

## ***Behind the Mask: Canada Intends to Disclose the Identity of Masked Substances***

By [Gatlin Smeijers](#), Senior Associate, with the assistance of Riley Weyman, Student-at-Law. © Willms & Shier Environmental Lawyers LLP.

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Environment and Climate Change Canada (“ECCC”) intends to unmask the identity of up to 24 masked substances listed on the Domestic Substances List (“DSL”). This intended unmasking is part of a pilot project to test out ECCC’s new approach for reviewing confidentiality claims in the chemicals industry.

### **Confidential Business Information and Masking Substance Names**

In the Canadian chemicals industry, companies can request to keep certain information and data confidential. Confidentiality requests should only be made for information that is truly considered confidential business information (“CBI”). CBI includes trade secrets and information that, if disclosed, could compromise a business’ competitive position in the industry.<sup>1</sup> ECCC has an obligation to protect CBI.

One of the ways ECCC protects CBI in the chemicals industry is by masking the name of certain substances. Substance names may be masked when disclosure of the actual identity of the substance would result in the release of CBI.<sup>2</sup> Substance names must be masked in accordance with the federal Masked Name Regulations, and only to the extent necessary.<sup>3</sup> Persons claiming confidentiality over more than one descriptive segment of a substance’s name must provide justification.<sup>4</sup>

### **The Approach to Disclose Confidential Information and Promote Transparency in Chemicals Management**

ECCC launched its new “Approach to disclose confidential information and promote transparency in chemicals management” (the “Approach”) in October 2018.<sup>5</sup> The Approach works to find a balance between transparency and confidentiality in the

<sup>1</sup> Environment and Climate Change Canada, “Approach to disclose confidential information and promote transparency in chemicals management”, (modified, 20 June 2019), online: <https://www.canada.ca/en/environment-climate-change/services/evaluating-existing-substances/approach-confidential-information-chemicals-management.html> [ECCC Approach].

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

chemicals industry. One way to achieve this balance is through a new 10-year review cycle on confidentiality claims for masked substances.

Before the 10-year period for a confidentiality claim expires, ECCC will “make reasonable attempts” to contact the submitter of the claim.<sup>6</sup> Submitters will then have a minimum of 30 days to determine whether they would like to update their confidentiality claim for an additional 10 years.<sup>7</sup> If the submitter no longer needs to mask the substance’s identity or ECCC receives no response from a submitter, a notice of intent to disclose the substance’s identity is published in the *Canada Gazette*. This notice of intent commences a public comment period before ECCC decides whether to unmask any of the proposed substances.

### **ECCC Pilot Project**

As a pilot project for the Approach, ECCC is reviewing confidentiality claims for 24 masked substances. In line with the Approach, the confidentiality claims for all 24 masked substances are over 10 years old. ECCC contacted the submitters of the confidentiality claims for the 24 substances and other entities known to use the substances commercially. The substances ECCC intends to unmask are substances for which the submitter no longer needs to mask the substance’s identity and substances for which ECCC did not receive a response from a submitter.

On November 30, 2019, ECCC published a notice of intent in the *Canada Gazette* to amend the DSL.<sup>8</sup> The amendment would allow for unmasking of the proposed substances by removing a substance from the confidential portion of the DSL and adding the substance to the public portion of the DSL. Substances that remain masked stay on the confidential portion of the DSL and their confidentiality claim will be reviewed again in 10 years.

The outcome of the pilot project will influence how ECCC validates the remainder of older confidentiality claims for masked substances.<sup>9</sup> ECCC plans to carry out Phase II of the Approach in 2020 and 2021.<sup>10</sup> Phase II is expected to expand the scope of the pilot project to review the remaining 1754 masked substances with confidentiality claims that are over 10 years old.

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<sup>6</sup> *Ibid* at “Duration of confidentiality claims for substance identity”.

<sup>7</sup> *Ibid*.

<sup>8</sup> Government Notices (Department of the Environment), (2019) C Gaz 1, 4239 (*Canadian Environmental Protection Act, 1999*) [Notice].

<sup>9</sup> *Ibid*.

<sup>10</sup> Environment and Climate Change Canada, “Process to Validate Older Claims of CBI for Substance Identity”, (modified, 5 October 2018), online: <https://www.canada.ca/content/dam/eccc/documents/pdf/pded/cbi-flowchart/Confidential-business-information.pdf>.

## **Public Comment Period**

ECCC is currently accepting public comments on the intended unmasking of the 24 pilot project substances. Comments can be submitted via ECCC's online [portal](#), mail<sup>11</sup> or [email](#).

If you have a commercial interest in a substance listed for disclosure and you would like the identity of the substance to remain confidential, you must provide ECCC with a justification.

ECCC is accepting comments until December 30, 2019.

See the full [notice](#) in the *Canada Gazette* for a complete list of the substances ECCC intends to unmask.

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<sup>11</sup> Comments can be mailed to the Executive Director, Program Development and Engagement Division, Department of Environment, 351 Saint-Joseph Boulevard, Gatineau, Quebec K1A 0H3.