

The Federal Government's New "Green Approach"

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Canada's Clean Air Act

What it is not

The new federal strategy respecting greenhouse gas reduction was finally unveiled on October 19, 2006 with the presentation of Bill C-30 on air quality¹ and the release of the brochure entitled *Canada's Clean Air Act*². A few days later, on October 21st, the Government published its Notice of Intent which outlines the measures that it intends to develop and implement to reduce air emissions³.

It should be noted at the outset that Bill C-30 on air quality, despite everything that has been said about it and the fact that its abridged title is *Canada's Clean Air Act*, by no means constitutes a new law. It is rather a Bill that would bring substantial changes to the *Canadian Environmental Protection Act* (the "CEPA") and also modify the Energy Efficiency Act and the Motor Vehicle Fuel Consumption Standards Act. This newsletter discusses only the amendments to the CEPA and the Notice of Intent published on October 21st.



Nor does Bill C-30 constitute a measure aimed at giving effect to the Kyoto Protocol. The Kyoto Protocol is completely overlooked in the context of the federal strategy.

From now on, three categories of regulated substances

The CEPA is currently structured in such a way that only toxic substances listed in Schedule 1 may be the subject of regulations or preventive measures. Readers may well be aware of the fact that, in 2005, the previous government chose to add to the List of Toxic Substances in Schedule 1 six greenhouse gases ("GHGs"), namely carbon dioxide, methane, nitrous oxide, hydrofluorocarbons that have the molecular formula $C_nH_xF_{(2n+2-x)}$, perfluorocarbons (C_nF_{2n+2} and C_4F_8) and sulphur hexafluoride.

With Bill C-30, the CEPA would be aimed at regulating three categories of substances, namely the toxic substances listed in Schedule 1 (the current regime), air pollutants and greenhouse gases. As a result, greenhouse gases and certain air pollutants would no longer be listed in Schedule 1 to the CEPA but would be the subject of a separate regime. The preamble of the CEPA is even modified in such a way that the Government of Canada acknowledges that "air pollutants" and greenhouse gases "constitute a risk to the environment and its biological diversity and to human health, and are matters of national and international concern which cannot be contained within geographic boundaries".

¹ Please note that this Bill is only at the stage of first reading. It must go through two further readings before being passed. Once passed, its date of coming into force would be fixed by an order.

² <http://www.ec.gc.ca/cleanair-airpur/default.asp?lang=En&n=6EBBF05D-1>

³ *Notice of intent to develop and implement regulations and other measures to reduce air emissions*, (2006) 42 Can. Gaz. I 3351.



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Therefore, in order to establish a separate regime for these categories of substances, the CEPA would henceforth include definitions of “greenhouse gases⁴” and “air pollutants⁵”.

The CEPA would also include a new Part, namely Part 5.1 pertaining to air quality, the main purpose of which is to establish a separate legal regime for air pollutants and greenhouse gases. This new Part 5.1 is modelled after Part 5 concerning toxic substances. It confers the authority to collect information respecting air pollutants and greenhouse gases, regulate these substances and require certain classes of persons to prepare a pollution prevention plan and/or an environmental emergency plan. All these powers are already found in Part 5 of the CEPA and air pollutants and greenhouse gases were already subject to this regime because they are included in the list of toxic substances in Schedule 1 to the CEPA.

Therefore, the Bill removes air pollutants and greenhouse gases from the list of toxic substances in Schedule 1 and move them to Part 5.1. By creating this new Part 5.1, the legislators’ aim is to remove greenhouse gases and certain air pollutants from the definition of toxic substances.

⁴ These are the six previously mentioned greenhouse gases and any substance prescribed as such by regulation.

⁵ Air pollutants are described as follows: respirable particulate matter less than or equal to 10 microns, ozone, sulphur dioxide, nitrogen monoxide, nitrogen dioxide, volatile organic compounds that participate in atmospheric photochemical reactions, excluding compounds listed in new Schedule 3.1 (which lists 44 exclusions), gaseous ammonia, mercury and any other substance prescribed by regulation.

Making distinctions between undertakings: an established concept

Paragraph 3.1 of Section 330 of the CEPA is the subject of a major amendment, which establishes the concept of making distinctions between undertakings. The new wording proposed in the draft regulations reads as follows:

(3.1) A regulation made under subsection 93 (1) or 103.09 (2) or section 140, 167, 177 or 326 may be made applicable in only a part or parts of Canada, including any province, in order to protect the environment, its biological diversity or human health or to achieve national consistency in environmental quality.

(3.2) A regulation made under subsection 93 (1) or 103.09 (2) or section 167, 177 or 326 may distinguish among persons, works, undertakings or activities according to any factors that, in the opinion of the Governor in Council, will allow for the making of a regulation that provides for satisfactory protection of the environment or human life or health, including

- (a) quantities of releases;
- (b) production capacity;
- (c) technology or techniques used;
- (d) in the case of works or undertakings, the date of commencement of their operation or the date on which any major alterations are completed. (emphasis added)

With the federal government’s new way of seeing things, would an existing undertaking be allowed to emit more greenhouse gases than a new undertaking, thus minimizing the former’s incentive to reduce its emissions? The future will reveal the real intent of the Government regarding this provision.

The regulatory approach

1. The adoption of the regulatory framework

Although the amendments that it proposes to make to the CEPA may, a priori, seem minor, the fact remains that the Canadian government truly intends to regulate GHGs. The regulatory measures proposed by the Government are aimed at four economic sectors, namely transportation, consumer products, indoor air and industries. It is useful to spell out that the main industrial sectors that are to be regulated under the proposed regulations include fossil-fuel fired electricity generation, upstream oil and gas, downstream petroleum, base metal smelters, iron and steel, cement, forest products and chemicals production.

The regulatory approach proposed by the Government will be implemented in 2007 by adopting regulations governing, among other things, air pollutant emissions from motorcycles, off-road diesel engines and equipment, as well as from certain marine engines and off-road recreational vehicles. As for GHG emissions from motor vehicles, the Government intends to regulate them only beginning in 2011, at the end of the 2005 auto industry voluntary commitment, which calls for a reduction of 5.3MT of GHGs by 2010. These regulations should result in improvements in fuel consumption performance.

In 2007, the Government also intends to consult on the overall regulatory framework that will guide the development of regulations applicable to the industrial sector. The purpose of this consultation is to determine the short-term targets for air pollutant and GHG emissions to be reflected in the drafting of the proposed regulations before the spring of 2007.

Beginning in the summer of 2007 and continuing until the end of 2008, the Government intends to engage in detailed consultations on the proposed regulations that will apply to individual economic sectors, in particular as regards sectoral objectives and the timelines that industries will be required to comply with to achieve these objectives. The proposed regulations should be published by the end of 2008.

Lastly, the Government wants the first sectoral regulations to be finalized and published by the end of 2008 and all the regulations to come into force by the end of 2010.

2. Proposed elements of the regulatory approach

The Government intends to regulate all air pollutants. To achieve this, it proposes considering three elements, namely emission targets and timelines, the options relating to compliance and assessment, and compliance monitoring and reporting.

2.1 Emission Targets and Timelines

The *Notice of intent to develop and implement regulations and other measures* to reduce air emissions specifies that the Government will establish air pollutant (and not GHG) reduction targets based on fixed limits.

The reduction targets for GHG emissions will be based on emissions intensity, as was provided for in the previous government's Green Plan. It appears that the emission reduction targets will be set commencing in 2010 and that they will become more stringent in the medium term (2020-2025) and the long term (2025-2050) to finally reach an absolute reduction in GHG emissions of between 45% and 65% from 2003 levels by 2050.

2.2 Compliance Options

Among the compliance options that the Government is currently contemplating to minimize the costs to industry of complying with the proposed regulatory requirements, it is interesting to note that the Government still intends to implement a compensatory system, which would now be called an "emissions trading system". A similar system was a key feature of the previous government's Green Plan. Notably, it provided for the possibility of creating, through GHG emission reductions, exchangeable credits to allow large emitters to comply with the mandatory emissions standards that would have been imposed on them. The system proposed by the current government would work in a similar way, particularly with respect to the creation of credits.

Recognition measures would also be implemented to recognize emission reductions achieved prior to the regulations coming into force. Incentives that would allow companies to borrow against substantial future reductions resulting from investments in technology would also be provided for, though the Government does not specify the nature of such incentives. It would also be possible for industrial firms, and even governments, to invest in a technology investment fund to support the development of technologies for emissions reduction. Such a fund had been contemplated by the previous government⁶, but was never established.

However, the current government would neither purchase emissions credits nor participate in the emissions trading market - a notable difference from the previous federal plan. As a result, the *Canada Emission Reduction Incentives Agency Act*⁷, which was intended to acquire the credits created by the compensatory system proposed by the previous government, will probably be abrogated.

We further understand that the Government does not intend to finance purchases of emissions rights by Canadian businesses if the value of such rights exceeds \$15 per tonne.

2.3 Compliance assessment, monitoring and reporting

In order to avoid the sending of information and reports to both levels of government, the federal Government intends to enter into agreements with provincial governments to implement a single window service, which would ensure the monitoring of businesses and heighten their awareness of the regulatory standards that will be adopted. The Government seems to be already interested in entering into equivalency and administrative agreements with the provinces in order to avoid regulatory overlapping of emissions reporting obligations.

⁶ *Greenhouse Gas Technology Investment Fund Act*, S.C. 2005 Ch. 30, Sec. 96. However, this Act never came into force.

⁷ *Canada Emission Reduction Incentives Agency Act*, S.C. 2005, Ch. 30, Sec. 87.

Conclusion

Although the Government's regulatory measures for reducing emissions of air pollutants and GHGs have been spread out over time, Canadian businesses will nonetheless have to take into account the Conservative Government's "Green Approach" in their operations. On the one hand, even if the obligations respecting emissions reduction have not yet been unveiled, we know that, beginning in 2010, businesses operating in industrial sector areas such as fossil-fuel fired electricity generation, upstream oil and gas, downstream petroleum, base metal smelting, iron and steel, cement, forest products, and chemicals production will be required to reduce their emissions.

We note that the government preferred to establish its own GHG reduction strategy rather than follow the goals set by the Kyoto Protocol. Although the Kyoto Protocol commitment period is from 2008 to 2012, the main measures that the federal government intends to implement will become effective only in 2010.

Be that as it may, with the knowledge that it is highly likely that, beginning in 2010, an emissions trading system will be implemented and regulatory obligations respecting the reduction of GHGs and air pollutants emissions will be imposed, businesses and farmers should immediately begin planning their investments in light of this knowledge and asserting their rights in respect of air pollutant and GHG emissions reductions.

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