Canada’s proposals for implementing a modernized CEPA

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On Oct. 2, 2024, Environment and Climate Change Canada (ECCC) published three proposals for implementing changes to the *Canadian Environmental Protection Act* (CEPA), one of Canada’s core environmental laws regulating toxic substances and pollution. All three proposals relate to the CEPA modernizations made in June 2023[1], which we first wrote about when Bill S-5, the *Strengthening Environmental Protection for a Healthier Canada Act*, was enacted, marking the first major update to CEPA in over 20 years.

The proposed framework for implementing the right to a healthy environment (referred to as the "implementation framework” for the rest of the article) is required under CEPA to uphold and protect this newly legislated right, while ECCC’s proposed Watch List Approach for monitoring substances of concern, and the Chemicals Plan of Priorities are both key strategies for supporting the federal government’s Chemicals Management Plan.

What you need to know

- The proposed framework for implementing the right to a healthy environment may impact the factors government decision-makers will consider when dealing with federal approvals, investigations, and prosecutions under CEPA.
- Organizations should consider how the proposed Watch List Approach to monitoring substances of potential concern may impact their operations planning and potential regulatory obligations in the future.
- Organizations should review the proposed list of substances and substance groups identified in the Plan of Priorities to determine whether any of the 30 identified substances may impact their business operations, or whether they believe additional substances should be listed.
- All of the proposals are open for public comment until Dec. 4, 2024.

Our take

All three proposals indicate that the federal government is continuing to develop guidelines and changes consistent with national and international commitments to environmental protection.

In particular, the proposed implementation framework provides a starting point from which industries can refer to in navigating complex regulatory risks, including engagement with Indigenous groups. The implementation framework may well serve as the basis of internal environmental policies and protocols developed by businesses engaged in activities that may result in air and water pollution, as well as the release of harmful substances and greenhouse gases.

Proposal #1: Draft framework for implementing the right to a healthy environment

Section 5.1 of CEPA requires that the federal government develop an implementation framework by June 2025, that sets out how a right to a healthy environment will be considered when administering CEPA. Section 3(1) of CEPA defines a healthy environment is defined as "an environment that is clean, healthy and sustainable".

The Government of Canada has now published a draft implementation framework. The proposed implementation framework:

i. defines both the substantive and procedural elements of the right to a healthy environment,
ii. sets out the principles used to guide CEPA decision-making,
iii. elaborates on the relevant factors used to interpret and apply the right to a healthy environment, and
iv. outlines research monitoring accountability, and reporting requirements to uphold the right to a healthy environment.

Substantive and procedural protections

The proposed implementation framework addresses five ways to protect the substantive elements of a right to a healthy environment. Notably, the proposal does not introduce new methods of upholding the right to a healthy environment, but rather addresses how existing programs, policies, and legislation will be used:

1. *Protection from harmful substances, pollutants, and wastes*: Accomplished through mechanisms such as the Chemicals Management Plan, the Federal Environmental Quality Guidelines, and guidelines on the movement of hazardous waste and hazardous recyclable material.
2. *Clean and healthy air*: Accomplished through mechanisms such as the Air Quality Management System, the Canadian Ambient Air Quality Standards, and the Health-Based Air Quality Objectives.
3. *Clean and healthy water*: Accomplished through mechanisms such as CEPA's Disposal at Sea program and Water Quality Guidelines.
4. *Sustainable climate:* Accomplished through several legislative mechanisms that regulate emissions across industry sectors.
5. *Healthy ecosystems and biodiversity:* All actions undertaken under CEPA should protect the environment and support biodiversity.

The proposed implementation framework also outlines how the procedural administration of CEPA will support the right to a healthy environment, including through:

1. *Access to information*: Allowing individuals to make informed decisions about their community health and environments, to understand government decision making, and hold government accountable.
2. *Participation in decision-making*: Includes providing opportunities for meaningful participation in decision-making through the CEPA management cycle and providing explanations for how decisions were made.
3. *Access to effective remedies in the event of environmental harm*: This includes tools to request investigations of alleged offences, pursuing civil suits, or filing a notice of objection.

Principles for administering the right to a healthy environment

While the proposed implementation framework does not propose new substantive mechanisms to address the right to a healthy environment, it does introduce new principles and factors that ECCC would have to consider when administering CEPA. Section 2 of CEPA already outlines several principles which are applied in the administration of the Act, including sustainable development, the precautionary principle, and polluter pays. The proposed implementation framework adds three new principles:

1. *Environmental justice*: Relates to avoiding disproportionate adverse impacts and burdens falling on different populations.
2. *Intergenerational equity*: The needs of the present generation should be met without compromising the ability of future generations to meet their own needs.
3. *Non-regression*: Preventing reduced levels of environmental and human health protection. This means that actions taken under CEPA should be clearly communicated, and decision rationale should be provided- especially where there is a change in approach.

Factors for interpreting and applying the right to a healthy environment

CEPA requires that the implementation framework elaborate on relevant factors that are taken into consideration when interpreting and applying the right. The proposed implementation framework elaborates on the following five factors:

1. *Scientific factors*: The framework proposes to use a “weight of evidence” approach to consider multiple lines of evidence, as well as an interdisciplinary approach to fully capture the complexity of interactions between ecological and environmental health.
2. *Environmental factors:* The framework proposes to consider the interconnected dimensions of ecosystem and biological diversity, climate change, air and water in CEPA decision-making.
3. *Health factors*: The framework proposes to analyze potential adverse human health impacts (both at the individual and community levels) of pollution and benefits of action under CEPA. This includes mental health impacts where information is available.

4. *Social factors*: The framework proposes to consider how different social groups may be impacted disproportionately by pollution, including impacts on cultural practices, traditions, and heritages.
5. *Economic factors*: The framework proposes to consider the financial and economic returns of decision-making, consistent with Canada's Cost Benefit Analysis Guide.

Indigenous rights, research, studies, monitoring, and reporting

The proposed implementation framework also elaborates on a several research, studies, monitoring, and reporting activities to support the protection of the right to a healthy environment under CEPA.

Moreover, the proposed implementation framework discusses the role of Indigenous knowledge, as well as the role of federal policy and constitutional commitments to Indigenous peoples, for upholding environmental protections under CEPA.

Canada following national and international trends

Canada's recognition of a right to a healthy environment puts them in company with the over 100 states internationally that have recognized the same right. Moreover, the legislative change comes after several provinces, including Ontario, Québec, and British Columbia have recognized the right in provincial legislation.

While the proposed implementation framework is an important step in providing greater environmental protections in Canada, it may remain a challenge to discern how their day-to-day operations and regulatory obligations will be changed. Many organizations are likely to encounter the changes from the proposed framework in their interactions with ECCC and their CEPA approvals, orders, and prosecutions. Some organizations may also encounter the right to a healthy environment in CEPA-related litigation. It is too early to tell whether the finalized implementation framework will increase the frequency of climate and environmental litigation in Canada, however, a finalized implementation framework may provide additional arguments in environmental harms claims that are within CEPA's jurisdiction.

Businesses and interested parties may consider submitting comments on the proposed framework and should continue to monitor new developments.

Proposal #2: Watch list for substances of concerns

As part of Bill S-5, a new section 75.1 of CEPA was introduced, which requires that the Minister of the Environment compile a Watch List that specifies substances that the Minister has reason to suspect are **capable of becoming** toxic but have not yet been determined to be toxic.

ECCC and Health Canada have proposed several criteria for administration of the Watch List, including: the severity or type of effect, the physical or chemical properties of the substance, the function and use of the substance, the environmental fate of the substance, and the potential for increase or changes in current uses and exposures.

The proposal outlines what can be expected in terms of how the Watch List will be administered. Substances will be added following existing processes for public consultation, publication of final recommendations, and communicated to stakeholders and the public through existing mechanisms such as the Canada Gazette, CEPA Registry, mailing lists, and the Chemical Substances webpage. Once a substance is on the Watch List, the list will identify the relevant Chemical Abstracts Service Reference Number, the substance name, the area of concern, and a reference.

There will be no new requirements or restrictions once a substance is added to the Watch List. However, organizations should monitor when a substance relevant to their operations is added to the Watch List, as there may be future follow-up activities such as information-gathering under section 71 of CEPA. Information gathering requirements under section 71 of CEPA have been used recently to collect information on the manufacture, import, and use of 312 types of per- and polyfluoroalkyl substances (PFAS). We recently wrote about the PFAS Notice and its information gathering requirements.

Proposal #3: Plan of Priorities for chemical substances

The Government of Canada has developed a proposed Plan of Priorities identifying more than 30 substances and substance groups that will be prioritized in terms of assessment for whether they are toxic or capable of becoming toxic, pursuant to section 73(1) of CEPA. The list of proposed substances can be found in section 2.1 of the proposed plan. The current list includes chemicals that are commonly the subject of environmental litigation such as Trichloroethylene and Tetrachloroethene.

The list is not static and may be amended from time to time based on the emergence of new science and through public requests.

We recommend reviewing the list for substances that impact your business and supply chain.

Implications and next steps

While the proposals outlined remain to be finalized after the comment period is closed, they are important indicators of forthcoming obligations on government, companies, and individuals. The current public comment period is an opportunity for individuals and businesses to voice any concerns or input regarding how the proposals may impact their interests. Comments or feedback on all three proposals should be submitted to ECCC before Dec. 4, 2024.

If you have any questions about the proposed changes and approaches to administering CEPA, questions regarding your own comments in the public consultation, or questions more generally, please reach out to any of the authors or key contacts listed below.

[1] The federal government also announced a fourth proposal, which is a proposed strategy to Replace, Reduce, and Refine Vertebrate Animal Testing. This proposal will not be addressed in this article.

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