Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

April 8, 2024

VIA ELECTRONIC MAIL
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RE: Submissions on Discussion Document on the Implementation Framework for a Right to a Healthy Environment under the *Canadian Environmental Protection Act, 1999* – Feb. 2024

I. WHO WE ARE

The Canadian Environmental Law Association ("CELA") is federally incorporated and also an Ontario Legal Aid Clinic that uses existing law to protect the environment and advocates environmental law reform to promote access to justice and to provide aid to low-income individuals and disadvantaged communities in Ontario facing environmental problems.

CELA has a long history with federal toxics law. This includes participation as an intervener in *R. v. Hydro-Quebec*, the 1997 Supreme Court of Canada judgment that upheld the constitutionality of the Act as valid federal legislation for controlling toxic substances under the criminal law power of the *Constitution Act, 1867*. More recently, CELA participated in all stages of the process that culminated in the enactment of the Bill S-5 amendments to *CEPA*, which came into force in June 2023 (S.C. 2023, c. 12). This includes: (1) preparing submissions and appearing before the House of Commons Standing Committee on Environment and Sustainable Development in May 2016 during the statutorily required five-year review of the Act; (2) monitoring developments surrounding reform of the Act, including the 2017 report of the Standing Committee, the 2018 interim and final responses of the federal government to that report, and Bill C-28, the 2021 predecessor to Bill S-5; (3) preparing submissions and draft amendments on Bill S-5 and appearing before the Standing Senate Committee on Energy, the Environment and Natural Resources in May 2022; (4) preparing revised submissions and draft amendments to Bill S-5 and appearing before the House of Commons Standing Committee on Environment and Sustainable Development in November 2022; and (5) monitoring the committee hearings, including clause by clause review of Bill S-5, in the spring and early summer of 2023, as well as the final debates in Parliament. CELA also: (1) wrote numerous articles and commentaries on Bill S-5 during this period, four of which appeared in the *Hill Times* in 2022 and 2023; and (2) prepared a major final summary of the 2023 amendments to the Act, which was presented at a Law Society of Ontario environmental law conference in October 2023 and is attached to these submissions. CELA also participated in the June/October 2023 information sessions and February/March 2024 workshops, sponsored by the federal government, regarding development of an Implementation Framework ("Framework") on the right to a healthy environment ("RTHE") under the Bill S-5 amendments.

II. RECOMMENDATIONS

CELA submits that the Framework expected in the Fall 2024 should:

- consider, discuss, and recommend how it will protect the RTHE through integration of principles developed by the Supreme Court of Canada in the *Oakes/Dore* line of decisions regarding **reasonable limits**, in the context of the non-*Charter* RTHE provisions of *CEPA*,

recognizing the differences between s. 1 of the *Charter* and the new *CEPA* reasonable limits provisions;

- consider, discuss, and recommend how the Framework will address situations where: (1) available information is not sufficient to determine if a substance is toxic or capable of becoming toxic, to ensure that **principles** like environmental justice and intergenerational equity, recognized by the Bill S-5 amendments, are protected in support of the RTHE provisions; and (2) how principles like non-regression, also recognized by the Bill S-5 amendments, will be protected in support of a RTHE to avoid both environmental degradation and the weakening of provisions of the Act and regulations;

- be considered an integral but only an interim first step in development of **procedural duties** to protect the newly recognized RTHE under *CEPA*. The ultimate step being to develop reforms to the Act to make the right more enforceable in the courts than is possible given the current wording of s. 22 of the Act. As part of this interim first step, consideration should be given to whether the Framework should:

    - be promulgated as a regulation under the Act;
    - be issued as a Cabinet order like the former *Environmental Assessment and Review Process Guidelines Order* ("EARPGO"); or
    - be published as a policy like the current Compliance and Enforcement Policy ("CEP") under *CEPA*;
    - regardless of which form the final version of the Framework takes, include a disclaimer that in the event of an inconsistency between it and the Act, the Act would prevail, such as the disclaimer contained in the CEP; and
    - be drafted such that it is consistent with both: (1) the *Canadian Charter of Rights and Freedoms*; and (2) the *Canadian Bill of Rights*.

- consider, discuss, and recommend steps to address the matters identified under Part III.E, of these submissions respecting **other measures**.

III. SELECTED COMMENTS AND RESPONSES TO QUESTIONS

The following provides selected comments on, and responses to questions in, the Discussion Document.

A. Document Purpose and Background

At both pages 5 and 6, the Document notes that: (1) the Framework will set out how the Minister of Environment will consider the RTHE in the administration of the Act and in the context of such **principles** as environmental justice, non-regression, and intergenerational equity; and (2) the Government of Canada has a duty to protect this right subject to any **reasonable limits**. At page 18 the Document states that **procedural duties** "could be important to protecting such rights" such as "access to effective remedies in the event of harm to the environment and human health". CELA devotes the bulk of its comments to the three issues highlighted in **boldface**, above**.** However, it also provides further observations and recommendations under a fourth heading of **other measures**, set out below.

The introductory portion of the Document also indicates that other Bill S-5 reforms to *CEPA* that contribute to the RTHE amendments include: (1) requiring consideration of vulnerable populations and cumulative effects from multiple chemical exposures where information is available; and (2) facilitating geographically targeted regulations. Our attachment discusses these and other Bill S-5 amendments to *CEPA* that inform our comments in these submissions.

B. Reasonable Limits

At pages 6 and 11 the Discussion Document states that: (1) the Government of Canada has a duty to protect the RTHE subject to any reasonable limits; (2) the RTHE is not absolute but is subject to reasonable limits; and (3) *CEPA* requires that the Framework elaborate on relevant factors to be considered in determining reasonable limits, including social, health, scientific, and economic factors that apply in the context of the different types of decisions made under *CEPA*.

At page 12 the Discussion Document asks the following question: "How would you see these factors to limit the consideration of the right being taken into account when making decisions under *CEPA*?

CELA Response to Question: The issue the federal government must tackle under s. 5.1 of the Act is ensuring that the administrative decision-making framework it develops protects: (1) the recognition of the right set out in the preamble of the Act (every individual in Canada has a right to a healthy environment as provided under the Act); and (2) the requirement in s. 2(1)(a.2) that the Government of Canada as part of its administrative duties exercise its powers in a manner that protects the right of every individual in Canada to a healthy environment as provided under the Act, subject to any reasonable limits.

Accordingly, having recognized the right, what Parliament wanted established is how the right was to be protected subject to reasonable limits; not lost in a maze of competing economic and other interests. The workshop discussions reflect some contrary views in this regard. The February 13th session suggested, for example, that: "The right should be considered respected if established thresholds are met" (slide 11 from March 19, 2024 workshop). In CELA's view, this approach would empty the right of any meaningful content Parliament expected for it, if it could be so easily thwarted in the face of a standard, for example, that is both outdated and deficient by international standards but still on the books. Take, for example, the *Persistence and Bioaccumulation Regulations*, SOR/2000-107, promulgated under *CEPA*. The Discussion Document describes persistence and bioaccumulation as two criteria that are key considerations in the prioritization, assessment, and risk management of substances (page 16). However, the regulations are over two decades old and have been viewed as outdated for over a decade. In 2011, a CELA presentation to the American Bar Association noted that not many substances met the very high criteria that were applied under *CEPA's* Chemicals Management Program ("CMP"), based on the regulations, for designating a substance as persistent, bioaccumulative, and toxic ("PBT") and, therefore, requiring assessment and / or management under the program. The criterion applied for persistence, for example, was whether the half life of a substance in water was equal to or greater than 26 weeks. In comparison to other jurisdictions or international agreements, this criterion was overly non-protective. For example: (1) under the *Canada-United States Great Lakes Water Quality Agreement* a substance was regarded as persistent if it had a half life in water of 8 weeks; (2) in Europe under REACH a substance was regarded as persistent if it had a half life in water of 5.7

weeks; (3) under the requirements employed by the United States Environmental Protection Agency a substance was regarded as persistent if it had a half life in water of 8.5 weeks; and (4) under the Stockholm Convention on Persistent Organic Pollutants a substance was regarded as persistent if it had a half life in water of 8.5 weeks. In short, if the CMP had applied criteria from other jurisdictions, more chemicals would have been regarded as PBT and subject to assessment and regulation under *CEPA*.[1]

So, the RTHE should not be considered protected just because there is a scientific threshold in existence or set out in a regulation. In its March 2024 report, the Law Commission of Ontario chose not to recommend that compliance with an instrument or a standard should provide a statutory defence under Ontario's *Environmental Bill of Rights* ("*EBR*"). The conclusion did not mean that compliance with an instrument or standard should have no or little weight in an environmental protection action under the *EBR*. Rather the LCO concluded that the courts will be in the best position to assess the extent to which these factors should provide a defence to a RTHE citizen suit.[2]

In the context of the RTHE authority under *CEPA*, where we are talking about a right in every individual to a healthy environment under the Act, it is also no secret that at the international level environmental rights are increasingly being equated with human rights. Appendix 1 (page 25) of the Discussion Document acknowledges that the United Nations Human Rights Council recently adopted resolutions recognizing the human right in a "clean, healthy and sustainable environment". Accordingly, while the federal government may have an initial administrative entitlement to weigh the right versus another factor, it will often be the case that the government is not arms-length from the factor it is considering, and may have a vested, if not a conflict of, interest in upholding scientific, health, economic, or other standards it has developed. Thus, it would be antithetical to the concept of a right, particularly a human right, if the government also had the final say in how that balancing is to be applied without resort to the courts. At the end of the day, it is not a right if the government can simply override it by reference to other factors in an exclusively administrative context without some level of judicial scrutiny, where necessary.

In this regard, CELA notes that one of the shared messages identified in the March 19, 2024 workshop (slide 11) is that the reasonable limits model that has developed under the *Charter* and the Supreme Court of Canada tests in *Oakes* should be applied in the context of considering *CEPA's* RTHE provisions. In general, under the *Charter*, constitutionally guaranteed rights to individuals cannot be infringed unless the government can show under s. 1 of the *Charter* that such an infringement is based on reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. *Charter* rights are not absolute and can be infringed if the courts

[1] See Joseph F. Castrilli, "CEPA: Lessons for U.S. Regulation", American Bar Association Annual Meeting (Toronto: August 11, 2011) slide 27. See also Joseph F. Castrilli, "Canadian Regulation of Toxic Substances: Model or Muddle?" (2013), 15 American Bar Association International Environment and Resources Law Committee Newsletter 31 – 35 (noting health effects assessments during categorization process did not consider endocrine toxicity; categorization largely relied on existing data, making limited use of surveys to gather data from industry; and had categorization process applied criteria similar to other jurisdictions for determining if a substance is persistent, bioaccumulative, or toxic this would have resulted in more chemicals being considered for further assessment during the CMP process under *CEPA*).

[2] Law Commission of Ontario, *A New Environmental Bill of Rights for Ontario* (Toronto: March 2024) at 60.

determine that the infringement is reasonably justified. Thus, s. 1 both limits and guarantees *Charter* rights. The tests that have developed for how the courts will determine if a law or government action that infringes a *Charter* right can be saved are well established: (1) there must be a pressing and substantial objective for the law or government action; and (2) the means chosen to achieve the objective must be proportional to the burden on the rights of the individual claiming his or her rights have been infringed in the sense that (i) the objective must be rationally connected to the limit on the *Charter* right; (ii) the limit must minimally impair the *Charter* right; and (iii) there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects on the right.[3]

The *Oakes* tests were developed in the context of interpreting a provision of quasi-criminal legislation alleged to violate the presumption of innocence provisions of the *Charter*. However, in a non-*Oakes* situation, such as review of whether an administrative decision as opposed to a provision of a statute or regulation violates the *Charter*, the Supreme Court of Canada has held that to determine whether the administrative decision-maker has exercised his or her statutory discretion in accordance with *Charter* protections, the review should be in accordance with an administrative law approach, not a s. 1 *Oakes* analysis. In that context, the standard of review of government conduct is reasonableness. As the Court noted in *Dore*:

> In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. But in assessing whether an adjudicated decision violates the *Charter*, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.
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> There is nothing in the administrative law approach which is inherently inconsistent with the strong protection of the *Charter*'s guarantees and values. An administrative law approach recognizes that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, and that administrative discretion is exercised in light of constitutional guarantees and the values they reflect. An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values and will generally be in the best position to consider the impact of the relevant *Charter* guarantee on the specific facts of the case. Under a robust conception of administrative law, discretion is exercised in light of constitutional guarantees and the values they reflect.
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> When applying *Charter* values in the exercise of statutory discretion, an administrative decision-maker must balance *Charter* values with the statutory objectives by asking how the *Charter* value at issue will best be protected in light of those objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.
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> On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* rights and values at play. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to

[3] *R. v. Oakes*, [1986] 1 SCR 103.

> administrative and legislative bodies in balancing *Charter* values against broader objectives. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.[4]

Consideration of these principles in the context of the non-*Charter* RTHE provisions of *CEPA* should be explored and discussed in the draft framework expected in the Fall 2024 recognizing the differences between s. 1 of the *Charter* and the new *CEPA* reasonable limits provisions.

C. Principles

1. Effect on Principles Where Information Not Available

At page 5 the Discussion Document states that the Framework will set out how the Minister of Environment will consider the RTHE in the administration of *CEPA* and in the context of such principles as environmental justice and intergenerational equity.

At page 14 of the Discussion Document the principle of **environmental justice** is described as including consideration of the avoidance of adverse effects that disproportionately affect vulnerable populations, which in the document are referred to as populations who may be disproportionately impacted by pollution or chemical exposure. Page 15 of the Discussion Document states that currently under *CEPA*, populations who may be disproportionately impacted by pollution or chemical exposures are considered where information is available. This process includes collecting information on susceptibility and exposure through research and monitoring, using this in the risk assessment, and then considering the findings at the risk management stage.

At page 16 the Discussion Document reviews the principle of **intergenerational equity** and notes that in the context of *CEPA*, there could be several considerations related to intergenerational equity. This could include a substance's potential to persist in the environment; certain substances are able to remain in the environment for long periods of time, which could have long term environmental impacts affecting enjoyment of land, water, or food sources. The effect of a substance in the environment could also lead to endocrine-related effects that impact fertility and reproductive success or mutagenic effects, which can cause irreversible and heritable changes in genetic material. Cumulative effects from exposure to multiple chemicals causing these same effects could also be a relevant consideration where information is available.

At page 17 the Discussion Document asks the following question: Are any of these principles and the way in which they can contribute to the protection of the RTHE under *CEPA* unclear?

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[4] *Dore v. Barreau du Quebec*, [2012] 1 SCR 395 (interpreting *Oakes* tests in administrative decision-making context). See also *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653, paras 57 (where effect of administrative decision being reviewed is to unjustifiably limit rights under the *Charter*, decision reviewable) and 235 (specialized expertise of administrative decision-makers is core rationale for judicial deference giving them "interpretive upper hand" on questions of law).

CELA Response to Question: The Discussion Document notes (pages 15-16) that the availability of information on chemicals is important under both the environmental justice and intergenerational equity principles. A key issue under this heading, therefore, is what should happen when information is not available for addressing a problem. During Parliamentary hearings, government witnesses suggested that if information is missing to assess a substance, the departments can use various tools, such as doing the testing themselves, monitoring and partnering with academia, leveraging data from other jurisdictions, or requesting data from industry to complete a risk assessment.[5] The Discussion Document (pages 15, 17) suggests something similar with longitudinal studies like MIREC (maternal-infant research on environmental chemicals). The government witnesses' suggestion of government doing the testing itself is somewhat surprising as the Act does not explicitly contemplate this, nor does the Act authorize cost recovery from industry for government to do so.

While the measures suggested by government witnesses and the Discussion Document may be sufficient in many instances to fill information gaps, the drafters of the Framework should consider the situation when those measures are not sufficient. The problem was neatly summarized in June 2022, by the Standing Senate Committee on Energy, the Environment and Natural Resources in its report to the full Senate of Canada on amendments to Bill S-5 arising from the committee's hearings. The Senate Committee's report included observations on testing, which precisely capture what was lacking in Bill S-5 but needed in CEPA:

> 5. This committee wishes to convey their concern surrounding industry data collection where information gaps exist on the toxicity of substances they use or emit. Bill S-5 authorizes collection of data on whether a substance is an endocrine disruptor. Bill S-5 also authorizes the Minister to consider available information on vulnerable populations and the cumulative effects of a potential toxic substance. However, in none of these cases does Bill S-5 direct the Minister to require testing by industry when data gaps exist on whether a substance is toxic or is capable of becoming toxic. In such instances, this committee believes that testing should be done by industry where and when available information on substance toxicity is unavailable or inconclusive.[6]

The problem was not resolved when the matter went to the House of Commons and remains embedded in the 2023 amendments to the Act. The forthcoming draft Framework should address this problem. By not having the appropriate measures in place to address information gaps, the process for making decisions may be prolonged. A current example of the problem is the PFAS class of chemicals. It is large and growing, but the data gaps for many of these substances continue to be used by some to slow down discussions on what should be happening on these substances. The Framework should address how information gaps will be addressed but it should also include an explicit template for when and how long data collection needs to occur and how long it should take to be completed, such as through timelines or deadlines.

2. Effect on Principles Where Maintaining Current Level of Protection Necessary

At page 15, the principle of non-regression is examined, and the Discussion Document notes that while there is no universally established definition, it generally refers to the notion that current levels of protection must be maintained. It may also include continuous improvement in environmental and health protection. This may apply to all stages of the *CEPA* cycle but may be

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[5] Attachment to CELA Submissions, page 3-22, footnote 65.
[6] *Journals of the Senate* (20 June 2022) at 752-762.

more salient when designing both enforceable risk management instruments (i.e., regulations, pollution prevention planning notices) and non-enforceable risk management instruments (e.g., guidelines, codes of practice, agreements). Continuous improvement of risk management actions developed under *CEPA* may include updating or replacing these actions when additional knowledge or information is obtained that demonstrates the initial risk management action is not effective at protecting the environment or human health. Any such change should be made in a fair and transparent manner.

At page 17 the Discussion Document asks the following question: Are any of these principles and the way in which they can contribute to the protection of the RTHE under *CEPA* unclear?

CELA Response to Question: CELA understands the principle of non-regression as having both ecological and legal dimensions. It can be defined as a prohibition on state conduct that results in: (1) environmental degradation (e.g., increased pollution, biodiversity loss); or (2) the weakening of environmental laws.[7] What is unclear is the extent to which it is contemplated that the proposed Framework can contribute to meeting both aspects of the non-regression principle. Page 6 of the Document indicates, for example, that a Bill S-5 reform to *CEPA* that could help contribute to protecting the RTHE included facilitating geographically targeted regulations.

CEPA already had enabling authority that made geographically focused regulation possible in order to protect the environment, biological diversity, or human health. In particular, although s. 330(3) provided that regulations made under the Act apply throughout Canada, s. 330(3.1) permitted exceptions to this rule to allow limited geographic application of regulations promulgated under the authority of ss. 93 (toxic substances), 140 (fuel), 167 (international air pollution) or 177 (international water pollution).[8] Bill S-5 repealed both ss. 330(3) and 330(3.1),[9] and nothing like them was added to any other Bill S-5 amendments.[10]

In pursuing this approach, the federal government appeared to be relying on the general authority under s. 8 of the *Interpretation Act*,[11] that states that every enactment applies to the whole of Canada, unless a contrary intention is expressed in the enactment. While this approach may allow the federal government to achieve the same result as the now repealed ss. 330(3) and (3.1) of *CEPA*, including addressing "hot spots", reliance on the generality of s. 8 obscures, not highlights, authority to do so. In practice, there have never been any geographically focused regulations promulgated under *CEPA*, and removing the explicit authority to make such regulations hardly seems like a recipe for it to occur in future.

It would have been preferable for Parliament to retain ss. 330(3) and (3.1) and simply extend the authority for geographically limited regulation in subsection (3.1) to other sections of the Act that enable regulatory authority, such as s. 94 (which provides for interim authority to address by order

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[7] Lynda M. Collins and David R. Boyd, "Non-Regression and the Charter Right to a Healthy Environment", *Journal of Environmental Law and Practice* (2016), 29 J. Env. L. & Prac. 285 at 294.
[8] S.C. 1999, c. 33, ss. 330(3), 330(3.1).
[9] S.C. 2023, c. 12, clause 54 (repealing ss. 330(3) and 330(3.1) of *CEPA*).
[10] *Ibid.*, clause 33 (no such amendments appear in amendments to s. 93). No amendments at all were made to ss. 140, 167, or 177.
[11] R.S.C. 1985, c. I-21.

substances that are not listed in Schedule 1).[12] Viewing these amendments through the lens of non-regression suggests that they were counter-productive at best. Nonetheless, if the Framework opens up, or facilitates, the possibility the federal government will pursue measures to ensure there will be geographically focused regulation that prevents environmental degradation, that would be a positive development consistent with meeting both aspects of the non-regression principle in the context of protecting a RTHE.

Another set of Bill S-5 amendments that fall into this category are the changes that placed almost 90 percent of Schedule 1 toxic substances into a new Part 2 where, on their face, they will not be subject to prohibition. As discussed in the attachment to our submissions, Part 2 contains approximately 13 times as many carcinogens as Part 1, yet only substances in Part 1 are, on their face, eligible for prohibition from commerce. An important question is how this kind of problem could be addressed under the Framework when dealing with cancer-causing agents that are now listed in Part 2 of Schedule 1 of the Act.

D. Procedural Duties

Pages 20-21 discuss access to effective remedies in the event of harm to the environment or human health and note that: (1) it is important for the public to be provided guidance about how to access these remedies; (2) consideration could also be given to providing assistance to overcome obstacles to accessing remedies; and (3) effective remedies refer to tools that are available for the public to use if they believe that environmental damages have occurred as a result of a contravention of *CEPA.*

These pages also indicate that currently: (1) *CEPA* has several tools that provide the public with opportunities to request an investigation of an alleged offence; to pursue a civil suit, injunction, and/or civil action to recover damages;[13] or to file a notice of objection requesting that a board of review be established; (2) these are tools available for the public to use to request the Government to act, or to act themselves, when they believe environmental damages or contraventions to *CEPA* have occurred; (3) however, in practice, these tools have been used infrequently; and (4) there may be opportunities to improve knowledge of these tools and provide better guidance on how to use the existing remedies within *CEPA.*

The March 19, 2024 Workshop, slide 20, states: "CEPA has several tools (i.e. remedies) that the public can use when they believe environmental damages or contraventions to CEPA have occurred". The slide identifies - "request for investigation; file a notice of objection; seek an injunction; pursue civil lawsuit to recover damages".[14]

Slide 22, of the March 19th Workshop asks:

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[12] S.C. 1999, c. 33, s. 94.

[13] The reference at page 21 in the Discussion Document to recovering damages in a civil action is not accurate. Section 22(3)(e) of *CEPA* specifically states that any appropriate relief in an environmental protection action brought under s. 22 does not include recovery of damages.

[14] The reference in slide 20 of the March 19, 2024 Workshop to recovering damages in a civil action is not accurate. Section 22(3)(e) of *CEPA* specifically states that any appropriate relief in an environmental protection action brought under s. 22 does not include recovery of damages.

- "How can we improve guidance and understanding on how to access the remedies provided in *CEPA*?; and
- "What are the barriers to accessing these remedies?"

At page 21 the Discussion Document also asks the following questions:

• 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?

CELA Response to Questions: What is unclear is how the procedural duties discussed can contribute to a RTHE in the absence of reforming s. 22 of *CEPA*. It would have been preferable for the federal government and Parliament to address this gap, which was not reformed under the Bill S-5 amendments and has implications for the effective protection of the right itself.

While the scope of the right may be unclear at this stage, the question of does the right have a remedy may be a larger problem. In June 2022, the Senate Energy Committee observed the following in its report to the full Senate on Bill S-5:

> 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.[15]

The problem was not resolved when the matter went to the House of Commons and remains embedded in *CEPA*. The forthcoming draft Framework needs to address this problem in some manner.

As noted above, the Discussion Document does not indicate how the Framework is meant to enhance the right now recognized in the Act when Bill S-5 failed to reform s. 22. In this regard, the attachment to our submissions reproduces CELA's observations on this, including the historic failure of s. 22 of *CEPA* to provide a reasonable basis for enforcement of the Act by ordinary members of the public.

Moreover, CELA notes that Appendix 1 of the Discussion Document (page 25) reproduces RTHE laws in several provinces and territories. We note that every single example listed there is of a statute that recognizes a right in the public to protect the environment in the courts without the intercession of an administrative Framework. Accordingly, the onus is on the federal government to explain how the Framework is meant to link up with the public's right to enforce a RTHE in the courts in the absence of reforming *CEPA* s. 22.

In our view, in the absence of s. 22 reform, an administrative Framework will always be a source of diversion from the central question of whether the RTHE recognized by Bill S-5 has any

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

substance for members of the public to invoke when, for whatever reasons, the government will not act.

We suggest as an interim step that the culmination of the federal consultation on the Framework should result in provision of an answer to the following question:

"What form would the Framework need to take to be 'enforceable' in the courts?"

We note that on April 13, 2021, the day the amendments to *CEPA* were tabled for first reading in Parliament, CELA attended a federal government technical briefing by conference call held on Bill C-28 (what later became Bill S-5 after the 2021 election). In response to a question we asked, we were advised by federal government officials that no further amendments to *CEPA* were expected arising from development of the RTHE Framework.

If that continues to be the federal government's policy, possible interim steps short of amending the statute, could include: (1) promulgating the Framework as a regulation under the Act; (2) issuing the Framework as a Cabinet order similar to the former *Environmental Assessment and Review Process Guidelines Order* ("EARPGO"); or (3) publishing the Framework as a policy similar to the current Compliance and Enforcement Policy ("CEP") under *CEPA*. Regardless of which form the final version of the Framework takes it would need to include a disclaimer that in the event of an inconsistency between it and the Act, the Act would prevail, such as the disclaimer contained in the CEP. The Framework should also be drafted such that it is consistent with both: (1) the *Canadian Charter of Rights and Freedoms*; and (2) the *Canadian Bill of Rights*.

We describe the above as an interim or first step because what is missing from the RTHE equation under *CEPA* is reform of s. 22. That continues to be the elephant in the room on enforcement of *CEPA* by members of the public. In the long run, no amount of re-arranging of the administrative deck chairs respecting the Framework will keep the Act from continuing to fail in the provision of publicly enforceable environmental rights if reform of s. 22 does not occur as well. We also note that reform of s. 22 is consistent with the notion of "continuous improvement" recognized by the Discussion Document (page 15) as part of the non-regression principle.

E. Other Measures

In addition to the foregoing, CELA makes the following observations and recommendations arising from review of the Discussion Document:

- the Framework should facilitate: (1) the application of Indigenous, traditional, and local knowledge; and (2) decision-making approaches that respect this knowledge;

- to protect communities suffering from legacy exposures, and to support further the principle of intergenerational equity, the Framework should ensure there are mechanisms that incorporate consideration of whether there is a benefit from the exposure in question;

- the Framework should prioritize areas to examine based on information derived from mapping vulnerability and exposures to air and water contaminants, longstanding legacy toxic exposures, and areas directly within federal authority such as ocean dumping;

- notwithstanding the focus of these submission on certain topics set out above, the whole of *CEPA* and its existing principles, such as the precautionary principle and sustainable development, must all be robustly incorporated into the Framework along with the principles newly introduced to the Act as a result of Bill S-5;

- the Framework should consider incorporating use of the reports of the Commissioner of the Environment and Sustainable Development to aid in prioritizing matters the federal government should address with respect to protecting the RTHE under the Act;

- the Framework should consider the use of environmental justice principles in deciding where to focus general *CEPA* enforcement efforts;

- the Framework should provide for a youth advisory council, to assist in prioritizing matters to consider from the perspective of intergenerational equity principles;

- the Framework should prioritize making federal data and information translatable and accessible to communities; and

- the Framework should ensure all *CEPA* decisions have an “environmental justice screen" as a mandatory aspect of the decision-making process.

IV. CLOSURE

For the foregoing reasons, CELA submits that the forthcoming Framework on implementing the RTHE under *CEPA* should address the issues of reasonable limits, principles, procedural duties, and other measures, as set out herein.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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Encl. Overview of 2023 *CEPA* Amendments