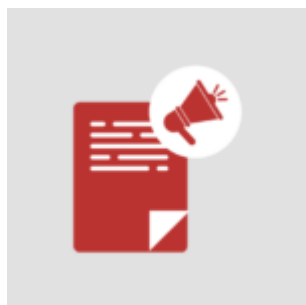


# Canada's Updated Draft PFAS Report: The Latest On The Emerging Regulation Of "Forever Chemicals"



On July 12, 2024, the Government of Canada published its [Updated Draft Report on the state of per- and polyfluoroalkyl substances \(PFAS\)](#) (the “**Updated Draft PFAS Report**”) and [Revised Risk Management Scope for per- and polyfluoroalkyl substances \(PFAS\)](#) (the “**Revised Risk Management Report**”), which provide updates to the original versions of these publications, each released in May 2023.

The Updated Draft PFAS Report and Revised Risk Management Report were accompanied by an [announcement](#) from the federal government outlining its recent efforts to protect the environment and communities by further regulating per- and polyfluoroalkyl substances (“**PFAS**”) and the next steps it now proposes to achieve this objective. This was followed by a [section 71 mandatory survey notice](#) under the [Canadian Environmental Protection Act, 1999](#) (“**CEPA**”) two weeks later requiring reporting on PFAS by certain manufacturers, importers and users of PFAS or products/materials containing PFAS by no later than January 29, 2025.

Commonly known as “forever chemicals”, PFAS are a group of several thousand man-made chemicals that include perfluorooctanoic (“**PFOS**”), perfluorooctanoic acid (“**PFOA**”),

perfluoroalkyl carboxylic acid (“**LC-PFCA**”) and perfluorobutane sulfonic acid (“**PFBS**”). PFAS are found in many frequently used consumer and industrial products, including fire-fighting foams, textiles, drugs, cosmetics, food packaging and electronics. In the environment, PFAS break down at a slow rate and are extremely persistent (which is how they earned the name “forever chemicals”). PFAS have also been found in the blood of humans and animals as well as in the air and various bodies of water. As levels of PFAS in the environment and areas impacted increase, concerns of their long-term effects have also risen.

Both the Updated Draft PFAS Report and Revised Risk Management Report are open for a 60-day public comment period ending on September 11, 2024. Any impacted or potentially impacted stakeholders should consider submitting their comments before this deadline.

This bulletin summarizes the current state of Canadian regulation of PFAS at both the federal and provincial levels of government as well as the federal government’s updated efforts to regulate PFAS, including the section 71 CEPA notice. For a discussion of the Original Draft PFAS Report, read our bulletin [here](#).

## **Federal Regulation of PFAS**

### *Current Status of PFAS Regulations in Canada*

Currently, PFAS is regulated at the federal level under the [Prohibition of Certain Toxic Substances Regulations, 2012](#) under the CEPA, which prohibits certain PFAS and their precursors, including PFOS, PFOA and LC-PFCA, from being manufactured, used, sold, offered for sale or imported into Canada. In 2022, Canada proposed replacing the 2012 regulation with the draft [Prohibition of Certain Toxic Substances Regulations, 2022](#) removing current exemptions for PFAS in certain uses, including fire-fighting foam and

photolithography and photographic film.

The federal government anticipates publishing a final version of the 2022 draft regulation in the fall of 2024 which will tighten restrictions on the manufacture, use, sale, offer for sale, and import of the PFAS subgroups currently regulated.

### *Updated Draft State of PFAS Report*

In May 2023, the federal government published the original [Draft State of per- and polyfluoroalkyl substances \(PFAS\) Report](#) (the “**Original Draft PFAS Report**”) and the [Risk Management Scope for per- and polyfluoroalkyl substances \(PFAS\)](#). Together, they proposed a precautionary, class-based approach to the regulation of PFAS in which regulatory measures would apply to all substances under the PFAS class rather than specific varieties of PFAS, as is the case under the current federal regulation.

The Updated Draft PFAS Report builds on the Original Draft PFAS Report by incorporating and addressing numerous comments received during the public consultation that followed its publication as well as additional literature. It proposes to conclude that the class of PFAS, excluding fluoropolymers, may cause harm to human health and the environment. The PFAS class captures substances with a wide range of structures and properties and is defined in the report as “fluorinated substances that contain at least one fully fluorinated methyl or methylene carbon atom (without any H/Cl/Br/I atom attached to it), i.e., with a few noted exceptions, any chemical with at least a perfluorinated methyl group (–CF<sub>3</sub>) or a perfluorinated methylene group (–CF<sub>2</sub>–) is a PFAS”.

A key change of approach from the Original Draft PFAS Report is that the definition of PFAS now excludes fluoropolymers on the basis that their hazard and exposure profiles may differ from other PFAS. Fluoropolymers will therefore be assessed separately and may be placed on a “Watch List” under section

75.1 of CEPA in order to caution consumers. This provision under CEPA deals with substances that the federal government has reason to suspect are capable of becoming toxic, or that have been determined to be capable of becoming toxic, and where the government may take further action regarding the use, manufacture or import of such substance in the future.

The Updated Draft PFAS Report proposes to conclude that all substances in the defined PFAS class (excluding fluoropolymers) meet the “toxic substance” criteria set out in section 64 of CEPA, which provides that a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that (a) have or may have immediate or long-term harmful effects on the environment or biological diversity; (b) constitute or may constitute a danger to the environment on which life depends; or (c) constitute or may constitute a danger in Canada to human life or health.

The timing for the publication of the final State of PFAS Report has not yet been confirmed.

#### *Revised Risk Management Report*

The Revised Risk Management Report proposes a phased approach beginning with restricting PFAS not currently regulated in firefighting foams. As a first step, the class of PFAS, excluding fluoropolymers, would be proposed to be recommended for addition to the List of Toxic Substances in Schedule 1 of CEPA. Once a substance is listed under Schedule 1, CEPA empowers the federal government to take a number of risk management measures including regulations that restrict the use, import, manufacture and release of substances. It is important to note that adding PFAS to Schedule 1 of CEPA does not itself ban or restrict the use of the substances. Instead, it allows the Minister of the Environment and Climate Change (“**Minister of ECCC**”) and the Minister of Health (together, the “**Ministers**”) to take risk management action under CEPA.

The Revised Risk Management Report also provides that voluntary risk management actions will help to combat the release of PFAS and suggests that stakeholders explore options for phasing out PFAS in their operations, collaborate with trading partners on assessing alternatives and informed substitution of PFAS, as well as voluntarily disclose information on products containing PFAS to consumers to allow for informed decision-making.

The Ministers are currently considering prioritization for prohibition of substances in the PFAS class based on factors including socio-economic considerations, available alternatives, and possible human and environmental exposure. The specifics of this prioritization exercise have not yet been disclosed.

Assuming the Ministers finalize the recommendation to add the class of PFAS to Schedule 1 of CEPA, they must propose risk management measures within 2 years of the recommendation and then finalize the regulation or other legislative instrument under CEPA within 18 months of the proposal. The timing for the recommendation has not yet been confirmed.

### *Section 71 Survey Notice*

The current information on PFAS in Canada comes from data gathered using section 71 CEPA notices. Section 71 of CEPA allows the Minister of ECCC to assess whether a substance is toxic or can become toxic and determine how it should be controlled. Section 71 notices therefore gather information relating to manufacturers, importers and others using subject substances to assess their potential risks.

On July 27, 2024, the Minister of ECCC issued a [section 71 mandatory survey notice](#) with respect to PFAS. Subject to certain exclusions, manufacturers, importers and users of PFAS or products/materials containing PFAS who meet the thresholds for obligated reporters are required to reply using the online

reporting system by no later than January 29, 2025. Pursuant to section 313 of CEPA, submissions can be requested to be treated as confidential. In addition, persons not subject to the notice can identify themselves by submitting a Declaration of Stakeholder Interest or a Declaration of Non-Engagement. Compliance with the notice is mandatory and failure to do so can lead to penalties for contravention under CEPA.

## **Provincial Regulation of PFAS**

### *British Columbia*

British Columbia is the leading province in terms of development of PFAS regulation. PFOS and PFOA are regulated substances in the province's [drinking water standards](#). As well, British Columbia has standards for PFOS, PFOA and PFBS in its [Contaminated Sites Regulation](#) regarding contaminated land remediation. The PFAS class of substances has also been classified as an "emerging contaminant" in the province's [Design Guidelines for Drinking Water Systems](#).

### *Ontario*

Ontario released interim advice on PFAS in drinking water in 2017 on recommended levels of 11 different PFAS in drinking water. Ontario is currently reviewing Health Canada's objective on a treatment-based drinking water objective for PFAS to determine how it will inform Ontario's own drinking water programs. The province is also undertaking various PFAS monitoring programs to better understand the presence and prevalence of PFAS in the province.<sup>1</sup>

### *Quebec*

Quebec has been monitoring levels of PFAS present in water since 2007.<sup>2</sup> In 2023, in response to potential PFAS in biosolids imported from Maine, Quebec banned the agricultural application of biosolids imported from the United States.<sup>3</sup> In

July 2024, Quebec published a draft *Fertilizing Residual Materials Management Code*, which would introduce thresholds for certain PFASs. Quebec also released a new [characterization guide for contaminated sites](#), specifically addressing PFAS (although in a limited way).

## Alberta

In January 2023, Alberta added PFOS and PFOA to the provinces soil and groundwater remediation guidelines ([Tier 1](#) and [Tier 2](#)).

## Key Takeaways

Businesses operating in Canada should expect increasing regulation of PFAS to align with existing and developing regulation in the U.S. and Europe. A growing level of consumer awareness and litigation in these jurisdictions arising from the presence of these substances, in particular in food packaging, various types of coatings, personal care products and fabrics has brought the issue to the forefront in recent years.

In anticipation of even higher levels of concern and greater regulation, businesses would do well to carry out a comprehensive review of any inputs, products, facilities and operations that may involve these substances and begin a process of investigation, assessment, risk management and phasing out (if not already underway). It is likely that most businesses will eventually be required to do so in any case and accordingly taking these steps now will help meet anticipated new regulatory standards for disclosure, management, elimination, substitution, notification and phasing out as well as for the remediation or closure of properties impacted by these substances. The potential for civil litigation, including in particular consumer and shareholder class actions, arising from exposure to PFAS is also a real emerging concern in Canada, having already become

a reality in the U.S. in connection with drinking water and other areas.

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.

## Footnotes

1 Ontario Ministry of Environment, Conservation and Parks, [\*Minister's Annual Report on Drinking Water \(2023\)\*](#) (14 December 2023).

2 Québec Ministry of the Environment, the Fight against Climate Change, the Fauna and Wildlife, "[\*Biosolides et substances per- et polyfluoroalkylées \(PFAS\)\*](#)" (available in French only) (undated).

3 Québec Ministry of the Environment, [\*Le Québec s'assure de demeurer un leader dans la gestion des risques associés aux contaminants d'intérêt émergent dans les biosolides\*](#) (available in French only) (2 March 2023).

*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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