# Identifying Risk Management Tools for Toxic Substances Under CEPA 1999

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Additional information on the *Canadian Environmental Protection Act, 1999* is available on Environment Canada's Green Lane on the Internet at:

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The *Canadian Environmental Protection Act, 1999* (CEPA 1999) is "an Act respecting pollution prevention and the protection of the environment and human health in order to contribute to sustainable development." It provides the federal government with new instruments to protect the environment and human health, establishes strict timelines for managing substances found to be toxic under the Act, and requires the virtual elimination of releases to the environment of those declared toxic substances that are bioaccumulative, persistent, and anthropogenic.

New provisions under CEPA 1999 require Environment Canada, under certain conditions, to develop a "regulation or preventive or control instrument" using the authorities under CEPA 1999 within prescribed timelines for a substance that is found to be "toxic" under the Act. These new provisions have raised a number of questions concerning the definition of a "CEPA instrument" and the circumstances under which the prescribed timelines apply. The purpose of this fact sheet is to explain these new requirements, describe the process for selecting the most appropriate tools to manage toxic substances, and explain how the CEPA 1999 requirements to establish a "regulation or instrument" fit into that process.

## What is "CEPA-toxic"?

Section 64 of CEPA 1999 defines a substance as "toxic" if it is entering or may enter the environment in a quantity or concentration or under conditions that:

- have or may have an immediate or longterm harmful effect on the environment or its biological diversity;
- constitute or may constitute a danger to the environment on which life depends; or
- constitute or may constitute a danger in Canada to human life or health.

For a substance that is found to be "toxic" under section 64 of CEPA 1999—through a Priority Substances List assessment of the substance, a screening assessment, or the review of a decision by another jurisdiction—section 91 of CEPA 1999 requires Environment Canada to publish a proposed regulation or instrument using the authorities under CEPA 1999 to establish preventive or control actions for managing the substance. Under section 91, the proposed regulation or instrument must be published in the *Canada Gazette* within two years of the Ministerial recommendation that the substance be added to the List of Toxic Substances in Schedule 1 of CEPA 1999. Section 92 of CEPA 1999 requires the regulation or instrument to be finalized and published in the *Canada Gazette* within 18 months of the publication of the proposed regulation or instrument. The regulations and instruments are also published on the CEPA Environmental Registry—a comprehensive, online source of public information relating to activities under the Act (www.ec.gc.ca/CEPARegistry).

Interested parties have a period of 60 days within which to provide comments on the proposed regulation or instrument or to file a notice of objection requesting that a Board of Review be established. Depending on the nature of the comments received, the Minister of the Environment then determines if further discussions or a Board of Review is warranted.

Substances may also be added to the List of Toxic Substances in Schedule 1 of CEPA 1999 through section 90(1) of the Act without having gone through a Priority Substances List assessment, a screening assessment, or the review of another jurisdiction's decision if, on the recommendation of the Ministers of Environment and Health, the Governor in Council is satisfied that a substance is toxic. In this listing process, sections 91 and 92, including the "time clock" provisions, do not apply. However, all of the risk management processes, tools, and instruments available to the government for toxic substances listed through the former mechanisms are also available when substances are listed in this manner.

## Selecting Instruments and Other Risk Management Tools

CEPA 1999 is the most important legislation available to the federal government for managing toxic substances. However, risk management tools other than those under CEPA 1999 are also available to the federal government. Further, other governments have a role to play in the management of toxic substances. Environment Canada is committed to considering the range of tools and to recognizing jurisdictional roles when it is developing strategies to manage substances that are toxic under CEPA 1999. The CEPA National Advisory Committee, consisting of representatives from provincial, territorial, and aboriginal governments, plays a key role in advising the federal government on activities under the Act and on cooperative, coordinated approaches to the management of toxic substances.

Management tools for toxic substances, including the preventive or control regulation or instrument that is required by the Act, are developed through the Toxics Management Process. This new process allows the federal government to meet the obligations set out in CEPA 1999 and to ensure that stakeholder consultations are effective. Central to the Toxics Management Process is the development of a Risk Management Strategy document. This document is prepared by Environment Canada in conjunction with Health Canada through a process involving consultation with National Advisory Committee members. Depending on the issues that need to be addressed in the management of a given substance, Environment Canada may also hold preliminary consultations with the most affected stakeholders during the development of the strategy. The Risk Management Strategy document, which can vary in format, outlines the proposed approach for managing the risks to the environment and human health for a particular toxic substance. The strategies are usually substance-specific. However, if there are several substances in one sector requiring management, a sector-specific strategy could be developed. Environment Canada also provides for focused, time-bound consultation on Risk Management Strategy documents through direct contact with industry and non-governmental organizations and, more broadly, through postings on the National Office of Pollution Prevention web-site (www.ec.gc.ca/nopp/en/index.cfm).

In developing the Risk Management Strategy, Environment Canada identifies the sectors that pose the greatest risk to the environment and human health, guided by the science in the risk assessment. A risk management objective is then identified for these sectors. This objective is usually based on results achieved from the best available processes, products, or techniques used by the sector or, in some cases, environmental quality objectives.

Once an objective has been set, the management tools and instruments that could achieve the risk management objective for each sector to be addressed are selected. These management tools may be used to control any aspect of the substance's life cycle—from the design and development stage to its manufacture, use, storage, transport, and ultimate disposal. All available tools, including existing management initiatives, are initially considered. These include instruments under CEPA 1999 as well as other risk management tools that are outside of CEPA 1999, including the regulatory provisions of other governments and voluntary approaches. The suite of tools can comprise a combination of tools

representing the most feasible options for managing the substance. For a substance that is added to the List of Toxic Substances in CEPA 1999 as a result of an assessment under section 77, at least one of the risk management tools must be a "CEPA instrument" that meets the requirements of sections 91 and 92 of the Act. For example, there may be cases in which a new regulation or pollution prevention plan under CEPA 1999 would be the best option for addressing risks posed by one sector and would satisfy the requirements of sections 91 and 92, while provinces or territories may be better suited to address another sector, and an existing voluntary agreement may sufficiently address yet another sector.

Qualitative analyses are undertaken at this initial stage to help identify the most appropriate tools for achieving the risk management objective for a certain sector. If more detailed information or further assessment is needed, then quantitative analyses are carried out on the most promising tools identified through the qualitative analysis. If a regulation is selected as a risk management tool, a more detailed quantitative analysis serves as the basis for the development of a Regulatory Impact Analysis Statement. Stakeholders will be consulted on the proposed risk management objectives and risk management tools.

### Examples of risk management tools

- The following illustrates the suite of risk management tools that are considered when identifying options for managing a substance: Instruments authorized under CEPA 1999—regulations (including deposit refund and trading system regulations), pollution prevention plans, environmental emergency plans, administrative agreements, codes of practice, environmental quality objectives or guidelines, release guidelines
- Voluntary approaches—Environmental Performance Agreements, Memoranda of Understanding
- Non-CEPA 1999 economic instruments—financial incentives and subsidies, environmental charges and taxes
- Joint federal/provincial/territorial initiatives—Canada-wide Standards, guidelines, codes of practice
- Provincial/territorial Acts—regulations, permits, or other processes
- Other federal Acts—e.g., *Fisheries Act, Pest Control Products Act, Hazardous Products Act*

## Preventive or Control Instruments under CEPA 1999

While "management tools" refers generally to the full suite of tools available to manage a toxic substance, a "CEPA instrument" means those instruments that are authorized under CEPA 1999 and includes regulations. For an instrument to satisfy sections 91 and 92 of the Act, it must not simply be made under a provision of CEPA 1999 but must also pass the "legal test" of establishing ***preventive or control actions*** that reduce or eliminate the risks to the environment or human health. Each instrument is assessed on a case-by-case basis to determine whether this requirement is met. Preventive or control action refers to action-oriented language, often in the form of an instruction or command that prevents or controls the release of a substance or an activity related to the substance. Examples of action-oriented language include "the concentration of the substance should not exceed …" and "no person shall…."

The following are the instruments provided for by CEPA 1999 that, ***if they establish preventive or control actions*** to reduce or eliminate the risk posed to the environment or human health, will satisfy the requirements of sections 91 and 92 of CEPA 1999:

- ***Regulations***—A regulation imposes restrictions on an activity related to a substance or sets limits on the concentrations of a substance that can be used, released to the environment, or present in a product. Regulations that could meet s.91 and s.92 requirements include those described in the following sections of CEPA 1999:
  - respecting substances on the List of Toxic Substances (s.93)
  - prescribing limits to achieve virtual elimination of releases (s.92.1)
  - prescribing requirements for fuels (s.140)
  - respecting vehicle, engine, and equipment emissions (s.160)

- respecting international air pollution (s.167)
- respecting international water pollution (s.177)
- prescribing a list of substances that would harm human health or the environment if they enter the environment as a result of an environmental emergency (s.200)
- respecting substances that are imported, manufactured, used, processed, released, disposed of, or recycled in relation to government operations or federal and aboriginal lands (s.209(2))
- respecting the protection of the environment in relation to government operations or federal and aboriginal lands, including regulations respecting the establishment of environmental management systems, pollution prevention and pollution prevention plans, and environmental emergencies (s.209)
- respecting systems related to deposits and refunds (s.325) if combined with a regulation under s.93 (toxic substances), s.118 (nutrients), or s.209 (regulations respecting federal entities or federal and aboriginal land)
- respecting systems related to tradable units (s.326) if combined with a regulation under s.93 (toxic substances), s.118 (nutrients), s.140 (fuels), s.167 (Canadian sources of international air pollution), s.177(Canadian sources of international water pollution), or s.209 (regulations respecting federal entities or federal and aboriginal land)

- ***Environmental objectives*** (s.54 and s.208)—Environmental objectives recommend qualitative or quantitative goals or purposes for pollution prevention or environmental control. They often recommend ambient environmental quality targets or maximum acceptable limits.
- ***Environmental guidelines*** (s.54, s.196, and s.208)—Environmental guidelines include qualitative or quantitative recommendations to support or maintain particular uses of the environment. They can be developed to recommend a numerical concentration for toxic substances in water, agricultural water, soil, sediment, and human and animal tissue. Guidelines may also be developed to prevent, prepare for, or respond to an environmental emergency or restore environmental damage.
- ***Environmental release guidelines*** (s.54 and s.208)—Environmental release guidelines include recommended limits expressed as concentrations or quantities for the release of substances into the environment from works, undertakings, or activities.
- ***Codes of practice*** (s.54, s.196, and s.208)—Codes of practice recommend procedures, practices, or release limits for environmental control relating to works, undertakings, and activities during any phase of their development and operation and any subsequent monitoring activities. Codes of practice may also be developed to give industries and regulators clear recommendations on how to reduce emissions, effluents, and wastes and to prevent, prepare for, or respond to an environmental emergency or restore environmental damage.
- ***Pollution prevention plans*** (s.56)—The Minister can require any person to prepare and implement a pollution prevention plan outlining actions to prevent or minimize the creation, use, or release of pollutants and waste.
- ***Environmental emergency plans*** (s.199)—The Minister can require any person to prepare and implement an environmental emergency plan outlining measures for the prevention of, preparedness for, response to, or recovery from an environmental emergency involving a toxic substance.
- ***Agreements respecting environmental data and research*** (s.44)—These agreements are usually cooperative arrangements with other governments or any person respecting the creation, operation, and maintenance of a system for monitoring environmental quality.
- ***Administrative agreements*** (s.9)—Administrative agreements are usually work-sharing arrangements between the federal government and provincial, territorial, or aboriginal governments and peoples respecting the administration of CEPA 1999. Canada-wide Standards agreements with the Canadian Council of Ministers of the Environment are also signed under this authority.

## Role of Canada-wide Standards

Canada-wide Standards (CWSs) are developed by the Canadian Council of Ministers of the Environment (federal, provincial, and territorial environment ministers) to coordinate action to establish and achieve common environmental standards across the country. Developed under the framework of the *Canada-Wide Accord on Environmental Harmonization* and its *Canada-wide Environmental Standards Sub-agreement*, they represent political commitments by Ministers to address key environmental protection and environmental health risk issues. The authority for the Minister of the Environment to sign these agreements is found under section 9 (administrative agreements) of CEPA 1999.

CWSs may be agreements to target specific substances from sectors within a defined timeframe, or they may be very broad control management strategies covering a number of sectors, sources, and substances. As such, they serve a very useful role in the cooperative management of toxic substances.

Each government is responsible for implementing the CWS in its own jurisdiction, with the goal of effective, efficient, and harmonized implementation. This means that each government will do what makes sense within its jurisdiction so that, through collective action, the problem is addressed. Action is expected to be taken by the jurisdiction best situated. While the federal government may be best situated to act in some cases, many of the actions required are expected to be implemented by provinces and territories.

For the federal government, CWSs relate to the effective management of toxic substances under CEPA 1999 in three ways.

First, where the CWS agreement establishes specific preventive or control actions in relation to the substance and is developed within CEPA 1999 timelines, the CWS could be used to satisfy the legislative requirements, including the "time clock" provisions, of sections 91 and 92. To fully meet the requirements under CEPA 1999, the CWS would also need to follow the consultation requirements under CEPA 1999 and be signed under the authority of section 9 of the Act. As is the case for other CEPA instruments, each CWS agreement would have to be analyzed on a case-by-case basis to determine if it established the specific preventative or control actions required under sections 91 and 92.

Second, a CWS can be used in combination with other instruments as part of the risk management strategy. Often, actions on many sources and sectors will be needed to achieve environmental objectives. For a given toxic substance, a CWS may be identified as the best tool to address a certain source or sector and could be used to complement other federal actions required for the substance under CEPA 1999.

Third, where the federal government is identified as the best situated to take action to address a certain sector or source, it may develop a regulation, guideline, code of practice, or other preventive or control instrument under CEPA 1999 to fulfill its commitments under a CWS agreement. As such, the CWS could be adopted or referenced in the other CEPA instrument—such as a code of practice, regulation, or guideline—that contains preventive or control actions to address releases from certain sectors.