



**ASSEMBLY OF FIRST NATIONS**

**SUBMISSION TO THE HOUSE OF COMMONS COMMITTEE  
ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

**Study on Bill S-5 An Act to amend the Canadian Environmental  
Protection Act, 1999, to make related amendments to the Food and  
Drugs Act and to repeal the Perfluorooctane Sulfonate Virtual  
Elimination Act**

**December 1, 2022**

## INTRODUCTION

The Assembly of First Nations (AFN) is the national, political organization of First Nations governments and their citizens, including those living on and off reserve. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action, and to advance the aspirations of First Nations.

The AFN presents this Committee with our comments on *Bill S-5: An Act to amend the Canadian Environmental Protection Act, 1999, to make related amendments to the Food and Drugs Act and to repeal the Perfluorooctane Sulfonate Virtual Elimination Act* (“Bill S-5”) and provides recommendations for improvements that will meet the interests of First Nations across Canada.

The *Canadian Environmental Protection Act, 1999*<sup>1</sup> (“CEPA” or “CEPA, 1999”) provides the legislative and regulatory structures for protecting the environment and human health from pollution, persistent chemicals, and toxic substances. However, Canada is one of the few countries in the world where its citizens do not have a right to a healthy environment entrenched in law. In fact, more than 100 countries around the world have the right to a healthy environment entrenched in their constitutions. In other countries, the courts have recognized some form of the right to a healthy environment as an ancillary aspect of their constitution and an essential component of the right to life.

Secondly, CEPA has not been significantly amended for a few decades. The suite of chemicals and other pollutants available for household and commercial use have grown substantially over the last twenty years. During this time, research and scientific assessments on the impacts of pollutants and toxins on human health and the environment, including cumulative impacts, has led to a broader awareness and understanding of the long-term risks and impacts these substances and compounds pose.

Finally, the AFN notes that *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIPA”) received royal assent on June 21, 2021.<sup>2</sup> UNDRIPA establishes a clear and ongoing legal commitment for the federal government to ensure that its laws, regulations, policies, and programs are consistent with the international human rights standards affirmed in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*.

## MEANINGFUL RECOGNITION OF THE RIGHT TO A HEALTHY ENVIRONMENT

The recognition of an individual’s right to a healthy environment would somewhat align Canadian laws with those of other countries around the world. The right to a healthy environment is enshrined in the constitutions of 110 states globally.<sup>3</sup> Such constitutional rights can be exercised by individuals or groups against the government, or by one level of government against another.

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<sup>1</sup> *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

<sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

<sup>3</sup> A/HRC/43/53, Right to a healthy environment: good practices. Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Human Rights Council 43 Session, December 30, 2019, at para 24.

The adoption of Bill S-5 and the implementation of the right to a healthy environment would allow Canada to join approximately 156 nations where this right has been incorporated into national legislation. However, Bill S-5 requires that the implementation of the right to a healthy environment be set in a future framework that is yet to be developed. It is important that this framework incorporate many human rights standards, including: the prohibition of discrimination and ensuring equal and effective protection; freedom of expression; freedom from harassment, intimidation and violence; peaceful assembly in relation to environmental matters; and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.<sup>4</sup> These essential protections must be afforded to First Nations citizens based on substantive equality principles to address the impacts of colonization and the continuing legacy of environmental racism in Canada.

First Nations are at particular risk of being harmed by polluted environments or targeted by policies that stem from environmental racism. Pollution from Alberta's oil sands have been linked to elevated cancer rates in Fort Chipewyan First Nation. Tataskweyak Cree Nation has been subjected to a drinking water advisory since 2017.<sup>5</sup> Its members have developed skin rashes, gastrointestinal problems and liver and kidney diseases from exposure to toxic blue-green algae. In 2016 to 2017, 45,357 tonnes of pollution were emitted from industries within a 25kilometer radius of Aamjiwnaang First Nation.<sup>6</sup> The cumulative and long-term effects of the pollution resulting from industry in this area have reportedly resulted in health impacts on the Aamjiwmaang First Nation.<sup>7</sup>

Bill S-5 proposes to create an obligation on the federal government to protect the health of vulnerable populations, including First Nations, in the administration of CEPA. The legislation specifically requires the federal government to consider vulnerable populations when assessing substances that may be toxic. Bill S-5 defines "vulnerable populations" as "a group of individuals within the Canadian population who, due to greater susceptibility or greater exposure, may be at an increased risk of experiencing adverse health effects from exposure to substances."<sup>8</sup> There is also the cumulative effect where one is exposed to many toxic substances and these chemicals begin to interact with another creating a toxic soup in an individual.

Aamjiwmaang First Nation's exposure to an array of chemicals and toxic substances provides a vivid picture of biological susceptibilities resulting from exposure to hormone-disrupting chemicals linked to cancer and infertility for women of child-bearing age. The percentage of male births in Aamjiwnaang First Nation began to continuously decline in the mid-1990s. By 2003,

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<sup>4</sup> A/HRC/37/59, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Human rights Council 37 session, January 24, 2018 at p. 14.

<sup>5</sup> Stéphane M. McLachlan, PhD, Environmental and Human Health Implications of the Athabasca Oil Sands for the Mikisew Cree First Nation and Athabasca Chipewyan First Nation in Northern Alberta. July 7, 2014, online: <https://intercontinentalcry.org/wp-content/uploads/2014/07/Executive-Summary-Fort-Chipewyan-Env-Health-Report-July-2014-Media.pdf>.

<sup>6</sup> Larissa Parker, "Not in Anyone's Backyard: Exploring Environmental Inequality under Section 15 of the Charter and Flexibility after *Fraser v Canada*", 2022 27 *Appeal* 19 at p. 24.

<sup>7</sup> Sarah Marie Wiebe, "Bodies on the line: The In/security of Everyday Life in Aamjiwnaang" in Matthew A Schnurr & Larry A Swatuk, eds, *Natural Resources and Social Conflict* (Palgrave Macmillan, London, 2012) 215.

<sup>8</sup> Bill S-5, *An Act to amend the Canadian Environmental Protection Act, 1999, to make related amendments to the Food and Drugs Act and to repeal the Perfluorooctane Sulfonate Virtual Elimination Act* (Bill S-5) at s. 4(2).

newborn girls outnumbered boys by about 2 to 1.<sup>9</sup> Residents in the community are also exposed to air pollution causing higher levels of asthma and cancer.<sup>10</sup> The circumstances in Aamjiwmaang First Nation highlight the need to factor in impacts to future generations in the right to a healthy environment. Many First Nations have adopted the Seven Generations concept into their decision making - that a decision today must factor in how the next seven generations will be impacted by that same decision.

A fundamental flaw with Bill S-5's right to a clean environment is that the right is not absolute under Bill S-5. It is subject to any reasonable limits "resulting from the consideration of relevant factors, including social, health, scientific and economic factors." The government's ability to set reasonable limits to the right to a clean environment is problematic as it could limit application of the right to such an extent as to render it meaningless. This is akin to many First Nations Aboriginal and Treaty rights, whereby the exercise of such right is constrained and regulated pursuant to government policies, licensing requirements and government action.

The AFN recommends the inclusion of a human rights lens into decision-making under CEPA - this would require an amendment to the protection clause of the right to a healthy environment. As drafted, the "reasonable limits" in subclause 5(2)(c) considers factors, such as economic interests, to the same status as the right to a healthy environment. This creates a conflict with the application of a basic human right and also contradicts the duty of Canada to "take the necessity of protecting the environment into account in making social and economic decisions." The AFN recommends that this committee amend subclause 3(2) to include more human rights concepts into the clause.

Finally, the commitment to develop an implementation framework that will take years to complete is not reflective of a stand-alone right of individuals to a healthy environment. The establishment of the right is dependent on government action. This is the opposite of a human rights-based approach. Secondly, the enforcement of one's right to a healthy environment lacks a forum whereby one can obtain a remedy where a breach has occurred. CEPA and Bill S-5 do not create a process where individuals can commence an action in court against organizations or corporations who have damaged the natural environment or the government for failing to act to prevent such harm.

### **Recommendation 1**

Amend subclause 3(2) of Bill S-5 as follows:

(a.2) protect the right of every individual in Canada and future generations to a healthy environment as provided under this Act, ~~subject to reasonable limits~~; which shall consider intergenerational equity, precautionary principles, polluter pays, sustainable development, environmental justice, and non-regression principles;

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<sup>9</sup> Constanze A. Mackenzie, Ada Lockridge, and Margaret Keith, "Declining Sex Ratio in a First Nation Community" *Environmental Health Perspectives*, Vol 113, No. 10, October 2005

<sup>10</sup> Deborah Davis Jackson, "Shelter in place: a First Nation community in Canada's Chemical Valley", *Interdisciplinary Environmental Review*, vol. 11, No. 4 (January 2010), pp. 249–262.

## Recommendation 2

Bill S-5 be amended to include a process for First Nations and individuals to seek legal recourse for any breaches or violations of their right to a healthy environment, as follows:

Notwithstanding section 5.1, any First Nations or individual may commence an environmental protection action in the Federal Court:

- (a) against the Government of Canada for:
  - (i) violating an individual's right to a healthy environment;
  - (ii) failing to perform any act or duty that is required under this Act;
  - (iii) failing to fulfill its duties as trustee of the environment; or
  - (iv) authorizing an activity or permit that results in environmental harm or degradation; or
  - (v) failing to prevent activity that results in environmental harm;
- (b) against any person, organization, or government body violating the right to a healthy environment, or where environmental harm has occurred.

## PRIORITIZATION OF PROHIBITIONS OF TOXIC SUBSTANCES

Bill S-5 proposes to create a new regime that gives priority to prohibiting toxic substances that pose the highest risk to human health. The stated intention of “highest risk” to human health is to prescribe thresholds for carcinogenicity, mutagenicity and reproductive toxicity, and any other relevant circumstances or conditions.<sup>11</sup> According to the National Pollutant Release Inventory's 2020 data, approximately 2.81 million tonnes of pollutants were released directly into the air, water and land. 1.8 million tonnes of pollutants were disposed in landfills or injected underground. Most of these pollutants (159 different substances) were released directly into the air.<sup>12</sup>

First Nations are particularly at risk from such trends. The First Nations Food, Nutrition and Environment Study confirmed the presence of contaminants such as mercury, methyl mercury, lead, cadmium in traditional foods consumed by First Nation individuals.<sup>13</sup> The study also found the presence of persistent organic pollutants, such as p,p'-dichlorodiphenyldichloroethylene and polychlorinated biphenyls in the food samples.<sup>14</sup> Approximately 2% of total of water sources tested contained exceedances of lead, uranium, arsenic, selenium.<sup>15</sup> Many of these substances are listed in Schedule 1 of CEPA, 1999.

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<sup>11</sup> Bill S-5 at s. 15, amending para 67(1)(a) of CEPA.

<sup>12</sup> Canada's National Pollutant Release Inventory: 2020 data highlights, online: <https://www.canada.ca/en/environment-climate-change/services/national-pollutant-release-inventory/tools-resources-data/fact-sheet.html>.

<sup>13</sup> First Nations Food, Nutrition and Environment Study — Summary of Findings and Recommendations for eight Assembly of First Nations regions 2008-2018, at p. 17, online: [https://www.fnfnes.ca/docs/CRA/FNFNES\\_Report\\_Summary\\_Oct\\_20\\_2021\\_FINAL.pdf](https://www.fnfnes.ca/docs/CRA/FNFNES_Report_Summary_Oct_20_2021_FINAL.pdf).

<sup>14</sup> Chan, H.M., Singh, K., Batal, M. *et al.* Levels of metals and persistent organic pollutants in traditional foods consumed by First Nations living on-reserve in Canada. *Can J Public Health* 112 (Suppl 1), 81–96 (2021).

<sup>15</sup> First Nations Food, Nutrition and Environment Study — Summary of Findings and Recommendations for eight Assembly of First Nations regions 2008-2018, at p. 15.

Bill S-5 proposes to divide the current CEPA Schedule 1 list of toxic substances into two parts. The new Part 1 list includes a total of 19 substances and compounds, such as PCBs and DDTs. The Minister of Environment must give priority to the total, partial, or conditional prohibition of Part 1 substances or activities in relation to such substances, or the release of such substances into the environment. The Minister must also consider whether there are feasible alternatives to a Part 1 substance. Higher risk substances will be those considered “toxic” within s. 64 of CEPA and that are recommended by the Ministers for “virtual elimination.”

Part 2 of the proposed revised Schedule 1 would list approximately 132 substances (lead, mercury, cadmium, etc.). These substances will be subjected to regular risk management actions or basic pollution prevention actions. The substances in Part 2 will be considered “toxic” but that are not recommended for virtual elimination. Many of these substances will likely not be subjected to the most rigorous of measures available under CEPA. This may undermine efforts to keep toxic substances out of the environment.

Bill S-5 seeks to amend section 56(1) by authorizing the Minister of Environment to also publish a notice requiring a person to prepare and implement a pollution prevention plan in respect of a product that contains a substance specified in Schedule 1 or that may release such a substance into the environment.<sup>16</sup> This proposed amendment appears to be an improvement over the existing text in CEPA where the Minister may publish a notice in the *Canada Gazette* requiring any person to prepare and implement a pollution prevention plan for a substance specified on the Schedule 1.<sup>17</sup> However, subsection 10(1) of Bill S-5 provides the Minister with discretion. There is no obligation for the Minister to issue a notice requiring the preparation and implementation of a pollution prevention plan for every toxic substance.

Finally, in assessing whether a substance is toxic or capable of becoming toxic, Bill S-5 would authorize the Minister of Environment to collect data and conduct research in relation to whether a substance has the ability to become an endocrine disrupter.<sup>18</sup> This amendment is an improvement on the existing legislation in relation to endocrine disrupting substances. However, the Minister is not authorized to compel industry to test substances for endocrine disruption. Furthermore, the amendments do not allow the Minister to require industry to test substances for any carcinogenic or neurotoxic effects.

### **Recommendation 3**

The AFN recommends that Parliament:

- (1) restore the phrase “List of Toxic Substances” to Schedule 1; and
- (2) not create two Parts to Schedule 1.

### **Recommendation 4**

Section 19 of Bill S-5 be amended to ensure s. 72 of CEPA states:

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<sup>16</sup> Bill S-5 at s. 10(1).

<sup>17</sup> CEPA at s. 56(1).

<sup>18</sup> Bill S-5 at s. 16(3), adding new s. 68(a)(vi.1)).

Notwithstanding subsection 71(1), the Minister shall exercise the power under paragraph 71(1)(c) in relation to a substance, a product that contains a substance or a product that may release a substance into the environment, require the corporation or person to conduct and provide the results of toxicological and other tests to allow for a determination of whether the substance is toxic or capable of becoming toxic.

## ASSESSMENT OF CUMULATIVE IMPACTS

The AFN is supportive of the existing amendments proposed by Bill S-5, which would place a requirement on Ministers in some determinations of whether a substance is toxic or capable of becoming toxic, to consider the cumulative effects resulting from exposure of the substance in combination with other substances,<sup>19</sup> particularly as CEPA currently only requires assessment of individual substances in isolation.

While this progression is laudable, the AFN would submit that the narrow focus of the proposed text in relation to cumulative effects arising as a result of the interplay of substances, i.e., toxic chemicals, is far too limited as it fails to consider the cumulative impacts that exposure to a substance may have when considered in light of existing environmental realities and activities. A broader definition of cumulative effects is therefore warranted.

A broad and holistic approach must be undertaken in the context of evaluating the cumulative effects of a substance, accounting for impacts on both human health and the environment, which necessarily includes the cumulative impacts of same on the rights, culture and way of life of First Nations, in alignment with Article 29(1) of the *United Nations Declaration on the Rights of Indigenous Peoples*<sup>20</sup> (“UNDRIP”) which speaks to Indigenous peoples having the right to conservation and protection of the environment. This holistic approach further aligns with Article 24 which speaks to Indigenous peoples right to maintain their traditional medicines and health practices, including the conservation of their vital medicinal plants, animals, and minerals, as well as their right to the enjoyment of the highest attainable standard of physical and mental health.

A prime example of the need to consider cumulative effects of a substances beyond its interplay with other toxic substances is well-represented by the tragic circumstances which continue to impact Grassy Narrows First Nation. As noted, between 1962 and 1970, ten tons of untreated mercury were discharged from the chlor-alkali plant next to the Dryden pulp mill, polluting the English-Wabigoon River system. First Nations along the waterways were largely impacted, including Grassy Narrows First Nation. Notably, recent studies reflect the fact that the consumption of mercury contaminated fresh-water fish over decades contributed to the premature mortality in Grassy Narrows First Nation.<sup>21</sup> In effect, this First Nations’ traditional fishing practices and heightened consumption of mercury laden fish over time cumulatively resulted in

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<sup>19</sup> Bill S-5 at s. 20, proposed amendment to s. 76.1 (2) of CEPA.

<sup>20</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

<sup>21</sup> Philibert, A, Fillion M., Mergler D. *Mercury Exposure and premature mortality in the Grassy Narrows First Nation community: a retrospective longitudinal study*, *Lancet Planet Health* 2020 4: e141–48 at pp. 141-142, online: <https://www.thelancet.com/action/showPdf?pii=S2542-5196%2820%2930057-7>.

earlier mortality for those residing in the First Nation, amongst the host of previously identified health issues. This reduced longevity has deprived the Grassy Narrows community of elders, who play an important role in the transmission of knowledge and traditions.<sup>22</sup>

### **Recommendation 5**

Amend Section 68(2) of Bill S-5 and the proposed addition to paragraph 68(a) of CEPA as follows:

**Paragraph 68(a) of the Act is amended by adding the following after subparagraph (iii):**

(iii.1) whether exposure to the substance ~~in combination with exposure to other substances~~ has the potential to cause cumulative effects, including, but not limited to, those arising from exposure to the substance in combination with exposure to other substances.

### **Recommendation 6**

Amend section 20 of Bill S-5 and the proposed subclause 76.1(2) as follows:

**Vulnerable population and cumulative effects**

(2) When the Ministers are conducting and interpreting the results of an assessment or review referred to in subsection (1), they shall consider available information on any vulnerable population or environment in relation to the substance and on the cumulative effects on human health and the environment that may result from exposure to the substance, including, but not limited to, the cumulative effects that may result from exposure to the substance in combination with exposure to other substances.

## **ASSESSMENT OF GENETICALLY MODIFIED AND ENGINEERED ORGANISMS**

Federal regulation of genetically modified (GM) and genetically engineered (GE) organisms are governed primarily through CEPA 1999, Part 6 – Animate Products of Biotechnology and the *New Substances Notification Regulation (Organisms)*.<sup>23</sup> The transfer of new genes from GM or GE organisms to wild or domesticated species raise concerns that this introduction into non-target species could have negative consequences to both human and environmental health and the exercise of First Nations' Inherent and Treaty rights. Currently, there are several plant species that fall under said Part, but only 1 animal species – a genetically engineered Atlantic Salmon produced by AquaBounty. The health of plant and wildlife is not only fundamental for the survival of Canadians, but First Nations may be greatly impacted in practicing our Inherent and Treaty rights, such as to fish and hunt. The federal government must honour said rights and ensure that CEPA ensures adequate protections from genetically modified and engineered organisms.

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<sup>22</sup> *Ibid* at p. 147.

<sup>23</sup> *New Substances Notification Regulations (Organisms)*, SOR/2005-248.



CEPA's current assessment process relating to risk is intended to determine whether or not the organism is suspected of being toxic or capable of becoming toxic is defined in section 64 of CEPA, 1999. Research involving the potential release of GE or GM organisms evaluate the safety and efficacy of the organism, assesses possible impacts to food production, and ensures that there is no or minimal harm to the environment or human health. CEPA, 1999 focuses only on whether a new animate product of biotechnology will pose risks to the environment or human health. Thus, the research is typically not designed to assess whether GE or GM organisms might persist in the wild. The unknown impacts of the release of these new organisms into the environment illuminates the need for careful decision-making and adequate government oversight involving the release of GE or GM organisms. Careful decision-making requires transparency, informed public dialogue, and engagement and empowerment of First Nations.

The AFN recommends amendments to Bill S-5 and CEPA, 1999 that would require a proponent to show "demonstrable need" for a genetically modified and engineered organisms that has a wild counterpart. The AFN would also support amendments requiring proponents of GE or GM biotechnology to obtain the free, prior and informed consent of potentially affected First Nations. The AFN is of the view that these provisions will provide critical safeguards to monitor these organisms, which could be destructive to our plant and wildlife health.

### **Recommendation 7**

The AFN recommends that Parliament amend Bill S-5 to make the following changes to CEPA:

Section 104.1 provides a definition of "demonstrable need" that assumes need is in relation to protection of biological diversity and wild species;

Subsection 106(1)(a.1) ensures that a proponent bears the burden of submitting information showing that a new animal is demonstrably needed, and that the new animal is not CEPA-toxic or capable of becoming CEPA-toxic;

Subsection 106(4)(a.1) ensures that a proponent bears the burden of submitting information showing that a "significant new activity" (SNAc) involving the animal is demonstrably needed, and will not render the animal CEPA-toxic or capable of becoming CEPA-toxic;

Subsections 106(8.1) and 108(1.1) establishes a requirement to consult Aboriginal peoples in order to obtain their free, prior and informed consent, in addition to public notice and participation requirements;

Section 108 requires the Minister to determine whether a living organism is toxic or capable of becoming toxic; and there is a demonstrable need for a living organism having a wild counterpart; and

Section 109 requires a prohibition where "demonstrable need" for a new living organism having a wild counterpart has not been shown.

### **SPECIES AT RISK AND PROTECTION REQUIRED UNDER CEPA**

At present, there is currently no requirement under CEPA to analyze potential effects of GE or GM organisms on species at risk. As defined by the *Species at Risk Act (SARA)*, species at risk means an extirpated, endangered, or threatened species or a species of special concern.<sup>24</sup> This

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<sup>24</sup> *Species at Risk Act*, S.C. 2002, c. 29.

federal legislation provides for the legal protection of wildlife species and the conservation of biological diversity. Further, its purpose is to prevent wildlife species in Canada from disappearing, to provide for the recovery of wildlife species that are extirpated, endangered, or threatened as a result of human activity, and to manage species of special concern to prevent them from becoming endangered or threatened.

First Nations thrive and depend on the preservation and protection of our land, peoples, and animals. As the first stewards of this land, First Nations have strong and sacred connections to our lands and the environment. Moreover, First Nations largely depend on animals for sustenance and economic reasons. As such, First Nations take responsibility for protecting our environment and all living things. This responsibility includes taking care of animals, especially those species at risk. Therefore, the AFN submits that it is crucial that the amendments to CEPA include provisions aimed at protecting and preserving at risk species.

### **Recommendation 8**

The AFN recommends adding the following under s. 2(1) of the Preamble section:

“Whereas the Government of Canada recognizes the need to protect wildlife species and in particular species at risk.”

### **Recommendation 9**

The AFN recommends adding in s. 104 of CEPA the following definition:

“species at risk means an extirpated, endangered or threatened species or a species of special concern as defined in the *Species at Risk Act*.”

### **Recommendation 10**

The AFN recommends that CEPA be amended at Part 6 to include a provision that requires the Minister to analyze potential effects of living organisms having a wild counterpart on species at risk, as part of the toxicity assessment. Further, the AFN recommends including a provision that requires the Minister to prepare a report, in consultation and cooperation with Aboriginal peoples, to identify the harmful effects of living organisms having a wild counterpart on species at risk and recommendations regarding alternative methods and strategies that are not harmful to species at risk.

## **FIRST NATIONS LANDS**

With respect to the ongoing regulatory gaps under CEPA concerning First Nations’ lands, the AFN notes there has been no fundamental change for Aboriginal lands under CEPA, given that Canada has passed legislation such as the UNDRIPA. Aboriginal land, which includes reserve land and certain lands under land claim or self-government agreements,<sup>25</sup> are subject to federal laws of

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<sup>25</sup> CEPA at s. 3(a): Aboriginal land means (a) reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the *Indian Act*; (b) land, including any water, that is subject to a comprehensive or specific claim agreement, or a self-government agreement, between the Government of Canada

general application, including CEPA. Environmental protection laws applicable to Aboriginal land are set out in several federal statutes and their regulations, including the *Indian Act*,<sup>26</sup> *Fisheries Act*, and of course CEPA. Under Part 9 of CEPA, the federal government has the power to pass environmental protection regulations that apply to Aboriginal land. However, only three such regulations exist concerning the regulation of petroleum storage tanks,<sup>27</sup> halocarbons,<sup>28</sup> and environmental emergency notification requirements.<sup>29</sup>

These federal regulations do not have the same scope as provincial regulations and permit systems that cover emissions, effluents, environmental emergencies, waste handling, and other environmental matters.<sup>30</sup> In 2009, the Auditor General's (AG) review of the scope of the regulatory gap found that many environmental threats identified by First Nations as high priorities were not regulated on reserve.<sup>31</sup> The AG highlighted gaps relating to solid waste,<sup>32</sup> sewage and other wastewater discharges,<sup>33</sup> fuel storage tanks,<sup>34</sup> and environmental emergencies.<sup>35</sup> While some of these concerns may have been addressed in the 14 years since the AG's report, many others likely remain outstanding.

In terms of these regulatory gaps, Bill S-5 does not address these problems for First Nations. While a First Nation can fill some of these gaps, First Nations are still limited in their authority and continue to develop internal process with respect to their land. For example, Band Councils have limited authority under the *Indian Act* to pass nuisance prevention bylaws.<sup>36</sup> First Nations who have enacted their own Land Codes, in accordance with the *First Nations Land Management Act*,<sup>37</sup> have broader authority and can enact environmental protection laws. Environmental laws passed by these First Nations must meet or exceed provincial standards,<sup>38</sup> which is arguably an implied acknowledgment that meeting federal standards does not provide adequate protection.

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and aboriginal people where title remains with Her Majesty in right of Canada; and (c) air and all layers of the atmosphere above and the subsurface below land mentioned in paragraph (a) or (b).

<sup>26</sup> *Indian Act*, R.S.C. 1985, c. I-5.

<sup>27</sup> *Storage Tank Systems for Petroleum Products and Allied Petroleum Products Regulations*, SOR/2008-197.

<sup>28</sup> *Federal Halocarbon Regulations, 2003*, SOR/2003-289.

<sup>29</sup> *Release and Environmental Emergency Notification Regulations*, SOR/2011-90.

<sup>30</sup> Canada, Environment and Climate Change Canada, *Guide to understanding the Canadian Environmental Protection Act: Chapter 13* (Ottawa: Environment and Climate Change Canada, 2019), online: <https://www.canada.ca/en/environment-climate-change/services/canadian-environmentalprotection-act-registry/publications/guide-to-understanding/chapter-13.html>.

<sup>31</sup> AG 2009 Report at s. 6.52.

<sup>32</sup> *Ibid* at s. 6.58.

<sup>33</sup> *Ibid* at s. 6.64.

<sup>34</sup> *Ibid* at s. 6.67.

<sup>35</sup> *Ibid* at s. 6.69.

<sup>36</sup> *Indian Act* at s. 81(1)(d).

<sup>37</sup> *First Nations Land Management Act*, S.C. 1999, c. 24.

<sup>38</sup> Canada, Aboriginal Affairs and Northern Development Canada, *Reserve Land and Environmental Management Manual* (Ottawa, November 2011), online: <https://nalma.ca/wpcontent/uploads/2016/01/RLEMP-Manual.pdf>.

### **Recommendation 11**

AFN recommends an amendment to CEPA that would increase federal enforcement activities on reserve and require careful consideration and extensive consultation with First Nations. First Nations must be an integral part of any enforcement regime on Aboriginal land. Development of compliance and enforcement policies must also be led by First Nations to ensure it is culturally appropriate and responsive to the needs and circumstances of the communities.

## **ACCOUNTABILITY AND RESPECT FOR RIGHTS UNDER THE CONSTITUTION AND UNDRIP**

In 2021, *UNDRIPA* received Royal Assent and immediately came into force. *UNDRIPA* advances the implementation of UNDRIP. There are several articles in UNDRIP that relate directly to environmental protection; specifically, articles 26, 29 and 32. Considering these articles, the AFN makes the following recommendations that strengthen Bill S-5 to truly deliver on the promise of both strong environmental protection law and consistency with UNDRIP.

### **Recommendation 12**

The AFN recommends amending Bill S-5 at subclause 3(1)(a) to include a separate provision with respect to implementing UNDRIP:

(3)(1) Paragraph 2(1)(a) of the Act is replaced by the following:

(a) exercise its powers in a manner that

(i) protects the environment and human health, including the health of vulnerable populations;

(ii) applies the precautionary principle, which provides that the lack of full scientific certainty shall not be used as a reason for postponing effective measures to prevent environmental degradation if there are threats of serious or irreversible damage, and

(iii) promotes and reinforces enforcement pollution prevention approaches;

(iv) contributes to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples;

### **Recommendation 13**

The AFN recommends amending Bill S-5 at subclause 73(3) to include a separate provision with respect to consulting with Aboriginal peoples:

(3) In developing a proposed plan, and in implementing the plan, the Ministers:

(a) may consult with the Committee, a government department or agency, ~~Aboriginal people~~, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment or the preservation and improvement of public health

- (b) shall consult with Aboriginal peoples interested in or affected by the quality of the environment or the preservation and improvement of public health
- ~~(b)~~ (c) shall consider whether assessing substances by class is more advantageous than assessing them individually, with a view toward avoiding substitutions within the class that may be harmful; and
- ~~(c)~~ (d) shall take into account the matters referred to in paragraph 68(a).

## **CONCLUSION**

Thank you for considering these recommendations to strengthen Bill S-5. It has been five years since the House Standing Committee on Environment and Sustainable Development reviewed CEPA and recommended strengthening the act. At the time, all parties agreed CEPA should be modernized. We must not let another year go by without bringing Canada's cornerstone environmental law into the 21st century. We encourage the committee to consider and adopt our recommendations into Bill S-5 as soon as possible.