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THE VOLKSWAGEN DEFEAT DEVICE CASE AND ENFORCEMENT OF THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

**Report of the Standing Committee on Environment and
Sustainable Development**

Francis Scarpaleggia, Chair

**JUNE 2021
43rd PARLIAMENT, 2nd SESSION**

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NOTICE TO READER

Reports from committees presented to the House of Commons

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

has the honour to present its

SEVENTH REPORT

Pursuant to its mandate under Standing Order 108(2), the committee has studied enforcement of the Canadian Environmental Protection Act and has agreed to report the following:

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SUMMARY

Between 9 December 2020 and 22 February 2021, the Standing Committee on Environment and Sustainable Development (the Committee) conducted a study about the investigation and prosecution of Volkswagen for its use of defeat devices in approximately 130,000 diesel vehicles imported into Canada. Through this lens, the Committee also investigated the enforcement of the *Canadian Environmental Protection Act, 1999* (CEPA), which is Canada's main statute for protecting the environment and human health.

Enforcement officers from Environment and Climate Change Canada (ECCC) began investigating Volkswagen in September 2015 in relation to its use of defeat devices in certain diesel vehicles. The defeat devices—computer programs within vehicles that permit them to alter their level of emission controls in certain circumstances—allowed vehicles to meet national emission standards for nitrogen oxides under testing conditions, but to emit significantly more under regular driving conditions.

On 9 December 2019, Volkswagen was charged in Canada with 60 counts of contravening CEPA: 58 counts of unlawfully importing non-compliant vehicles and 2 counts of providing misleading information. On 22 January 2020, Volkswagen pleaded guilty to all charges and paid a fine of \$196.5 million, the highest Canadian fine for environmental infractions to date.

Witnesses spoke about the way the Volkswagen defeat device case had unfolded in Canada. They shared their views on the timing and length of the case, on challenges faced by members of the public who wished to participate, and on transparency. Witnesses had differing views on what kind of charges would have been most appropriate and how they should have been organized, and on the extent to which the consequences to Volkswagen were commensurate with the nature of the crime. Witnesses shared information about the environmental and human health impacts of the pollutants that were emitted by the vehicles with defeat devices.

The study also addressed the implications of the Volkswagen case for the way CEPA is enforced. Concerns were expressed about the accessibility of civil enforcement provisions under CEPA and whether ECCC had the resources and willingness to investigate large polluters. Some witnesses suggested that, when possible, fines and penalties should be directed to projects that mitigate the specific damage caused by environmental crimes. Some witnesses discussed how the fines could be used in Canada to address air pollution and fund zero-emission vehicle infrastructure.

The Committee heard that ECCC is shifting towards a risk-based approach to environmental enforcement, which helps to ensure that its enforcement actions focus on the most serious cases of non-compliance with regulations. The Committee also heard that a high likelihood of conviction is a more important deterrent than the size of a fine.

The study identified several priorities for strengthening the enforcement of CEPA; these include increasing transparency, ensuring ongoing sufficient resources for enforcement operations, increasing the use of administrative monetary penalties and facilitating public participation in enforcement investigations.

LIST OF RECOMMENDATIONS

As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.

Recommendation 1

The Committee recommends that Environment and Climate Change Canada ensure that investigations under CEPA are carried out in a way that is, and is seen to be, transparent. 20

Recommendation 2

The Committee recommends that Environment and Climate Change Canada, as a means of adding to the transparency of investigations under CEPA improve the mechanisms for public participation and for sharing information about investigations with the public. 20

Recommendation 3

The Committee recommends that Environment and Climate Change Canada increase the use of administrative monetary penalties to strengthen the enforcement of CEPA. 27

Recommendation 4

The Committee recommends that the Government of Canada increase the minimum penalty amount of administrative monetary penalties. 27

Recommendation 5

The Committee recommends that Environment and Climate Change Canada consider requiring, wherever possible, that funds deposited into the Environmental Damages Fund be used for projects that address the environmental harm caused by the crime for which the fine was collected. 28

Recommendation 6

The Committee recommends that the Government of Canada facilitate constructive public participation in CEPA by taking the following steps, adapted from recommendations 30 to 34 of the 2017 Committee report *Healthy Environment, Healthy Canadians, Healthy Economy: Strengthening the Canadian Environmental Protection Act, 1999*:

- amend section 22 of CEPA to lower the threshold for bringing an environmental protection action from an allegation that the offence caused ‘significant harm’ to that it caused ‘harm’ to the environment;
- amend section 22 of CEPA to better enable public participation and accountability in the implementation and enforcement of CEPA by authorizing environmental protection actions, adjudicated as civil proceedings based on the balance of probabilities, in the following circumstances:
 - when the Minister(s) has/have not undertaken a specific mandatory act or duty under CEPA; and
 - when any person or government body has violated, is violating or is reasonably likely to violate CEPA, including regulations, orders and other instruments thereunder;
- consider authorizing mediation, interim orders, and specialized cost rules (whereby costs shall not be assessed against anyone bringing such an action, unless it is determined that the action is frivolous, vexatious or otherwise brought in bad faith) in order to ensure that environmental protection actions will be accessible to the public and so that Canadians may, in limited and appropriate circumstances, play a role in ensuring the application of CEPA without personally suffering damages;

- amend CEPA to include safeguards to ensure environmental protection actions are brought responsibly, including adding a mandatory 60-day notice of intent to bring a section 22 action, non-duplication of government enforcement actions, and provision for early dismissal of actions that are frivolous, vexatious or otherwise brought in bad faith; and
- maintain the request for investigation provision in section 17 of CEPA, but amend CEPA to remove that as a prerequisite to bringing an environmental protection action. 32

Recommendation 7

The Committee recommends that Environment and Climate Change Canada augment its use of on-road testing, including by using remote sensing to increase the likelihood of catching defeat devices..... 34



THE VOLKSWAGEN DEFEAT DEVICE CASE AND ENFORCEMENT OF THE *CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999*

INTRODUCTION

Between 9 December 2020 and 22 February 2021, the House of Commons Standing Committee on Environment and Sustainable Development (the Committee) undertook a study on the enforcement of the *Canadian Environmental Protection Act, 1999* (CEPA), with a particular focus on the case of Volkswagen vehicles that used defeat devices to emit higher nitrogen oxide (NO_x) levels than were permitted under CEPA. The Committee heard from witnesses on several topics, including how CEPA currently functions and is enforced, possible improvements to the enforcement of CEPA, and how the Volkswagen defeat device case was tried in Canada.

This report provides background on CEPA and its enforcement, and on the Volkswagen defeat device case. It then presents views on how the Volkswagen case was dealt with in Canada and on how the enforcement of CEPA could be improved.

The Committee thanks the witnesses for their contributions, and is pleased to present its final report, which includes the study's findings and recommendations to the Government of Canada.

OVERVIEW OF THE *CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999* AND ITS ENFORCEMENT

This section provides an overview of the relevant sections of CEPA and outlines enforcement measures under CEPA.

The Canadian Environmental Protection Act, 1999

CEPA came into force on 31 March 2000. It aims to prevent pollution and protect the environment and human health by preventing and managing risks posed by toxic and other harmful substances. CEPA provides a suite of instruments and measures for identifying, assessing, and addressing environmental and human health risks. The Act provides the legislative basis for such activities as “the assessment and management of risks from chemicals, polymers and living organisms; programs related to air and water



pollution, hazardous waste, air pollutant and greenhouse gas emissions; ocean disposal; and environmental emergencies.”¹ The Minister of Health has responsibility under CEPA to provide advice in relation to human health aspects to the Minister of Environment.

The Management of Vehicle Emissions under the *Canadian Environmental Protection Act, 1999*

CEPA regulates emissions from on-road vehicles through the On-Road Vehicle and Engine Emission Regulations (the Regulations). CEPA also regulates emissions from engines used in off-road applications. Emissions from engines used to power large marine vessels, aircraft and trains, are regulated by Transport Canada, under separate federal legislation such as the *Railway Safety Act* and the *Canada Shipping Act, 2001*.

The Regulations establish emissions performance standards for on-road vehicles including passenger cars, light trucks, motorcycles and heavy-duty vehicles, to reduce their contribution to air pollution. The Regulations apply to vehicles, engines and equipment manufactured in Canada and imported into Canada. CEPA allows emissions regulations from other countries, including those from the United States (U.S.), to be adopted in place of domestic regulations. Beginning with model year 2011, Canada has used the same emissions standards for light-duty vehicles as the U.S. Environmental Protection Agency (U.S. EPA).²

Amendments to the Regulations came into force in 2015, in alignment with new regulations from the U.S. EPA. The amendments introduced stricter limits on air pollutant emissions from new passenger cars, light-duty trucks and certain heavy-duty vehicles. The amended Regulations are being phased in, and began with the 2017 model year. They are expected to be fully implemented by 2025. Earlier model vehicles are still regulated by the parent regulations.³ The amended Regulations were designed to reduce annual on-road vehicle NO_x emissions by 13% by 2030.⁴

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- 1 Government of Canada, [*Understanding the Canadian Environmental Protection Act*](#).
 - 2 [*Canadian Environmental Protection Act, 1999: Regulations Amending the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations*](#), SOR/2014-207, 19 September 2014 in *Canada Gazette, Part II*, 8 October 2014.
 - 3 Environment and Climate Change Canada [ECCC], [*Frequently asked questions—Regulations Amending the On-Road Vehicle and Engine Emission Regulations and Other Regulations Made Under the Canadian Environmental Protection Act, 1999*](#).
 - 4 ECCC, [*We’re taking action on air pollution*](#).

Enforcement of the *Canadian Environmental Protection Act, 1999*

A duty of the Government of Canada, as described in CEPA, is to enforce the Act in “a fair, predictable and consistent manner.”⁵ The Committee heard that, in 2020, the Enforcement Branch at Environment and Climate Change Canada (ECCC) employed about 400 staff, including 249 uniformed enforcement officers. Enforcement officers are “highly trained with backgrounds in chemistry, biology and other specializations along with significant law enforcement skills and experience.”⁶ The Enforcement Branch carries out inspections to verify compliance with a broad range of laws and regulations designed to prevent pollution, protect the environment and human health as well as the conservation of wildlife species, their habitat and biodiversity.⁷

Both compliance promotion activities and enforcement measures are used to achieve greater compliance with CEPA. Compliance promotion aims to increase awareness and understanding of risk management instruments. It also includes communication and publication of information, and consultation with parties affected by CEPA.

Enforcement measures that can be used to address alleged violations of CEPA and its regulations include:

- written warnings;
- tickets for certain designated offences;
- environmental protection compliance orders, which generally require action to be taken to stop an ongoing violation from continuing, or to prevent a violation from occurring;
- administrative monetary penalties (AMPs), which are penalty amounts calculated based on factors such as the severity of the infraction and whether it is a repeat offence;
- prosecution at the discretion of a Crown prosecutor; and

5 [*Canadian Environmental Protection Act, 1999*](#) [CEPA], S.C. 1999, s. (2)(1)(o).

6 House of Commons, Standing Committee on Environment and Sustainable Development [ENVI], [Evidence](#), 22 February 2021, 1650 (Anne-Marie Pelletier, Chief Enforcement Officer, Enforcement Branch, ECCC).

7 Ibid.



- environmental protection alternative measures, as an alternative to prosecution, to come to agreement on measures that the accused must take in order to restore compliance.

Inspections involve gathering information to verify compliance with legislation and can be done through site visits or document verification. Over the course of an inspection, enforcement officers can:

- “enter premises, open containers, examine contents and take samples;
- conduct tests and measurements;
- obtain access to information (including data stored on computers);
- stop and detain conveyances;
- search, seize and detain items related to the enforcement of the Act;
- secure inspection warrants to enter and inspect premises that are locked and/or abandoned or where entry has been refused;
- seek search warrants; and
- arrest offenders.”⁸

Investigations involve gathering evidence and information relevant to a suspected violation. Investigations are conducted when there are reasonable grounds to believe that an offence has been committed under CEPA and when a prosecution is considered the appropriate enforcement action.

Various penalties exist for offences under CEPA. Violators may have to pay for clean-up costs or forfeit profits earned as a result of an offence. The Act also includes mandatory sentencing criteria for consideration by the courts, such as the cost to remedy the damage done to the environment. The maximum penalties include, for example, fines of up to \$1 million per day for each day an offence continues, up to three years’ imprisonment, or

8 [ECCC, *Canadian Environmental Protection Act, 1999—Annual Report to Parliament for April 2018 to March 2019 2020*, p. 63.](#)

both. Finally, corporate officials may be prosecuted if they authorize, accept or participate in any violation of CEPA or its regulations.⁹

The Environmental Damages Fund

The Environmental Damages Fund (EDF) is managed by ECCC and collects the funds from fines, court orders and voluntary payments under certain federal environmental laws, including CEPA.¹⁰ For example, \$2.9 million in fines was directed to the EDF after the *Nathan E. Stewart* tug boat ran aground at Edge Reef near Bella Bella, British Columbia in 2016, resulting in the release of over 100,000 litres of diesel fuel and over 2,000 litres of lubricant, both of which are deleterious substances for fish and migratory birds.¹¹ Since June 2012, 10 federal statutes have automatically directed fines to the EDF and five federal statutes have had the discretionary ability to do so.¹²

The EDF funds projects that lead to environmental benefits, such as the restoration of the natural environment and the conservation of wildlife; initiatives leading to environmental quality improvements; research and development on environmental restoration and improvement; and education and awareness projects related to the health of the natural environment.¹³ ECCC typically distributes the funds through a competitive process, in which organizations can apply for funds to carry out projects.¹⁴ In the case of the \$2.9 million in fines directed towards the EDF after the grounding of the *Nathan E. Stewart*, the judge directed that the fines imposed be “administered for the benefit of the Heiltsuk First Nations for the purposes of restoration of the habitat affected by the environmental damage.”¹⁵

9 Government of Canada, [Guide to understanding the Canadian Environmental Protection Act: chapter 14](#).

10 Government of Canada, [Environmental Damages Fund](#).

11 ECCC, [Kirby Offshore Marine Operating LLC ordered to pay \\$2.9 million after pleading guilty to three charges of violating federal environmental legislation](#), News release, 17 July 2019. Other convictions that have led to the deposit of funds into the Environmental Damages Fund are listed in the [Environmental Offenders Registry](#).

12 ECCC, ["Volkswagen \(including the Environmental Damages Fund\)," Enforcement: appearance before the Standing Committee](#).

13 Government of Canada, [Environmental Damages Fund](#).

14 Ibid.

15 *R. v. Kirby Offshore Marine Operating LLC*, 2019 BCPC 185, para. 38.



Other projects funded by the EDF aim, for example, to restore and protect swallow habitat in Quebec; to protect the habitat of a species of endangered frog in British Columbia; and to restore peatlands in Alberta.¹⁶

Civil Enforcement of the *Canadian Environmental Protection Act, 1999*

Under sections 17 to 21 of CEPA, citizens can call on the Minister of Environment and Climate Change to investigate allegations of criminal activity. Once these allegations have been made, the Minister must investigate the claims and provide updates to the applicant, every 90 days, on the progress of the investigation and the action, if any, that the Minister has taken or proposes to take.

Under section 22, individuals who have applied for an investigation may bring an environmental protection action (EPA) to court if the Minister has failed to conduct and report on an investigation in a timely way or if the response to the investigation was unreasonable.

Under section 23, there is a time limit of two years on EPAs, beginning when the plaintiff becomes aware of the alleged infraction.

THE VOLKSWAGEN DEFEAT DEVICE CASE

This section provides an overview of the events of the Volkswagen defeat device case in Canada and in the U.S., based on publicly available information and testimony heard during the study.

Overview of Environment and Climate Change Canada's Case against Volkswagen Aktiengesellschaft

On 22 September 2015, ECCC's Enforcement Branch launched an investigation into the allegation that Volkswagen Group Canada Inc. (Volkswagen Canada) had imported and sold Volkswagen and Audi four-cylinder diesel vehicles of the model years 2009–2015 that included a defeat device that reduced the effectiveness of air pollutant control systems.¹⁷ Days earlier, the U.S. EPA had issued a Notice of Violation of the *Clean Air Act* to Volkswagen Aktiengesellschaft (Volkswagen AG), Audi Aktiengesellschaft (Audi AG) and

16 Government of Canada, [Environmental Damages Fund: project map](#). See this website for a list of other current and completed projects funded under the Environmental Damages Fund program.

17 ECCC, [Government of Canada opens an investigation into Volkswagen's alleged use of defeat devices to circumvent emissions regulations](#), Statement, 22 September 2015.

Volkswagen Group of America, Inc., for their use of defeat devices.¹⁸ These devices used computer software to keep emissions of NO_x to below permitted levels during testing, but allowed vehicles to emit an estimated 40 times more pollutants under normal driving conditions than emission standards permitted.¹⁹

On 26 April 2018, Volkswagen AG was notified that it was the subject of an ECCC investigation.²⁰

On 9 December 2019, the federal government charged Volkswagen AG, the German parent company of Volkswagen Canada, with 60 counts of contravening CEPA²¹ related to approximately 130,000 non-compliant vehicles that had been imported into Canada:²²

- 58 counts of unlawfully importing into Canada vehicles that did not conform to Canada's vehicle emission regulations thus contravening section 154 of CEPA, an offence under paragraph 272(1)(a); and
- two counts of providing misleading information to ECCC, an offence under paragraph 272(1)(k) of CEPA.²³

Volkswagen AG's first court appearance was on 13 December 2019. The hearing was delayed when a lawyer from the environmental group Ecojustice petitioned the judge for standing in the case in order to bring a motion that the court should hear a community impact statement before making a sentencing decision.²⁴

On 22 January 2020, before the Ontario Court of Justice, Volkswagen AG pleaded guilty to all 60 counts for offences under CEPA.²⁵ The counsel for the Public Prosecution Service of Canada (the Crown) and the Defence provided a "joint submission" negotiated in advance, which presented a proposed sentence for Volkswagen AG. The counsel also

18 United States [U.S.] Environmental Protection Agency [EPA], [Learn About Volkswagen Violations](#).

19 Ibid.

20 *R. v. Volkswagen AG*, 2020 ONCJ 398, para 58.

21 Government of Canada, [Volkswagen Aktiengesellschaft charged with offences under federal environmental legislation](#), News release, 9 December 2019.

22 ECCC, "[Volkswagen investigation](#)," *Backgrounders: appearance before the Standing Committee*.

23 Ibid.

24 ENVI, [Evidence](#), 9 December 2020, 1535 (David Wright, Retired Crown Prosecutor in Ontario, As an individual).

25 *R. v. Volkswagen Aktiengesellschaft*, Transcript of Sentencing before the Honourable Justice Rondinelli, 22 January 2020, p. 83.



presented community impact statements.²⁶ The presiding judge provided his decision and some of the reasons for it orally, in order that “fines could be paid as soon as possible and put to use for the public interest.”²⁷ He ordered Volkswagen AG to pay a fine of \$196.5 million, as proposed in the joint submission, payable in 30 days.

The Judge’s Reasons for the Sentencing Decision

The judge who heard the case noted in the reasons for his decision that legal precedent related to joint submissions indicates that “a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.”²⁸

In considering the joint submission on sentencing from Volkswagen AG and the Crown, the judge stated, “I cannot overlook the risk of damage to the environment and risk of harm to human health that was created by [Volkswagen] AG’s actions.”²⁹

He further stated:

The proposed fine in this case lends legitimacy to Canada’s role in fulfilling its international obligation in respect of the environment. It is difficult to see how the quantum of the proposed fine could be construed merely as “the price of doing business”—even in light of the size of this global corporate offender. It is approximately 26 times more than the largest fine ever imposed for environmental infractions in Canada to date.³⁰ In my view, the proposed fine signals a new era of substantial fines for environmental infractions and is sufficient in achieving the required deterrence and denunciation.³¹

The judge acknowledged the extensive experience of the legal counsel for both the Crown and Volkswagen AG and the substantial time they took to prepare the joint position, and stated that he felt the sentence was adequate. Finally, he agreed with the parties’ suggestion that the fines credited to the EDF be used to support national,

26 Ibid.

27 Ibid.

28 *R. v. Volkswagen AG*, para. 70.

29 Ibid., para. 72.

30 See: Government of Canada, *Bloom Lake General Partner must pay \$7.5 million for environmental infractions*, News release, 22 December 2014.

31 *R. v. Volkswagen AG*, 2020 ONCJ 398, para. 73.

provincial or territorial programs in proportion to the excess NO_x emissions caused in that province or territory, and recommended that this be the case.

Settlements in Class Action Lawsuits against Volkswagen Group Canada Inc.

In December 2016, Volkswagen Canada reached a settlement of up to \$2.1 billion, that is, up to \$20,000 per vehicle, with approximately 105,000 Canadian owners or lessees of its diesel vehicles with 2.0-litre engines. Based on this case, the company also agreed to pay a \$15 million penalty for false or misleading environmental claims³² following an action brought by Canada's Competition Bureau, which is an independent Canadian law enforcement agency that aims to protect Canadian businesses and consumers.

In April 2018, Quebec and Ontario courts approved a nationwide class action settlement agreement, valued at up to \$290.5 million, between Volkswagen Canada and Canadian owners or lessees of approximately 20,000 vehicles with 3.0-litre engines.³³ The Competition Bureau reached an agreement with Volkswagen Canada valued at \$2.5 million to address false or misleading environmental claims in this case as well.³⁴

The Defeat Device Case against Volkswagen in the United States

This section outlines the defeat device case against Volkswagen in the United States and the settlement reached there.

The U.S. EPA became aware of emissions problems with the 2009–2015 Volkswagen diesel vehicles in May 2014 after the publication of a study commissioned by the International Council on Clean Transportation (ICCT): the study found that one 2012 Jetta and one 2013 Passat had NO_x emissions 10 to 40 times above allowed levels, depending on the type of driving.³⁵ For over a year following the publication of the report, Volkswagen claimed that technical issues and unexpected testing conditions were the cause of the results. Volkswagen issued a voluntary recall in December 2014, but follow-up testing by the U.S. EPA found that there was only a limited improvement

32 ECCC, "[Volkswagen investigation](#)," *Backgrounders: appearance before the Standing Committee*.

33 *Ibid.*

34 *Ibid.*

35 Philip A. Brooks, Director of the Air Enforcement Division, Officer of Civil Enforcement (U.S. EPA), [Notice of Violation](#), 18 September 2015.



after the fix to the vehicles.³⁶ Volkswagen only admitted to having designed and installed a defeat device when it was clear that the U.S. EPA would not approve certificates of conformity for the company's 2016 model year diesel vehicles.³⁷

In September 2015, the U.S. EPA issued a Notice of Violation of the *Clean Air Act* to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc., alleging that they had installed defeat devices in 2.0-litre diesel cars of the 2009–2015 model years.³⁸ In November 2015, a second Notice of Violation of the *Clean Air Act* was issued to Volkswagen, Audi, and Porsche alleging that 3.0-litre diesel cars and SUVs were equipped with defeat devices.³⁹

In January 2016, the U.S. Department of Justice filed a complaint against various automakers for alleged violations of the *Clean Air Act*.⁴⁰ In June 2016, the U.S. Department of Justice announced that Volkswagen⁴¹ would be required to spend up to US\$14.7 billion to settle allegations of cheating on emissions tests and deceiving customers.⁴² These required expenditures stemmed from two related settlements: one with the U.S. and the State of California related to violations of the *Clean Air Act*, the California Health and Safety Code, and California's Unfair Competition Laws; and one with the U.S. Federal Trade Commission for "deceptive and unfair advertising" in the sale of nearly 500,000 2.0-litre engine "clean diesel" vehicles.⁴³

The settlements required Volkswagen to make expenditures in three categories:⁴⁴

- 1) Vehicle recall: The company had to set aside US\$10.3 billion to pay for buy-backs or fixes to the emissions systems (if approved) for all the non-

36 Ibid.

37 Ibid.

38 U.S., EPA, [Learn About Volkswagen Violations](#).

39 Ibid.

40 Ibid.

41 In the U.S. case, "Volkswagen" refers collectively to Volkswagen AG, Audi AG, Dr. Ing. h.c. F. Porsche AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, and Porsche Cars North America, Inc.

42 U.S., Department of Justice, [Volkswagen to Spend Up to \\$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles](#), News release, 28 June 2016.

43 Ibid.

44 Ibid.

compliant vehicles, with a minimum of 85% of the vehicles recalled or fixed to avoid further financial penalties.

- 2) Emissions reduction program: US\$2.7 billion was to be paid over three years to fund projects to reduce emissions of NO_x across the U.S. in areas where the vehicles had been or would be operated, to mitigate the impacts of the pollution they caused. States, Indigenous groups and others may apply to use the funds for NO_x reduction projects such as upgrading the engines of diesel vehicles.⁴⁵
- 3) Zero emissions technology investments: US\$2 billion was to be paid over ten years to “improv[e] infrastructure, access and education to support and advance zero emission vehicles.”⁴⁶

Two subsequent “partial settlements” were reached: one related to the approximately 90,000 non-compliant vehicles with 3.0-litre diesel engines, which involved a buy-back and an additional payment of US\$225 million to the US\$2.7 billion emissions reduction program; and a separate civil penalty.⁴⁷

According to the U.S. EPA, on 11 January 2017, Volkswagen also agreed to plead guilty to three criminal felony counts and to pay a US\$2.8 billion criminal penalty.⁴⁸ The company also reached several separate civil resolutions of environmental, customs, and financial claims, and agreed to pay US\$1.5 billion to cover the U.S. EPA’s claim for civil penalties against it, as well as U.S. Customs and Border Protection claims for customs fraud, among other things.

45 Ohio Environmental Protection Agency, [*\\$15 million in Volkswagen settlement grants available in 26 counties*](#), News release, 4 June 2019.

46 U.S., Department of Justice, [*Volkswagen to Spend Up to \\$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles*](#), News release, 28 June 2016.

47 U.S., EPA, [*Volkswagen Clean Air Act Civil Settlement*](#).

48 U.S., EPA, [*Learn About Volkswagen Violations*](#).



VIEWS ON THE VOLKSWAGEN CASE IN CANADA AND ITS IMPLICATIONS FOR ENFORCEMENT OF THE *CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999*

Witnesses described their disparate views on the way the Volkswagen defeat device case had taken place in Canada. Topics they focused on included timing, transparency, type of charges, and the size of the fine paid.

Transparency and Public Participation in the Case against Volkswagen in Canada

Muhannad Malas, Program Manager, Toxics, Environmental Defence Canada, mentioned that it had taken a long time for the federal government to charge and prosecute Volkswagen, despite the admission of guilt in the U.S.⁴⁹ David Wright, retired Crown Prosecutor in Ontario, specified that Volkswagen had entered an agreed statement of facts in the U.S. in 2017 as part of its plea agreement, and that it would have been possible to use this evidence as the basis for a case in Canada, hastening the progress of the case:

The *Canada Evidence Act*, section 23, allows for foreign judgments and foreign findings to be applied in Canadian courts, and it certainly would have streamlined and assisted any prosecution. The fact that it took almost another three years for the case to get brought before a court and for it to be resolved is unexplained at this point.⁵⁰

Michael Enns, Director General of the Risk Analysis Directorate at ECCC, stated, in contrast, “the admission of guilt by Volkswagen in the United States did not carry any specific weight in terms of a finding of guilt or innocence in Canada. Certainly, everyone was aware of it and considered it, but there was no rubber-stamping of U.S. decisions in Canadian courts.”⁵¹

Mr. Malas also outlined his experience with attempting to engage in the Volkswagen investigation through Section 17 of CEPA—under which a member of the public has “the right to request that the Minister investigate an alleged violation of the Act.”⁵² He explained that while the Minister did open one investigation based on his requests, the

49 ENVI, *Evidence*, 9 December 2020, 1540 (Muhannad Malas, Program Manager, Toxics, Environmental Defence Canada).

50 *Ibid.*, 1610 (David Wright).

51 ENVI, *Evidence*, 22 February 2021, 1735 (Michael Enns, Director General, Risk Analysis Directorate, ECCC).

52 Government of Canada, [Public participation in the Canadian Environmental Protection Act](#).

progress updates provided minimal information, and his requests on more critical topics were rejected on the grounds that there was an ongoing investigation. This meant that no substantive updates on these topics were provided. Overall, Mr. Malas found that the process did not provide answers about why the investigation of Volkswagen was taking so long and generally did not provide an effective mechanism for public participation.⁵³

When asked about the provisions related to public participation in enforcement of CEPA, Dr. Mark Winfield, Professor, Faculty of Environmental and Urban Change at York University, commented that

[t]he attempt to introduce the kind of citizen suit provision that exists in U.S. environmental law didn't work in CEPA 1999. It's never been used and it's very complicated from a citizen perspective. There is a request for investigation provision. Again, I'm not seeing much activity there.⁵⁴

Mr. Malas⁵⁵ and Mr. Wright also raised concerns about a lack of transparency in the way the case proceeded. To illustrate his point, Mr. Wright outlined how a federal case is normally expected to proceed:

Once a charge is laid, the accused attends court for a first appearance, normally within three to four weeks, allowing time for the Crown to prepare disclosure. On this first appearance, disclosure is then provided to the defence lawyer.

The next step is a formal meeting between the Crown and the defence, called a Crown pretrial. In serious cases, a judicial pretrial, or JPT, must be held. This is a meeting between a judge, the Crown and the defence to determine if the case can be resolved or whether the trial issues can be narrowed to save court time. Then either the case is resolved or a trial date is set. If a case is resolved, the victim will be advised before the plea proceeds. Resolution for these types of offences normally takes between three and five months.⁵⁶

In this case, however, Mr. Wright explained that the 60 charges under CEPA were laid on 9 December 2019, and the first court appearance was 13 December 2019, at which time the Crown and the Defence were already ready to present their joint submission on sentencing.

53 ENVI, *Evidence*, 9 December 2020, 1615 (Muhannad Malas).

54 ENVI, *Evidence*, 1 February 2021, 1715 (Mark Winfield, Professor, Faculty of Environmental and Urban Change, York University, as an individual).

55 ENVI, *Evidence*, 9 December 2020, 1540 (Muhannad Malas).

56 *Ibid.*, 1535 (David Wright).



Because this process lacked a judicial pre-trial on the record, Mr. Wright explained, information that would have been public in most cases is not available:

Differing from any usual prosecution, Volkswagen did not have to repeatedly attend court, publicly obtain disclosure, publicly set a Crown pretrial [or] publicly set a judicial pretrial, like every other accused in Canada has to.⁵⁷

He later added that this approach is “not what we should be doing or how justice should be seen to be done. It must be clear and transparent, and the public should have an understanding that these cases are progressing through the courts.”⁵⁸

Ben Sharpe, Senior Researcher and Canada Lead at the International Council on Clean Transportation, specified: “More transparency is needed to determine how Canada came to a settlement that has resulted in significantly lower penalties on a per-vehicle basis versus the U.S.”⁵⁹

Mr. Wright outlined what he saw as a lack of opportunity for public involvement in the case:

Even though [ECCC] had been locked in litigation with Ecojustice for years regarding Volkswagen’s unlawful conduct, it told no interested parties of the date the charges were laid or that a plea was pending December 13, 2019. No environmental or health organization had time to prepare any type of response, including a community impact statement. On January 22, 2020, contrary to the mandatory provisions of the Criminal Code, the Crown unilaterally disallowed community impact statements.⁶⁰

Recommendation 1

The Committee recommends that Environment and Climate Change Canada ensure that investigations under CEPA are carried out in a way that is, and is seen to be, transparent.

Recommendation 2

The Committee recommends that Environment and Climate Change Canada, as a means of adding to the transparency of investigations under CEPA improve the mechanisms for public participation and for sharing information about investigations with the public.

57 Ibid.

58 Ibid., 1615.

59 Ibid., 1545 (Ben Sharpe, Senior Researcher and Canada Lead, International Council on Clean Transportation [ICCT]).

60 Ibid., 1540 (David Wright).

Type of Charges Laid

Witnesses commented on the structure of the charges laid in the Volkswagen case in Canada, and offered varying views on the appropriateness of the charges.

Ms. Ariane Gagnon-Rocque, lawyer, explained that “[CEPA] contains criminal offences. While it is true that no charges have been laid under the Criminal Code [in this case], the charges are still criminal under [CEPA].”⁶¹ Mr. Wright highlighted that “it was in the Crown's discretion to lay Criminal Code conspiracy charges against Volkswagen, as was done in the U.S., not the less serious charges found in [CEPA].”⁶² He felt that charges should have been laid under the Criminal Code:

I think that conspiracy to commit an indictable offence and fraud are two criminal charges that could well have been laid. The Crown could have taken that option. I didn't really see where the loss would be. You commence with criminal charges, and then at a later date, looking at the complexities that have arisen or enormous amounts of time or disclosure problems or any of those things, you can always have fallback on the indictable offences found in [CEPA]. Use of the Criminal Code should be made when you're dealing with extremely serious environmental crimes such as the one [resulting from] Volkswagen's actions.⁶³

Witnesses generally agreed that it had been necessary to group the charges, but some expressed concern about the way charges had been “packaged.” Mr. Malas suggested that considering the import of 10,269 non-compliant Jettas as a single offence was “troubling.”⁶⁴ Mr. Sharpe added that “the fact that so many of the per-vehicle charges were bundled together seemed fairly arbitrary and wasn't commensurate with how things played out in the U.S. [and more specifically] in California. That was one of the reasons the total fine, as well as the per-vehicle fine, was so much less in the Canadian context.”⁶⁵

Mr. Wright explained that the “number of charges is completely discretionary. They chose 60 charges. They could have chosen 100 charges. ... They could have chosen

61 ENVI, *Evidence*, 1 February 2021, 1655 (Ariane Gagnon-Rocque, Lawyer, as an individual).

62 ENVI, *Evidence*, 9 December 2020, 1535 (David Wright).

63 *Ibid.*, 1615.

64 *Ibid.*, 1630 (Muhannad Malas).

65 *Ibid.*, 1630 (Ben Sharpe).



128,000 charges if they wanted to, but that's completely unreasonable.”⁶⁶
Ms. Gagnon-Rocque echoed this view, stating:

... I think it has to do with prosecutorial discretion. It's difficult to interfere with that exercise of discretion. That being said, should the prosecution have laid a hundred thousand charges? No, absolutely not. That would have been unmanageable. The only choice was to lump them together in some way.⁶⁷

Size of the Penalty Volkswagen Paid

The financial consequences to Volkswagen arising from their use of defeat devices in vehicles imported into Canada were not limited to the fines imposed on them by the court. During the sentencing hearing on 22 January, the Crown prosecutor pointed out that “the \$196.5 million fine is on top of the class-action settlement by Volkswagen AG that compensated and provided benefits and buy-back options to Canadian consumers of the non-compliant vehicles up to a maximum ... of nearly \$2.4 billion.”⁶⁸ He also pointed out the \$17.5 million in fines the company had paid under the *Competition Act*.⁶⁹

Most of the witnesses commented on the suitability of the fine that Volkswagen was required to pay as a consequence of its guilty plea. Most of them felt it had been insufficient. Ken Bondy, National Representative, Health, Safety and Environment at Unifor, described the fine as “paltry,”⁷⁰ expressing surprise that the government had been “so easy” on Volkswagen although it appeared there weren't even any Canadian jobs to be protected.⁷¹ Mr. Sharpe pointed out that the fine was significantly lower per vehicle than the fines in the U.S.,⁷² and Mr. Wright suggested the Crown Prosecutor should be asked why the fine was so low.⁷³

Dr. Winfield also acknowledged the possibility that the penalty had been low: “The scale of the penalty does beg questions: Did we let them off the hook a little easier given the

66 Ibid., 1655 (David Wright).

67 ENVI, *Evidence*, 1 February 2021, 1640 (Ariane Gagnon-Rocque).

68 *R. v. Volkswagen Aktiengesellschaft*, Transcript of the court proceedings on 22 January 2020: Sentencing, 22 January 2020, Toronto, Ontario, 19-12000724-00.

69 Ibid.

70 ENVI, *Evidence*, 1 February 2021, 1610 (Ken Bondy, National Representative, Health, Safety and Environment, Unifor).

71 Ibid., 1630.

72 ENVI, *Evidence*, 9 December 2020, 1545 (Ben Sharpe).

73 Ibid., 1625 (David Wright).

scale of this? Part of this, too, is that we haven't seen anything on this scale in our experience under CEPA so far.”⁷⁴

On the other hand, Ms. Gagnon-Rocque stated that the fine was sufficient. She suggested that the penalties were “likely appropriate in the circumstances, despite the huge discrepancy between the penalties in Canada and the United States,” adding, “[w]e don't have the same system, and it's difficult to compare and, in fact, I don't think we should.”⁷⁵ She also stated:

I'll honestly tell you that I don't see any problem with the Volkswagen case. As I mentioned, if we had wanted to punish Volkswagen much more severely, we could have. We could have laid more charges and asked for the maximum fines to be imposed. The prosecution didn't do that. I think it was a choice.

As you may know, the prosecution has discretion. I, for one, believe that this is one of the powers that shouldn't be taken away. It's clear that the prosecutor, the Crown attorney who prosecuted Volkswagen, validated the agreement he had reached, probably with his superiors. In my view, that decision has been made, and it's in keeping with a culture that doesn't apply the same rates as in the United States. I have to say I'm pleased about that. We have a very different system from the U.S. system, and we shouldn't try to copy it.⁷⁶

Dr. Winfield commended the process of environmental enforcement in the U.S. because there is a general expectation of enforcement.⁷⁷ “[T]he United States is very different,” he said, adding, “[t]he U.S. EPA is much more aggressive around enforcement, not just on the criminal side but on the civil side as well, and you see that in the Volkswagen case. That gets people's attention.”⁷⁸

Ms. Gagnon-Rocque asserted that the size of a fine was much less significant as a deterrent than the certainty of prosecution:

Personally, a multi-billion dollar fine doesn't impress me much. I'd be much more impressed by the certainty that criminal proceedings will be taken against offenders. It would be a more positive change than increasing the fines.⁷⁹

74 ENVI, *Evidence*, 1 February 2021, 1620 (Mark Winfield).

75 *Ibid.*, 1655 (Ariane Gagnon-Rocque).

76 *Ibid.*, 1640.

77 *Ibid.*, 1645 (Mark Winfield).

78 *Ibid.*

79 *Ibid.*, 1700 (Ariane Gagnon-Rocque).



Use of Fines to Support Electric Vehicle Infrastructure

Mr. Bondy suggested that the fines to Volkswagen could have been used to fill gaps in the expansion of zero-emission vehicle (ZEV) use in Canada, for example by being applied to the development of infrastructure—which could help manufacturers in Canada, such as General Motors, that have committed to producing all electric cars by 2035.⁸⁰

Mr. Sharpe noted that some of the penalties paid in the U.S. by Volkswagen had been dedicated to improving infrastructure for ZEVs, among other things, and suggested that such an approach might have been a win-win in Canada.⁸¹ From the perspective of the ICCT, he said, “mobilizing these penalty funds to move towards electric drive is a best-case scenario,” as a lot of policy support and long-term funding will be needed to support this shift⁸². He commented that Canada is falling behind some of the other auto-producing countries in the transition to electric vehicles and “needs to be doing all it can to make up some lost ground in terms of auto-producing.”⁸³

Without disagreeing about the possible uses of the fines, Ms. Gagnon-Rocque clarified that she did not think law or regulations should specify how fines should be spent, but rather that such decisions should be left to the discretion of a judge to decide.⁸⁴

Environmental and Human Health Impacts of the Pollutants Emitted by Non-Compliant Vehicles

The ICCT explains that the defeat devices used by Volkswagen specifically affected the diesel vehicles’ emissions of NO_x.⁸⁵ NO_x are produced by all internal combustion engines and include nitric oxide (NO) and nitrogen dioxide (NO₂). These chemicals have a number of environmental and human health consequences.

NO_x are not greenhouse gases, so NO_x emissions have little direct effect on climate change. However, NO_x react with other atmospheric chemicals, causing secondary fine particulate matter, as well as ground-level ozone, and causing smog. Ozone pollution can

80 Ibid., 1650 (Ken Bondy).

81 ENVI, [Evidence](#), 9 December 2020, 1610 (Ben Sharpe).

82 Ibid.

83 Ibid.

84 ENVI, [Evidence](#), 1 February 2021, 1655 (Ariane Gagnon-Rocque).

85 ICCT, [Vehicle NO_x emissions: The basics](#).

decrease the biomass and yield of crops and forests, and fine particulate matter can interfere with solar irradiation, decreasing plant photosynthesis, and reducing the amount of CO₂ plants can sequester.⁸⁶ While ozone in the ozone layer is technically a greenhouse gas, it is primarily beneficial, because it forms a layer that blocks ultraviolet light from reaching the earth's surface. At lower elevations of the atmosphere, however, ozone is harmful to human health, as it can cause or exacerbate chronic lung diseases.⁸⁷

The ICCT notes that researchers attributed 254,000 premature deaths to ozone pollution worldwide in 2015.⁸⁸ The organization adds that exposure to fine particulate matter can “cause stroke, ischemic heart disease, chronic obstructive pulmonary disease, lung cancer, and lower respiratory infections,” and it caused 4.2 million premature deaths worldwide in 2015. Long-term exposure to NO₂ is linked to the development of asthma and susceptibility to respiratory illnesses, while short-term exposure can exacerbate such conditions and lead to respiratory symptoms that require hospitalization.⁸⁹

Mr. Malas stated that the 128,000 Volkswagen vehicles equipped with defeat devices in Canada released emissions equivalent to those of more than four million compliant vehicles. Given that up to 15,000 Canadians die because of air pollution every year, he noted that “putting the pieces together can really help to paint a picture of how harmful those excess emissions were.”⁹⁰ According to Mr. Sharpe, it is estimated the non-compliant Volkswagen vehicles’ excess emissions led to thousands of premature deaths in Europe, where diesel vehicles are more popular than in Canada.⁹¹

Implications of the Volkswagen Case for Enforcement of the Canadian Environmental Protection Act, 1999

In considering the Volkswagen defeat device case, witnesses pointed out implications related to CEPA and its enforcement in several areas.

86 ICCT, “[Vehicle NO_x emissions: The basics](#),” *How NO_x happens, and why you should care*.

87 U. S. Energy Administration Information, “[Is Ozone a greenhouse gas?](#)” *Frequently Asked Questions*.

88 ICCT, “[Vehicle NO_x emissions: The basics](#),” *How NO_x happens, and why you should care*.

89 Government of Canada, [Common air pollutants: nitrogen oxides](#).

90 ENVI, [Evidence](#), 9 December 2020, 1645 (Muhannad Malas).

91 *Ibid.*, 1640 (Ben Sharpe).



Witnesses noted that in some cases the changes they would recommend were related to enforcement policies, and did not necessarily require any change to CEPA itself.⁹²

Ms. Gagnon-Rocque described the Volkswagen case as an exceptional situation, noting that it is difficult to find a precedent to compare to.⁹³ She urged the committee not to “overhaul a system on the basis of a single exceptional case,” commenting that while CEPA enforcement must be prepared to deal with such cases, it is most often used for more average cases.⁹⁴ Dr. Winfield believed that “the tool box in relation to [CEPA] enforcement” was quite good but that the issue was instead with the administration of the Act and the enforcement policies of ECCC.⁹⁵

Certainty of Conviction and Size of Fines

Witnesses told the Committee that strong enforcement of CEPA is important.⁹⁶

Mr. Malas stated that “[e]nvironmental laws are only as effective as their enforcement” and that polluters must be held accountable.⁹⁷

Some witnesses agreed that a high likelihood of getting caught was a stronger deterrent than high fines or severe sentences. Ben Sharpe argued that

compliance and enforcement should be the bedrock of any regulatory program, whether it's vehicles, dry cleaning ... or water quality. Across the board, it's not enough to have that strong regulation in place. Governments have to be verifying that manufacturers and companies are doing what we expect them to do.⁹⁸

Witnesses noted that the certainty of being prosecuted may not be very high in Canada: ECCC “initiates very few investigations and lays few criminal charges under CEPA”⁹⁹ and even in the milder form of ticketing is “exceedingly rare,”¹⁰⁰ while warnings are

92 ENVI, *Evidence*, 1 February 2021, 1605 (Ariane Gagnon-Rocque); *Ibid.*, 1610 (Ken Bondy); and *Ibid.*, 1710 (Mark Winfield).

93 *Ibid.*, 1655 (Ariane Gagnon-Rocque).

94 *Ibid.*

95 *Ibid.*, 1710 (Mark Winfield).

96 *Ibid.*, 1645.

97 ENVI, *Evidence*, 9 December 2020, 1540 (Muhannad Malas).

98 *Ibid.*, 1625 (Ben Sharpe).

99 ENVI, *Evidence*, 1 February 2021, 1605 (Ariane Gagnon-Rocque).

100 *Ibid.*, 1635 (Mark Winfield).

more common.¹⁰¹ Ms. Gagnon-Rocque pointed out that during the 2016–17 fiscal year, 2,721 warnings were issued while 26 criminal investigations were initiated.¹⁰² This emphasis on warnings appears to follow ECCC’s compliance and enforcement policy, which states that the desired result of enforcement actions is compliance with CEPA as quickly as possible without further violations, and that this can be accomplished with warnings or other actions that are not prosecutions.¹⁰³

Ms. Gagnon-Rocque stated that “if criminal prosecutions were seen as a realistic and credible threat, corporations and individuals would likely take more proactive steps to comply with their environmental obligations.”¹⁰⁴ She suggested that ECCC make fuller use of AMPs, which she viewed as “an excellent compromise between the simplicity of a warning and quickness of a warning and the punitive nature of criminal prosecution.”¹⁰⁵ Ms. Gagnon-Rocque added that the minimum penalty amount of AMPs should be slightly increased.¹⁰⁶ Donald Walker, Director General of Environmental Enforcement at ECCC, commented that “with the implementation of the administrative monetary penalty system, there has been a reduction in other types of enforcement activities. It’s a more straightforward means to address non-compliance in a reasonable time frame.”¹⁰⁷

Recommendation 3

The Committee recommends that Environment and Climate Change Canada increase the use of administrative monetary penalties to strengthen the enforcement of CEPA.

Recommendation 4

The Committee recommends that the Government of Canada increase the minimum penalty amount of administrative monetary penalties.

101 Ibid.; and Ibid., 1700 (Ariane Gagnon-Rocque).

102 ENVI, [Evidence](#), 1 February 2021, 1625 (Ariane Gagnon-Rocque).

103 See: Government of Canada, [Canadian Environmental Protection Act: compliance and enforcement policy, Chapter 7](#).

104 ENVI, [Evidence](#), 1 February 2021, 1605 (Ariane Gagnon-Rocque).

105 Ibid.

106 Ibid., 1700.

107 ENVI, [Evidence](#), 22 February 2021, 1730 (Donald Walker, Director General, Environmental Enforcement, ECCC).



The Environmental Damages Fund

Anne-Marie Pelletier, Chief Enforcement Officer of the Enforcement Branch at ECCC, informed the Committee that the fines paid by Volkswagen into the EDF would fund projects related to air quality and climate change impacts.¹⁰⁸ Volkswagen's \$196.5 million fine represents most of the funding for the Climate Action and Awareness Fund, which will invest \$206 million over five years to support projects that help to reduce greenhouse gas emissions in Canada.¹⁰⁹

Witnesses discussed what kinds of projects the money deposited into the EDF should fund. Ms. Gagnon-Rocque suggested funds should be directed towards repairing the environmental damages caused by an offence as remediation, or towards projects that are related to the offence if remediation is not possible.¹¹⁰ Mr. Sharpe and Mr. Malas agreed that the EDF could be improved by ensuring that fines collected are going towards projects related to the damage caused by an offence.¹¹¹

Dr. Winfield cautioned that while it was possible to "tie [a penalty] tightly to the specific damage that occurred," consideration should also be given to the benefit of giving the Crown or the judge discretion as to where the resources should go.¹¹²

Recommendation 5

The Committee recommends that Environment and Climate Change Canada consider requiring, wherever possible, that funds deposited into the Environmental Damages Fund be used for projects that address the environmental harm caused by the crime for which the fine was collected.

A Risk-Based Approach to Enforcement

Witnesses indicated that audits completed by the Commissioner of the Environment and Sustainable Development (CESD) related to the enforcement of CEPA were helpful in

108 Ibid., 1810 (Anne-Marie Pelletier).

109 Government of Canada, "[Environmental Damages Fund and the Volkswagen AG Fine](#)," *Environmental Protection and Enforcement: appearance before the Standing Committee (November 4, 2020)*.

110 ENVI, [Evidence](#), 1 February 2021, 1630 (Ariane Gagnon-Rocque).

111 ENVI, [Evidence](#), 9 December 2020, 1610 (Ben Sharpe); and Ibid., 1705 (Muhannad Malas).

112 ENVI, [Evidence](#), 1 February 2021, 1620 (Mark Winfield).

identifying opportunities for improvement in the enforcement of the Act.¹¹³ Mr. Malas underscored certain audit findings from 2009, 2011 and 2018, including the lack of risk prioritization when ECCC was allocating resources, and issues with resources and funding.¹¹⁴ Mr. Malas and Dr. Winfield both highlighted the finding in the 2018 audit that the department appeared to be targeting dry cleaners, which are mostly small and medium-sized businesses, for enforcement action.¹¹⁵ Mr. Malas stated that 70% of all convictions from 2014 to 2017 were dry cleaners.¹¹⁶ In contrast, there were relatively few enforcement actions directed at larger, industrial facilities, which may have more resources to defend themselves in court.¹¹⁷ Mr. Enns stated that, because of recent CESD audit recommendations on the need for strong, risk-based prioritization, ECCC had been implementing a risk-based approach.¹¹⁸ A risk-based approach involves considering the likelihood of an offence occurring as well as the potential impact or damage of the offense if it occurs, in order to target the most serious forms of environmental non-compliance. To assess impact, the Enforcement Branch considers, for example, the threat posed by a chemical throughout its lifecycle, including its interactions with other chemicals; the threat posed to the environment; and the potential for bioaccumulation. Elements considered to assess likelihood include the likelihood of a business's non-compliance and its prior criminal history.¹¹⁹ The move towards a risk-based process started approximately two years ago and inspections have been implemented on the basis of the risk-based analysis.¹²⁰ Mr. Enns said that "[l]ooking at the chemicals and the pollutants and their relationship with one another and targeting businesses on that basis is not a simple matter, but we do it, and I believe we do it as well as anybody else in the world does."¹²¹

A policy on reinspection has also been developed following CESD audit recommendations. A percentage of inspections every year is reserved for reinspection to verify compliance.¹²²

113 ENVI, [Evidence](#), 9 December 2020, 1555 (Muhannad Malas); ENVI, [Evidence](#), 1 February 2021, 1605 (Mark Winfield); and ENVI, [Evidence](#), 22 February 2021, 1705 (Michael Enns).

114 ENVI, [Evidence](#), 9 December 2020, 1555 (Muhannad Malas).

115 Ibid., 1700 (Muhannad Malas); and ENVI, [Evidence](#), 1 February 2021, 1615 (Mark Winfield).

116 ENVI, [Evidence](#), 9 December 2020, 1700 (Muhannad Malas).

117 ENVI, [Evidence](#), 1 February 2021, 1615 (Mark Winfield).

118 ENVI, [Evidence](#), 22 February 2021, 1705 (Michael Enns).

119 Ibid., 1815.

120 Ibid., 1705.

121 Ibid., 1810.

122 Ibid.



Dr. Winfield emphasized that, although a number of regulations exist under CEPA, ECCC’s enforcement activities seemed “relatively focused on a fairly short list of those regulations,” while there was very little enforcement activity on other regulations.¹²³

Dr. Winfield also commented that there was a lack of “meaningful information” available about the enforcement activities related to regulations that are under administrative or equivalency agreements with provinces. He noted that pulp and paper mills were an area in which there have historically been agreements but also a lack of enforcement. Newer administrative and equivalency agreements for coal-fired electricity and methane from industrial sources may be a cause for concern, he pointed out.¹²⁴

Resources for Enforcement

Some witnesses expressed concerns about a lack of resources and funding available for the enforcement of CEPA.¹²⁵ The number of inspections and investigations has decreased in recent years. ECCC completed 4,915 inspections in fiscal year 2014-15 and fewer each subsequent year, reaching a low of 1,608 inspections in fiscal year 2018-2019. The number of investigations begun in each fiscal year also decreased over that time period, from 60 to 16.¹²⁶ Mr. Malas wondered if ECCC had sufficient enforcement resources to be “capable and willing to take on large polluters,” with Volkswagen as a prime example.¹²⁷ Mr. Enns stated that, in the case of the Volkswagen defeat device investigation, ECCC had “all the necessary resources to complete a thorough and comprehensive investigation and to subsequently make a recommendation to the Public Prosecution Service of Canada.”¹²⁸

Ms. Pelletier assured the Committee that a drop in the number of investigations was not necessarily representative of the magnitude of the work being accomplished.¹²⁹

123 ENVI, *Evidence*, 1 February 2021, 1605 (Mark Winfield).

124 Ibid., 1615.

125 ENVI, *Evidence*, 9 December 2020, 1555 (Muhannad Malas); and ENVI, *Evidence*, 1 February 2021, 1645 (Ariane Gagnon-Rocque).

126 ECCC, *CEPA annual report for the period of April 2018 to March 2019*; ECCC, *CEPA annual report for the period of April 2017 to March 2018*; ECCC, *CEPA annual report for the period of April 2016 to March 2017*; ECCC, *CEPA annual report for the period of April 2015 to March 2016*; and ECCC, *CEPA annual report for the period of April 2014 to March 2015*.

127 ENVI, *Evidence*, 9 December 2020, 1700 (Muhannad Malas).

128 ENVI, *Evidence*, 22 February 2021, 1700 (Michael Enns).

129 Ibid., 1710 (Anne-Marie Pelletier).

A more complex investigation—such as one happening in a rural or remote area or involving the collection of samples and evidence or the analysis of the evidence—can take a long time.¹³⁰

Donald Walker stated that the responsibility of the Enforcement Branch at ECCC was to ensure the “most effective use of the [available] resources,” and that this explained the move to the risk-based approach to enforcement. The department evaluates both the impact and likelihood of non-compliance when determining how to use available human resources.¹³¹

In the last few years, the Enforcement Branch has made investments in recruitment and training to make more effective use of resources.¹³² Recruitment efforts were made to hire people with “backgrounds that are diverse and scientific in nature” and who had detailed knowledge of policing techniques. The training focuses on the “detailed requirements of the CEPA regulations, the nature and extent of non-compliance, and all of the possible tools to bring back conformity.”¹³³ Ms. Pelletier explained that ECCC is developing a plan for priorities for investigations. While the number of investigations may not increase through the implementation of the plan, they will be better targeted towards situations that correspond to a high level of risk, situations which are often “much more complex”.¹³⁴

Civil Enforcement and Public Participation

Witnesses expressed concern that the civil enforcement and public participation elements of CEPA were not effective. Mr. Malas described his own request to the Minister of the Environment and Climate Change under Section 17 of CEPA to open an investigation into Volkswagen’s violations after nearly two years without public progress on the case. The Minister only opened one of the four requested investigations. In the following three years, Mr. Malas received 12 progress updates on the investigation, which he felt offered little to no meaningful information about the government’s progress:

[T]here was no information in those update reports about the status of the investigation. The report often just told me that officers were collecting evidence and, in

130 Ibid., 1710 (Donald Walker).

131 Ibid.

132 Ibid., 1710 (Michael Enns).

133 Ibid.

134 Ibid., 1710 (Anne-Marie Pelletier).



many cases, the report would provide a timeline for when the investigation was predicted to be completed. In those 12 instances, whenever a time was provided, in most cases timelines were not met.¹³⁵

Mr. Malas described it as a “very puzzling process” that went “against the spirit of CEPA in terms of providing a mechanism for people to be able to take part in the enforcement.”¹³⁶

If an individual citizen believes that an investigation was poorly conducted or the response to the investigation was unreasonable, that person can bring an environmental protection action (EPA) against the person or company that committed the offense. However, Mr. Malas described the EPA process as “overly onerous and ridden with barriers that are effectively insurmountable,” as the individual must demonstrate that the violation causes significant harm to the environment, and risk of paying substantial costs if the EPA is unsuccessful.¹³⁷ As a result, he said, no EPAs have started or been completed.¹³⁸

Mr. Malas urged Parliament to adopt the Committee’s 2017 recommendations to improve public participation in the enforcement of CEPA.

Dr. Winfield suggested that the public may be using the CESD environmental petitions process¹³⁹ instead of the “request for investigation provision” under CEPA, which has never been used and is very complicated from a citizen perspective, because the environmental petitions process compels a response from the relevant minister.¹⁴⁰

Recommendation 6

The Committee recommends that the Government of Canada facilitate constructive public participation in CEPA by taking the following steps, adapted from recommendations 30 to 34 of the 2017 Committee report *Healthy Environment, Healthy*

135 ENVI, *Evidence*, 9 December 2020, 1615 (Muhannad Malas).

136 Ibid.

137 ENVI, *Evidence*, 9 December 2020, 1540 (Muhannad Malas).

138 Ibid.

139 Any Canadian resident may send a petition to the Commissioner of the Environment and Sustainable Development [CESD] if it concerns environmental matters related to sustainable development that fall under the mandate of the federal government. The CESD then forwards the petition to the relevant minister, who must respond to the petition within 120 days.

140 ENVI, *Evidence*, 1 February 2021, 1715 (Mark Winfield).

Canadians, Healthy Economy: Strengthening the Canadian Environmental Protection Act, 1999:

- amend section 22 of CEPA to lower the threshold for bringing an environmental protection action from an allegation that the offence caused ‘significant harm’ to that it caused ‘harm’ to the environment;
- amend section 22 of CEPA to better enable public participation and accountability in the implementation and enforcement of CEPA by authorizing environmental protection actions, adjudicated as civil proceedings based on the balance of probabilities, in the following circumstances:
 - when the Minister(s) has/have not undertaken a specific mandatory act or duty under CEPA; and
 - when any person or government body has violated, is violating or is reasonably likely to violate CEPA, including regulations, orders and other instruments thereunder;
- consider authorizing mediation, interim orders, and specialized cost rules (whereby costs shall not be assessed against anyone bringing such an action, unless it is determined that the action is frivolous, vexatious or otherwise brought in bad faith) in order to ensure that environmental protection actions will be accessible to the public and so that Canadians may, in limited and appropriate circumstances, play a role in ensuring the application of CEPA without personally suffering damages;
- amend CEPA to include safeguards to ensure environmental protection actions are brought responsibly, including adding a mandatory 60-day notice of intent to bring a section 22 action, non-duplication of government enforcement actions, and provision for early dismissal of actions that are frivolous, vexatious or otherwise brought in bad faith; and
- maintain the request for investigation provision in section 17 of CEPA, but amend CEPA to remove that as a prerequisite to bringing an environmental protection action.



Other Suggestions for Improvements to the *Canadian Environmental Protection Act, 1999* and its Enforcement

According to Mr. Sharpe, “[a] strong vehicle emissions regulatory program requires that vehicles [be] tested under a wide range of operating conditions and that there [be] specific protections against cheating,” including against software algorithm loopholes.¹⁴¹ He also indicated that remote sensing was a way to collect real-world emissions data and link it to compliance and enforcement activities.¹⁴² Stéphane Couroux, Director of the Transportation Division, Environmental Protection Branch, ECCC, explained that the department selects vehicles to test every year to ensure the broadest scope and to focus on the vehicles that have a higher likelihood of exceeding emissions regulations. The program has begun to conduct on-road testing using portable emission measurement devices. If there is evidence that vehicles are non-compliant with regulations, the information is provided to ECCC’s Enforcement Branch.¹⁴³

Recommendation 7

The Committee recommends that Environment and Climate Change Canada augment its use of on-road testing, including by using remote sensing to increase the likelihood of catching defeat devices.

Dr. Winfield suggested that it was important to keep making CEPA regulations more stringent as technologies and practices improve. He noted that something like this takes place in Germany and California, but Canada does not seem to update its regulations very often.¹⁴⁴

Many witnesses mentioned the Committee’s 2017 report on CEPA reform as a useful source of recommendations and ways to improve CEPA and its enforcement.¹⁴⁵ In a joint brief submitted to the Committee, the Breast Cancer Action Quebec and the Women’s Healthy Environments Network emphasized that the 2017 recommendations “should

141 ENVI, *Evidence*, 9 December 2020, 1545 (Ben Sharpe).

142 *Ibid.*, 1600.

143 ENVI, *Evidence*, 22 February 2021, 1720 (Stéphane Couroux, Director, Transportation Division, Energy and Transportation, ECCC).

144 ENVI, *Evidence*, 1 February 2021, 1645 (Mark Winfield).

145 In June 2017, ENVI produced the report “[Healthy environment, healthy Canadians, healthy economy: Strengthening the Canadian Environmental Protection Act, 1999](#),” after completing a study of CEPA. This report contained 87 recommendations.

be the floor, not the ceiling, of our ambitions on CEPA.”¹⁴⁶ Mr. Malas also strongly supported the recommendations of the 2017 report and saw them as a “blueprint for how CEPA could be modernized and brought to the 21st century, because we still have legislation from 1999.”¹⁴⁷ He identified three priority areas addressed by recommendations in the 2017 report: the protection of vulnerable populations and the recognition of a right to a healthy environment; the need to address risk assessment of chemicals in a holistic way; and ensuring public participation in decision-making and enforcement.¹⁴⁸

CONCLUSION

The Committee examined the specific case of the investigation and prosecution of Volkswagen for its use of defeat devices to circumvent emissions regulations. Through this lens, the Committee also investigated the enforcement of CEPA, Canada's main law for protecting the environment and human health.

ECCC is already shifting towards a risk-based approach to environmental enforcement. Other priorities for strengthening the enforcement of CEPA that were identified in the study include increasing transparency, making public participation in enforcement investigations more feasible, directing fines appropriately, and ensuring sufficient resources for enforcement operations.

146 Cassie Barker and Anna Yang, Women’s Healthy Environments Network; Jennifer Beeman, Breast Cancer Action Quebec, *ENVI Brief: CEPA Enforcement*, Brief submitted to ENVI, February 2021.

147 ENVI, *Evidence*, 9 December 2020, 1605 (Muhannad Malas).

148 Ibid.

APPENDIX A LIST OF WITNESSES

The following table lists the witnesses who appeared before the committee at its meetings related to this report. Transcripts of all public meetings related to this report are available on the committee’s [webpage for this study](#).

Organizations and Individuals	Date	Meeting
As an individual David Wright, Retired Crown Prosecutor in Ontario	2020/12/09	10
Environmental Defence Canada Muhannad Malas, Program Manager Toxics	2020/12/09	10
International Council on Clean Transportation Ben Sharpe, Senior Researcher and Canada Lead	2020/12/09	10
As an individual Ms. Ariane Gagnon-Rocque, Lawyer	2021/02/01	11
Dr. Mark Winfield, Professor Faculty of Environmental and Urban Change, York University	2021/02/01	11
Unifor Ken Bondy, National Representative Health, Safety and Environment	2021/02/01	11

Organizations and Individuals	Date	Meeting
Department of the Environment Stéphane Couroux, Director, Transportation Division Environmental Protection Branch Michael Enns, Director General Risk Analysis Directorate Sheldon Jordan, Director General Wildlife Enforcement Anne-Marie Pelletier, Chief Enforcement Officer Enforcement Branch Hannah Rogers, Executive Director, Environmental Enforcement Enforcement Branch Donald Walker, Director General Environmental Enforcement	2021/02/22	13

APPENDIX B LIST OF BRIEFS

The following is an alphabetical list of organizations and individuals who submitted briefs to the committee related to this report. For more information, please consult the committee's [webpage for this study](#).

Breast Cancer Action Quebec

Women's Healthy Environments Network

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 10, 11, 13, 20, 30 and 40](#)) is tabled.

Respectfully submitted,

Francis Scarpaleggia
Chair

