New draft VOC regulations in Canada: Same old constitutional battles?

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On Feb. 23, 2024, the federal government released draft regulations to cut volatile organic compound (VOC) emissions from the petroleum sector (Draft VOC Regulations), and a notice of intent to limit benzene emissions from gas stations (the Notice of Intent).

According to the federal government, these actions expand on previous efforts to address VOCs and other air-borne contaminants and – backed by its recent amendments to the *Canadian Environmental Protection Act, 1999* (CEPA) – its commitment to provide Canadians with a healthy environment. However, as outlined below, these proposed regulations might be the next frontier for a clash between the federal and provincial governments over who has the constitutional right to regulate over the environment.

VOC regulations in Canada

The Draft VOC Regulations will require petroleum liquid storage tanks and loading racks to be equipped with emissions control equipment. The draft regulations will apply to facilities such as truck, rail, marine and pipeline terminals; petroleum refineries; upgraders; petrochemical facilities; and large bulk fuel facilities. Facilities will be required to install, inspect, maintain and repair emissions control equipment, and to comply with recordkeeping and reporting requirements. The required emissions control equipment will vary depending on the type of tank or loading rack, but could include an internal or external floating roof, vapour control systems, pressure-vacuum vents, or vapour balancing systems. Facilities will have different compliance deadlines, between 2025 to 2031, for existing racks, tanks and equipment based on the emitting levels of the racks, tanks and equipment.

In addition to the Draft VOC Regulations, in the Notice of Intent the government announced its intention to limit benzene emissions from gasoline stations. The Department of Health and the Department of the Environment will initiate the development of a risk management strategy, which will include potentially issuing regulations under CEPA to limit benzene emissions from gasoline stations. Consultations on a risk management strategy to manage gasoline vapour emissions from gasoline stations will begin in 2024.

Efforts to regulate emissions

The Draft VOC Regulations follow a spate of activity by the federal government to regulate emissions, including the proposed amendments to ensure a reduction of methane emissions in the upstream oil and gas sector by at least 75 per cent below 2012 levels by 2030 (the Proposed Methane Amendments), and the introduction of a cap on oil and gas emissions.

The government's technical backgrounder on the Proposed Methane Amendments explicitly refers to the fact that reduced methane emissions will lead to reduced VOC emissions, given that VOCs are often released from the same venting and fugitive sources of methane. The link between methane and VOC emissions reduction is also noted in the Draft VOC Regulations as the regulation of methane and VOC emissions go hand in hand. The Proposed Methane Amendments have been the subject of significant pushback, with Saskatchewan and Alberta criticizing the impact on provincial economies and claiming that the federal government is infringing on provincial constitutional rights.

The clash between the provincial and federal governments in the area of environmental regulations is nothing new. In 2021, the Supreme Court of Canada held in the *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, that the federal government had the power to enact minimum national standards for GHG pricing as a matter of national concern. However, this was limited to pricing of GHG emissions, which was a narrow and specific regulatory mechanism. The decision did not give the federal government a carte blanche to regulate GHG emissions generally.

The limits on federal powers over environmental matters were explored further by the Court in the *Reference re Impact Assessment Act*, 2023 SCC 23. Here, the Court held that the designated project scheme in the federal *Impact Assessment Act* was *ultra vires* for not being focused on regulated effects within federal jurisdiction. Most recently, the Federal Court held that the federal government's criminal law power does not provide authority to ban single-use plastics under CEPA; however, this decision was recently stayed pending an appeal to the Federal Court of Appeal.

Given the recent opinion in the *Reference re Impact Assessment Act*, commentators have questioned whether the Proposed Methane Amendments are sufficiently focused on areas of federal jurisdiction. The Draft VOC Regulations may raise similar questions, as they appear to regulate a wide range of facilities that would otherwise fall within provincial jurisdiction. In addition, the federal government has acknowledged in its Regulatory Impact Analysis Statement that some of the facilities are already subject to mandatory provincial or municipal measures, raising the possibility of overlapping regulatory requirements. Whether those overlapping requirements will impermissibly conflict or whether they are properly the subject of the "double aspect" doctrine, which permits the federal and provincial governments to pass laws in relation to the same subject matter, in certain cases, remains to be seen.

The Draft VOC Regulations are purported to tie into the federal government's commitment to protect public health. A 2023 Health Canada report concluded that Canadians living near gas stations may be exposed to elevated levels of carcinogens, including benzene, due to emissions, providing context for the federal government's decision to release the notice of intent on benzene.

Both the focus on environmental protection and public health are, according to the federal government, in line with its commitment to provide Canadians with a healthy environment. The announcement of both the Draft VOC Regulations and the Notice of Intent come on the heels of the federal government's Feb. 8, 2024 announcement that it is commencing public consultation on the development of a right to a healthy environment implementation framework.

Next steps

BLG can assist anyone wanting to comment on the Draft VOC Regulations and/or the Notice of Intent, monitor future developments, or better understand how this may affect your interests.

Comments on the Draft VOC Regulations in Canada are accepted online until April 24, 2024, with the goal of publishing the final regulations in winter 2024-2025. Feedback on the Notice of Intent can be emailed to the federal government at fuels-carburants@ec.gc.ca.

For further information, including assistance with your submissions, please contact the authors listed below or any member of BLG's Environmental or Energy groups.

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