

Briefing note

Necessary amendments to CEPA, 1999 to protect nature against new living organisms

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Nature groups, Indigenous leaders, hunting and fishing organizations and food safety groups have been calling on the federal government to protect nature from the unintended consequences of genetic engineering for over two decades. The introduction of genetically-engineered animals and plants can constitute living pollution and have irreversible consequences for nature and Indigenous rights, requiring greater attention in federal law.

In 2017, after extensive study and evidence the House of Commons Standing Committee on the Environment and Sustainable Development made recommendations supporting better protection of Indigenous rights and nature from genetic engineering technologies through amendments to the *Canadian Environmental Protection Act, 1999* (CEPA). Key among these was the committee's Recommendation # 26: "that CEPA be amended to establish a more open, inclusive and transparent risk assessment process that better enables public participation in the evaluation of new living modified organisms."

Bill C-28 (the *Strengthening Environmental Protection for a Healthier Canada Act*, 2nd Sess, 43rd Parl, 2021) proposes only minor, administrative changes to Part 6 of CEPA, which deals with "animate products of biotechnology." The government has also proposed that it conduct a review of the *New Substances Notification Regulations (Organisms)* (NSNRO) made under Part 6.

Key improvements that Nature Canada recommends require amendments to CEPA first, even if the NSNRO are to be publicly reviewed and updated. The current NSNRO are authorized by s 114 of CEPA, which does not provide for regulations respecting public involvement in the assessment and decisions allowing the manufacture, use, or import to Canada of new living organisms. (A regulation cannot do what its authorizing statute does not allow.) For example, public involvement in assessments of Part 6 notifications and waiver requests is required in order to determine whether a demonstrable need exists for a new living organism that has a wild counterpart, and whether the new living organism is toxic. Such public involvement, in turn, requires advance public notice. Section 114 does not currently grant authority for including these elements in the NSNRO. Amendments to CEPA are required.¹

¹ The current NSNRO has nothing to do with notifications or significant new activity (SNAc) notices, and nothing to do with public involvement. The current regulations provide for information that a proponent must provide for assessment purposes. Amendments to CEPA are needed in order to expand the scope and subject-matter of the NSNRO.

Changes to the NSNRO alone will not address the following key changes recommended made by Nature Canada over the past year to address situations where a living organism is proposed for import, manufacture, or use in Canada:

Place the burden on the proponent to demonstrate that the LO is not toxic;

Substantial amendments to Part 6 of CEPA are necessary to achieve the changes that Nature Canada and other organizations have been calling for. Some of the key amendments are described in the table below.

Recommendation	Change to CEPA (further amendments will be necessary to make these changes coherent)
<p>Align CEPA reform with Indigenous rights, including harmonization of CEPA with section 35 of the <i>Constitution Act, 1982</i>, and the <i>United Nations Declaration on the Rights of Indigenous Peoples</i> (UNDRIP).</p> <p>(Articles 26 to 29, 30 to 32, 39 to 40 of UNDRIP are some examples of its relevant provisions.)</p>	<p>See for example section 5 of Bill C-15, <i>An Act Respecting the UNDRIP</i>, which reads:</p> <p>“5 The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.”</p> <p>Section 5 of the <i>UNDRIP Act</i> requires that CEPA be amended to require appropriate consultation and cooperation with Indigenous peoples, including in relation to Part 6. The <i>UNDRIP Act</i> came into force on 21 June, 2021.</p>
<p>Reverse the burden of proof: Until a proponent can demonstrate that a living organism that has a wild counterpart can be used safely, its development, manufacture, import or use is prohibited. (Similar recommendations have been made for chemical substances of very high concern.) The proponent should also have to demonstrate that the new living organism is needed.</p>	<p>106 (1) Where a living organism is not specified on the Domestic Substances List, no person shall manufacture or import the living organism unless</p> <p>(a) the prescribed information with respect to the living organism, accompanied by the prescribed fee, has been provided by that person to the Minister on or before the prescribed date; and</p> <p>(b) the period for assessing the information under section 108 has expired <u>where the living organism is an animal having a wild counterpart, the information provided shows a demonstrable need for the living organism and that the living organism is not toxic or capable of becoming toxic.</u></p> <p>...</p> <p>(4) Where a living organism is not specified on the Domestic Substances List and the Minister publishes a notice in the <i>Canada Gazette</i> indicating that this subsection applies with respect to the living organism, no person shall use the living organism for a significant new activity that is indicated in the notice unless</p>

Place the burden on the proponent to demonstrate the need for the LO.

	<p>(a) the person has provided the Minister with the prescribed information, on or before the date that is specified by the Minister or prescribed, accompanied by the prescribed fee; and</p> <p>(b) <u>the period for assessing the information specified by the Minister or provided under section 108 has expired where the living organism is an animal having a wild counterpart, the information provided shows a demonstrable need for the significant new activity involving the living organism and that the significant new activity does not render the living organism toxic or capable of becoming toxic.</u></p>
	<p><u>Requirements where waiver of information requested:</u></p> <p>106 (8): On the request of any person to whom [prohibitions in 106(1), (3) or (4) apply] ... the Minister may waive any of the requirements to provide information if</p> <p>(a) in the opinion of the Ministers, the information is not needed in order to determine whether the living organism is toxic or capable of becoming toxic;</p> <p>(b) a living organism is to be used for a prescribed purpose or manufactured at a location where, in the opinion of the Ministers, the person requesting the waiver is able to contain the living organism so as to satisfactorily protect the environment and human health; or</p> <p>(c) it is not, in the opinion of the Ministers, practicable or feasible to obtain the test data necessary to generate the information.</p> <p>106 (8.1) <u>Notwithstanding subsection (8), where the living organism is an animal having a wild counterpart, the Ministers must give public notice of the waiver request and must provide opportunities for members of the public to participate in the assessment, in accordance with subsection 108(1.1).</u></p>
<p>Embed transparent processes that include meaningful public involvement and informed acceptance in Part 6. We support the advice of others that to bring CEPA into the 21st century, CEPA</p>	<p>108 (1) Subject to subsection (4), the Ministers shall, within the prescribed assessment period, assess information provided under subsection 106(1), (3) or (4) or paragraph 109(1)(c) or otherwise available to them in respect of a living organism in order to determine whether</p> <p>(a) <u>it is toxic or capable of becoming toxic, and</u></p>

<p>needs significantly improved accountability and transparency.</p>	<p>(b) <u>it shows a demonstrable need for the living organism.</u></p> <p>(1.1) <u>The Ministers must give public notice of the conduct of the assessment and must provide opportunities for members of the public to participate in the assessment, in a manner that includes testing of all evidence and requests to waive information requirements that are to be considered by the Ministers, and opportunities to present additional evidence.</u></p>
<p>Require opportunities to comment on each of the above steps being taken before decisions are made, including opportunities for informed participation in any assessments.</p>	<p>See proposed amendments to sections 106 and 108 above, including proposed new subsections 106 (8.1) and 108 (1.1).</p> <p>[Also, decisions made following the assessment must be announced in a more timely and public manner. Currently, a SNAc notice is often published long after the decision has been made.]</p>
<p>Regulation-making authority</p>	<p>114 (1) The Governor in Council may, on the recommendation of the Ministers, make regulations [...]</p> <p><u>(j.1) prescribing processes for meaningful public participation in the assessment referred to in section 108, and in the assessment of a waiver request referred to in section 106; and [...].</u></p>
<p>Transparency and public notification ought to trump confidentiality for business</p>	<p>Bill C-28 (e.g. clauses 50 to 54 of the bill) proposes minor tinkering with existing CEPA provisions dealing with confidentiality. For the above amendments to work, amendments are required to emphasize public rights to environmental information and decision-making.</p>

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