of PFAS substances in Canada under certain circumstances. The proposed enactment of these regulations is consistent with the underlying purpose of the Virtual Elimination List and the April 4, 2021 federal notice. The comment period for these proposed regulations is open until July 28, 2022.^[11]

British Columbia

British Columbia leads the provinces and territories in PFAS substance regulation by including PFOS and PFOA as a regulated substance in its drinking water standards.^[12] British Columbia also has had in place standards since 2019 for PFOS, PFOA and PFBS in its *Contaminated Sites Regulation* in the context of management and remediation of contaminated land.^[13]

Ontario

Looking east, Ontario has only recently released interim advice on PFAS in drinking water in 2021.^[14] The

province has since then been working with the federal government to establish new approaches for regulating drinking water safety in light of the federal class-based approach to PFAS regulation.^[15]

PFAS Regulation in the United States and Europe

In 2021, the U.S. Environmental Protection Agency (“**EPA**”) announced its PFAS Strategic Roadmap^[16] which sets out the Agency’s near-term agenda for addressing the problem of PFAS by using the “full range” of statutory authorities at its disposal.^[17]

The EPA has since taken numerous steps to address the persistence of PFAS in consumer products and drinking water. One such step includes proposing to designate PFAS substances as hazardous under the *Comprehensive Environmental Response, Compensation and Liability Act*.^[18] Also in 2021, bill S.3169 was introduced to Congress, which would amend the *Federal Food, Drug, and Cosmetic Act* to prohibit the use of food packaging containing added PFAS (a common source of PFAS in consumer goods).^[19] The EPA has also released drinking water health advisories, new testing strategies, contaminated site standards and strategic plans and other measures to address and respond to PFAS in the environment and their potential impact on human health.^[20]

Europe has paid PFAS an even higher degree of attention. The use of PFOS has been restricted under the European Union’s Persistent Organic Pollutants Regulation for over a decade and PFOA has been banned since 2020. Under the European Union’s *Regulation concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals* (REACH), several PFAS substances have been designated as “substances of very high concern” which are those considered the most dangerous chemicals. In addition, several European countries have been advocating recently for further restrictions and/or bans on other PFAS substances.^[21]

Key Takeaways

Companies operating in Canada should expect increasing regulation of PFAS substances to align with existing and developing regulation in the US and Europe. A growing level of consumer awareness and litigation in the US arising from the presence of these substances, in particular in food packaging, has brought the issue to the forefront in recent years.

In anticipation of even higher levels of concern and more regulation, companies would do well to carry out a comprehensive review of their inputs, products, facilities and operations involving the use and presence of these substances and begin the lengthy process of investigation, assessment, risk management and phasing out (if not already underway). It is likely that companies will eventually be required to do so, and this will help them meet new regulatory standards for potential disclosure, management, notification and remediation of these substances.

McMillan's environmental team is ready to help you and your business identify potential areas of concern with respect to PFAS. We will continue to provide updates regarding Canada's federal and provincial PFAS regulation, and how businesses can expect such regulations to impact their existing and future operations.

- [1] Nicole Brennan et al, "[Trends in the Regulation of Per- and Polyfluoroalkyl Substances \(PFAS\): A Scoping Review](#)", Int J Environ Res Public Health. 2021 Oct; 18(20): 10900.
- [2] United States Environmental Protection Agency, [PFAS Explained](#) (last updated on 28 April 2022) .
- [3] [Canadian Environmental Protection Act, 1999](#), SC 1999, c 33 [CEPA].
- [4] [Perfluorooctane Sulfonate and its Salts and Certain Other Compounds Regulations](#), SOR/2008-178 (in effect from May 29, 2008 to December 23, 2016).
- [5] CEPA, s 65.
- [6] [Virtual Elimination List](#), SOR/2006-298; [Perfluorooctane Sulfonate Virtual Elimination Act](#), SC 2008, c 13 (expected to be repealed by [S-5](#) of the Senate of Canada).
- [7] Environment Canada, [Canadian Environmental Protection Act: virtual elimination](#) (last accessed 11 July 2022); Environment Canada, [The Canadian Environmental Protection Act 1999 \(CEPA 1999\) and Virtual Elimination Fact Sheet](#) (last accessed 11 July 2022).
- [8] [Prohibition of Certain Toxic Substances Regulations, 2012](#), SOR/2012-285.
- [9] Government of Canada, "[Water Talk - Perfluoroalkylated substances in drinking water](#)" (April 2019); Government of Canada, "[Guidelines for Canadian Drinking Water Quality - Summary Table](#)", (18 July 2022).
- [10] Canada Gazette, Part I, Volume 155, Number 17, April 24, 2021, [Notice of intent to address the broad class of per- and polyfluoroalkyl substances](#).
- [11] Canada Gazette, Part I, Volume 156, Number 20, May 14, 2022, [Prohibition of Certain Toxic Substances Regulations, 2022](#).
- [12] British Columbia Ministry of Environment & Climate Change Strategy, "[Source Drinking Water Quality Guidelines](#)" (2020).
- [13] [Contaminated Sites Regulation](#), BC Reg. 375/96, Schedule 1.
- [14] Ontario Ministry of the Environment, Conservation and Parks, "[Minister's annual report on drinking water \(2021\)](#)" (2021).
- [15] Ontario Ministry of the Environment, Conservation and Parks, "[Minister's annual report on drinking water \(2021\)](#)" (2021).
- [16] United States Environment Protection Agency, "[PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024](#)" (29 June 2022).
- [17] United States Environmental Protection Agency, "[PFAS Strategic Roadmap: EPA's Commitments to Action 2021-2024](#)" (October 2021), p5.
- [18] United States Environmental Protection Agency, "[EPA Administrator Regan Announces Comprehensive](#)

[National Strategy to Confront PFAS Pollution](#)” (18 October 2021).

[19] United States Congress, S.3169 - [Keep Food Containers Safe from PFAS Act of 2021](#) (17th Congress, 2021-2022)

[20] United States Environmental Protection Agency, [“EPA Actions to Address PFAS”](#) (last accessed 15 June 2022).

[21] European Chemicals Agency, [“Perfluoroalkyl chemicals \(PFAS\)”](#) (last accessed 18 July 2022).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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