

**Amendment of the
Export and Import of Hazardous Wastes Regulations**

Initial Discussion Paper

**Transboundary Movement Division
Environment Canada**

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1. Introduction

Global recognition in the 1980's of the dangers posed by the uncontrolled transboundary movements of hazardous wastes and hazardous recyclable materials led to the development several international agreements in this area. Recognizing the challenge of monitoring movements across international boundaries, the core of these agreements is a requirement for prior informed consent of the importing jurisdiction and tracking of transboundary movements from their origin until final disposal or recycling. The control of imports and exports of hazardous wastes and hazardous recyclable materials is one of Environment Canada's important responsibilities to ensure protection of the environment and human health and meet Canada's international obligations.

The Government of Canada adopted the *Export and Import of Hazardous Wastes Regulations (EIHWR)* in 1992 under the authority of the former *Canadian Environmental Protection Act, 1988 (CEPA, 1988)* and now under the new *Canadian Environmental Protection Act, 1999 (CEPA, 1999)*. The *EIHW*R are intended to protect Canada's environment from the risks posed by unregulated traffic in hazardous wastes and to implement Canada's international obligations to protect the environment of other countries from uncontrolled hazardous waste exports from Canada. These obligations stem from three different international agreements:

- the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989*;
- the *OECD Decision of Council concerning the control of transfrontier movements of wastes destined for recovery operations, C(92)39/Final, March 1992*; and
- the *Canada-United States Agreement Concerning the Transboundary Movement of Hazardous Wastes, 1986 (as amended in 1992)*.

Since 1992, various changes have occurred. The international regimes regulating the import and export of hazardous wastes have evolved. The volume of hazardous wastes crossing Canada's border has increased over the years, particularly in the last two years where there have been increases in imports destined for final disposal. *CEPA, 1999*, in force since April 2000, provides enhanced authority to control the export and import of hazardous waste and hazardous recyclable materials. In addition, government and industry have gained significant experience in the administration and enforcement of the regulations. This experience has highlighted areas where the efficiency and effectiveness of the regulations can be improved, and where new technologies can be employed to assist in achieving this goal. These developments, along with a normal requirement to periodically review the operation of government regulations, have led to the initiation of an anticipated three-year process to amend and renew the *EIHW*R.

Given the decoupling of the definitions of waste and recyclable materials under *CEPA, 1999*, these new regulations will become the *Export and Import of Hazardous Wastes and Hazardous Recyclable Materials Regulations (EIHWHRMR)*.

2. CEPA, 1999

CEPA, 1999 expands the authority over exports and imports of hazardous waste in *CEPA, 1988*. It includes the authority to:

- implement prohibitions on exports, imports or transits when required to implement international agreements;
- establish separate definitions for wastes and recyclable materials;
- develop and implement criteria to ensure the environmentally sound management of transboundary movements of wastes or recyclable materials, and to refuse permits for import or export if criteria are not met;
- issue permits for activities that are different from the requirements set out in the regulations but that are of an “equivalent level of environmental safety”; and
- require the preparation of plans to reduce wastes destined for final disposal.

CEPA, 1999 also provides Environment Canada with new authority to control interprovincial/territorial movements of hazardous wastes and hazardous recyclable materials (transferred from the *Transportation of Dangerous Goods Act and Regulations*) and to control the export and import of prescribed non-hazardous wastes destined for final disposal. Concurrent with the process to revise the *EIHW*, Environment Canada will also be developing separate regulations to address these issues.

The *EIHW* will address each of the new *CEPA, 1999* authorities, as well as introducing various changes to enhance the clarity of the regulations and the efficiency with which the export and import requirements can be administered and complied with. This will involve a complete review and overhaul of the current *EIHW* over the course of the next two years.

A minor consequential amendment was made to *EIHW* at the time of entry into force of *CEPA, 1999* to roll over the regulations under the new authority and to include the definition of hazardous waste that had previously been in the Act. This roll over did not change the scope or effect of the regulations but was necessary to ensure its on-going operation by referring to the new Act rather than *CEPA, 1988*.

The current *EIHW* also makes several references to the *Transportation of Dangerous Goods Regulations (TDGR)*, especially with respect to waste classification and manifesting. The *TDGR* are currently undergoing a substantial revision that is expected to be in place in the next year or so. In addition, the transfer of waste classification and manifest from *TDGR* to the new *CEPA* interprovincial regulations will take place before the overhaul to the *EIHW* is complete. Because of the timing of these other regulatory initiatives, consequential amendments are expected to ensure that the *EIHW* allow the current manifest and waste classification requirements to remain in force until the major revision to *EIHW* can be implemented.

3. Outline of Planned Consultations Process

Stakeholder input is essential to ensuring an effective amendment process. Throughout this process, views will be sought from the industry involved in transboundary movements of hazardous wastes, from community and environmental non-governmental organizations and from

aboriginal groups. Given their role in reviewing import notices and in establishing national harmonized definitions for hazardous waste and hazardous recyclable materials, provinces will also play an important role in the amendment process.

This discussion paper is intended to begin the public consultation process. This initial phase of consultations involves the publication of this paper to seek preliminary written comments from interested stakeholders. This phase will also involve both one-on-one discussions with various stakeholders and regional meetings with groups of stakeholders in February and March 2001.

The initial consultation process will be followed by a comprehensive public consultation document detailing the proposed elements of a revised regulation. Public consultations with stakeholders on that document are then anticipated for the late summer/early fall of 2001. Following these consultation sessions, draft regulations to amend the current *EIHW* will be prepared and a socio-economic study on the potential impact of the new regulations will be undertaken. This socio-economic study will involve a cost-benefit analysis on the proposed amendments that will be used to develop the Regulatory Impact Assessment Statement which must accompany the proposed amendment. Depending on the outcome of this study, additional stakeholder consultations may be required in the first half of 2002, which may result in further changes to the proposed controls.

The formal regulatory process would then be followed. The *Statutory Instruments Act* (R.S., 1985, C. S-22) establishes the basic legal process the federal government must follow when developing regulations. The process is summarized as follows:¹

1. A copy of the regulations proposed to be made by the Minister or the Governor in Council under *CEPA* is published by the Minister in Part I of the *Canada Gazette*, Canada's official parliamentary journal.
2. Within 60 days after the publication of a proposed regulation, any person, including a representative of the government of any country that would be affected by or benefit from it, may file with the Minister written comments on the proposed regulation.
3. Once a proposed regulation has been finalized, taking into account the comments received during the 60-day public consultation period, the final official regulation is published in Part II of the *Canada Gazette*. It is expected that the *EIHWHRMR* would be ready for Gazetting in Part I by the end of 2002.

4. Principles Behind the Amendment Process

While the amendment process will involve a complete review of the current *EIHW*, the main goal of these regulations -- ensuring effective control of transboundary movements of hazardous waste and hazardous recyclable materials to protect the environment and human health -- remains unchanged.

The amended regulations must continue to allow Canada to implement its international obligations under the Basel Convention, the OECD Council Decision on wastes destined for

¹ Government of Canada, *CEPA* Environmental Registry™ URL <http://www.ec.gc.ca/CEPARegistry/Regulations>

recovery operations and the Canada-USA Agreement on transboundary movements of hazardous wastes. These agreements are quite prescriptive in the requirements that countries must implement to ensure proper notification and tracking via movement document of transboundary movements of hazardous wastes and hazardous recyclable materials.

As will be discussed in later sections, there have been some changes made to the Basel Convention and OECD Decision over the last several years which will have to be addressed in the new regulations. However, the core elements and goals of these agreements have not changed.

Prior notification and consent for imports, exports and transits for both hazardous wastes and hazardous recyclable materials will continue to be at the core of the new regulations. Given their responsibility to regulate and license disposal and recycling facilities as well as carriers, Environment Canada will continue to seek the consent of the province in question for any import. As is currently the case, no export, import or transit will be allowed unless the proper consent from the importing jurisdiction has been secured.

Harmonization of hazardous waste and recycling regimes will also be an underlying principle of the process. Because *EIHW* is designed to implement Canada's international obligations under the Basel Convention, OECD Decision and Canada-USA Agreement, the *EIHWHRMR* must be fully consistent with the types of controls in these agreements. At the same time, in Canada, hazardous wastes and hazardous recyclable material may also be subject to provincial waste management regulations, the upcoming regulations on interprovincial movements of hazardous wastes and hazardous recyclable materials as well as federal or provincial transportation of dangerous goods regulations.

Clearly, if each of these regulations had very different controls and definitions of what constituted hazardous waste or hazardous recyclable materials, the costs of compliance and the risks of confusion in the regulated community will be much higher than if there is a harmonized approach. That regulators have recognized this is evident by the efforts under the Canadian Council of Ministers of the Environment (CCME) to cooperate in reviewing and harmonizing definitions and controls for movements of hazardous waste and hazardous recyclable materials in Canada.

While remaining consistent with Canada's international obligations, Environment Canada's goal will be to adopt, to the extent possible, the definitions being developed under the CCME and ensure appropriate coordination with provincial requirements in the *EIHWHRMR*. Specific areas of harmonization are further discussed in the sections that follow.

5. Specific Elements of the Current EIHW to be Retained

Although there may be changes and improvements to these requirements, the following elements will also remain a part of the control regime:

- prior informed consent mechanism
- prohibitions on exports to Antarctica or to countries which prohibit the import of hazardous waste or hazardous recyclable materials,

- definitions of who may be the exporter or importer,
- requirement for authorized facilities and authorized carriers,
- requirements for contracts between importers and exporters,
- liability insurance requirements for importers, exporters and carriers,
- the tracking of transboundary movements via manifest or movement document and certificates of disposal/recycling, and,
- obligations with respect to rejected/returned shipments.

The regulations will continue to define the types of hazardous wastes and hazardous recyclable materials that are controlled as well as defining recycling and disposal activities.

The sections below address key new issues in the amendment process. They arise from new authorities under CEPA, 1999, from the experience gained in the administration of the current *EIHW*, or from changes in technology that allow new efficiencies in the administering of the regulations to be achieved. The issues addressed below are significant policy issues and are considered here at the policy level. Specific technical details related to these issues, for example the technical standards for environmentally sound management, will be addressed as part of other consultation processes.

6. Clarifying Definitions and Scope

One of the most important elements in any regulation is the definition of the scope of activities or substances involved. Anyone involved in the sector would agree that defining hazardous waste or what is a recycling process is not easy and that there are numerous different views on what these definitions should be.

In the current *EIHW*, hazardous wastes subject to the regulations include any waste dangerous good as defined in the *TDGR* or any item in the list of hazardous wastes in Schedule III of *EIHW* that is destined for one of the listed disposal or recycling operations. When they were developed, these lists of hazardous wastes and disposal and recycling activities were largely based on those set out in OECD Council Decisions.

Decoupling recycling and disposal

The language of *CEPA, 1988* meant that hazardous recyclable materials were included in the definition of hazardous waste along with materials destined for final disposal. *CEPA, 1999* now allows the definitions to be decoupled.

The current *EIHW* already provides for modified controls for most hazardous recyclable materials consistent with OECD Council Decision C(92)39, including tacit consent mechanisms, lower insurance requirements, the possibility of facilities being pre-approved and allowing exporters to be brokers. Environment Canada will change the wording of the letters issued to permit exports, imports and transits to reflect the decoupling of wastes and recyclable materials to reflect the language of the new *CEPA*.

The international agreements, which the *EIHW* implement, require control both hazardous wastes and hazardous recyclable materials. However, this review of the current *EIHW* will take into account the changes to the OECD Council Decision on recyclable materials as well as experience in the implementation of the current regulations. Consequently, alternative approaches that minimize any unnecessary interference with the trade in recyclable materials while maintaining controls that are in keeping with Canada's international obligations may well materialize, and each can be considered on its own merits.

Harmonizing with Canadian definitions, tests and criteria

The most recent Canada-wide work and draft recommendations on this come from the CCME Hazardous Waste Task Group (HWTG). Over the last several years the HWTG has developed and held stakeholder consultations on proposed harmonized national definitions for "waste", "recyclable materials", "disposal" and "recycling". The HWTG has also done extensive work on the classification system for environmentally hazardous wastes and hazardous recyclable material.

The Canadian approach is and will continue to be defining "hazardous" as it applies to waste and recyclable materials through reference to lists of materials known to be hazardous as well as a series of hazard criteria and tests. Generators, importers and exporters can use these tests and criteria to demonstrate that their material is not hazardous and therefore not subject to the controls for hazardous wastes and hazardous recyclable materials.

There is significant harmonization internationally and in Canada in the lists, tests and criteria for acutely hazardous wastes and recyclable materials, such as those for gases, flammability, toxicity and corrosivity (*TDGR* hazard classes 2 to 6.1 and 8). There are no internationally recognized classification schemes for infectious substances/biomedical wastes or for chronically hazardous, environmentally hazardous or leachable toxic wastes or recyclable materials. Therefore each country must develop its own regime.

In Canada, most jurisdictions make reference to the hazard criteria as had been set out in the current *TDGR*. As environmental controls for hazardous wastes and hazardous recyclable materials are shifted from *TDGR* to regulations under *CEPA, 1999*, these references will need to be up-dated, including in the *EIHWHRMR*.

As part of its recent work, the HWTG has proposed clarifications for the definition of infectious substances/biomedical wastes and a more substantial change in the way environmentally hazardous and leachable toxic wastes and recyclable materials are classified. This involves adopting the US Toxicity Characteristic Leaching Procedure (TCLP) and changing the list of contaminants subject to testing. Because neither the Basel Convention nor the OECD has developed such criteria, it is proposed that the regulations be updated to include a reference to the new HWTG proposal.

For more information on the HWTG proposals, please refer to the background paper for the most recent stakeholder consultations at the following internet site:

http://www.ec.gc.ca/CEPARRegistry/participation/archives/Hazardouswaste_E.pdf

Updated international waste lists

Over the last few years, both the Basel Convention and the OECD have updated and clarified the lists of wastes and recyclable materials subject to the Convention and the OECD Council Decision. To ensure on-going compliance with these agreements, it is proposed that the *EIHWHRMR* make appropriate reference to these new lists.

The new Basel lists of waste (and recyclable materials) that are or are not subject to the Convention can be found in Annex VIII and IX of the Convention at the following internet address: **<http://www.basel.int/text/text.html>**.

The OECD has just recently finalized updating the list of recyclable material in Council Decision C(92)39. The main goal of this work was to harmonize these lists with Annex VIII and IX of the Basel Convention. As part of this revision the current three-tiered list (red, amber, green) has been replaced with a two-part list, similar to Annex VIII and IX of the Basel Convention.

Clarifying what is a waste, recyclable material and product

While hazardous classification involves scientific tests and criteria, distinguishing between wastes, recyclable materials and products is much more difficult. "Is my recyclable/secondary material/by-product subject to *EIHW*?" is a question that Environment Canada is frequently asked. It will be important for the amended regulations to provide enhanced clarity on this issue.

Both the OECD and the HWTG have developed guidance criteria, which are essentially those which Environment Canada has been using when answering questions from industry on whether a material is a waste/recyclable material or not. The following are criteria have been used by Environment Canada to characterise materials to be considered as wastes or recyclable materials. (It is important to emphasise that these criteria need to be examined as a whole.):

- It is unavoidably produced in the generation of another material or it is at the end of its useful life.
- It is intended for final disposal (including storage) or it is a recyclable that requires recovery/treatment before it can be used.
- Its production is not subject to adequate quality control or national/international standards.
- It may meet industrial requirements for use as an ingredient only under certain circumstances or only in one facility.
- It has a low or negative economic value.
- Its markets are not well defined, unstable or are very limited.
- Its use/reuse generates wastes that must be further treated in excess of those which may result from the use of virgin input.
- It has a great potential for contamination that would make it more hazardous than the product it replaces.

Even in using these criteria, members of the regulated community have, at times, come up with different conclusions than Environment Canada. As the amendment process evolves, further discussions with stakeholders will be required to develop a more common understanding of how these criteria are to be applied. Environment Canada will examine the possibility of developing further the criteria under the new regulations (e.g. inclusion in the regulations, reference to a

guidance manual). Since the HWTG has also considered the use of these criteria for interprovincial movements, it will be important to consider harmonization of criteria for international and domestic controls.

7. Implementation of ESM Criteria

The revisions to *CEPA* provide an opportunity to improve Environment Canada's ability to ensure that all exports and imports are managed in an environmentally sound manner. The current regulations require importers and exporters to "take all practicable" measures to ensure that hazardous wastes and recyclable materials will be treated in an environmentally sound manner. This language was taken directly from the Basel Convention. Facilities must also be authorized as per their provincial license or certificate of approval to manage the hazardous wastes or hazardous recyclable material in question.

Some general guidance has been developed under the Basel Convention to define environmentally sound management (ESM), including technical guidelines on several waste streams and disposal/recycling operations as well as a framework document on the preparation of technical guidelines for the environmentally sound management of wastes subject to the Basel Convention. This framework document sets out guiding principles and general requirements for ESM.

CEPA, 1999 seeks to address this problem by enabling Environment Canada to establish criteria for ESM that can be applied by importers and exporters in seeking to ensure the wastes and recyclable materials they export will be treated in an environmentally sound manner. It also gives the Minister the discretion to refuse to issue a permit if satisfied that the material will not be handled in an environmentally sound manner. In such a case, the Minister is required to consult with the government of the jurisdiction of destination before refusing to issue a permit.

As set out in a July 2000 news release, the Minister of the Environment has called the provinces to action to develop and implement a new national regime for ESM. While this was largely as a response to the increasing imports of hazardous wastes due in part to lower landfill standard in Canada than in the United States, this national regime will be implemented for both domestic and international movements.

Work under this initiative has been started and will include a review of various CCME guidelines for the management of hazardous waste and an examination of the liability regime for hazardous waste and hazardous recyclable materials in Canada. By working together, the provinces and the federal government can ensure that a harmonized national ESM regime is established, which would be implemented by the provinces for domestic shipments and by Environment Canada for international movements.

At the same time, at the last Conference of the Parties, the Basel Convention adopted a Ministerial declaration, a Decision and a workplan to increase its efforts to define and promote environmentally sound management of hazardous waste, including hazardous recyclable materials.

It is important to recognize that the upgrading of standards for the management of hazardous wastes and hazardous recyclable material is a continuous and step-wise process. As such, a flexible mechanism is required to ensure that the core elements of ESM for international movements are integrated into the *EIHWHRMR*, while ensuring that the evolving national regime for ESM can easily be implemented even after the 2003 time frame for the amendment. It may be necessary to implement ESM in phases as the regime evolves.

Another important consideration is how the ESM criteria that are adopted are implemented for international movements, recognizing the provincial role in authorizing facilities. There are many ways in which this could be achieved which will need to be investigated, including:

- specific inclusion of the criteria in the *regulations* that Environment Canada could use in evaluating import and export notices
- development of separate federal regulations on ESM which could apply to shipments under *EIHWHRMR*, the proposed upcoming regulations on interprovincial movements of hazardous waste and hazardous recyclable materials as well as the regulations on hazardous waste management at federal facilities;
- leaving it to the provinces to integrate ESM in the licensing of facility, either through reference to federal ESM regulations or by virtue of provincial legislation;
- adoption of some third party standard (e.g. some ISO or equivalent national standard) that must be complied with in order to import or export; or,
- a voluntary approach with periodic auditing or reporting.

A combination of approaches may be necessary. For example, there may need to be ESM criteria that are specific to transboundary movements, such as how to take into account the proximity principle, that go beyond those technical standards that may be adopted in the national regime for ESM at the facility level. Particular attention will also be placed on substances have been deemed “CEPA toxic” which are subject to the Toxic Substances Management Policy and Environment Canada’s Strategic Options Process.

However, since both domestic and international work in this area is only in its early stages, this issue will have to be periodically re-examined as these initiatives proceed in parallel with the amendments to the current *EIHWHR*. At the same time, by developing its own ESM regime, Canada will be in a better position to influence the development of ESM criteria internationally.

It is not intended that the consultation process on the *EIHWHRMR* duplicate or replace any discussions of ESM under this national regime or within the Basel Convention. However, any stakeholder input provided at this and future stages of the consultation process for the *EIHWHRMR* will be very useful in both the domestic and international ESM initiatives.

8. Waste Reduction Plans

One of the goals of the Basel Convention is to reduce transboundary movements of hazardous wastes. Article 4(2) of the Convention requires Parties to develop their own domestic capacity to manage the hazardous wastes produced in that country. Article 4(9) requires Parties to take appropriate measures to allow hazardous waste exports only if the State of export does not have

the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the hazardous waste in question in an environmentally sound and efficient manner. This Article also states that transboundary movements may be allowed if the wastes in question are required as a raw material for recycling or recovery in the country of import.

The Basel Convention also includes a general obligation to reduce the generation of hazardous wastes to a minimum, “taking into account social, technological and economic aspects” (Article 4(1)). This is an issue that, in terms of industry obligations, is generally associated with provincial jurisdictions. At present, there are few enforceable hazardous waste minimization laws in place. Most provinces seek regional plans for waste reduction, and many have processes that encourage the implementation of waste reduction planning. The CCME also has some policies in place aimed at reducing waste generation, but little work has been done recently in this area for hazardous waste.

Under Section 188 in *CEPA, 1999* Environment Canada has authority to require exporters or a class of exporters to prepare and implement a plan to reduce hazardous waste being exported for final disposal. Where plans are required, a written declaration of implementation of each stage of the plan is also required. Environment Canada has the authority to refuse to issue a permit to an exporter who does not comply with the requirement to prepare, submit or implement the plan or submission of the declaration. In using this authority, Environment Canada is required to take into consideration the benefits of using the nearest environmentally sound facility and changes in the quantity of goods the production of which generates hazardous waste to be disposed of. The Act does not specify what information must be included in any reduction plan or declaration or what form these documents nor does it say that Environment Canada must require these plans for all exports for final disposal.

Various considerations will need to be addressed in determining how to achieve this goal of reducing exports for final disposal and what to include in the revised regulations. Practical realities such as lack of capacity in Canada for certain specific waste types will have to be taken into consideration. The technical and economic feasibility of reduction at source and diversion to recycling will also have to be considered. It will also be appropriate to recognize that exports for final disposal constitute only a small percentage of the transboundary movements subject to *EIHRW*.

Most important will be determining which exporters or classes of exporters would be subject to this type of planning. Some exports for disposal are the result of one-time clean-up project while others are on-going activities. One particular challenge is that many exporters waste management companies that do not actually generate the wastes being shipped. These exporters would therefore be limited in their capacity to reduce generation at source but may be able to play a more important role in finding recycling opportunities for these hazardous wastes.

Finally, it will be important to account for potential linkages both to the pollution prevention planning requirements for toxic substances under Part 4 of *CEPA, 1999* and to any similar provincial waste reduction/prevention programs. This will ensure that standards are not lower, and will avoid unnecessary duplication where other requirements for waste reduction already exist. In tern, this will reduce implementation costs for both industry and Environment Canada.

Stakeholders are invited to provide any suggestions on how the goal of reducing exports for final disposal can be achieved. Voluntary pilot projects with certain companies/sectors currently exporting hazardous waste for final disposal could be considered as a means to better understand the challenges that will be faced in implementing this goal.

9. Other Changes to International Agreements

Insurance

Currently, the *EIHW* sets out insurance requirements for Canadian exporters, importers and the carriers of hazardous waste and hazardous recyclable materials subject to these regulations. For, exports and imports for recycling consistent with the OECD Decision of wastes destined for recovery operations, the Canadian exporter or importer must have \$1 million coverage for any damage to third parties or environmental clean-up. All other imports and exports (for disposal or for recycling outside of the OECD regime) must have \$5 million coverage. Carriers must have valid coverage as is required in the jurisdiction through which they will travel.

The revised regulation should also clarify the amounts of insurance required and the scope of insurance coverage required. Again, there are two parallel initiatives in this area, one domestic and one international that will have to be examined.

In December 1999, Parties to the Basel Convention adopted a Protocol on Liability and Compensation for Accidents Resulting from Transboundary Movements of Hazardous Waste and Their Disposal. To ensure prompt compensation of victims, this Protocol sets out who should be held liable and the extent of this liability, including establishing minimum insurance requirements. This Protocol sets out a requirement for strict liability of the exporter until the hazardous waste/hazardous recyclable material is transfer to the receiving facility at which time the facility operator becomes strictly liable. It also provides the right of recourse for the strictly liable person to sue other persons involved on a fault basis.

This Protocol is not yet in force internationally. Canada has not yet decided whether it will accede to this agreement. Extensive stakeholder consultations and complete review of the impact of such a decision would be required before any such decision is made.

In addition to working towards a national regime for ESM, provinces and Environment Canada have agreed to review the current liability requirements for the generators and facilities that manage hazardous wastes and hazardous recyclable materials. In Canada, liability is generally transferred from the generator to the facility at the time of entry into the facility. However, in other jurisdictions such as the United States, the generator retains some residual responsibility. There is anecdotal evidence that some hazardous wastes are being exported to Canada from the United States because of the different levels of liability.

In July 2000, Environment Canada announced its intention to introduce an enhanced liability regime so that hazardous waste generators remain responsible for their waste even after it leaves their site. Making the generator responsible, from generation of the hazardous waste through to

its disposal or recycling, will ensure that generators will be more accountable for the wastes that they generate.

Once again, there will be specific consultation processes on these initiatives. Should Canada decide to accede to the Protocol or should a new domestic liability regime be established within the time frame proposed for this amendment, this will have to be taken into account in the *EIHWHRMR*. However, the consultation process on the new regulations will provide stakeholders an opportunity to discuss options for implementing liability coverage and the level of coverage that would be appropriate for various types of activities. This could then be fed into the discussions on the national liability regime and future discussions on the Basel Protocol.

Prohibitions

CEPA, 1999 includes a specific authority to prohibit, completely or partially the import, export or transit of hazardous wastes or hazardous recyclable materials in order to implement international environmental agreements binding on Canada. Examples of this type of prohibition, which are already in place in the current *EIHWWR*, are the prohibition on exports to Antarctica and the prohibition to export to a country that has notified Canada that it prohibits the import of the hazardous waste in question..

In 1995, Parties to the Basel Convention adopted an amendment to the Convention that would prohibit the export of hazardous wastes from developed to developing countries. This amendment is not yet in force and Canada has made no decision with respect to ratification of this amendment. *CEPA, 1999* provides the authority to implement such a prohibition should Canada decide to ratify this amendment. The discussions on whether or not to ratify and implement the ban will occur outside of the consultation process on the *EIHWHRMR*. However stakeholders will be informed of any planned consultation specifically on this matter.

Amendments to C(92)39

In 1997, the OECD decided to examine areas for harmonization of requirements and procedures under Council Decision C(92)39 with those under the Basel Convention. This OECD Council Decision applies only to transboundary movements of recyclable materials within the OECD area. Draft amendments to this Decision have recently been completed and are expected to be adopted by member countries in the coming months. The OECD has also worked to consolidate and amend several other Council Decisions regarding the transboundary movements of waste and recyclable materials, including Council Decision C(88)90, which sets out the definition of hazardous waste/recyclable materials and the tables for the International Waste Identification Code (IWIC).

The amended Council Decision C(92)39 will continue to require notification and allow for written or 30-day tacit consent for transboundary movements of hazardous (amber) recyclable materials. The concept of pre-consented recycling facilities with 7-day tacit consent was also retained. Non-hazardous (green) recyclable material will continue to be subject to controls normally applied to commercial transactions.

In addition to revisions to the waste lists discussed above, these amended Decisions includes the same technical changes that will be taken into account when revising the current regulations, such as simplification of the classification coding that had previously used the IWIC code tables and formal adoption of specific notification and movement documents similar to those adopted by the Basel Convention.

However, the changes also include more policy-oriented issues that may be considered during the present consultations on possible changes to the regulations:

- clarification of the controls when the recyclable material is the result of a mixture of two or more listed recyclable materials and who is considered the generator in such cases;
- elimination of the “red” level of control since the wastes currently in the red list such as PCBs or biomedical waste are generally never sent for recycling;
- an option for countries to exempt transboundary movements which involve small quantities of hazardous recyclable materials destined for laboratory analysis, under certain conditions;
- a requirement that the recovery operation take place within one year of receipt of the waste;
- clarification of the requirements with respect to alternate arrangement and duty to re-import where the recyclable material cannot be managed as notified; and,
- additional provisions relating to intermediary recycling operations (i.e. exchange or accumulation prior to recycling) to better track the recyclable material through to the subsequent recovery operation.

10. Permits of Equivalent Levels of Environmental Safety

There is a growing trend in new environmental legislation to provide regulators some discretion to establish alternative regulatory systems for individual circumstances where specific and unique conditions arise. This opportunity is provided in the *CEPA, 1999*, under the heading of “permits of equivalent level of environmental safety” or PELES. A similar tool has been in place for a number of years under *TDGR*.

PELES will not be used as a form of deregulation. Instead, they will be used to help meet individual or unique circumstances through a legally binding permit that imposes standards for the environmentally sound management of the wastes or recyclable materials being shipped. These standards will be different from, but equivalent to, those that would otherwise apply under the *EIHWHRMR*, including a consideration of risk.

CEPA, 1999 establishes two conditions for the issuance of a PELES. First, the permit must ensure the activity it authorizes will be at least as safe as if it took place under the regulations. Second, the actual transboundary movement must be consistent with any relevant international environmental agreements. This second condition will be especially important under *EIHWHRMR*. The prescriptive nature of the applicable international agreements will limit Environment Canada’s flexibility in issuing such permits. There are also provisions to revoke such permits, and a requirement to publish all of them in the Canada Gazette.

The PELES concept will also apply to the interprovincial movement of hazardous wastes and hazardous recyclable material being developed under the new CEPA regulations. Some

consultation on this mechanism has already taken place under that forum. During the most recent consultation workshop on the interprovincial regulations, stakeholders indicated that they want a system that is fair, consistent, economical and timely. It was requested that the regulations clearly spell out the process and criteria to be employed by the issuing authority.

Stakeholder views on how this mechanism can be applied to transboundary movements are invited during this consultation process. As the procedures for this mechanism evolve under these interprovincial regulations, there will have to be further discussion of how this tool will be adapted for international movements.

11. Improving Regulatory Efficiency

In addition to addressing new issues such as ESM criteria and waste reduction plans, the forthcoming revisions to the regulations provide a valuable opportunity to enhance the clarity and efficiency with which the export and import regime operates. This section briefly describes some of the many possible areas for revision.

Requirements for Carriers

At present there are considerable differences among the various provincial requirements for carriers. In addition, there has been a significant increase in the use of subcontractors in the road transport industry that has led to some confusion among the regulated community as to which carriers need to be named in the notice. The revisions to the regulations will provide an opportunity to re-examine the requirements for carriers involved in transboundary movements.

Completion of Shipments and the Obligation of Return

The Basel Convention requires that any hazardous wastes or hazardous recyclable materials that are imported or exported but that cannot be treated as intended, be returned to the exporter unless alternative environmentally sound arrangements can be made with the approval of the appropriate authorities. This mechanism ensures that shipments do not become stranded.

The current *EIHW* obliges exporters to require, through contractual arrangements, their foreign importers to notify Environment Canada after a shipment has been completed and after the treatment is complete. The *EIHW* also require Canadian exporters to make alternative arrangements or ensure the return of the wastes or recyclable materials if a shipment is not completed as planned.

For imports into Canada, the current obligation is for the importer and exporter to take “all practicable measures” to help the country of export meet its obligations to take the return of the material or ensure an environmentally sound alternative. From a practical perspective, this entails informing Environment Canada of the decision to divert the hazardous waste or hazardous recyclable material to another facility in Canada or to return it to the country of export. However, the current *EIHW* does not specifically set out how this notification is to occur for imports.

The revised regulations could seek to resolve these problems by:

- clarifying the obligation to notify Environment Canada of a shipment that is not completed or that cannot be treated as intended;
- clarifying the obligation to repatriate the waste or find an environmentally sound alternative treatment that is approved by the importing and exporting authorities; and
- establishing clear timelines within which treatment or disposal must be completed.

Clarifying definitions

Because of the experience gained in implementing the current *EIHW*, some changes will be required to clarify certain regulatory definitions. For example, the definition of who can be the exporter must be further clarified, particularly as it applies to a person who collects and bulks waste for export. Stakeholders are invited to identify definitions which they feel require further clarification.

Improving enforceability and facilitating compliance

In addition to all of the considerations and issues described above, the reform of the regulations will consider possible amendments to key components – such as notification requirements – to improve enforceability while minimizing the burden on the regulated community.

Paper burden

Just as governments will want to consider the potential administrative and enforcement impacts of any revisions, it will be essential to consider the costs of compliance with any new regulatory provisions and with the overall revised regime. In particular, the revised regulations may provide an opportunity to provide for improved forms, consolidating information requests, and, ultimately, electronic notification and manifesting..

12. Access to Information

Disclosure of information concerning exports and imports of hazardous waste – like other environmental information – often involves competing interests. Government officials, public interest groups and local communities may favour wide disclosure to enable monitoring and enforcement activities, while industry may be concerned that disclosure of technical and financial information might harm their business interests.

The sections of *CEPA, 1999* that set out the authorities for waste and recyclable materials largely repeat the same requirement for Environment Canada to publish notice information as was done under the old Act, specifically the name of the Canadian exporter or importer, the country of export or import and the type of waste involved. In addition, Environment Canada must publish some information related to any reduction plans required to be submitted and requests for PELES.

One of the goals of *CEPA, 1999* is to ensure fuller public participation and transparency in environmental decision-making. *CEPA, 1999* requires the establishment of an Environmental Registry of information published under or related to the Act. The consultation process on the

EIHWHRMR will provide an opportunity to revisit how to best balance of private interests and public access to export and import information.

13. COST RECOVERY

Environment Canada had planned to introduce cost recovery for *EIHW* in April 1998 and had undertaken significant stakeholder consultations on this proposal. During the consultations, a number of stakeholders raised legitimate program issues. Some emphasized the need to harmonize hazardous waste definitions and controls in Canada and identified areas where the administrative operation of *EIHW* could be streamlined while still meeting Canada's obligations under the Basel Convention.

In 1999, Environment Canada announced that it would defer cost recovery in order to further examine opportunities for streamlining of some of the administrative tasks under *EIHW* and to implement new interprovincial movement regulations. The goal of this streamlining should be to reduce the overall administrative cost of implementing the regulations for both the government and for industry.

It is not intended to reinitiate the discussions on cost recovery until the new interprovincial movement regulations are in place and changes are made to the current *EIHW* to improve regulatory efficiency. Full consultations and a cost-benefit analysis will be required at that time, before any fees are implemented. While there will be no specific discussion of cost recovery as part of the process to revise the current *EIHW*, stakeholders may wish to take future cost recovery into account in making proposals for changes to include in the *EIHWHRMR*.

14. NEXT STEPS

The planned consultation process is described in section 3 of this paper. Stakeholder consultation is key to the success of the development of improved regulations on the export and import of hazardous wastes and recyclable materials. We appreciate hearing your views, at all stages of the process.

There will be a number of opportunities throughout the process to provide input. If you have any comments on the issues raised in this initial discussion paper, including the anticipated consultation process, you are invited to contact:

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APPENDIX A

CEPA, 1999: PART 7- DIVISION 8 Sections Dealing with Control of Transboundary Movement of Hazardous Waste and Hazardous Recyclable Material²

Export, Import and Transit

185. (1) No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, [...] except

(a) after notifying the Minister and paying the prescribed fee;

(b) after receiving from the Minister whichever one of the following permits is applicable:

(i) an import permit or export permit that, except in the case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material, or

(ii) a transit permit that states that the Minister has authorized the movement; and

(c) in accordance with the prescribed conditions.

(2) If the Minister is of the opinion that the waste or material will not be managed in a manner that will protect the environment and human health against the adverse effects that may result from that waste or material, the Minister may refuse, in accordance with the criteria set out in the regulations, to issue a permit even if the relevant authorities have given their authorization.

(3) Before refusing under subsection (2) to issue a permit to import, the Minister shall consult with the government of the jurisdiction of destination.

(4) Where the Minister is of the opinion that the waste or material will be managed in a manner that will protect the environment and human health against the adverse effects that may result from that waste or material, the Minister may issue a permit if the relevant authorities inform the Minister that they lack the legal authority to authorize the movement, final disposal or recycling but are not opposed to it.

Prohibitions

² For ease of reading, references to prescribed non-hazardous waste destined for final disposal and to interprovincial movements have been omitted from this text.

186. (1) For the purpose of implementing international agreements respecting the environment, the Minister may, with the approval of the Governor in Council and taking into account Canada's international obligations, prohibit, completely or partially and under any conditions that may be prescribed, the import, export or transit of waste or material referred to in subsection 185(1).

(2) No person shall abandon any waste or material referred to in subsection 185(1) in the course of import, export or transit.

Publication

187. After the Minister receives a notification of the proposed import, export or transit of a waste or material referred to in paragraph 185(1)(a), the Minister shall publish in the Canada Gazette, or in any other manner that the Minister considers appropriate, the name or specifications of the waste or material and

(a) in the case of a proposed import, the name of the jurisdiction of origin and the name of the importer;

(b) in the case of a proposed export, the name of the jurisdiction of destination and the name of the exporter; and

(c) in the case of a proposed transit, the names of the jurisdictions of origin and of destination and the name of the conveyer.

Reduction of export for final disposal

188. (1) For the purpose of reducing or phasing out the export of hazardous waste [...], the Minister may require an exporter, or a class of exporters, of hazardous waste to

(a) submit to the Minister, at the same time as the notification referred to in paragraph 185(1)(a) and at any other prescribed time, a plan in accordance with the regulations; and

(b) implement that plan.

(2) Every person who is required to implement a plan under paragraph (1)(b) shall file with the Minister, within 30 days after the completion of each stage of the plan, a written declaration that the implementation has been completed.

(3) The Minister may refuse to issue a permit to an exporter who does not comply with subsection (1) or (2).

Permits based on equivalent environmental safety level

190. (1) The Minister may issue a permit authorizing, subject to conditions fixed by the Minister, any activity to be conducted in a manner that does not comply with this Division if the Minister is satisfied that

- (a) the manner in which the activity will be conducted provides a level of environmental safety at least equivalent to that provided by compliance with this Division; and
 - (b) in the case of the importation, exportation or transit of a waste or material referred to in subsection 185(1), the activity is consistent with international environmental agreements binding on Canada.
- (2) The permit may authorize the activity in terms of the persons who may conduct the activity and in terms of the waste and material that it may involve.
- (3) The Minister may revoke the permit if
- (a) the Minister is of the opinion that paragraph (1)(a) or (b) no longer applies;
 - (b) the regulations have been amended and address the activity authorized by the permit;
or
 - (c) the permit holder does not comply with the conditions of the permit.
- (4) The Minister shall publish in the Canada Gazette, or in any other manner that the Minister considers appropriate, a copy of each permit issued under this section.

Regulations

191. The Governor in Council may, on the recommendation of the Minister, make regulations generally for carrying out the purposes and provisions of this Division, including regulations

- (a) defining, for the purposes of this Division and Part 10, words and expressions used in this Division, and providing criteria, testing protocols and standards in relation to those definitions;
- (b) respecting the notification referred to in paragraph 185(1)(a) and the procedure for applying for a permit under this Division;
- (c) establishing criteria for the purpose of subsection 185(2) that take into account obligations arising from international agreements to which Canada is a party;
- (d) for establishing a classification system for waste and material;
- (e) respecting information and documents to be provided to the Minister;
- (f) respecting conditions governing the import, export, transit and movement within Canada of waste and material;
- (g) respecting plans referred to in subsection 188(1), taking into account

- (i) the benefit of using the nearest appropriate disposal facility, and
 - (ii) changes in the quantity of goods the production of which generates hazardous waste to be disposed of by an exporter or class of exporters; and
- (h) prescribing anything that by this Division is to be prescribed.

Forms

192. The Minister may establish forms for the purposes of this Division.