

# New Mandatory PFAS “Forever Chemical” Reporting in Canada: What Businesses Need to Know

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“Forever chemicals” is a phrase that continues to have heightened awareness. “Forever chemicals” are more scientifically referred to as PFAS, or per-and polyfluoroalkyl substances that are commonly found in consumer products and manufacturing materials. PFAS are persistent in nature and there are significant concerns related to their toxicity and potential health impacts. There is significant litigation in the US and starting in Canada regarding PFAS.

The Government of Canada is requiring businesses to report on the presence of PFAS, in their supply chains by January 29, 2025. Environment and Climate Change Canada (“ECCC”) published the Notice<sup>[1]</sup>, pursuant to s.71(1)(b) of the *Canadian Environmental Protection Act* (“CEPA”) on July 27, 2024. The short time frame for reporting is already causing concerns in industry.

While the purpose of the Notice is to collect information respecting certain PFAS chemicals in products or manufactured items in Canada, establish data on the commercial use of PFAS it is clear that the data collection will result in further regulation of PFAS and increased liability for those entities that have PFAS in their supply chain and products.

## Understanding PFAS

PFAS is a large group of human made chemicals that persist in the environment as they do not naturally degrade due to their strong carbon-fluorine bonds. The most common PFAS are perfluorooctane sulfonate (PFOS) and perfluorooctanoic acid (PFOA). According to Health Canada’s objective on PFAS in drinking water, these chemicals have been found in people, fish and wildlife globally, as well as fresh water and drinking water.<sup>[2]</sup>

ECCC and Health Canada published an updated draft report on the state of PFAS in July, 2024.<sup>[3]</sup> The updated draft proposes to conclude that PFAS may be classified as a “toxic substance” under CEPA. According to section 64 of CEPA, a substance is toxic if it enters or may enter the environment in a concentration or quantity or under conditions that:

“(a) have or may have an immediate or long-term harmful effect on the environment or its 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.”<sup>[4]</sup>

The Notice sets out a Schedule of 312 chemicals in the PFAS class that businesses are expected to report on, if the Notice applies to them.

## Affected Industries

Given the pervasive presence of PFAS, the Notice and reporting requirements apply to a broad range of industries. Both the Notice

and Guidance Manual provide details of the lists 12 categories of products or manufactured item that may be affected, including products that are:

1. for use by children under the age of 14 (e.g., pacifiers, toys, board books);
2. intended to come into contact with the mucosa of an individual (e.g., orthodontic equipment, cotton-tipped applicators);
3. products that may be inhaled or come into dermal or oral contact with an individual (e.g., air fresheners, cell-phone cases);
4. cookware or cooking or serving utensils that are intended to come into contact with heated food or beverages (e.g., pots and pans, serving ladles);
5. food packaging material (e.g., single serve containers, food wrap);
6. reusable food or beverage containers (e.g., travel mugs, baby bottles);
7. food processing equipment that come into contact with food prior to packaging and distribution (e.g., conveyer belts, trays);
8. clothing or footwear and safety apparel;
9. bedding, sleeping bags or towels;
10. furniture, mattresses or cushions where the substance is contained in foam, leather, textile fiber or fabric;
11. carpet, vinyl or laminate flooring, or foam underlay for flooring; and
12. products that release the substance from the manufactured item (e.g., air freshener diffuser, writing instruments).

### Reporting Requirements

Any person who satisfied any of the following criteria in the 2023 calendar year must respond to the Notice. Companies must respond if they:

- manufactured more than 1000 g of a substance listed in schedule 1
- imported more than 10 g of a substance listed in Part 1, or more than 100 kg of a substance listed in Part 2 or Part 3 of Schedule 1, either alone, at concentration equal to or above 1 ppm.
- imported more than 100 kg of any substance listed in Schedule 1 at a concentration of 1 ppm or more, in a manufactured item not listed in Table 1.
- used more than 10 g of a substance in Schedule 1, either alone or at a concentration of 1 ppm or more in a product.

Each substance and activity must be considered separately when determining whether a company is required to report. The Notice and Guidance Manual set out each of the following new definitions relevant to interpretation:

- **Manufacture:** to create or produce one or more of the reportable substances, either intentionally or incidentally.
- **Import:** to move the reportable substance (alone, in a mixture, product or manufactured item) into Canada from another country. For clarity, the importer is required to report.
- **Substance alone:** the reportable substance not intentionally combined or mixed with anything else.
- **Mixture:** a combination of substances that does not produce a different substance than those that were combined.
- **Manufactured item:** an item that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design.

Notably, the above terms are not defined in *CEPA*.

The reporting requirement also applies to successors and assigns. If your business was involved in either an acquisition or sale you will need to confirm that the Notice requirements are being met.

Persons who do not meet the reporting criteria and are not interested in any of the substances are still encouraged by the Notice to submit a Declaration of Non-Engagement to ECCC.

### Reporting Template

Reporting entities must complete their reports using ECCC's Excel Reporting File.[\[5\]](#) Each report is required to be submitted alongside a declaration that the information provided is accurate and complete.

The reports must include the following information:

- the total quantity of substances manufactured, imported and used; the name and address of each facility that manufactures or uses a reportable substance;
- application codes, substance codes and common names of goods; and
- technical data such as the structural formula, molecular weight distribution, and expected conditions resulting in the degradation, depolymerization or decomposition of the polymer.

Importantly, reporting entities are required to provide the titles of any available data, studies or information related to the substance that have not already been disclosed to the Government of Canada under the *New Substances Notification Regulations (Chemicals and Polymers)* under CEPA.[\[6\]](#) It is not clear from this broad wording in the Notice how an entity would know what information may have already been submitted to ECCC by others. In addition, it is also unclear what "information" is required. Careful consideration will need to be taken by reporting entities to ensure that they have adequately reviewed the information they may have in relation to this disclosure requirement so they do not fall afoul of providing false or misleading information.

No testing is required to generate data for the report, but any reports, test results, or information that is available from suppliers should be provided. Companies that do not provide any analytical data may be contacted for additional information.

Companies with more than one facility must report on a company-wide basis with a single report by amalgamating the information from all facilities or locations in its report.

### Confidentiality

There is an opportunity for reporting entities to request that the information provided in response to the Notice be treated as confidential. Reporting entities should understand the implications of not make submissions classifying their information as confidential. Reporting entities can declare that any portion of the requested information is confidential if one of the following criteria applies:

- the information is a trade secret;
- financial, commercial, scientific or technical information that is confidential;
- disclosure of the information would reasonably be expected to result in a material financial gain or loss, or prejudice the competitive position of any person; or
- disclosure of the information would reasonably be expected to interfere with contractual or other negotiations of any person.[\[7\]](#)

It will be important for entities to have documentation to support the confidentiality declaration for due diligence purposes.

### Exclusions

The Notice excludes products, substances, mixtures, and manufactured items that are:

- only in transit through Canada, where Canada is not the point of origin or destination;
- not for commercial use;
- intended for scientific research, as a laboratory standard or for analysis;
- classified as hazardous waste or hazardous recyclable material and imported and exported in compliance with *Cross-border Movement of Hazardous Waste and Hazardous Recyclable Material Regulations*; or
- registered under the *Pest Control Products Act*, *Fertilizers Act*, *Feeds Act* or *Seeds Act*.[\[8\]](#)

The Notice does not apply to “micro-businesses,” which are defined as businesses with fewer than five employees; or businesses that make less than \$30,000 in annual gross revenue.[\[9\]](#)

### Voluntary Reporting

The Notice encourage companies that are not mandated to report to voluntarily elect to submit a Declaration of Stakeholder Interest. The declaration may include information about substances not listed in the Notice, activity for another calendar year, and other activity. Given the potential increased scrutiny we do not expect there to be significant voluntary reporting.

### Extensions

Companies are likely to face challenges in gathering and reporting the necessary information by the filing deadline. There is an opportunity to request additional time to respond to the Notice with an appropriate advance submission. No extensions will be granted after the deadline has passed.

### Penalties for Noncompliance

Failure to comply with an obligation arising from the Notice is an offence, as is providing false or misleading information. Companies must make declarations regarding the truthfulness of their submissions. Companies that fail to comply with the Notice can face fines ranging from a maximum of \$25,000 for an individual on a first offence while large corporations can face fines up to a maximum of \$500,000 convicted on indictment. The maximum fines are doubled for second or subsequent offences.

### Director & Officer Liability

Directors and officers have a positive duty under CEPA to ensure companies are in compliance with the act. They also face personal liability under CEPA where they directed, authorized or acquiesced or participated in the commission of the offence i.e.: if a director or officer knew about the reporting requirement in the Notice and took no action to ensure compliance. It is important that directors and officers ensure that they take all personal due diligence in relation to the Notice.

### Key takeaways

Given the persistent nature of PFAS, there is an increase in risk for any entities who has PFAS in their supply chain. The disclosure requirements in the Notice are significant and can have potential legal implications for reporting entities including confidentiality requirements and future regulatory requirements. Recording and documenting the level of effort undertaken by entities to fulfil the Notice requirements will be an important component of due diligence for both the entity as well as directors and officers. We expect there to be numerous requests for extensions.

### Contact Us

Our lawyers are available to assist you in determining whether your business is obligated to file a report and for assistance with how to work effectively with your technical advisors. We can assist with confidentiality submissions, extensions, reviewing reports, conducting supply chain audits, and developing policies relating to the use of PFAS. The authors continue to submit requests for information from ECCC and maintain up-to-date information regarding the Notice and reporting requirements.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

[1] Canada Gazette Notice <https://canadagazette.gc.ca/rp-pr/p1/2024/2024-07-27/html/sup-eng.html>

[2] "Water talk: Per- and polyfluoroalkyl substances (PFAS) in drinking water," Health Canada ([online: webpage](#)).

[3] "Updated draft state of per- and polyfluoroalkyl substances (PFAS) report" Government of Canada ([online: pdf](#)).

[5] "Responding to the PFAS Notice," Government of Canada ([online: webpage](#)).

[6] *New Substances Notification Regulations (Chemicals and Polymers)* [SOR/2005-247](#).

[7] *Ibid.*

[8] *Ibid.*

[9] Guidance Manual at 12.

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