



ASSEMBLY OF FIRST NATIONS

**Right to a Healthy Environment Implementation (RTHE)
Framework Discussion Document**

Technical Submission

June 17, 2024

1.0.ASSEMBLY OF FIRST NATIONS

The Assembly of First Nations (AFN) is the national, political organization of First Nations governments and their citizens, including those living on and off reserve. Every Chief in Canada is entitled to be a member of the Assembly, and the National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens. The AFN has 634 member First Nations within its Assembly. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective, and co-operative measures on any subject matter that the First Nations delegate for review, study, response, or action, and to advance the aspirations of First Nations.

The AFN supports First Nations by coordinating, facilitating, and advocating for policy change, while the leaders of this change are the First Nations themselves. Chiefs, and the First Nations they represent, must be an integral part of Canada's development of a Right to a Healthy Environment (RTHE) Implementation Framework, through direct Nation-to-Nation consultations with the Rights Holders.

The AFN is mandated by the First Nations in Assembly to advocate for First Nations' environmental protection. Specifically, Resolution 65/2018: *Closing the Environmental Protection Regulatory Gap on First Nation Lands* call on the Government of Canada to address the long-standing gaps in environmental protection on First Nations lands in full consultation and partnership with First Nations. This will require legislative, policy, regulatory, and program reforms in consultation and partnership with First Nations. Similarly, Resolution 17/2020: *Support for First Nations Climate Leadership, Food Sovereignty, Environmental Protection, Stewardship, and Conservation* calls for a holistic approach to addressing the environmental challenges, injustices, and racism experienced by First Nations.

2.0. CONTEXT

The Assembly of First Nations (AFN) participated in the legislative review process for Bill S-5 - *An Act to amend the Canadian Environmental Protection Act (CEPA)*¹ by providing written submissions to the Senate Standing Committee on Energy, the Environment and Natural Resources (ENEV) and the House of Commons Committee on Environment and Sustainable Development (ENVI). Through these submissions, the AFN outlined recommendations for improvements to CEPA that will meet the interests of First Nations across Canada. One such recommendation was the call for a Right to a Healthy Environment (RTHE) to be recognized, protected, and enforced in Canada.

The recognition of a RTHE is long overdue as Canada is one of the few countries in the world that has yet to legally or legislatively recognize this right. In fact, more than 100 countries around the world have the RTHE entrenched in their constitutions.² In other countries, the courts have

¹ S-5, An Act to Amend the Canadian Environmental Protection Act, 1999 c. 12 (assented to 13, June 2023).

² Boyd, D. R. (n.d.). The status of constitutional protection for the environment in other nations: Executive summary.

recognized some form of the RTHE as an ancillary aspect of their constitution and an essential component of the right to life. While the AFN welcomes the introduction of a RTHE, it is important to note that First Nations have a crucial role to play in the development, framing, and implementation of this right. This role is affirmed under Section 35 of the Constitution Act, 1982, which obligates the Government of Canada to consult with Indigenous peoples when it considers any action that may adversely affect Aboriginal or Treaty rights. Additionally, Canada's duty to ensure meaningful participation of First Nations in decision-making in matters that would affect their Rights is further affirmed under the United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA).³ Specifically, Article 32 mandates good-faith consultation and cooperation with Indigenous people to obtain their free, prior, and informed consent for projects affecting their lands or resources. Consequently, this Technical Written Submission (hereon referred to as Technical Submission) demands the full and effective participation of First Nations in the development and implementation of the RTHE framework as a prerequisite for the effective application of the right. We emphasize that it is imperative to meaningfully engage and consult with First Nations rights- and titleholders, who are stewards of the environment and are disproportionately affected by pollution in Canada.

This Technical Submission provides AFN's response to the Discussion Document on the Implementation Framework for a RTHE under CEPA, 1999 (hereon referred to as the Discussion Document) and outlines our perspectives on key concepts and principles contained in the Discussion Document. It also highlights AFN's areas of concern and priority. Given that the Discussion Document centers on a "healthy environment," this Technical Submission will commence by presenting First Nations' conceptualization of the environment, health, and what constitutes a healthy environment. It will then highlight certain gaps and concerns in the Discussion Document, particularly those that diverge from First Nations teachings, principles, rights, knowledge systems, and worldviews. Finally, this Technical Submission will provide recommendations to align the RTHE framework with the rights, interests, and worldviews of First Nations.

3.0. FIRST NATIONS CONCEPTUALIZATION OF THE ENVIRONMENT AND HEALTH

Developing a RTHE implementation framework requires an understanding of what constitutes a healthy environment, from diverse perspectives. Section 3.1 of the Discussion Document acknowledges this by posing the question, "What does a healthy environment mean to you in the context of the CEPA cycle?" This Technical Submission will address this question by presenting a high-level First Nations understanding of 'the environment' and 'health,' and conceptualizing the relationship between these concepts, particularly from a decolonial perspective. This decolonial lens is crucial in broadening our understanding of the RTHE and developing an inclusive framework. It is important to note that there are more than 630 First Nations, each of which is a sovereign Nation with unique realities, context, and experiences that may inform their distinct perspectives, understanding, and conceptualization of a healthy environment. Therefore, this Technical Submission is not meant to be an exhaustive exploration and representation of First Nations' understanding or conceptualization of a healthy environment. Rather, it offers a broad

³ United Nations Declaration on the Rights of Indigenous Peoples Act (S.C. 2021, c. 14)

and high-level First Nations perspective on a healthy environment that must critically inform the development of a RTHE implementation framework.

3.1. *The Environment*

While the Western conceptualization of the environment tends to be narrow and focused on land, air, water, organic and inorganic matter, living organisms, and the interacting natural systems,⁴ First Nation's conceptualization of the environment encompasses more. First Nations relate to and connect with the environment as Mother Earth, a living entity that humans have a relationship with. First Nation's conceptualization of the environment is deeply rooted in traditional knowledge, cultural practices, ceremonies, and the natural world (which is alive and has agency), encompassing centuries of observation, experience, and wisdom passed down through generations. This knowledge holds a holistic understanding of the interconnectedness between humans, the land, waters, and all living beings,⁵ including the sun, moons, spirit beings, and ancestors. This also includes Indigenous Sacred Places that serve as connections to ancestors, to all beings on the planet, and to different planes of existence,⁶ thus highlighting Sacred Places, spirit/spiritual beliefs, and ancestors as integral to First Nations conceptualization of the environment and a healthy environment.

First Nations have a unique, intimate, and sacred connection to the environment and all living things in it. This connection is guided by a strong spiritual and reciprocal relationship with Mother Earth that supports the health and well-being of First Nations. This connection means that First Nations view the environment not just as a resource, but as an integral component of their identity, culture, spirituality, and well-being. This unique connection also means that First Nations face a potentially higher risk of exposure to environmental contaminants.

3.2. *Health*

The Western definition of health is historically rooted in a biomedical model of health that focuses on the absence of disease. The definition of health has evolved, starting with the World Health Organization's (1948) definition of health as the positive state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity. This definition further evolved with the Lalonde Report (1974), the EPP Report (Health and Welfare Canada, 1986), the Ottawa Charter for Health Promotion Report (WHO, 1986), and the One Health Approach (WHO, 2022). However, these definitions are predominantly informed by Western worldviews.

First Nations' conception of health (framed as wellness or well-being) is understood as an action, state, or occurrence as opposed to a word used to identify a class of people, places, or things,⁷ suggesting that wellness is a process rather than a product. Furthermore, First Nation's conceptualization of health underpins the principle of interconnectedness, emphasizing that wellness is not solely determined by an individual's actions but rather by the balance and harmony between all aspects of life, including personal and collective elements. This balance extends to the relationship between human beings and the environment, making ecological balance imperative for wellness.

⁴ Impact Assessment Act (S.C. 2019, c. 28, s. 1)

⁵ Menzies C. R. (2007). Traditional ecological knowledge and natural resource management.

⁶ Cloud, Q. Y., & Redvers, N. (2023). Honoring Indigenous Sacred Places and spirit in environmental health. *Environmental Health Insights*, 17.

⁷ McBeath, B. M. (2020). Conceptualization of community wellness in three First Nations communities.

It is evident that First Nations conceptualizations of health diverge considerably from Western conceptualizations. How health is conceptualized will inevitably influence the framing and implementation of a RTHE, including the formulation of outcome indicators of a healthy environment. Relying solely on the prevalent Western conceptualizations of health will constrain the representation of First Nations wellness and may lead to further oppressive outcomes for First Nations. For instance, considerations of cultural, spiritual, and communal health are important components of First Nations well-being that are often overlooked in Western conceptualization of health and risk assessment.⁸ Hence, it is crucial to acknowledge the differences in conceptualizations to ensure that First Nations wellness is appropriately represented, integrated, and operationalized in Canada's RTHE framework.

4.0. FIRST NATIONS CONCEPTUALIZATION OF A HEALTHY ENVIRONMENT

Given the historical and ongoing environmental racism and injustices faced by First Nations and other disproportionately impacted communities in Canada, it is imperative that Western and colonial ways of thinking must not dominate the conceptualization of a healthy environment, as this would result in an ineffective framework that could potentially produce additional injustices. Rather, First Nations knowledge and non-Western concepts should form the dominant foundational perspectives and epistemology to inform Canada's conceptualization and framing of RTHE.

For First Nations, a healthy environment is an essential component of a healthy individual and community and is framed in the context of well-being, including an integration of First Nation's conceptualization of the environment described earlier. A healthy environment is not just a physical space but also a reflection of First Nations' cultural identity and spiritual beliefs.⁹ First Nations' conceptualization of a healthy environment emphasizes holistic approaches to ecosystem management, recognizing the interconnectedness of all living beings and the importance of maintaining balance and harmony within the environment. These knowledge systems and worldviews guide First Nations' interaction with the land, water, wildlife, natural world, ancestors, and every component of the environment.

A key tenet of First Nations' conceptualization of a healthy environment is reciprocal relationship or living in harmony with nature. First Nations' worldviews emphasize reciprocity, stewardship, and respect for the environment, rejecting notions of human dominance or control over the environment. Hence, First Nations emphasize the importance of sustainable resource use and ensuring the health and integrity of ecosystems for future generations. The Nibi Declaration of Treaty #3 tool kit highlights an example of how First Nations' conception of a healthy environment is practiced. Although this toolkit centers on water, the teachings and principles shared also relate to the environment in general, of which water is an important component.

According to the toolkit,¹⁰ *“Nibi is the source of our wellbeing. It nourishes us, spiritually, physically, mentally, and emotionally and provides cleansing and healing. Clean nibi for drinking is important to our health. We must respect our sacred relationship with nibi and all beings in creation to help protect nibi for our children and future generations.”*

⁸ Vickery, J., & Hunter, L. M. (2017). Native Americans: Where in Environmental Justice Research?

⁹ Supra note 4.

¹⁰ Nibi Declaration of Treaty #3 Tool Kit. <https://watergovernance.sites.olt.ubc.ca/files/2020/04/Nibi-Declaration-Toolkit.pdf>

Furthermore, the RTHE framework must consider how the right would be accommodated in a changing environment, including the impacts of these changes on First Nations' well-being, rights, culture, and lifeways. For instance, habitat destruction due to logging continues to have significant impacts on forestry and pose major threat to First Nations well-being. Environmental degradation due to industrialization and colonial policies and practices continue to harm First Nations environments and result in adverse impacts on First Nations rights to a safe and healthy environment. An environment that is contaminated and unhealthy cannot sustain well-being and, as such, interferes with the RTHE. Industrial agriculture has resulted in wide-ranging impacts, including the destruction of key ecosystems, increased greenhouse gas emissions, declining salmon populations, and water pollution, among many others. These impacts have significant implications for the well-being of First Nations and are closely linked to their ability to enjoy a RTHE.

5.0. MAJOR AREAS OF CONCERN IDENTIFIED IN THE DISCUSSION DOCUMENT

After a careful review of the Discussion Document, we have identified the following areas of concern that require attention.

5.1. Right to a Healthy Environment Limited to CEPA:

The Discussion Document notes that the RTHE is limited to the CEPA context and is not applicable to other federal Acts that have a role in protecting the environment. This is problematic as it represents a significant divergence from the First Nations principle of interconnectedness which is strongly tied to First Nations' conceptualization of a healthy environment. The environment, as a living entity with agency, should not be bound to a specific Act. Limiting the implementation of the RTHE to the CEPA context defeats the very essence of the right and creates a conflict with the application of a human rights-based approach as framed by the United Nations.

It is important to note that the RTHE is deeply rooted in human rights. The United Nations Human Rights Council, on October 8, 2021, adopted Resolution 48/13, recognizing a clean, healthy, and sustainable environment as a human right.¹¹ In corroboration with the UN Human Rights Council, the United Nations General Assembly (UNGA), on July 28, 2022, passed Resolution A/76/L.75 recognizing the right to a clean, healthy, and sustainable environment as a human right.¹² Both UN Resolutions essentially ground RTHE within a human rights framework. The United Nations affirms that all people have the right to a healthy environment, noting that human rights and the environment are interdependent and that a healthy environment is necessary for the full enjoyment of a wide range of human rights, such as the right to life, health, food, water and sanitation and development, among others. The UN further affirms that the enjoyment of all human rights, including the rights to information, participation, and access to justice, is of great importance to the protection of the environment and the exercise of the RTHE. As such, limiting the implementation of RTHE to the CEPA context would not only weaken and make the right ineffective, it would also negate human rights as a central tenet of the RTHE. The UN considers RTHE essential for tackling the triple planetary crises of climate change, pollution, and

¹¹ United Nations General Assembly - Human Rights Council. (2021). Forty-eighth session: The human right to a safe, clean, healthy and sustainable environment.

¹² United Nations General Assembly (2022). Seventy-sixth session: The human right to a safe, clean, healthy and sustainable environment.

biodiversity loss, indicating the need for interconnectedness and a cross-sector/non-siloed approach to RTHE.¹³

5.2. The Integration of First Nations Rights and Knowledge Systems:

Recognizing the Right to a Healthy Environment (RTHE) is a positive step for Canadians, including First Nations peoples. However, it is crucial that the RTHE implementation framework upholds First Nations' Inherent and Treaty Rights. Additionally, it is important that the RTHE framework acknowledges the unique and sacred relationship First Nations have with the environment by incorporating First Nations' knowledge systems and perspectives into the design, implementation, and administration of the RTHE framework. Although the Discussion Document mentions a commitment to renewed nation-to-nation and government-to-government relationships with First Nations, there is a need for the framework to explicitly outline how First Nations peoples, communities, rights, and overall interests will be protected. This recognition is warranted as First Nations possess Inherent and Treaty Rights that are closely connected to their environment. Further, this explicit recognition is consistent with the United Nations Declaration on the Rights of Indigenous Peoples¹⁴ (UN Declaration) whereby it makes the following preambular statement:

“Recognizing that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.”

In addition, while the amended CEPA recognizes the role of Indigenous knowledge in decisions related to protecting the environment and human health, the RTHE framework must go beyond “recognition” to set out clearly how First Nations rights, self-determination, and knowledge systems will be upheld within the framework. Decision-making processes in all aspects of the RTHE development and implementation must fully integrate First Nations knowledge and science. This could be achieved through stronger collaboration with First Nations experts, Knowledge Keepers, researchers, and leadership.

Similarly, there is inadequate monitoring of First Nations' environmental and human health, resulting in data gaps regarding the exposure and impacts of pollution on First Nations, particularly First Nations living on-reserve. Many government-led data collection and monitoring programs do not include First Nations communities. The Discussion Document did not provide an explicit indication of how this gap will be addressed as an important component of RTHE. As data collection is integral to risk assessment and management, there is an urgent need to enhance human and environmental health data collection and monitoring activities on First Nations lands. First Nations have consistently raised concerns regarding how risk assessment is conducted in Canada. The risk-based approach to risk assessment often does not integrate traditional knowledge and fails to capture important First Nations context and lived/living experiences. An important aspect of data collection is how data is collected. Data collection must align with the principles of ownership, control, access, and possession (OCAP), utilize decolonial methods, and integrate Indigenous ways of knowing. In addition to quantitative data, qualitative data collected through storytelling, foretelling, talking circles, and traditional knowledge must be gathered to inform decision-making.

¹³ OHCHR, UNEP, & UNDP-What is the right to a healthy environment: Information note.

¹⁴ Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

The integration of Indigenous knowledge, data, and monitoring should utilize a distinction-based approach.

The protection of First Nations rights and integration of their knowledge systems is required if the RTHE is to be effective and meaningful. This can be achieved in several ways. For instance, the Discussion Document indicates that the CEPA National Advisory Committee is a forum established to advance public participation in the CEPA management cycle. This Committee should have First Nations representation, particularly Elders and Knowledge Keepers, who possess a wealth of traditional knowledge in protecting the environment and its inhabitants. Additionally, in the CEPA management cycle at Figure 2, the integration of Indigenous traditional knowledge must be included as a specific stage in the management cycle and integrated into every other stage of the management cycle. As stewards of the land, First Nations have a responsibility to honor and protect the environment and possess valuable knowledge in this regard. As such, their input would add important perspectives to identifying risks posed by a specific environmental activity and whether it is consistent with First Nation's traditional knowledge and respects their Inherent and Treaty Rights.

5.3. The Need to Include Reparation and the Precautionary Principle as Guiding Principles:

First Nations have experienced significant environmental degradation and loss of traditional lands due to colonization, resource extraction, and industrialization. Environmental racism and injustice also expose First Nations communities to disproportionate levels of pollution. Considering this, it is imperative that the RTHE implementation framework include a mechanism for reparation, which aims to acknowledge and rectify environmental injustices perpetrated on First Nations. Reparation seeks to rectify environmental injustices by holding responsible parties accountable for past and ongoing environmental harm. This should include remediation efforts to restore damaged ecosystems, clean-up of contaminated sites, and mechanisms to seek redress or compensation for communities impacted by environmental pollution. Such mechanisms should aim to lower costs for individuals or communities seeking environmental justice.

By acknowledging historical and ongoing environmental harms, reparation can play a crucial role in promoting environmental justice, supporting the well-being of communities, and protecting the RTHE for present and future generations. Furthermore, by addressing environmental injustices, reparation can contribute to the affirmation of First Nations Inherent and Treaty rights and support the preservation of cultural heritage as part of Canada's commitment to reconciliation, including commitments in the UN Declaration and the Truth and Reconciliation Commission (TRC) Calls to Action. In view of the foregoing, this Technical Submission calls for the inclusion of reparation as a guiding principle in the RTHE implementation framework. In addition, there is a need to include the precautionary principle as a guiding principle of the RTHE framework. The precautionary principle asserts that when there are threats of serious or irreversible damage, the absence of scientific certainty should not hinder the implementation of preventive actions against environmental degradation.¹⁵ It emphasizes the need to take preventive measures even under scientific uncertainty, asserting that uncertainty does not justify inaction. Thus, the precautionary principle promotes policies that protect human and environmental health, even when faced with uncertain risks.

¹⁵ Kriebel et al. (2001). The precautionary principle in environmental science.

5.4. Framing of Environmental Justice:

The Discussion Document outlines three main components of environmental justice: procedural justice, recognition justice, and distributive justice. This framing is a common mainstream representation of environmental justice. However, this Technical Submission argues that historical justice should also be considered as an essential component of environmental justice.¹⁶ This is necessary given the historical and ongoing environmental injustice/racism that Indigenous peoples and other disproportionately impacted groups and communities in Canada have faced due to settler-colonialism and industrial activities. Therefore, environmental justice must be understood within the context of settler-colonial practices that have eroded First Nations rights and access to a safe and healthy environment. As such, in line with Canada's commitments to reconciliation, environmental justice must be decolonized and informed by First Nations' knowledge systems, context, and worldviews. In addition, mechanisms for redress and remedy must be included as essential components of the RTHE framework.

For First Nations, RTHE is strongly connected to environmental justice, which in turn is intrinsically connected to First Nations Inherent and Treaty rights. As presented in the Discussion Document, the concept of environmental justice is primarily anthropocentric (human-centered) and focused on humans. However, this Technical Submission proposes an ecocentric¹⁷ approach to environmental justice that highlights the importance of protecting the well-being of the entire ecosystem and valuing all elements of the environment, including humans and non-human species such as animals, wildlife, plants, water, and soil.

5.5. The Integration of Water:

The RTHE Discussion Document references water pollution only in the context of drinking water. As a key component of the ecosystem, the role of water in supporting life and a healthy environment extends beyond drinking water and must include all forms and sources of water, such as lakes, rivers, rain, and the ocean, among others. Water security plays a crucial role in supporting the well-being, culture, and food sovereignty of First Nations. Consequently, this Technical Submission calls for stronger integration of water stewardship into the RTHE implementation framework. As water is a crucial component of First Nations conceptualization of the environment, it is essential that water protection, including the conception of water as a living entity with agency, is firmly incorporated into the RTHE framework. In relation to this, there is a need to ensure that the RTHE framework provides the backing to harmonize the implementation of pollution standards under CEPA and marine pollution legislation (e.g., Canada Shipping Act and Oceans Act) to strengthen pollution prevention across terrestrial-marine and jurisdictional boundaries. Similarly, ongoing work on Bill C-61 (First Nations drinking water and wastewater legislation) and the creation of the Canada Water Agency should be consistent with the RTHE. In addition, the RTHE framework offers an opportunity to align CEPA with international agreements and instruments on marine pollution, such as the International Convention for the Prevention of Pollution from Ships (MARPOL) and the UN Convention on the Laws of the Sea (UNCLOS). The

¹⁶ Whitfield, S., Apgar, M., Chabvuta, C., Challinor, A., Deering, K., Dougill, A., Gulzar, A., Kalaba, F., Lamanna, C., Manyonga, D., Naess, L. O., Quinn, C. H., Rosentock, T. S., Sallu, S. M., Schreckenberger, K., Smith, H. E., Smith, R., Steward, P., & Vincent, K. (2021). A framework for examining justice in food system transformations research. *Nature Food*, 2(6), 383–385. <https://doi.org/10.1038/s43016-021-00304-x>

¹⁷ Kopnina, H. (2012). Education for sustainable development (ESD): the turn away from 'environment' in environmental education? *Environmental Education Research*, 18(5), 699–717. <https://doi.org/10.1080/13504622.2012.658028>

concerns and comments presented here further highlight why limiting the RTHE to CEPA context is detrimental to the application and exercise of the right.

5.6. Application of Reasonable Limits:

The application of reasonable limits to the RTHE could hinder its protection. Section 3.1.1 of the Discussion Document noted social, health, scientific, and economic factors as relevant factors to be considered in determining reasonable limits in the administration of RTHE. This raises concerns regarding how such reasonable limits would impact First Nations' RTHE, including their Inherent and Treaty Rights. Further clarity on the application of reasonable limits is required, accompanied by a statement ensuring that the administration of the RTHE will not negatively impact or diminish First Nations Inherent and Treaty Rights. It should also be noted that RTHE is rooted in human rights, and it is inappropriate to talk about limits to human rights. There are also concerns regarding the potential misuse of economic limits. Economic limits may reinforce capitalistic preferences and approaches and give undue advantage and power to corporations at the expense of a healthy environment. There is a need for a more careful consideration of how reasonable limits would be applied without weakening the right or negating a human rights-based approach to the right. The government's ability to set reasonable limits to the RTHE is problematic as it could limit the application of the right to such an extent as to render it meaningless.

5.7. Procedural Duties:

The UN Declaration can inform the development of a RTHE implementation framework, and the procedural duties contained therein. The UN Declaration is clear that Indigenous peoples have the right to decide matters affecting their own citizens as stated under Article 18 whereby it states:

“Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”¹⁸

The Discussion Document and CEPA recognize and attempt to integrate the UN Declaration. For instance, CEPA includes a preambular statement declaring its commitment to implementing the UN Declaration. In addition, the preamble of CEPA states that the Government recognizes the role of science and Indigenous knowledge in risk assessment decision-making processes. Although this recognition is essential, there is a need to establish a clear mechanism for implementing Indigenous knowledge in the context of RTHE. Hence, the Discussion Document needs to go beyond recognition and focus on taking action by establishing effective systems that integrate Indigenous knowledge in procedural duties related to RTHE.

The procedural duties stated in the Discussion Document include access to information, participation in decision-making, and access to effective remedies in the event of harm to the environment and human health. These duties will be further discussed as follows.

5.7.1. Access to Information

Access to information supports the public in holding governments accountable, participating in health and environmental decision-making, and making informed decisions about human and

¹⁸ Supra note 2.

environmental health. An important component of access to information that must be integrated into the RTHE implementation framework is First Nations data sovereignty. First Nations principles of ownership, control, access, and possession (OCAP) assert that First Nations have control over data collection processes and that they own and control how this information can be used, shared, and stored. Mechanisms to protect First Nations data sovereignty must be included in the RTHE implementation framework. An important aspect of access to information that relates to First Nations is the need to address the data gap regarding the human and environmental health of First Nations, in alignment with OCAP principles.

Although the Discussion Document outlines some mechanisms within CEPA and potential opportunities to strengthen access to information, it does not go far enough to meet the interests of First Nations peoples. For example, First Nations living in remote areas may not be aware that resources exist and may not have access to information with respect to CEPA and RTHE. Publishing CEPA's Annual Report online does not go far enough as broadband/internet access remains limited in some communities. Moreover, the National Pollutant Release Inventory (NPRI) data and website must capture information that adequately reflects on unique First Nations contexts and realities. Such information should be presented in formats that are accessible to First Nations. Another instance of making information more accessible to First Nations is the translation of data and information in Indigenous languages.

5.7.2. Participation in Decision Making

It is essential that First Nations are involved in decision-making processes, especially since the RTHE has significant implications for their Inherent and Treaty Rights. As such, First Nations representation on the CEPA National Advisory Committee is crucial. First Nations are a distinct population and have various needs across Canada that depend on their environment. Consequently, it is recommended that several First Nations representatives be appointed to this Committee to reflect the distinct and diverse voices and interests of First Nations across Canada.

As an essential component of meaningful First Nations participation in the RTHE process, First Nations rights- and title- holders, as stewards of the environment must be meaningfully engaged and consulted. This includes ensuring that First Nations are well-informed and resourced to participate in the entirety of the RTHE process. Further to this is the need to ensure consistency with the UN Declaration, including upholding commitments to free, prior, and informed consent (FPIC).

5.7.3. Access to Effective Remedies

In terms of the proposed mechanisms within CEPA to access remedies, it is important to make the procedure more accessible for First Nations. For instance, greater clarity is required to understand how First Nations will be informed and assisted, due to language, social, and cultural barriers, in requesting an investigation of an alleged offense under CEPA and RTHE. The tools outlined in the Discussion Document are not always easily accessible to First Nations or aligned with their priorities, contexts, and knowledge systems. This indicates the potential for marginalization within the process, especially if the burden of proof is placed on the citizens whose RTHE has been violated, as is currently the case within CEPA. This also reinforces the need to ensure lower costs for individuals or communities seeking environmental justice.

Furthermore, there must be alternate ways to pursue a remedy and to participate in a manner that is accessible and consistent with First Nations rights, knowledge systems, and culture. This process should be guided by an Elder or Knowledge Keeper who would assist First Nations in voicing their concerns with respect to the RTHE. This could take the form of a talking circle that is accessible and culturally appropriate to First Nations.

5.8. On-Reserve Environmental Protection Regulatory Gap:

Part 9 of CEPA gives the federal government the authority to create environmental protection regulations that apply to Aboriginal land. However, only three such regulations are currently in place, which cover petroleum storage tanks, halocarbons, and environmental emergency notification requirements. These federal regulations are less comprehensive than provincial regulations and permit systems, which cover a broader area of environmental matters. This creates a “regulatory gap” that leaves Aboriginal land without the same environmental protection as lands under provincial jurisdiction.

In 2009, the Auditor General’s (AG) review of the scope of the regulatory gap found that many environmental threats identified by First Nations as high priorities were not regulated on reserve.¹⁹ The AG highlighted gaps relating to solid waste, wastewater discharges, fuel storage tanks, and environmental emergencies. While some of these concerns may have been addressed in the 15 years since the AG’s report, many others likely remain outstanding. The impact of the regulatory gap is also evident through the disproportionate exposure and resultant health outcomes experienced by many First Nations. For instance, pollution from Alberta’s oil sands has been linked to elevated cancer rates in Fort Chipewyan First Nation. Between 2016 and 2017, 45,357 tonnes of pollution were emitted from industries within a 25-kilometer radius of Aamjiwnaang First Nation.²⁰ The cumulative and long-term effects of the pollution resulting from industry in this area have reportedly resulted in health impacts on the Aamjiwnaang First Nation.²¹

The on-reserve regulatory gap is a significant obstacle to First Nations environmental protection and RTHE. Consequently, the RTHE framework must set out how this gap will be addressed in collaboration with First Nations.

5.9. Non-Regression:

The framing of non-regression must extend beyond maintaining current levels of protection. Non-regression must include an improvement in protection over time. As such, non-improvement should be considered as regression. Also, the framing of non-regression within the RTHE framework must consider and integrate the protection and improvement of targets set in other frameworks, such as the Global Biodiversity Framework and greenhouse gas emission targets.

5.10. Intergenerational Equity:

Intergenerational equity is of profound significance for First Nations, encompassing a deep-rooted commitment to preserving cultural practices, traditional lands, ancestral knowledge, environmental stewardship, and the well-being of present and future generations. Intergenerational equity, as conceptualized through the Seven Generations teaching, emphasizes the responsibility

¹⁹ AG 2009 Report at s. 6.52.

²⁰ Larissa Parker, “Not in Anyone’s Backyard: Exploring Environmental Inequality under Section 15 of the Charter and Flexibility after *Fraser v Canada*”, 2022 27 *Appeal* 19 at p. 24.

²¹ Sarah Marie Wiebe, “Bodies on the line: The In/security of Everyday Life in Aamjiwnaang” in Matthew A Schnurr & Larry A Swatuk, eds, *Natural Resources and Social Conflict* (Palgrave Macmillan, London, 2012) 215.

of each generation to consider the impact of their actions on the next seven generations and beyond. It underscores the interconnectedness between past, present, and future generations, recognizing the rights of future descendants to inherit a healthy environment. An essential element of intergenerational equity is the transmission of traditional knowledge to younger generations. Elders and Knowledge Keepers play a crucial role in guiding younger generations to understand the significance of a healthy environment, cultural practices, and community well-being.²² Thus, meaningful participation of younger generations in decision-making processes at all levels must be integrated into the RTHE implementation framework. Furthermore, an important element of intergenerational equity is considering cumulative effects, including the impacts on children and youth. The cumulative impacts of colonialism and intergenerational trauma must be considered within the context of intergenerational equity.

The RTHE Discussion Document addresses the concept of intergenerational equity only in the context of physical and biological impacts of toxics on humans and overlooks the impact of environmental contamination on cultural practices and knowledge transfer. The Document fails to recognize the significance of intergenerational knowledge transfer, particularly in the context of Indigenous knowledge systems. The absence of intergenerational knowledge transfer can be observed when the current generation is unable to engage in cultural practices due to environmental contamination. Such situations can prevent the transmission of knowledge about these practices to future generations. Consequently, the spiritual and relational aspects associated with these practices may become lost over time, which can have significant implications for the cultural continuity, identity, mental health, and well-being of First Nations.

5.11. Indicators of a Healthy Environment:

In addition to the indicators mentioned in the RTHE discussion document, such as the Canadian Environmental Sustainability Indicators (CESI) and the CCME's Water Quality Index, it is important to integrate metrics and indicators that are First Nations specific and informed by First Nation knowledge systems. For example, the AFN National Climate Strategy provides objectives that could be developed into indicators for the RTHE framework.²³ Sections 3.1 and 3.2 of the AFN Climate Strategy highlight the need for increased financial resources to support and integrate First Nations' knowledge systems, data governance, inherent rights, and self-determination into decision-making processes. These objectives would be instrumental in developing First Nations-informed metrics for the RTHE implementation framework. Relying predominantly on indicators that are based on Western ideology and epistemology will constrain the representation of First Nations in the RTHE framework and may lead to further oppressive outcomes for First Nations.

5.12. Meaningful Protection of the Right to a Healthy Environment:

Many countries in the world have implemented a right to a healthy environment in their constitutions and have had success in this regard. As of 2013, 182 of the world's 193 UN member nations recognize the RTHE, either through their constitution, environmental legislation, court decisions, or ratification of an international agreement.²⁴ Countries with a constitutionally protected RTHE demonstrate that some politically and economically marginalized communities

²² Viscogliosi, C., Asselin, H., Basile, S., Borwick, K., Couturier, Y., Drolet, M., ... & Levasseur, M. (2020). Importance of indigenous elders' contributions to individual and community wellness: results from a scoping review on social participation and intergenerational solidarity. *Canadian Journal of Public Health*, 111(5), 667-681. <https://doi.org/10.17269/s41997-019-00292-3>

²³ Assembly of First Nations National (2023). National Climate Strategy.

²⁴ Boyd, D. R. (2013). The effectiveness of constitutional environmental rights. Yale UNITAR Workshop

have enjoyed success in the Courts in enforcing their RTHE. For instance, in Argentina, litigation based on constitutional environmental rights resulted in a court-ordered clean-up and restoration of the Mantanza-Riachuelo watershed. As such, it is important to take steps to ensure that the RTHE is meaningfully protected in Canada. An option to strengthen the RTHE in Canada would be the inclusion of the RTHE in the *Canadian Charter of Rights and Freedoms*. This could be accomplished in three specific ways and incorporated into Canadian law by: a direct amendment to the *Constitution Act, 1982* through clarification of section 7 of the *Canadian Charter of Rights and Freedoms* to include RTHE, a standalone provision in the Charter, or a detailed Charter of Environmental Rights and Responsibilities to be added as part of the Constitution.

There are several reasons why Canada needs to strengthen the RTHE through constitutional protection. Evidence from around the world indicates that establishing RTHE in constitutions has led to stronger environmental laws, better enforcement, and greater public participation in environmental governance.²⁵ As Canada embarks on the development of a RTHE implementation framework, it is important that this framework incorporates many human rights standards, including the prohibition of discrimination and ensuring equal and effective protection; freedom of expression; freedom from harassment, intimidation, and violence; peaceful assembly in relation to environmental matters; and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfill human rights.²⁶ These essential protections must be afforded to First Nations and included in the RTHE implementation framework.

5.13 The Framing of Pollution as Potentially Harmful:

The Discussion Document presents pollution as a potential threat to health, stating "...pollution that could impact their health." This framing is problematic as it may suggest that pollution can at times be harmless. While certain circumstances may not present immediate harm to humans, pollution still poses significant risks to the environment, including non-human species. There is also the potential for harm to manifest later due to cumulative impacts or in different geographical locations, highlighting the importance of spatial and temporal context.

Additionally, the harms associated with pollution may not be immediately apparent or may be hidden and invisible, as is often the case for many harms experienced by First Nations. This raises important questions about how harm or health impact is defined and determined and by whom. By framing pollution as a potential threat, the burden of proof is placed on the affected individuals rather than the polluter. We argue that pollution is inherently harmful and should be framed as such within the RTHE implementation framework.

5.14 Lack of Clear Linkages with the Global Biodiversity Framework:

In 2022, Canada adopted the Kunming-Montreal Biodiversity Framework (KMGBF),²⁷ committing to develop a National Biodiversity Strategy and Action Plan (NBSAP) aligned with the KMGBF's 2030 Goals and the 2050 Vision of living in harmony with nature. Section C of the KMGBF outlines principles for implementation, emphasizing the following: (a) Contribution and

²⁵ Boyd, D. R. (2021). The right to a healthy environment: Revitalizing Canada's constitution.

²⁶ A/HRC/37/59, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Human rights Council 37 session, January 24, 2018 at p. 14.

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/42/PDF/G1801742.pdf?OpenElement>

²⁷ Decision 15/4, U.N. Doc. CBD/COP/DEC/15/4 (2022) <https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>

rights of Indigenous peoples and local communities; (b) Different value systems; and (c) Whole-of-government and whole-of-society approach.²⁸ We argue that those concepts must be taken into account and inform the development of the RTHE implementation framework.

Section C(a) of the KMGBF mandates respect, documentation, and preservation of Indigenous knowledge, practices, and free, prior, and informed consent, ensuring their participation in decision-making without diminishing their rights. The KMGBF advocates for the One Health approach and highlights the interconnections between biodiversity and health, directly relating to the RTHE. This aligns with First Nations' principles of interconnectedness and holistic health as discussed earlier, reiterating the need for a holistic and cross-sectoral approach to RTHE, beyond the CEPA context. Furthermore, Canada's commitment to the KMGBF goals and targets includes a whole-of-government approach to fostering environmental and human health. Consequently, this Technical Submission calls for a stronger integration of biodiversity and conservation into the RTHE implementation framework. Additionally, the KMGBF and Canada's forthcoming NBSAP must be considered in the development of a RTHE implementation framework.

5.15 Lack of Clear Linkages with the Species at Risk Act:

This Technical Submission argues that there are important connections between CEPA, the RTHE, and Canada's Species at Risk Act (SARA), as a healthy environment promotes healthy species. Biodiversity in Canada is declining due to drivers such as habitat loss, degradation and fragmentation, pollution, overexploitation and climate change, which also contribute to a healthy environment and poor health outcomes.²⁹ According to the Canadian "Wild Species 2020" report, one fifth of the species assessed are at some level of risk of extinction.³⁰ This plummeting biodiversity represents a significant loss of relations, knowledge, cultural practices, environmental integrity, and ecosystem adaptation capabilities and further jeopardizes human and environmental health.³¹

While species are important actors in their ecosystems by providing ecological services, maintaining balance and ensuring a healthy environment, they are also culturally significant, particularly for First Nations. Culturally significant species are iconic species for First Nations that shape knowledge systems, the physical existence of Indigenous Peoples and Indigenous laws, they also hold spiritual value and linkage to health, and are part of First Nations stories, cultures, ceremonies and practices.³² First Nations foster relationships with Mother Earth, which supports the environment and human health and well-being.

The SARA is designed to protect endangered and extirpated national and transboundary species.³³ However, it does little to prevent those species from appearing on the endangered species list and

²⁸ *ibid* 26

²⁹ Toward a 2030 Biodiversity Strategy for Canada: Halting and reversing nature loss. (2023, May 15). <https://www.canada.ca/en/services/environment/wildlife-plants-species/biodiversity/2030-biodiversity-strategy-canada.html>

³⁰ Wild Species 2020: The General Status of Species in Canada. (2022, November 29). [Featured articles]. <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/general-status/wild-species-2020.html>

³¹ *ibid* 31

³² Summary Report of the 2023 First Nations Dialogues on Culturally Significant Species

³³ Branch, L. S. (2023, December 8). Consolidated federal laws of Canada, Species at Risk Act. <https://laws.justice.gc.ca/eng/acts/S-15.3/FullText.html>

ensure species population health. For example, ungulates in Canada, such as various subspecies of caribou, which are culturally significant for First Nations, are facing imminent threat from Chronic Wasting Disease (CWD),³⁴ yet insufficient actions are taken to address escalating CWD cases. Furthermore, the requirements for a species to enter the list are predominantly constricted to Western data and science. Although the Committee on the Status of Endangered Wildlife in Canada's (COSEWIC) sub-committee on Aboriginal Traditional Knowledge and the National Aboriginal Council on Species at Risk (NACOSAR) are intended to provide advice and guidance on Indigenous priorities and knowledge throughout the species status assessment, their presence and roles have been constrained.

Nonetheless, it has become apparent that First Nations knowledge systems and approaches to species stewardship are needed to help Canada develop better conservation strategies, frameworks, policies, and legislation. Consequently, species health considerations and First Nations inputs are crucial in the development of a RTHE implementation framework.

6.0. CONCLUSION

The implementation of the RTHE would allow Canada to join approximately 156 nations where this right has been incorporated into national legislation. Overall, the Discussion Document presents a good first step in recognizing the importance of RTHE within the context of CEPA. However, there are several gaps that exist within the Document that must be strengthened to meet the needs of First Nations. As discussed in this Technical Submission, ways to strengthen the RTHE implementation framework include respecting First Nations Inherent rights and Title, incorporating First Nations knowledge systems, ensuring the meaningful participation of First Nations in decision-making, and upholding commitments to reconciliation, including commitments to the UN Declaration and TRC Calls to Action.

Currently, the framing and decision-making on what constitutes a healthy environment in Canada are predominantly informed by Western epistemology and ontology, falling short of First Nations conceptualization and lived experiences of what constitutes a healthy environment. An example of this is Canada's risk assessment process, which solely relies on Western science and lacks meaningful integration of Indigenous science, values, and knowledge systems. As a result, risk assessment processes in Canada often lead to outcomes that do not align with First Nations interests and are detrimental to their well-being. This Technical Submission also raises concerns about the criteria and indicators used to evaluate a healthy environment or to gauge the impacts of an unhealthy environment, which tends to diverge from First Nations' conceptions. Additionally, this Technical Submission highlights the need to account for the indirect, hidden, and invisible impacts of environmental degradation on the well-being of First Nations, which are typically not captured by Western scientific methods. In this regard, it is unclear how Canada's RTHE framework would address these concerns.

³⁴ Haley, N. J., & Hoover, E. A. (2015). Chronic Wasting Disease of Cervids: Current Knowledge and Future Perspectives. *Annual Review of Animal Biosciences*, 3(Volume 3, 2015), 305–325. <https://doi.org/10.1146/annurev-animal-022114-111001>

Furthermore, meaningful participation of First Nations in the RTHE process requires upholding First Nations Inherent rights and Title, self-determination, and knowledge systems, including aligning the RTHE process with Canada's commitment to reconciliation. The RTHE process is an opportunity for Canada to acknowledge and address historical power imbalances and environmental injustice by honoring commitments to reconciliation, respecting First Nations' rights, and aligning environmental protection policies with the UN Declaration. To this end, the RTHE implementation framework must unequivocally outline how First Nations rights, self-determination, knowledge systems, and priorities will be integrated and respected. This includes mechanisms to ensure that First Nations play significant roles in decision-making and in shaping the outcomes of the framework. Finally, section 2.1 of the Discussion Document mentions that the Minister of Environment and Climate Change will report on the RTHE implementation framework annually within the CEPA Annual Report. This Annual Report must indicate, based on First Nations-informed metrics and indicators, how the implementation of RTHE has been beneficial to First Nations and addressed their interests.

7.0. RECOMMENDATIONS

In addition to the recommendations provided throughout this Technical Submission, the following are key recommendations to strengthen the RTHE framework:

1. Ensure full and effective participation of First Nations in the development and implementation of the RTHE framework. This includes ensuring the meaningful participation of First Nations rights and title holders in all aspects of the RTHE decision-making process.
2. The RTHE Framework must explicitly outline how First Nations rights, self-determination, knowledge systems, priorities, and overall interests will be respected and protected.
3. Ensure that the RTHE implementation framework is consistent with Canada's commitment to reconciliation, including upholding the UN Declaration, respecting First Nations rights, and honoring the TRC Calls to Action.
4. Apply a decolonial lens and First Nations' knowledge systems to inform the conceptualization of a healthy environment and the development of the RTHE implementation framework.
5. The Annual CEPA Report must indicate, based on First Nations-informed metrics and indicators, how the implementation of RTHE has been beneficial to First Nations and addressed their interests.
6. Integrate Indigenous traditional knowledge as a specific stage in the CEPA management cycle and into every other stage of the management cycle.
7. In addition to quantitative data, qualitative data collected through storytelling, foretelling, talking circles, and traditional knowledge must be incorporated as essential to decision-making in the RTHE process.
8. The integration of Indigenous knowledge, data, and monitoring should utilize a distinction-based approach.
9. The CEPA National Advisory Committee should have First Nations representation, especially Elders and/or Knowledge Keepers.

10. While CEPA forms the basis for recognizing RTHE in Canada, the framing and implementation of the right should extend beyond CEPA and focus on a human rights-based approach.
11. The RTHE implementation framework should include reparation as a guiding principle. This should include mechanisms for seeking remedy, redress, or compensation for any environmental injustices that have been inflicted on First Nations. Additionally, such mechanisms should aim to lower costs for individuals or communities seeking environmental justice.
12. Integrate metrics and indicators that are First Nations-specific and informed by First Nations' knowledge systems. For example, the AFN National Climate Strategy provides objectives that could be developed into indicators. Some of these objectives that are relevant to RTHE and should be integrated into the framework as indicators include increased financial resources to support and incorporate First Nations knowledge systems, data governance, inherent rights, and self-determination into decision-making processes.
13. Include historical justice as one of the components of environmental justice and apply an ecocentric approach to environmental justice, emphasizing the importance of protecting the well-being of both humans and non-human species.
14. The integration of water security into the RTHE framework should extend beyond drinking water and must include all forms and sources of water, such as lakes, rivers, rain, and the ocean.
15. Ensure transparency and clarity regarding how reasonable limits would be applied to the RTHE without weakening the right or negating a human rights-based approach to the right. Additionally, the RTHE framework should include a statement ensuring that the administration of the RTHE will not negatively impact or diminish First Nations' Inherent and Treaty Rights.
16. Ensure that the RTHE procedural duties align with the UN Declaration, First Nations' rights, and the TRC Calls to Action.
17. The RTHE implementation framework should include a plan to address the on-reserve regulatory gap.
18. As part of the principle of intergenerational equity, ensure the transmission of traditional knowledge by creating mechanisms that allow meaningful participation of younger generations in decision-making processes at all levels of the RTHE process.
19. The RTHE implementation framework must include a mechanism to account for cumulative impacts, including the cumulative impacts of colonialism and intergenerational trauma.
20. Pollution must be framed and recognized as inherently harmful, posing a real and persistent threat, not just as a potential threat.