Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

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VIA ELECTRONIC MAIL

Department of the Environment
Legislative Governance Division
Gatineau, Quebec K1A 0H3
healthyenv-envsain@ec.gc.ca

Re: Comments on Consultation on CEPA Right to a Healthy Environment Draft Implementation Framework

The "Draft implementation framework for the right to a healthy environment under the Canadian Environmental Protection Act, 1999" ("Draft Framework") sets out how Environment and Climate Change Canada ("ECCC) and Health Canada ("HC") propose to fulfill the federal government's duty to protect the right to a healthy environment in administering CEPA.

In light of our review, CELA proposes the following:

Recommendations

1. Amend the Draft Framework to demonstrate how the right to a healthy environment is expected to emerge protected though the implementation process.

2. Provide much more detailed clarity in the Draft Framework on how principles identified in the 2023 CEPA amendments (e.g. environmental justice) will be applied and achieved using, for example, the approach developed by the state of Washington.

3. Acknowledge in the Draft Framework that the right may be unenforceable in the absence of reform to section 22 and related provisions of CEPA.

Background

To recap the statutory changes to CEPA contained in the 2023 amendments include section 2(1)(a.2) which states that in administering the Act the government shall protect the right of every individual in Canada to a healthy environment as provided under the Act.

In addition, section 5.1 of the Act says that for the purpose of section 2(1)(a.2), the ECCC Minister shall develop an implementation framework. The framework developed pursuant to section 5.1 must do two things. First, the framework must set out the process for protecting the right under section 76.1(1), which section requires applying the weight of evidence approach and the precautionary principle in assessing if a substance is toxic or capable of becoming toxic, as defined under the Act. Second, the framework must elaborate on the principles to be considered in the

Act's administration, including environmental justice, non-regression, and intergenerational equity, and the factors (e.g., economic) that may constitute reasonable limits on the right.

In short, section 5.1 is not about how individuals can vindicate their right to a healthy environment, but how the government may do so for them. There may be circumstances where the government's actions could result in Federal Court intervention at the behest of an individual member of the public on the grounds that the government has not met the section 2(1) duty considering how the section 5.1 process has been applied under the framework. But, at the same time, the framework produced pursuant to section 5.1 is also how the government may say in response to such a court challenge that the administrative process has been followed, is reasonable, and a balance achieved notwithstanding the outcome may not be to the individual's liking.

So, recognizing that section 5.1 is not about how an individual may vindicate his or her rights, the question is whether the Draft Framework adequately explains how the government will consider the rights of individuals in its administration of the Act.

Flaws in an Administrative Approach to Vindicating Individual Rights

In CELA's view, there are several problems with the Draft Framework. First, it is not at all clear that adherence to the Draft Framework would produce environmentally different results than if the Act had not been amended at all. The Draft Framework constitutes primarily an inventory of principles, factors, and programs to be considered (See Figures 1 and 2 of the Draft Framework). In identifying these various considerations, the Draft Framework does not purport to dictate a "rights" result guided by the statute; rather it is designed to ensure that all the boxes of what should be considered are checked off. So, in that sense, it is anyone's guess what the result will be in any particular circumstance. In such a context, a chemical's right to be placed into, or to remain in, commerce will stand as good a chance, if not better, than an individual's right not to be exposed to that chemical. That is what half a century of toxics legislation and its administration in Canada has shown. The 2023 amendments purport to move this needle in a different direction but have done so only marginally. Relying heavily on an administrative regime to vindicate individual rights, in the absence of grounding the amendments firmly in human rights principles, is a recipe for business as usual. That is a flaw in the amendments that the Draft Framework cannot overcome and ends up repeating, if not codifying.

For example, in section 2.1.1 of the Draft Framework, it is stated that:

> "Within CEPA there are specific requirements and authorities for the assessment and management of existing substances that have been or are being used in Canada and for new substances that are proposed to be introduced…"

The Draft Framework further states in section 2.2.2 that:

> "Participation in decision-making under CEPA provides the public, stakeholders, and Indigenous peoples with the opportunity to influence the decisions that may impact them...

> Opportunities for meaningful participation in decision-making are made available throughout the CEPA management cycle. Providing sufficient time for interested persons to review materials and to respond, and providing explanations of how input may have informed decision-making under CEPA are important to promoting this procedural element, recognizing that, in some cases, comment periods are bound by CEPA requirements".

The opportunities provided to the public and stakeholders to engage with decision-makers through the public comment process have been available under CEPA since at least 1988, including with respect to consideration of the assessment and management of existing chemicals prioritized under the Act for review. However, these CEPA provisions represent the most minimal or basic requirements afforded for public involvement since they occur largely after government has completed its assessment or development of management options. Very rarely has there been substantial revisions to the decisions during these processes that have been based on information provided to the responsible government agency by the public. They are, in short, too little too late.

For processes involving chemicals new to Canada even these limited opportunities are substantially absent and transparency lacking as the review is completed without opportunities for the public to engage in the decision making process. For living organisms subject to the processes outlined in Part 6 of CEPA, the 2023 amendments provided a new level of transparency and public engagement on decisions. However, significant concerns remain on how decisions are made on living organisms and what constitutes acceptable evidence for consideration as decisions are finalized.

As we stated more than once while the amendments were being considered by Parliament, an implementation framework does not on its face create a stand-alone "right" of individuals to a healthy environment. It is a regime entirely dependent on the will of government; i.e., the opposite of a rights-based approach to the law. The Draft Framework needs to much more coherently demonstrate how the right to a healthy environment is expected to emerge from the implementation process of a largely unchanged administrative regime. There is a need to explain how the right has become integral to the review, and not simply another add-on.

Lack of Clarity in Applying Principles

Second, and related to the first problem, is the failure of the Draft Framework, if not the amendments, to articulate an approach for implementing any of the principles the government is charged by the Act with examining. Taking environmental justice as just one example, section 4.1 of the Draft Framework devotes just a few paragraphs of general discussion on the matter, but no clear direction on what is to be achieved by the examination undertaken. By comparison, the state of Washington requires that a state agency must conduct an environmental justice assessment in accordance with state law to inform and support the agency's consideration of "overburdened communities" and "vulnerable populations" when making decisions and to assist the agency with the "equitable distribution of environmental benefits", the reduction of "environmental harms", and the identification and reduction of "environmental and health disparities".[1] All the terms in

[1] Session Laws of 2021, ch. 314, s. 14.

quotations are defined in detail in the Washington state law.[2] If this type of approach had been employed throughout the Draft Framework, with better guidance from the amendments, one could more confidently predict an outcome in keeping with what Parliament directed respecting the protection of the right of individuals to a healthy environment.

Failure to Acknowledge Right Remains Largely, if not Completely, Unenforceable

Third, the Draft Framework leaves the unwarranted impression that there are no obstacles to members of the public attempting to use the existing remedies provisions of CEPA. For example, under section 2.2.3 of the Draft Framework the following is stated:

> **"2.2.3 Access to effective remedies in the event of environmental harm**
> Effective remedies refer to tools the public can use to request the Government of Canada to act if they believe that environmental damages have occurred, if there are no mitigation measures in place, or as a result of non-compliance with CEPA. There are several existing tools under CEPA that provide the public with opportunities to request an investigation of an alleged offence; to pursue a civil suit, injunctions, and/or civil action to recover damages; or to file a notice of objection requesting that a board of review be established".

Twenty-five years of experience with non-use by members of the public of the section 22 environmental protection action provision due to numerous barriers in the Act itself, should have disabused everyone of this notion. The right, quite simply, is unenforceable by members of the public if it is dependent on section 22 as currently worded. Before a section 22 environmental protection action may be brought by an individual that person must first: (1) apply for an

[2] Session Laws of 2021, ch. 314, ss. 2(11) ("overburdened communities" means "a geographic area where vulnerable populations face combined, multiple environmental harms and health impacts, and includes, but is not limited to, highly impacted communities…"); 2(14)(a) ("Vulnerable populations" means population groups that are more likely to be at higher risk for poor health outcomes in response to environmental harms, due to: (i) Adverse socioeconomic factors, such as unemployment, high housing and transportation costs relative to income, limited access to nutritious food and adequate health care, linguistic isolation, and other factors that negatively affect health outcomes and increase vulnerability to the effects of environmental harms; and (ii) sensitivity factors, such as low birth weight and higher rates of hospitalization; and 2(14)(b) ("Vulnerable populations" includes, but is not limited to: (i) Racial or ethnic minorities; (ii) Low-income populations; (iii) Populations disproportionately impacted by environmental harms; and (iv) Populations of workers experiencing environmental harms); 2(9) ("Equitable distribution" means a fair and just, but not necessarily equal, allocation intended to mitigate disparities in benefits and burdens that are based on current conditions, including existing legacy and cumulative impacts, that are informed by cumulative environmental health impact analysis); 2(4) ("Environmental benefits" means activities that: (a) Prevent or reduce existing environmental harms or associated risks that contribute significantly to cumulative environmental health impacts; (b) Prevent or mitigate impacts to overburdened communities or vulnerable populations from, or support community response to, the impacts of environmental harm; or (c) Meet a community need formally identified to a covered agency by an overburdened community or vulnerable population that is consistent with the intent of this chapter); 2(5) ("Environmental harm" means the individual or cumulative environmental health impacts and risks to communities caused by historic, current, or projected: (a) Exposure to pollution, conventional or toxic pollutants, environmental hazards, or other contamination in the air, water, and land; (b) Adverse environmental effects, including exposure to contamination, hazardous substances, or pollution that increase the risk of adverse environmental health outcomes or create vulnerabilities to the impacts of climate change; (c) Loss or impairment of ecosystem functions or traditional food resources or loss of access to gather cultural resources or harvest traditional foods; or (d) Health and economic impacts from climate change); 2(6) ("Environmental and health disparities" means the data and information developed pursuant to section 19 of this act).

investigation with the Minister; (2) the Minister must have failed to conduct such investigation and report within a reasonable time; or (3) the Minister's response to the investigation must have been unreasonable. Only then does section 22 permit an individual to bring an environmental protection action in a court of competent jurisdiction against a person who committed an offence under CEPA that: (1) was alleged in the application for the investigation; and (2) caused significant harm to the environment. A 2007 House standing environment committee, reporting eight years after *CEPA, 1999* had come into force, noted that section 22 had "yet to be used".[3] A 2017 House committee report found that section 22 of the Act continued to be unused by members of the public. The 2017 committee's report suggested that one reason that may account for why section 22 had not been used is the "strict test" for bringing an environmental protection action, which requires that the alleged offence "caused significant harm to the environment" as opposed to any harm. The 2017 committee recommended that section 22 be amended to remove the "significant harm" test and replace it with a less onerous one, and to also remove the requirement that an investigation be requested before an environmental protection action can be brought.[4] It bears noting that in testimony before that House standing committee in October 2016, federal government officials also confirmed that with respect to section 22: (1) this citizen suit provision has not been used since its passage; (2) the existing provision constitutes a high threshold for individuals seeking to bring such an action; and (3) the Environment Minister wanted this brought to the Standing Committee's attention for consideration.[5] Neither of the 2017 Committee's recommendations were proposed by the government for the amendments to the Act and Parliament did not otherwise address the matter before the 2023 amendments were passed. In 2024, the provision has still not been invoked.

However, the Draft Framework avoids any recognition of this problem, which the 2023 amendments did not rectify, but which the government has been aware of for years. As the Senate Energy Committee observed in its June 2022 report to the full Senate on Bill S-5 (that became the 2023 amendments):

> 4. This committee would like to state their concern that the right to a healthy environment cannot be protected unless it is made truly enforceable. This enforceability would come by removing the barriers that exist to the current remedy authority within Section 22 of CEPA, entitled "Environmental Protection Action." There is concern that Section 22 of CEPA contains too many procedural barriers and technical requirements that must be met to be of practical use. As Bill S-5 does not propose the removal or re-evaluation of these barriers, this Committee is concerned that the right to a healthy environment may remain unenforceable.[6]

As the government is also aware, the problem was not resolved when the matter went to the House of Commons and remains embedded in CEPA today. The Draft Framework needs to acknowledge this problem. The first step to recovery is always to admit there is a problem.

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[3] Canada, House of Commons Standing Committee on Environment and Sustainable Development, "The Canadian Environmental Protection Act, 1999 – Five-Year Review: Closing the Gaps" in *Debates*, No. 5 (April 2007) at 40.

[4] Canada, House of Commons Standing Committee on Environment and Sustainable Development, "Healthy Environment, Healthy Canadians, Healthy Economy: Strengthening the *Canadian Environmental Protection Act, 1999*" in *Debates*, No. 8 (June 2017) at 37-39.

[5] Canada, House of Commons, Standing Committee on Environment and Sustainable Development, *A Review of the Canadian Environmental Protection Act, 1999*, Evidence, No. 28, 1st Sess., 42nd Parl. (6 October 2016) (John Moffet, Director General, Legislative and Regulatory Affairs Directorate, Environment and Climate Change Canada) at 2, 6-7.

[6] See *Journals of the Senate* (20 June 2022) at 761.

Finally, there is one further concern with the Draft Framework; its silence on the impact the traditional law of costs has on the willingness of members of the public to risk undertaking a section 22 environmental protection action. Where the law of costs has been studied it has always been regarded as one of the main barriers for bringing these types of actions in Canada. This has most recently been re-affirmed in the 2024 report of the Law Commission of Ontario (LCO):

> "In Canada, courts have traditionally applied a two-way costs award whereby a litigant's entitlement to costs is contingent on the successful outcome of the case [footnote omitted].
>
> For the losing party the potential liability for an adverse costs award is perhaps the most significant barrier to public interest litigation [footnote omitted].
>
> Courts in many jurisdictions (including the United Kingdom, Australia, New Zealand, and South Africa) have recognized that a rigid application of the two-way rule can cause considerable unfairness in public interest litigation [footnote omitted]. This is because public interest litigants typically do not stand to gain financially but face serious economic consequences if their case is unsuccessful. As a result, courts in these jurisdictions have, in appropriate cases, departed from the two-way costs regime [footnote omitted]".[7]

The LCO report recommended adoption of a one-way costs rule which would allow public interest litigants who are successful in an environmental protection action to recover costs, but they would not be liable for adverse costs if they lost the case.[8] Because public interest litigants remain potentially liable for adverse costs under CEPA[9] the Draft Framework missed an opportunity to acknowledge very serious limitations with section 22 as an instrument for facilitating access to effective remedies.

Closure

CELA identified these and other problems in our April 2024 review of the government consultation document. We continue to be concerned that the Draft Framework does not address let alone resolve the bulk of the concerns identified therein. For the assistance of the government, we re-attach to the within comments those earlier submissions (without their attachments).

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Joseph F. Castrilli
Counsel

Ramani Nadarajah
Counsel

Fe de Leon
Senior Researcher

[7] Law Commission of Ontario, *A New Environmental Bill of Rights for Ontario*, (Toronto: 2024) at 61 (Ms. Nadarajah was the lead author of the report).
[8] *Ibid.* at 62-63, 111.
[9] *Ibid.*

cc. CELA April 2014 Submissions