

ecojustice



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Comments on the *Right to a Healthy Environment in CEPA Implementation Framework Discussion Document*

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These are the comments of Breast Cancer Action Quebec, the Canadian Association of Physicians for the Environment, the Coalition for Environmental Rights, the David Suzuki Foundation, Ecojustice and Environmental Defence on the discussion document on the implementation framework for the right to a healthy environment under the Canadian Environmental Protection Act (CEPA).

The first sections below address the specific questions in the discussion document. The subsequent sections make other recommendations for development of the framework.

As organizations concerned with environmental health, we advocated for the modernization of CEPA and supported amendments in Parliament to strengthen Bill S-5, including the clauses pertaining to recognition in law of the right to a healthy environment (R2HE).

We are encouraged by the work Environment and Climate Change Canada (ECCC) and Health Canada (HC) are undertaking to develop the implementation framework that will give meaning to the right in the context of CEPA, and welcome the opportunity to provide these comments on the discussion paper.

Response to questions in the discussion paper

Definition and scope of the right to a healthy environment

What does a healthy environment mean to you in the context of the CEPA cycle described in section 2.2 or the issues described in section 3.1?

How would you know if your environment is healthy?

We are concerned that the discussion paper does not hone in on what it means to implement a human-rights-based approach in the administration of CEPA. Although it is interesting to consider

the new CEPA definition of “healthy environment,” these questions obscure the more significant aspect of the Bill S-5 right to a healthy environment amendments; namely, the recognition of a healthy environment as a right and the positive duty to protect the right. Adopting a rights-based approach will ensure that the right is properly protected and prioritized against competing considerations that are not rights, subject to limits that are reasonable and demonstrably justified by the government.

To answer the question of what a right to a healthy environment encompasses, Canada should consider the elements of R2HE as defined by the UN, and recently re-affirmed by the Inter-American Court of Human Rights.¹

The substantive elements include clean air; a safe and stable climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study and play; and healthy biodiversity and ecosystems. The procedural elements include access to information, the right to participate in decision-making, and access to justice and effective remedies, including the secure exercise of these rights free from reprisals and retaliation.²

Although incorporating a rights approach into environmental decision-making under CEPA may be novel to ECCC and HC, rights frameworks are not novel to the government of Canada. Canada signed the Canadian Charter of Rights and Freedoms in 1982, which forms part of our Constitution, the highest law in Canada. In addition to domestic human rights obligations, Canada is a party to several international human rights treaties adopted by the UN.

These collectively offer decades of experience that ECCC and HC can learn from to define the right to a healthy environment and develop the implementation framework.

While compliance with standards (or conformance with a guideline) set by government could be one consideration in assessing whether an environment is healthy or if the right is breached, it is not necessarily determinative. Some standards are outdated or do not account for cumulative effects, and pollution that meets a standard may still cause harmful effects in the circumstances of a particular case. These effects could be exacerbated when imposed on already vulnerable communities. Accordingly, while breach of a standard should be considered to breach the R2HE, mere compliance with a government standard cannot automatically demonstrate that the R2HE is

¹ *Inhabitants of La Oroya v Peru*, Sentence of 27 November 2023, published 24 March 2024, Inter-American Court of Human Rights, paras. 115-126.

² What is the Right to a Healthy Environment? Information Note. Page 9. <https://www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf>. See also the detailed reports of the UN Special Rapporteur on the right to a healthy environment: A/HRC/40/55—clean air; A/HRC/46/28—safe and sufficient water; A/HRC/49/53—non-toxic environments; A/74/161—a safe climate; A/75/161—healthy ecosystems and biodiversity; A/76/179—healthy and sustainably produced food. All thematic reports of the current and previous Special Rapporteurs are here: <https://www.ohchr.org/en/special-procedures/sr-environment/annual-thematic-reports>

being upheld. We agree with the Canadian Environmental Law Association’s submissions on this point.

Recommendation:

- The government should draw on its collective experience in many rights frameworks and laws, including the Charter, to define R2HE using a rights-based approach in the implementation framework. International human rights and environmental rights frameworks should also be considered with the recognition that environmental and human rights exist in the broader global context. (See also the recommendation below that Canada articulate a conceptual approach to the R2HE.)
- While breach of a standard should be considered to breach the R2HE, mere compliance with a government standard cannot automatically demonstrate that the R2HE is being upheld and that the environment is therefore healthy.

Reasonable limits

How would you see these factors limit the consideration of the right being taken into account when making decisions under CEPA?

Similar to the comment above, this question is limited and ignores an important aspect of the section on the factors to consider. Factors are not relegated to assessing the reasonable limits but also apply to “interpreting and applying” the right (s 5.1(2)c). By failing to ask how the factors can be used in this manner, the discussion paper will not solicit feedback on how the factors may inform the right in other ways. The framework should explicitly acknowledge that the listed factors may also support expanding the right.

We oppose relying on economic factors to justify limiting the R2HE; nothing in section 5(2)(c) or CEPA requires that the implementation framework allow economic factors to be used in this way. Instead, the implementation framework should explain that economic factors may influence the interpretation and application of the R2HE with respect to identifying “vulnerable populations” and avoiding adverse effects that disproportionately affect these populations. For example, economic factors may increase a community or individual’s vulnerability to pollution threats. In that case, the R2HE may require special protection measures. Moreover, decision-makers could appropriately consider economic factors in determining whether a proposed limit on the R2HE is reasonable. For example, if a decision limiting the R2HE will cause negative economic impacts to a vulnerable community or individual, this could demonstrate that the limit is not reasonable. Likewise, if a decision limiting the right to a healthy environment will cause negative environmental or health impacts to economically disadvantaged communities or populations, this could demonstrate that the limit is not reasonable.

This limited role for economic considerations aligns with the legal constraints in the statutory framework. CEPA aims to promote sustainable development through pollution prevention. CEPA imposes no duties on decision-makers to foster sustainable development except in relation to various pollution-prevention duties. CEPA’s overarching emphasis on pollution prevention reflects Parliament’s judgement that pollution prevention in and of itself promotes sustainable

development. For example, CEPA requires decision-makers to take the necessity of protecting the environment into account when making economic decisions (s. 2(1)b)), but it does not require decision-makers to consider economic factors when making environmental protection decisions. Allowing decision-makers to limit the right to a healthy environment because of economic considerations would conflict with the established statutory framework and would undermine CEPA's pollution-prevention purpose.

In the alternative, if the implementation framework purports to allow decision-makers to use economic factors to limit the R2HE, then those factors must reflect CEPA's focus on sustainable development through pollution prevention. CEPA defines "sustainable development" to mean development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Any reliance on economic considerations to limit the R2HE would need to be linked to sustainable development on this generational, national scale, occur within a robust analysis of intergenerational equity issues, and otherwise respect the legal constraints imposed in CEPA, including CEPA's overarching focus on pollution prevention. Any such limits would also need to meet the general requirements for reasonable limits established in the jurisprudence — for example, by minimally impairing the right.

Recommendations:

- The implementation framework should address the consideration of factors in interpreting and applying the right in addition to reasonable limits.
- Economic factors must not be used to justify limiting the R2HE; nothing in section 5(2)(c) or CEPA requires that the implementation framework allow economic factors to be used in this way. The implementation framework should explain that these factors may influence the interpretation and application of the R2HE by ensuring that it protects especially "vulnerable populations". In the alternative, if the implementation framework purports to allow decision-makers to use economic factors to limit the R2HE, then those factors must reflect CEPA's focus on sustainable development through pollution prevention.

Aligning with the *Charter* and *Vavilov*

We acknowledge that rights are not absolute and that limits apply, including to R2HE. Guidance on the reasonable limits of rights can be drawn from the Charter, where applicable tests are well established and set out in legal decisions like *Oakes* and *Commission scolaire francophone des Territoires du Nord-Ouest*.³ We recommend that similar tests apply here. As with Charter rights, once someone establishes a breach of the R2HE, the onus should shift to the government to justify the breach. The framework should clarify that the government must justify any breaches in reasons accompanying the decision.

As with any decisions that involve the government's interpretation and application of the R2HE, government decisions limiting the right must be "justified, intelligible and transparent,"⁴

³ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 1; *R v Oakes*, [1986] 1 SCR 103; *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31.

⁴ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras 94-96.

particularly for anyone who may be affected by the decision. The decision must fully disclose how each factor was assessed and weighed against the right and the other factors.

In situations where factors are considered, procedural rights become extremely important. Ensuring access to information regarding the decision, including the analysis of how each factor was considered and weighted, is necessary. This includes the data and reports used in the analysis. The discussion paper asks the following question:

What information would you need to see to feel confident that the right set out in the framework is being protected in CEPA decision-making? Are there specific actions that should be taken to assess this?

It is essential that there is public access to information regarding all decisions under CEPA, including the analysis of how a decision protects the right and how each relevant factor was considered and weighed, including any data and reports used in the analysis.

To ensure this information is publicly available, we recommend that where the minister (or delegate) or Governor in Council (e.g., when making regulations about substances) makes a decision engaging the right to a healthy environment, they must publish a statement of consideration documenting how the decision aligns with and upholds the principles, and protects the right including use of relevant factors. If it limits the right, how is it reasonable in light of relevant factors? This could help prevent regressive actions by requiring the government to publish the rationale for such decisions and document how it considered the principles of non-regression, environmental justice and intergenerational equity.

Recommendations:

- Decisions about reasonable limits should follow established Charter tests and be “justified, intelligible and transparent.”
- Where the minister (or delegate) or Governor in Council (e.g., when making regulations about substances) makes a decision engaging the right to a healthy environment, they must publish a Statement of Consideration documenting:
 - How their decision aligns with, and upholds, these principles;
 - How the decision protects the right to a healthy environment, including an explanation of how the decision-maker used relevant factors (social, health, scientific and economic) to interpret and apply the right and how the decision upholds the principles set out in section 2(1)(a.3);
 - If the decision purports to limit the right, a justification of why the decision-maker considers the limit to be reasonable, in light of relevant factors.

Principles

Are any of these principles and the way in which they can contribute to the protection of the right to a healthy environment under CEPA unclear?

Are there other opportunities within the CEPA management cycle to consider these principles and strengthen the protection of the right?

Are there other principles within CEPA that could be considered as part of the framework (see Appendix 2 for list of CEPA principles and their definitions)?

The three principles intersect, and this should be recognized in the implementation framework.

With respect to the principle of environmental justice, the recent amendments to CEPA specify that this includes the avoidance of adverse effects that disproportionately affect “vulnerable populations.” An intersectional approach is needed to assess vulnerability and identify “vulnerable populations” and the social determinants that make them more vulnerable than other populations to exposure and poor health. Racialization, class, geography, gender, sex, disability and other dimensions of vulnerability intersect and moderate both exposure and impact. Social categorizations such as race, class, and gender are interconnected as they apply to a given individual or group, creating overlapping and interdependent systems of discrimination or disadvantage. Biological susceptibility is also important particularly in considering the levels of exposure that may have a harmful effect or constitute a danger to human life or health.

The principle of non-regression should be understood as continuous improvement of environmental quality (i.e., healthier environments) - not merely maintaining individual regulatory standards. This is well established in international human rights law. We agree that specific attention should be paid to substitutes introduced to replace a toxic substance. As noted in the consultation sessions, regrettable substitution - where a banned toxic substance is replaced by a substance with similar properties - is contrary to the principle of non-regression. Suspicious substitutes should be automatically recommended for incorporation into the priority substances plan. Furthermore, a class-based approach to chemicals management (including toxic determinations and regulations under CEPA) is needed to uphold the principles of prevention, precaution and non-regression.

The principle of intergenerational equity is foundational to the protection of the interests and quality of life of future generations. It can be seen to have at least three essential dimensions, "the conservation of the diversity of the natural and cultural resource base, the principle of conservation of quality [so that the environment is passed on in no worse condition that it was received], and the principle of conservation of access [...] so that equitable rights of access to the legacy of past generations is conserved for future generations."⁵ As noted in the consultation sessions, consideration of cumulative and synergistic effects and stronger controls on persistent and bioaccumulating substances would represent a strong step towards protecting intergenerational equity. The principle of intergenerational equity can also be understood to require special attention to avoiding adverse effects on children and their environments.

⁵ Isabelle Michallet in Kramer & Orlando eds. Principles of Environmental Law, Edward Elgar, 2017

Recommendations:

- The framework should set out a working definition of each principle.
- Work underway to develop a National Strategy to assess, prevent and address environmental racism and to advance environmental justice - including consultations required under Bill C-226, if passed - should inform development of the CEPA implementation framework and will be particularly relevant with respect to defining, considering and upholding the principle of environmental justice.
- An intersectional approach is needed to assess vulnerability and impacts.
- The framework should set out how these principles will inform the development of the CEPA Priority Plan and Watch List, particularly in relation to persistent and bioaccumulating substances and promoting safer substitution and avoiding adverse effects on children and their environments.
- Consideration of these principles must also take into account the precautionary principle.

Procedural duties

Are any of these procedural duties unclear?

Are there other opportunities within the CEPA management cycle to consider these procedural duties and strengthen the protection of the right?

Are there other procedural duties that could be considered as part of the framework?

It is essential that consultations are undertaken before decisions are finalized, particularly with any impacted communities. Consultation with impacted communities may require additional measures to ensure participation, such as community meetings. The CEPA registry and Canada Gazette are not typically reviewed and accessed by the general public. However, the need to ensure communities are consulted should not cause delays in action, including the introduction and implementation of risk management measures.

The information provided in any consultation on a proposed decision must be sufficient to fully understand how the right will be protected, how the principles are upheld and how the factors were considered. Consultations with Indigenous communities with language barriers will require information to be translated to ensure it is accessible. All comments must be fully considered and addressed in public documents published with the final decision.

With respect to accessing remedies, unfortunately, CEPA offers no specific remedy for individuals to challenge a decision that affects their rights. Furthermore, as noted in the discussion paper, the more limited CEPA mechanisms to access remedies in the event of harm to the environment or human health have been used infrequently. The discussion paper contemplates improving public knowledge of these mechanisms and how to use them but overlooks other barriers identified in the 2016 CEPA Review (including ECCC's discussion paper at the time) and highlighted more recently in Parliamentary hearings on Bill S-5 that discuss why the mechanisms have been ineffective. Although the relevant sections of CEPA were ultimately not amended by Bill S-5, several of these

barriers can and should be addressed in the implementation framework to support access to justice.

Sections 17 to 20 provide residents of Canada with a right to request that the minister undertake an investigation of an alleged offence under CEPA. If the minister fails to investigate and report in a reasonable amount of time or if the investigation is unreasonable, the resident may pursue an Environmental Protection Action (EPA) under sections 22 to 38 to seek an order from the courts if the alleged offence caused significant harm to the environment.

Multiple barriers and limitations that likely deter the public from using these procedures include:

1. Procedural — requiring an investigation request before an EPA.
2. High threshold — EPA can only be brought for “significant” harm to the environment.
3. Cost — the risk of adverse court costs against the individual bringing the EPA.⁶

In addition, as mentioned above, these sections do not offer a means to request an investigation or EPA of the government or ministers for decisions that violate the R2HE.

However, the application of R2HE in the administration of CEPA should lower some of the barriers to pursuing investigations and EPAs under sections 22 to 38. For example, when a potential offence engages the R2HE regime, it should be easier for requesters to demonstrate that the conduct constitutes “significant harm” or that there has been “unreasonable delay” in addressing the conduct under section 22. For example, shorter periods of delay may be unreasonable when the R2HE is at stake because delay in responding has a tangible impact on someone’s statutory right. Similarly, a potential offence that threatens someone’s statutory right may more easily constitute “significant harm” than a potential offence that does not engage the R2HE. In addition, to improve access to justice, the government should develop a policy to protect residents from the adverse cost risks of bringing an EPA, with the recognition that rights-holders affected by environmental conditions have infrequent access to justice and do not receive effective remedies due to the numerous legal, financial and other obstacles, including threats, intimidation and reprisals. For example, the implementation framework could set out a policy that the government will not ask to recover costs against people trying to enforce the R2HE unless they have acted frivolously, vexatiously or abusively, as the Law Commission of Ontario recently recommended in its review of Ontario’s Environmental Bill of Rights.⁷

Recommendations:

- The implementation framework should recognize and support consultation with full information transparency as necessary to understand how a proposed decision aligns with and upholds the principles, and protects the right, including use of relevant factors. If it limits the right, how is it reasonable in light of relevant factors? If the right is protected, how

⁶ Law Commission of Ontario, A New Environmental Bill of Rights for Ontario: Final Paper (March 2024), online: <https://www.lco-cdo.org/wp-content/uploads/2024/03/LCO-Environmental-Accountability-Final-Paper-compressed.pdf>, at pp 55-65

⁷Ibid, at pp 62-63.

are the principles upheld? See also the commentary under the section above titled Aligning with Charter and Vavilov.)

- The implementation framework should state that the application of R2HE lowers the barriers in section 22, including what constitutes “significant harm” and “unreasonable delay.” The implementation framework should explicitly incorporate a policy lowering the adverse cost risk of residents facing high court costs for EPAs.

Indigenous rights

How can the right to a healthy environment under CEPA support the priorities of First Nations, Inuit, Metis, Modern Treaty Partners, and Self Governments?

How can the framework meaningfully consider Indigenous knowledge systems and bring them together with western knowledge systems to inform science, policy, and program decision-making?

Are there specific distinctions-based elements you would like to see incorporated into the implementation framework?

As stated in the discussion paper, "The rights and principles in the UN Declaration [of the Rights of Indigenous Peoples], including those noted above, can inform the consideration of a right to a healthy environment under CEPA and the development of the associated framework." The implementation framework must be consistent with UNDRIP and must also respect the rights, title, sovereignty and decision-making authority of Indigenous nations.

The consultation website indicates that ECCC and Health Canada are engaging with Indigenous Peoples and organizations through additional mechanisms to support meaningful and distinctions-based approach. We look to these processes and submissions from Indigenous Peoples and organizations, to address the questions of Indigenous rights set out in the discussion paper.

Climate change poses a particular threat to the right to a healthy environment, with acute impacts on the fundamental rights and interests of Indigenous Peoples. Considering that CEPA provides the legislative framework for federal regulation of greenhouse gas emissions, the implementation framework should take into account the growing body of jurisprudence resulting from climate justice litigation led by Indigenous peoples, children and youth, and others with distinct vulnerabilities.⁸ The framework can also be informed by the Assembly of First Nations National Climate Strategy (2023) and the National Inuit Climate Strategy (2019).

The AFN National Climate Strategy identifies seven priority areas of action:

- *Prioritize First Nation Knowledge Systems, health, languages, cultures, and spiritualities.*
- *Recognize, respect, and position First Nations inherent jurisdiction and inherent right to self-determination as central to decision-making at all levels.*

⁸ See Library of Parliament (Hill Studies), Climate Change and the Right to a Healthy Environment: International and Canadian Developments (January 2024).
<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/HillStudies/PDF/2023-12-E.pdf>

- *Address capacity needs to support First Nations governance and their role as climate leaders.*
- *Ensure First Nations self-sufficiency in food, water, and energy.*
- *Close the natural and built infrastructure gap.*
- *Ensure First Nations are equipped to mitigate, prevent, respond, and recover to all emergencies.*
- *Leverage the First Nations Climate Lens to reform federal, provincial, and territorial legislation, regulation, policy, and programs.*

The National Inuit Climate Change Strategy sets out the following vision, purpose and guiding principles:

Vision

- *Sustainable Inuit communities bound by the inextricable links between our culture, way of life and the environment working collaboratively in the face of a changing climate to overcome inequities, ensure our long-term prosperity, and strengthen our health and well-being.*

Purpose

- *To shape local, regional, national, and international climate policy.*
- *To advance Inuit-driven climate research, policy making and actions through ethical partnerships that meet our distinct, immediate, growing and diverse needs.*

Guiding Principles

- *Rights and self-determination*
- *Leadership and resilience*
- *Long-term and holistic*

Proposed approach for the framework

Recognizing that implementation will be progressive and incremental, should the framework prioritize certain activities under CEPA or focus on more general improvement? What would you like to see prioritized?

Given that the framework will need to elaborate on research, studies and monitoring to support protection of the right, are there any particular areas of importance related to these activities that should be considered?

What information would you need to see to feel confident that the right set out in the framework is being protected in CEPA decision-making? Are there specific actions that should be taken to assess this?

The R2HE applies to the entire Act, and we fully expect that the implementation framework will address the application of R2HE to CEPA in its entirety. However, if progressive and incremental implementation is necessary, we recommend that the government commit to a package of quick-start actions to protect the right to a healthy environment by reducing cumulative exposures to pollution and toxic chemicals that historically and continue to bear a disproportionate burden of

pollution, climate impacts and other forms of environmental degradation on equity-deserving communities. These should be announced and launched with the draft framework later this year. If the government chooses to focus on progressive, incremental steps in the framework, it should clarify in the framework that this focus does not limit the scope of the right guaranteed in section 2(1).

For example, air and water pollution hot spots like Sarnia, Hamilton, and Windsor in Ontario, the oilsands area and downstream communities in Alberta, and other communities impacted by industrial pollution, such as Rouyn-Noranda in Quebec, should be prioritized. We also recommend prioritizing major classes of toxic chemicals that are known to have widespread devastating impacts, such as PFAS “forever chemicals” and toxic flame retardants, as well as additives to plastics like phthalates and bisphenols known to disrupt endocrine systems.

Quick-start priorities could be informed in part by the consultations with Indigenous, racialized, lower-income and other “vulnerable populations,” the findings of the study, and environmental justice consultations in anticipation of and following the passage of Bill C-226, An Act respecting the development of a national strategy to assess, prevent *and address environmental racism and to advance environmental justice*.

A greatly expanded program of research and monitoring is needed to identify “vulnerable populations” and understand how factors contributing to vulnerability intersect, including the social determinants of health that make some populations (e.g., Indigenous, Black, racialized, immigrant) more vulnerable than other populations to exposure and poor health outcomes. This will also support the evaluation of the framework and CEPA programs with respect to the principle of environmental justice.

Expansion of longitudinal biomonitoring studies should also be a research priority, in relation to the duty to uphold the principle of intergenerational equity.

Recommendations:

- Quick-start priorities could be air- or water-pollution hot spots, prioritizing major classes of toxic chemicals and be informed by consultations with Indigenous, racialized, lower-income and other “vulnerable populations”.
- Expand research and monitoring to identify “vulnerable populations” and understand how factors contributing to vulnerability intersect.
- Expand longitudinal biomonitoring studies.

Additional comments on the development of the framework

Positive duty should drive planning and priorities under CEPA

The R2HE in CEPA places a positive duty on the government to protect people's right to a healthy environment through the administration of CEPA. This positive duty is not clearly articulated in the discussion paper. In considering the scope of R2HE, section 3.1 examines current CEPA programs. However, relying on current CEPA programs may not be enough to fulfill the R2HE across Canada. The R2HE implementation framework should not be reduced to a lens applied to current decision-making under CEPA.

To achieve the government's duty to protect the R2HE across Canada in the administration of CEPA, a gap assessment is necessary to determine where the R2HE is being infringed and what additional measures within the scope of CEPA authorities are necessary to rectify these infringements. Comparison to air, water or other environmental quality or human health-based standards or guidelines can inform a gap analysis, but meeting standards and guidelines should not be determinative of the right being met. Standards and guidelines can be met, but harm could still occur; for example, if standards are outdated, not protective of "vulnerable populations" or cumulative effects are not considered. Other considerations for determining infringement could be if toxic exposures exceed safe levels for any population, including the disproportionately affected or susceptible populations and circumstances of ongoing or historical contamination that threatens people or ecosystems.

While completing a gap assessment is likely not possible in time for finalizing the implementation framework, the framework should include procedures that ensure ongoing analysis of gaps in meeting the conditions that reflect a healthy environment across Canada. That ongoing analysis should drive CEPA programs and planning. For example, the government's gap analysis in assessing its duty to protect the R2HE should inform the development of the government's priority plan as required under section 73.

Recommendation:

- The implementation framework should include a process for ongoing identification of gaps in the government's duty to protect the R2HE to inform programming and planning under CEPA to close those gaps.

Other mechanisms to support R2HE

CEPA Sec. 5.1.2(d) requires that the implementation framework elaborate on "mechanisms to support protection of [the] right." The discussion paper identifies existing CEPA "mechanisms" related to the various elements under consideration for inclusion in the framework. While existing tools should be leveraged, it is disappointing that the discussion paper does not contemplate any new mechanisms, purpose-built specifically to support protection of the right to a healthy environment.

For example, the implementation framework could set out "service delivery" standards for typical CEPA cycle steps to ensure timely action.

Lengthy delays are an enduring problem under CEPA.⁹ Although Bill S-5 introduced some accountability measures requiring reporting of expected timelines and delays (see subsections 73(1) and 77(8) and section 78), it did not promulgate new time limitations for decisions at the various steps of the CEPA cycle.

Delays in assessing toxic threats and implementing risk-management measures can result in lengthy infringements of the R2HE, whereas a human rights approach requires timely and effective action to protect the right. “Service delivery” standards for typical CEPA cycle steps would discourage delay and provide individuals and communities with greater certainty that risk-management actions are being taken, especially given that delay can result in risks remaining unmanaged.

For example, Bill S-5 amended CEPA to require reasons and a new time estimate if more than two years have elapsed since the publication of a draft assessment (see subsection 77(8)). The implementation framework could reinforce this reporting timeframe by setting it as an upper-limit service standard with a target of less than two years to finalize an assessment and propose risk-management measures. Similarly, the implementation framework should set out a service standard for the subsequent regulation timeframes that are to be reported on in section 78.

In *Vavilov*, the Supreme Court of Canada confirmed that statutory decision-makers must adopt a culture of justification and demonstrate that the decisions they make are transparent, justified and intelligible. To ensure that decisions made under CEPA meet this standard, the implementation framework should clarify that decision-makers must give reasons explaining how they considered and applied the R2HE when making decisions under CEPA.

Recommendation:

- The implementation framework should include purpose-built mechanisms to support protection of the right, including service standards regarding time limits for steps within the CEPA cycle to ensure communities and individuals have timely protection from harmful substances and pollution that may infringe their R2HE. In addition, the implementation framework should clarify that decision-makers must provide reasons explaining how they considered and applied the R2HE when making decisions under CEPA (see also the recommendation above for a Statement of Consideration).

Application to Subsection 76.1(1)

The discussion paper does not address subsection 5.1(1.1) a, which explicitly requires the implementation framework to set out “the process under subsection 76.1(1) in respect of the protection of the right to a healthy environment.” This is a major omission.

Subsection 76.1(1) is significant in that it sets out that the ministers “shall apply a weight of evidence approach and the precautionary principle when they are conducting and interpreting the

⁹ For example, a draft assessment for hydrogen sulfide (H₂S) was initially released for public comment in 2017. An updated draft assessment was released more than six years later in 2024 for public comment. This delay means it will still be a few years before any risk-management measures can be brought into force, given the remaining steps required of finalizing the assessment, listing H₂S and proposing new regulatory measures.

results of” an assessment to determine if a substance is toxic or capable of becoming toxic, or a decision made by another jurisdiction that is relevant to Canada to prohibit or substantially restrict any substance. The addition of the application of the R2HE to this section that also requires the ministers to apply both a “weight-of-evidence approach” and the “precautionary principle” is worthy of discussion and consultation with the public.

The precautionary principle is defined in CEPA, although the weight-of-evidence approach is not defined. The government published a fact sheet¹⁰ on the application of the weight-of-evidence approach and precautionary principle used in risk assessments. Applying R2HE to the application of these principles may require this policy guidance and fact sheet to be amended, and if so, the implementation framework should set that out. For example, applying R2HE could require greater weight be given to evidence of harm caused by substances and higher levels of precaution when the ministers are applying and interpreting results under subsection 76.1(1).

Recommendations:

- The government must consult on the details of the implementation framework, as required under subsection 5.1(1.1)a, regarding the application of R2HE to subsection 76.1(1).
- The implementation framework should set out the process for applying R2HE to the weight-of-evidence approach and precautionary principle under subsection 76.1(1). This should include reviewing and revising the related fact sheet.

An environmental justice lens on enforcement

In 2022, the U.S. Department of Justice (DoJ) announced a new comprehensive environmental justice enforcement strategy and established a dedicated Office of Environmental Justice. The strategy establishes that enforcing environmental laws where violations disproportionately affect Indigenous, BIPOC and low-income communities is an environmental justice priority. The DoJ Office of Environmental Justice supports investigations and litigation in relation to violations with environmental justice impacts, as well as outreach to communities facing environmental justice concerns.

The implementation framework should consider this model and outline how ECCC’s enforcement branch will adapt its risk-based approach to compliance and enforcement to protect the right to a healthy environment and uphold the principle of environmental justice.

Furthermore, the Environmental Damages Fund could be directed to projects that will benefit communities affected by environmental crimes and advance environmental justice, as recommended by the Green Budget Coalition.

Recommendation:

- The implementation framework should set out guidelines for prioritizing enforcement of environmental laws and regulations where violations disproportionately affect Indigenous, BIPOC and low-income communities.

¹⁰ <https://www.canada.ca/en/health-canada/services/chemical-substances/fact-sheets/application-weight-of-evidence-precaution-risk-assessments.html>

Articulating Canada's approach to the right to a healthy environment

Section 3.2 and Appendix 1 of the discussion paper address recognition of the right to a healthy environment in a broader context.

In recent years, a right to a healthy environment has been recognized in various jurisdictions both domestically and internationally. There is also growing recognition of the negative impacts that environmental degradation can have on human rights. However, currently there is no internationally agreed upon understanding of the content and scope of this right. At the UN level Canada has noted, along with several countries, that there is no common or internationally agreed upon understanding of the content and scope of a right to a clean, healthy, and sustainable environment. (Section 3.2)

These sections of the discussion paper could have been built out to review how the right is described by the UNHRC, other authorities, relevant literature, and jurisprudence. While the UN has not formally defined the content and scope of the right to a healthy environment, the concept is well established. For example, the right to a healthy environment is generally understood to have procedural and substantive dimensions. Canada isn't starting from scratch!

This concerning gap in the discussion paper highlights the need for Canada — having recognized the right to a healthy environment in CEPA and the UN resolution — to articulate a conceptual approach to the right to a healthy environment. That approach should align with the procedural and substantive elements of the UN resolutions recognizing the right. It would provide a reference point for development of the CEPA implementation framework, as well as other related policies. It would also support Canada's 2022 commitment to work with other UN member countries toward a common understanding of the right to a healthy environment. Communication and resource materials should be developed to promote understanding of the right to a healthy environment among the general public and within government.

Recommendations:

- Outline Canada's conceptual understanding of/approach to the right to a healthy environment in a public reference document (e.g., web page/background).
- Develop training modules to improve awareness of human rights concepts and the right to a healthy environment within the federal government.
- Pursue broader recognition of the right to a healthy environment through reform of other relevant statutes and champion rights-based approaches in international environmental agreements.

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