

# Discussion Paper

## *Canadian Environmental Protection Act, 1999*

### Issues & Possible Approaches

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## Introduction

The *Canadian Environmental Protection Act, 1999* (CEPA) is an important federal law aimed at preventing pollution and protecting the environment and human health. The Minister of Environment and Climate Change (ECC) is responsible for administering most of CEPA. Some provisions are jointly administered with the Minister of Health. For more information on CEPA, please see the CEPA Environmental Registry: <https://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=D44ED61E-1>.

CEPA is a large, complex and powerful law. When CEPA was originally created in 1988, it consolidated selected provisions and laws administered by Environment Canada and other federal departments. For example, it replaced the *Environmental Contaminants Act* of 1975, and subsumed the *Clean Air Act*, the *Ocean Dumping Act*, the nutrient provisions of the *Canada Water Act* and certain provisions of the *Department of the Environment Act*. The 1988 version of the Act underwent an extensive Parliamentary review, which ultimately led to CEPA 1999 (referred to in this paper as CEPA).<sup>1</sup>

For the most part, CEPA is an enabling statute that authorizes action on a wide range of environmental and health risks – from chemicals to air and water pollution to wastes and emergencies. It provides a suite of tools that can be used to identify, assess and address these risks. In many cases, CEPA authorizes more than one possible approach to address a given risk. This ensures that the Government can choose the approach that is most effective. As such, CEPA has been used as the legislative basis for many of the federal government’s environmental and health protection programs. As a result of these programs, considerable progress has been made towards preventing pollution and protecting human health and the environment.

Despite being a fundamentally sound and well-structured Act, there are numerous issues with CEPA that need to be addressed. These have been identified by ECCC and Health Canada in the course of implementing CEPA for sixteen years. The list of issues has been informed by the development and delivery of programs, discussions and work with other governments and Indigenous Peoples, recommendations from the Parliamentary committees that reviewed the Act in 2007<sup>2</sup> and 2008<sup>3</sup>, and ideas generated through public consultations<sup>4</sup> held in 2004 and 2005 and through ongoing interactions with stakeholders.

Of the various issues associated with CEPA, this Discussion Paper identifies those issues that are important and meaningful to our partners and stakeholders, and provides possible approaches to address them.

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<sup>1</sup>Note: CEPA was also reviewed by Parliament in 2007 and 2008, but has not been substantively updated since that time.

<sup>2</sup> Report by the House of Commons Standing Committee on Environment and Sustainable Development: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=39&Ses=1&DocId=2614246>

<sup>3</sup> Report by the Standing Senate Committee on Energy, the Environment and Natural Resources: <http://www.parl.gc.ca/Content/SEN/Committee/392/enrg/rep/rep06mar08-e.htm>

<sup>4</sup> Summary report of comments received online: <https://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=4F2CD9D2-1>; Summary report of comments received through public workshops: <https://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=AEC66284-1>

The issues noted in this paper are wide ranging – both in subject matter and in scope – reflecting the nature of CEPA itself and its programs. However, they are individually and collectively important to consider in ensuring a strong legislative basis for delivering existing programs and for addressing new priorities related to the protection of the environment and human health.

# 1. Reducing Air Pollution and Greenhouse Gas Emissions

Many sources of air pollutants and greenhouse gases arise from our current patterns of energy production and consumption, as well as from our manufacturing industries and the products we produce and use.

CEPA provides the federal government with a variety of tools to control air pollutants and greenhouse gas emissions.

Divisions 4 and 5 of Part 7 of the Act provide authorities to regulate the manufacture and import of specific products that contribute to air pollution and greenhouse gas emissions, such as vehicles, engines, equipment and fuels. These Divisions enable the making of regulations to control the composition of fuels as well as the emission performance of on-road and off-road vehicles and engines, including cars, trucks, recreational vehicles, and engines used in lawn and garden, agricultural, and construction machinery. Under these authorities, increasingly stringent standards for smog-forming emissions from on- and off-road vehicles and engines, as well as for greenhouse gas emissions from on-road vehicles and engines, have been adopted. This has helped reduce the level of air pollutants such as nitrogen oxides, hydrocarbons, particulate matter, and carbon monoxide, as well as the level of greenhouse gases such as carbon dioxide, emitted from these sources. There are also regulations to lower the concentration of harmful components in gasoline and diesel fuels, resulting in a significant reduction in air pollution from the combustion of fuels, as well as requiring the inclusion of renewable content in certain fuels. For more information on vehicle, engine and fuel regulations, visit:

<http://www.ec.gc.ca/Air/default.asp?Lang=En&n=DDBB166E-1>

In addition, greenhouse gases and many air pollutants are on the List of Toxic Substances in Schedule 1 of CEPA (Schedule 1). This allows the government to use the broad regulatory powers in section 93 of Part 5 of the Act for those substances. Regulations under section 93 can control a wide range of activities. For example, the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations* set a stringent performance standard for new coal-fired electricity generation units and those that have reached the end of their useful life. In addition, the *Gasoline and Gasoline Blend Dispensing Flow Rate Regulations*, which reduce emissions of benzene and other volatile organic compounds (VOCs) during the refueling of on-road vehicles, were made using the ‘toxic substance’ regulation-making powers.

## 1.1 Clarify the scope of vehicles, engines and equipment for which standards can be set

### *Issue*

Currently, Division 5 of Part 7 of CEPA authorizes the Governor in Council, on the recommendation of the Minister, to set “standards on the design, functioning, construction or marking of vehicles, engines and equipment for the purpose of monitoring or controlling their emissions”. The majority of the vehicle and engine regulations under CEPA are aligned with the

standards set out in rules established by the United States Environmental Protection Agency (US EPA).

The US EPA also sets standards for *machines* that are powered by engines. This allows them to address the design, function and construction of the machine itself, which contribute to the overall emissions of the machine. CEPA, on the other hand, only expressly allows standards to be set for engines that power the machines.

Additionally, while the *Marine Spark-Ignition Engine, Vessel and Off-Road Recreational Vehicle Emission Regulations* came into force in 2011, in part to set emission standards for some types of small engines and vessels, there is no explicit authority to regulate the full suite of small marine diesel engines found in Canada.

### ***Possible Approach to Address the Issue***

CEPA could be amended to expressly allow regulations that set standards for the following:

- machines that are powered by engines
- small marine diesel engines (i.e., per cylinder displacement of less than 7 litres), such as tugboats, small ferries, emergency rescue vessels, small fishing boats and yachts.

This would better enable the development of regulations to reduce the impact that machines powered by engines or small marine vessels have on emission levels. They would also further the government's goal of harmonizing ECCC regulations and standards with those of the US EPA.

## **1.2 Provide a more flexible framework for managing temporary importations**

### ***Issue***

Section 155 of CEPA allows for the temporary importation of vehicles, engines or equipment for certain reasons, such as its exhibition or testing for a period of one year or a period specified by the Minister – even if it does not comply with regulatory standards. Section 155 further provides that an importer must remove the vehicle or engine from Canada before the expiry of the temporary importation period. To qualify for this exception, the importer must submit a declaration that sets out prescribed information. This provision is similar to one set out in the *Motor Vehicle Safety Act*.

CEPA does not expressly provide the authority to extend the temporary importation period or to allow vehicles to remain in Canada in certain situations. This may impact importers who wish to bring the product into compliance with the applicable standards within that period, or donate it to a museum or a research body. Finally, there may be a valid reason to request an extension of the temporary importation period, such as additional testing or evaluation before returning it to the country of origin.

### ***Possible Approach to Address the Issue***

CEPA could be amended to clarify options in addition to removing the vehicle, engine, or equipment from Canada, including:

- bringing the vehicle, engine or equipment into compliance with the regulations prior to the expiry of the temporary importation period, such that it meets the emissions standards of its prescribed class and the importer has complied with all prescribed reporting and testing requirements;
- donating the vehicle, engine or equipment prior to the expiry of the temporary importation period, subject to rules that would be set out in the regulations; and
- requesting an extension of the temporary importation period by submitting a request to the Minister justifying the extension (e.g., additional tests needed, close to bringing vehicle, engine, or equipment into compliance with regulations).

### **1.3 Strengthening the notices of defect provisions**

#### ***Issue***

Section 157 requires a company that sells, manufactures or imports a regulated vehicle, engine or piece of equipment to notify the Minister and any owners, of any defect in the design, construction or functioning of the vehicle, engine or equipment that is likely to affect compliance with prescribed standards. There is no explicit requirement for companies to notify the Minister and others of defects in labelling or marking of vehicles, engines or equipment or to undertake corrections at their expense. Also, there is no express authority for the Minister to order a company that was issued a notice of non-compliance to submit a notice of defect when it is in the best interest of protecting the environment and human health.

### ***Possible Approach to Address the Issue***

CEPA could be amended to expand the Notice of Defect provisions to expressly include:

- label deficiencies;
- a requirement for companies to cover the cost of corrections; and
- an authority for the Minister to order a company to submit a notice of defect.

### **1.4 Ensure consistency with the *Motor Vehicle Safety Act***

#### ***Issue***

When CEPA 1999 was brought into force, it included authorities for regulating vehicle emissions that were previously in the *Motor Vehicle Safety Act* (MVSA), which is administered by Minister of Transport. As a result, these CEPA provisions largely mirror the safety-related provisions in the MVSA.

On June 19, 2014, *An Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures* received royal assent. It amended many federal Acts, including the *Motor Vehicle Safety Act*. It introduced measures for multiple purposes, including



streamlining the regulatory process, reducing administrative burden, improving safety through revised oversight procedures, enhancing availability of vehicle safety information, etc. These changes created some inconsistencies between the MVSA and CEPA. In addition, some modifications made to the MVSA provided tools that could also be expressly specified under CEPA.

### ***Possible Approach to Address the Issue***

Where appropriate, CEPA could be modified to ensure consistency with the MVSA.

## **1.5 Help Canadians make environmentally informed choices about fuels**

Several regulations made under CEPA regulate the composition and quality of fuels. For example, regulations limit the level of sulphur and benzene that can be present in gasoline and diesel fuels. Because those components are high contributors to air pollutants from the combustion of fuels, these regulations have significantly lowered the output of air pollutants from vehicles and engines that use gasoline and diesel.

### ***Issue***

Not all fuel components that impact potential emissions are covered by the regulations. Some companies voluntarily limit potential pollutants, or add additives that reduce emissions. As an alternative to regulating every aspect of fuel composition, if gasoline and diesel consumers were provided with sufficient information on the differences in fuel qualities, they would be able to make informed decisions and potentially choose to purchase fuels that have a lower impact on the environment. However, CEPA does not provide express authorities to require the labelling of fuel dispensing equipment.

### ***Possible Approach to Address the Issue***

CEPA could be amended to authorize expressly the making of regulations respecting labelling of fuel dispensers. Examples could include mandatory labelling to identify whether the fuels have particular additives that make them less harmful to the environment than others.

## **1.6 Facilitate use of the regulation-making power for fuel composition**

### ***Issue***

The regulation-making authority in subsection 140(1) is constrained by subsection 140(2), which states that regulations under paragraphs 140(1)(a)-(d) may only be made if the Governor in Council is of the opinion that the regulation could make a “significant contribution to the prevention of, or reduction in, air pollution”.

### ***Possible Approach to Address the Issue***

CEPA could be amended to change the pre-condition for section 140 regulations to “contribute to” rather than make a “significant contribution to the prevention of, or reduction in, air pollution”.

## 1.7 Expressly allow efficient regulation of releases of substances from products

### *Issue*

Parts 3 and 5 of CEPA allow information gathering and risk management actions to target products that contain a toxic substance. They do not expressly target products that do not contain the toxic substance, but release it during use. For example, portable fuel containers may not be made of toxic materials, but they can release VOCs while they are storing fuel if they are not designed with effective caps. As another example, woodstoves – while likely not constructed out of toxic materials – can emit air pollutants and greenhouse gases during use. Although CEPA would authorize regulations focused on users of those products, it would be much more efficient to regulate the product design to minimize the potential for release of toxic substances.

### *Possible Approach to Address the Issue*

Parts 3 and 5 of CEPA could be amended to expressly allow information gathering and regulation making to target the design and functioning of products, and to apply to manufacturers, importers or distributors of the products, rather than only to the users of the products.

## 1.8 Allow for auctioning of tradeable units

### *Issue*

Authorities exist under CEPA to develop systems of tradeable units. However, CEPA does not set out expressly all necessary authorities for the Government to operate a properly functioning auctioning system for those units.

### *Possible Approach to Address the Issue*

CEPA could be amended to expressly provide for the tools necessary to operate a properly functioning auctioning system, such as the authority to sell tradeable units either at a fixed price or by competitive bidding.

## **2. Protecting Canadians from toxic substances and living organisms**

The Chemicals Management Plan is a joint Environment and Climate Change Canada and Health Canada initiative that assesses risks from chemical substances and living organisms. It addresses chemicals and living organisms that are new to Canada as well as those that are already in commercial use in Canada (i.e., on the Domestic Substances List). In 2006, this program completed a triage (referred to in CEPA as “categorization”) of the approximately 23,000 chemicals and living organisms on the Domestic Substances List at that time, and identified 4,300 existing substances for further attention by 2020. The program is generally viewed as functioning well.

## Risk Assessment

### 2.1 Formally acknowledge vulnerable populations

#### *Issue*

Environmental exposure to certain substances may pose greater health risks for certain more vulnerable members of society, such as children, expectant mothers and elderly persons, than for the general population, owing to physiological differences such as body size, weight, metabolism and growth rate. Assessments of risks to human health, conducted under CEPA, consider the specific vulnerabilities of these groups, including appropriate safety factors, according to available hazard, use and exposure data. However, CEPA does not formally recognize the importance of considering the vulnerabilities of certain populations as an important matter of principle when determining whether a substance is toxic or capable of becoming toxic.

#### *Possible Approach to Address the Issue*

CEPA could be amended to mention in the preamble, the importance of considering vulnerable populations in risk assessments.

### **New Substances and Activities**

CEPA required the Minister of ECC to create a Domestic Substances List that specified all substances that were, between 1984 and 1986: manufactured or imported in quantities of 100 kg or more, or in commerce. Any substance not on the Domestic Substances List is prohibited from being manufactured in or imported into Canada, until prescribed information is provided and the Ministers of ECC and of Health have had an opportunity to assess the substance to determine whether it is toxic, as defined in section 64 of the Act. Following this pre-market notification and assessment process, if certain criteria are met, the Minister of ECC must add the substance to the Domestic Substances List. As such, the list continues to grow over time. In addition, risk management actions can be taken if the substance is determined, or suspected, to be toxic. Similar obligations and authorities exist related to new activities associated with substances, if the Minister of ECC suspects that those activities could result in the substance becoming toxic.

This regime relies mainly on the provisions found in the first half of Part 5 of CEPA. A parallel regime exists for new living organisms, and is found in Part 6 of the Act. The issues identified below also apply to Part 6, in addition to the specific issues related to living organisms, which are noted in items 2.12 – 2.14.

### 2.2 Formally expand the authority to update the Domestic Substances List

#### *Issue*

Although CEPA requires the Minister of ECC to maintain the Domestic Substances List, it does not expressly authorize the removal of a substance from the List unless it was added by error. In addition, although CEPA authorizes the Minister to collect the information necessary to determine whether a substance should be removed, it does not oblige her to do so.

### ***Possible Approach to Address the Issue***

CEPA could be amended to add an explicit authority to remove a substance from the Domestic Substances List when it is not in commerce. This would result in the substance becoming subject to the new substance pre-market notification and assessment requirements, should someone wish to manufacture or import it into Canada following deletion from the List. As such, the removal should involve a transparent process, with opportunity for public comment. An obligation could also be put on the Minister to collect the information necessary to periodically update the Domestic Substances List.

## **2.3 Enhance the transparency of the Domestic Substances List**

### ***Issue***

To protect confidential business information, a notifier of a new substance or living organism can request that its name be kept confidential, and appear as a “masked name” on public documents, such as the Domestic Substances List. However, there are cases when disclosure of the name may be desirable, in particular, when compliance by the broader regulated community depends on knowledge of the substance or living organism being regulated.

### ***Possible Approach to Address the Issue***

CEPA could be amended to explicitly require the disclosure of names when risk management instruments are in place for the substance or living organism (e.g., when it is added to the Domestic Substances List with the requirement that the Government must be notified of new uses). The Ministers could also be formally authorized to release a name after five years, after proponents have had the opportunity to demonstrate that it should remain confidential.

## **2.4 Clarify timelines in the new substance regime**

### ***Issue***

The new substances provisions in Part 5 of CEPA prohibit the manufacture or import of new substances unless information is provided to the Minister in order for that new substance to be assessed for potential health or environmental risks, and an assessment period has expired. During the assessment period, the Minister can formally request additional information, which “pauses” the assessment period. However, if the Minister requests clarifications of submitted information, the assessment period is not “paused”. As a result, the assessment period could expire (allowing the substance to enter Canada) before the Minister receives the clarifications required to make an informed decision.

### ***Possible Approach to Address the Issue***

CEPA could be amended to expressly allow the assessment period to be “paused” if the Minister requests clarifications related to submitted information.

## [2.5 Tailor authorities to address substances in products that are subject to the \*Food and Drugs Act\*](#)

### *Issue*

Subsections 81(1) to 81(4) of CEPA require the notification and assessment of new substances and new uses of existing substances. CEPA recognizes that other Acts may provide equivalent pre-market notification and assessment regimes that are better suited for certain new substances. If such a regime is listed on Schedule 2 of CEPA, the substances subject to it are exempt from the above-noted requirements in CEPA. For example, new animal feeds and new pesticides are assessed and managed through the *Feeds Act* and *Pest Control Products Act* respectively. This allows the departments with the relevant expertise to determine whether these substances are safe for use in Canada.

However, in certain cases, the appropriate departments do not have legislation with equivalent pre-market notification, assessment and management regimes. For example, substances that are used or intended to be used in products regulated under the *Food and Drugs Act* (FDA) are subject to the new substance requirements in CEPA. This has resulted in a number of issues:

- CEPA does not always formally provide for the tailoring necessary for the new substance regime to apply to substances in products subject to the FDA. For example, certain foods and substances that originate in nature do not pose a risk to the environment, and should be exempted from pre-market notification and assessment. However, the regime in CEPA does not expressly allow for such exemptions.
- Section 83 of CEPA requires the Minister of ECC and the Minister of Health to both assess information to determine whether a new substance is toxic or capable of becoming toxic. However, for substances in certain products regulated under the FDA, the assessment process could be streamlined if the Minister of Health was solely responsible.

Another issue relates to the administrative “In-commerce List” which comprises substances in products subject to the FDA that entered Canada between January 1, 1987 and September 13, 2001. These substances were subject to an assessment of safety and efficacy under the FDA, and are currently being prioritized under the Chemicals Management Plan for risks which they may pose to human health and the environment. However, their status in relation to the New Substances provisions of CEPA remains an issue.

### *Possible Approach to Address the Issue*

CEPA could be amended, in the following ways, to address these issues:

- Explicitly allow for exemptions related to notification and information provisions for certain classes of new substances, such as substances in FDA regulated products that are originating in nature.
- Provide an express authority to the Governor in Council to designate the Minister of Health as the minister solely responsible for section 83 assessments of new substances in specified products regulated under the FDA.

- Formally authorize the Minister of ECC to add substances on the “In-commerce list” to the Domestic Substances List, with any restrictions necessary to account for uses that have not yet been assessed. This would provide regulatory certainty for industry with respect to the status of these substances.

## 2.6 Expressly allow simultaneous use of instruments

### *Issue*

During the assessment period, where the substance is suspected of being toxic, or capable of becoming toxic, paragraphs 84(1)(a)-(c) provide that the Minister may a) permit the manufacture or import of the substance, with conditions, b) prohibit the manufacture or import of the substance, or c) request additional information. Subsection 84(2) prohibits the manufacture or import of the substance when additional information has been requested. However, in certain cases, it may be beneficial to expressly allow the controlled manufacture/import of a substance while also requesting the notifier to provide additional information.

### *Possible Approach to Address the Issue*

CEPA could be amended to formally allow additional information to be requested using paragraph 84(1)(c) at the same time as allowing controlled manufacture/import under paragraph 84(1)(a) (i.e., to allow an exception to the prohibition in subsection 84(2) if the manufacture or import is permitted under paragraph 84(1)(a)).

## 2.7 Strengthen the Significant New Activity Provisions

### *Issue*

The Significant New Activity (SNAc) provisions prohibit new activities associated with a substance, unless information is provided to the Minister in order for that new activity to be assessed for potential health or environmental risks. A number of issues have been identified related to these provisions:

- When the Minister publishes a SNAc notice for substances or living organisms not on the Domestic Substance List, CEPA requires every person who transfers the substance or living organism to notify all persons to whom the substance or living organism is transferred of the obligation to comply with the SNAc notice. However, a similar downstream notification requirement is not explicitly provided for SNAc notices issued for substances that *are on* the Domestic Substance List.
- The Minister can vary the significant new activities identified in a significant new activity notice, but is not expressly authorized to vary other information such as data requirements and timeframes for submission.
- Some substances on the Domestic Substances List are subject to the CEPA requirements concerning significant new activities. CEPA does not expressly provide the authority to use interim risk management measures such as Ministerial conditions and prohibitions to

manage risks identified when a proponent notifies the Ministers of a proposed significant new activity with respect to these substances.

### ***Possible Approach to Address the Issue***

CEPA could be amended, in the following ways, to address these issues:

- To provide explicitly for a downstream notification requirement for significant new activities regarding substances that *are on* the Domestic Substance List, similar to that for substances *not on* the Domestic Substances List. This provision may need to be tailored to take into account the specific circumstances of substances on the Domestic Substances List.
- Explicitly allow Minister to vary any part of a significant new activity notice (not just the new activities). Such an amendment could clarify that any information in a notice may be modified.
- Expressly allow Ministerial conditions and prohibitions to be used for Domestic Substances List substances.

### **Risk management of Existing Substances**

Substances on the Domestic Substances List are referred to as *existing* substances, to distinguish them from *new* substances that are not yet in commercial use in Canada. If the results of a risk assessment for a substance show that the substance is toxic under CEPA, risk management actions may be undertaken. In certain cases, this is an obligation for existing substances. Along with regulations, a variety of other instruments can be used to risk manage toxic substances. This is known as the risk management toolbox. Having a wide selection of tools allows the departments to select the risk management action that will be the most effective and efficient at controlling the risk. Provisions related to risk management instruments are found throughout CEPA. In certain cases, there are timeframes and requirements for action with respect to risk management, which are set out in Part 5.

Some substances may also be managed through controls on exports, administered through the Export Control List, which operates under Part 5 of CEPA, Schedule 3 and related regulations.

## **2.8 Enable a more functional virtual elimination regime**

### ***Issue***

CEPA's virtual elimination regime – established to address substances that are persistent, bioaccumulative, and toxic (PBT) – requires that certain PBT substances be added to a Ministerial Virtual Elimination List (in addition to Schedule 1), and that a Ministerial release limit regulation and virtual elimination plans be developed for each substance. However, this largely duplicates the risk management requirements that already exist by virtue of adding the substance to Schedule 1.



In addition, the regime requires that a “level of quantification” be developed for each substance added to the Virtual Elimination List. However, this restricts the use of the current provisions to substances that can be measured while they are being released into the environment (e.g., point source releases), thereby preventing the Government from adding to the Virtual Elimination List those PBT substances that are released diffusely.

For these reasons, only two substances have been added to the Virtual Elimination List, even though about 20 meet the criteria.

### ***Possible Approach to Address the Issue***

CEPA could be amended to create a more functional virtual elimination regime for managing persistent, bioaccumulative and toxic substances, with the following elements:

- Schedule 1 is divided into 2 parts:
  - Part 1: Virtual Elimination List
  - Part 2: Other toxic substances
- Following an assessment, a substance may be added to either Part of Schedule 1 (not both)
- Substances added to Part 1 (the Virtual Elimination List) must be risk managed with one of two possible instruments:
  - A regulation under CEPA or another federal Act; or
  - Addition to the *Toxic Substances with Restricted Activities List* (see 2.9 below)
- Exemption for substances that are critical to human or animal health
- This would involve removal of the following elements: the definition of virtual elimination, the level of quantification, virtual elimination plans, Ministerial release limit regulations, and the Ministerial virtual elimination list.

## **2.9 Expand the risk management “toolbox”**

### ***Issue***

For most existing substances that are found toxic, section 91 of CEPA requires a *preventive or control instrument or regulation* to be proposed by the Minister of ECC within 24 months, and section 92 requires that instrument or regulation to be finalized 18 months later. Although CEPA provides for the use of a wide range of preventive or control instruments and regulations to manage risks from toxic substances, additional express authorities would formally enable the government to manage each risk as effectively as possible.

- *Performance Agreements* are entered into according to the existing *Policy Framework for Environmental Performance Agreements*. They are flexible instruments with core design criteria negotiated among parties to achieve specified environmental results. They stipulate clear and measurable performance standards and include effective accountability mechanisms. However, as they are not expressly mentioned in CEPA, these agreements do not formally allow the Minister of ECC to discharge the obligations under sections 91 and 92.



- The obligation on the Minister of ECC is to publish a regulation or instrument under CEPA. In some cases, however, another federal act may be the *best placed act* to manage the risks associated with a toxic substance. For example, measures provided under the *Canada Consumer Product Safety Act* may be better suited than CEPA to manage the risks of some substances found in certain types of consumer products.
- In some situations, the current activities associated with a toxic substance do not pose a risk, but potential future activities might. The addition of a new instrument (*Toxic Substances with Restricted Activities List*) would explicitly allow risk management to focus on only these potential new uses.
- *All CEPA instruments and regulations* are currently formally limited in their ability to control risks arising from products that do not originally contain a toxic substance, but release it during use (as mentioned in item 1.7 above). For example, portable fuel containers may not be made of toxic materials, but they can release VOCs while they are storing fuel if they are not properly constructed.

### **Possible Approach to Address the Issue**

CEPA could be amended to formally expand the toolbox in CEPA as follows:

- *Performance agreements*: Expressly allow performance agreements between either the Minister of Health or the Minister of ECC and another party, to fulfill the risk management obligation.
- *Best Placed Act*: Formally allow a regulation or instrument made under another Act to fulfill the risk management obligations under CEPA
- *Toxic Substances with Restricted Activities (TSRA) List*: Create a list under the Act, and expressly allow the Governor in Council to add a toxic substance to this list, and specify the activities associated with the substance that are prohibited. The Governor in Council would also have the authority to modify the list (remove substances, add and remove activities, etc.)
- *All instruments & regulations*: Ensure they can cover products that may release a substance (as mentioned in item 1.7 above).

## **2.10 Streamline roles for managing toxics**

### **Issue**

The obligation to propose a risk management regulation or instrument for certain toxic substances (described above), rests solely with the Minister of ECC. However when risk management of a substance is entirely led by the Minister of Health, the accountability to meet the legislated timeframes arguably should expressly rest with the Minister of Health.

In addition, section 93 regulations for toxic substances are made by the Governor in Council (GiC) upon recommendation of both the Minister of ECC and of Health. However, in certain cases, this adds unnecessary administrative process.

### ***Possible Approach to Address the Issue***

CEPA could be amended to formally allow the Minister of Health to be responsible for the sections 91 and 92 obligations to develop a preventive or control instrument or regulation for a toxic substance, in the following two circumstances:

- when the risk management will be entirely led by the Minister of Health using a CEPA instrument that the Minister of Health has authority to develop unilaterally (i.e., section 55 guidelines or code of practice); and
- when the development of the preventive or control instrument or regulation will be entirely led by the Minister of Health under a Health Canada Act such as the *Canada Consumer Product Safety Act* or the *Food and Drugs Act* (see item 2.9 re: Best Placed Act proposal).

Consideration could also be given to amending CEPA to streamline the process for putting regulations in place to manage a substance.

### **2.11 Align the timing of the Minister's risk management obligation with the Governor in Council decision to add a substance to Schedule 1**

#### ***Issue***

Section 91 states that the Minister must propose a preventive or control instrument or regulation for certain toxic substances within 24 months of making a *recommendation* to the Governor in Council to add that substance to the List of Toxic Substances. Subsection 90(1) specifies that the Governor in Council may (or may not) choose to add the substance to Schedule 1. This creates a possible problem because some risk management regulations and instruments are only available for substances that are listed on Schedule 1, but the obligation to risk manage the substance applies, even if the Governor in Council decides not to list the substance on Schedule 1.

#### ***Possible Approach to Address the Issue***

CEPA could be amended to trigger the obligation to develop the instrument or regulation for a substance when the Governor in Council decides to add the substance to Schedule 1.

### **Living Organisms**

Living organisms, such as micro-organisms, are used in a growing range of products such as adhesives and detergents, and for purposes such as bioremediation and biomass conversion. New living organisms are subject to analogous pre-market notification and assessment requirements to chemicals. Existing living organisms can also be assessed, added to Schedule 1 if they are determined to be toxic, and risk managed if needed. This program relies mainly on Part 6 and Schedule 4, but could also use Part 5 for risk management.

## **2.12 Expand the definition of “biotechnology”**

### ***Issue***

The current definition of “biotechnology” refers to the “application of science and engineering in the direct or indirect use of living organisms”. This definition lacks clarity.

### ***Possible Approach to Address the Issue***

CEPA could be amended to clarify the definition of biotechnology.

## **2.13 Enable the appropriate department(s) to assess and manage new living organisms**

### ***Issue***

The Government must assess the environmental and health risks of all new products of biotechnology before they are introduced into Canada. As for new substances, the default situation is for these assessments to be performed by ECCC and Health Canada under CEPA. Recognizing that other departments or agencies may be better placed to address certain living organisms, CEPA can stand-down in favour of other Acts that contain an equivalent assessment regime, if they are listed on Schedule 4. However, in certain cases, the departments with the relevant expertise do not have statutes with equivalent pre-market notification regimes.

### ***Possible Approach to Address the Issue***

CEPA could be amended to formally allow the Governor in Council to designate another Minister –whose department or agency has the appropriate mandate, expertise and stakeholder relationships for a given living organism– as responsible for, and having the authority under CEPA to assess and manage, specific products of biotechnology.

## **2.14 Miscellaneous amendments to the authorities related to living organisms in Part 6**

### ***Issues***

There are a few issues that present challenges in the administration of Part 6 of CEPA:

- The Ministers of ECC and Health have authority to make guidelines on the interpretation and application of the provisions of Part 5 of CEPA, but this authority is missing for Part 6.
- A person must provide certain information to the Minister before manufacturing, importing or using a new living organism. The Minister can waive information requirements in certain circumstances, for example if the information is not required to determine toxicity, or if the living organism will be manufactured at a location where it will be contained in a way that protects the environment and human health. However, the provisions do not expressly allow for information requirements to be waived for a person

importing a living organism in a manner and to a location where it will be contained in a way that protects the environment and human health.

- Paragraph 115(1)(b) provides authority to make regulations dealing with the effective and safe use of living organisms with respect to their use in pollution prevention, but this is narrower than it needs to be (i.e., living organisms are also often used in environmental remediation and protection).

### ***Possible Approach to Address the Issue***

CEPA could be amended to address these issues as follows:

- Ensuring that the section 69 authority to make interpretive guidelines explicitly applies to Part 6 (as well as Part 5)
- Updating waiver provisions to formally allow for waiving of information when a living organism is imported in a manner and to a location where it will be safely contained.
- Broaden language in paragraph 115(1)(b) to better reflect biotechnology uses in environmental protection applications.

## **3. Preventing water pollution from nutrients**

Division 1 of Part 7 of CEPA provides the authority to regulate nutrients that degrade or have a negative impact on aquatic ecosystems, such as those contained in cleaning products and water conditioners. CEPA prohibits the manufacture or import of a cleaning product or water conditioner that contains a regulated nutrient in a concentration or quantity that exceeds the regulated limit.

### **3.1 Provide authority to regulate labelling of products containing nutrients**

#### ***Issue***

Regulation-making authorities in Division 1 of Part 7 of CEPA do not expressly provide the authority to specify packaging requirements, such as how a product should be labelled, or the type of information, including conditions of use and instructions for use, that the label needs to contain. The express ability to specify labelling requirements would facilitate the use of concentrated products, resulting in reduced shipping costs, emissions and packaging, but ensure that users of the products have the information needed to correctly dilute them to a safe level.

#### ***Possible Approach to Address the Issue***

CEPA could be amended to explicitly provide the authority in Division 1 of Part 7 to specify labelling and packaging requirements.

## 4. Preventing marine pollution

Surrounded by the Arctic, Atlantic and Pacific Oceans, Canada has a 243,790 km long coastline - the longest coastline in the world – which also includes the coastline of the country's 52,455 islands. The oceans are an important part in our country's history and economy. Ports and harbours are used for shipping various commodities and regular dredging of waterways is necessary to keep these open and safe. The resulting dredged material is typically disposed of at sea. In addition, certain other low-risk materials are also routinely disposed of at sea.

Since 1975, Canada has prevented marine pollution from disposals at sea of waste and other matter by federally controlling them via a permitting system. This system is designed to ensure Canada's compliance with its obligations under two international treaties to which it is Party: the *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (London Protocol) and the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972* (London Convention).

Consistent with the London Convention and its Protocol, Division 3 of Part 7 of CEPA prohibits the disposal of substances into waters or onto ice from a ship, aircraft platform or other structure, unless it is done in accordance with a permit issued by ECCC. Incineration at sea, and the import or export of a substance for its disposal at sea, are also prohibited.

Only a small list of wastes or other matter, which are listed in Schedule 5 of the Act, can be considered for permits. These are individually assessed to make sure that disposal at sea is the environmentally preferable management option and that there are no practicable uses for the material, that pollution is prevented, and that any conflicts with other legitimate uses of the sea are avoided. Permit conditions ensure the quantities, disposal sites and special precautions are well considered.

The program that manages the disposal at sea regime operates on a cost-recovery basis. ECCC recovers costs associated with permit processing and with monitoring of representative disposal sites. For further information on the disposal at sea regime, please visit:

<https://www.ec.gc.ca/iem-das/default.asp?lang=En&n=55A643AE-1#gp4>.

The disposal at sea regime is sound and well-functioning. However, improvements to CEPA could be made to bring it up to date with recent changes to the London Protocol, to further protect the marine environment by changing the way specific activities are controlled, and to strengthen the regime's enforcement tools.

## 4.1 Permit storage of CO<sub>2</sub> in sub-seabed geological formations

### *Issue*

Carbon capture and storage involves the extraction of CO<sub>2</sub> from gas streams typically emitted during electricity production, fuel processing and other industrial process, and the storage of that CO<sub>2</sub> in geological formations. CEPA prohibits the storage of CO<sub>2</sub> in sub-seabed geological formations. This was consistent with the London Protocol, until it was amended in 2006 and 2009 to authorize sequestration of CO<sub>2</sub> in sub-seabed geological formations and to transport CO<sub>2</sub> across international borders for the purpose of sequestration. With those amendments, the global community recognized the importance of mitigating the impacts of climate change and that the storage of CO<sub>2</sub> at sea could be done without causing marine pollution if appropriate safeguards are put in place.

### *Possible Approach to Address the Issue*

CEPA could be amended to expressly authorize the Minister of ECC to issue permits for the storage of CO<sub>2</sub> in sub-seabed geological formations and to allow for import and export of CO<sub>2</sub> for the purpose of sequestration.

The permitted activity would occur in a way that protects the marine environment, as proposed projects would be subject to an assessment and permit conditions imposed by the Minister. This would reflect the amendments made to the London Protocol.

## 4.2 Prevent marine pollution from ocean fertilization and other marine geo-engineering activities

### *Issue*

Amendments to the London Protocol were adopted on October 18, 2013 to create a mechanism to specifically address ocean fertilization<sup>5</sup> and other marine geo-engineering activities – defined as “a deliberate intervention in the marine environment to manipulate natural processes, including to counteract anthropogenic climate change and/or its impacts, and that has the potential to result in deleterious effects, especially where those effects may be widespread, long lasting or severe”. The amendments to the Protocol prohibit ocean fertilization, but allow the issuance of permits in cases where the activity is assessed as legitimate scientific research and not contrary to the aims of the Protocol. The amendment creates a mechanism such that additional marine geo-engineering activities can be controlled similarly in the future. The current ocean disposal provisions in CEPA prohibit ocean fertilization. However, the Act could be amended to be more explicit as to how it addresses this issue, to provide the necessary authorities

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<sup>5</sup> Ocean fertilization is a type of marine geo-engineering activity which involves the addition of nutrient, such as iron filings, to the ocean with the goal of triggering of phytoplankton blooms. As these blooms grow, they convert carbon dioxide into “organic carbon”, and in theory, sequester this carbon as they sink to the ocean floor. Global concern over the possible severe, ocean-scale and long-lasting environmental impacts of ocean fertilization activities prompted the international community to amend the London Protocol to clarify how it addresses this issue.

for the issuance of permits for legitimate scientific research and to include the other elements of the 2013 London Protocol amendments.

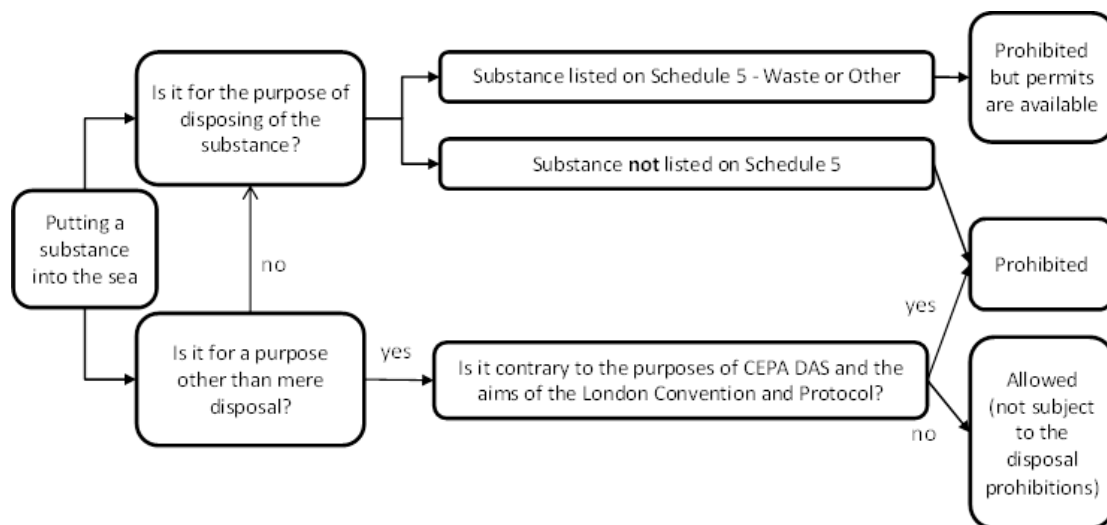
### **Possible Approach to Address the Issue**

CEPA could be amended to expressly codify the recent changes to the London Protocol. This could be considered along with item 4.3 below.

### **4.3 Prevent marine pollution from other placement activities**

#### **Issue**

CEPA’s disposal at sea regime (CEPA DAS) mirrors the London Protocol by not subjecting specific activities to the disposal prohibitions, and therefore not requiring the issuance of permits in order for them to occur. This is the case for the “placement” of a substance for a purpose other than its mere disposal, if the placement is not contrary to the purpose of CEPA DAS and the aims of the London Protocol. This is illustrated below:



It is sometimes difficult for a potential proponent to determine whether the placement of a given substance is (or is not) contrary to the purpose of CEPA DAS and the aims of the London Protocol, and therefore whether it should be subject to the disposal prohibitions. In addition, the involvement of ECCC is necessary in certain cases, to ensure that a placement activity is performed in a way that minimizes impacts on the marine environment.

If a proponent determines that his or her activity is a placement that is not contrary to the purpose of CEPA DAS or the aims of the London Protocol, there is no explicit obligation to discuss that placement activity with ECCC, nor for the activity to be conducted subject to any conditions or mitigation measures that ECCC may suggest. In addition, CEPA does not expressly authorize the Department to require monitoring or request additional information related to that activity.

### ***Possible Approach to Address the Issue***

In addition to codifying the 2013 London Protocol amendments, which are limited to addressing marine geo-engineering activities, CEPA could be amended to create a regime that also resolves the lack of certainty in regards to specific placement activities that have proved problematic in the past, and that provides a framework to facilitate the control of additional placement activities in the future.

This could involve the following elements:

- Clarification of the delineation between “disposal” and “placement”
- Clarification of the status of specific placement activities that have proved to be problematic in the past by:
  - Expressly prohibiting certain placement activities that are contrary to the purposes of CEPA DAS and the London Protocol, such as ocean fertilization.
  - Prohibiting other placement activities that are contrary to the purposes of CEPA DAS and the London Protocol, unless done in accordance with a permit, such as:
    - legitimate scientific research on ocean fertilization;
    - the use of dredged material to create an artificial island.
  - Clarifying that specific placement activities that are not contrary to the purpose of CEPA DAS and the London Protocol – if they are done in accordance with specific criteria– can proceed without a permit, such as:
    - moving sediment when laying cable;
    - burial of human remains at sea;
    - using sampling equipment for scientific purposes.
- Creating a mechanism that could be easily updated to clarify the status of additional placement activities in the future.

#### **4.4 Diversify CEPA’s enforcement tools in the disposal at sea regime**

##### ***Issue***

Unlike other parts of the Act (e.g., sections 95 or 99 in Part 5), there is no express authority in Division 3 of Part 7 for the Minister to order a person who has contravened the division, or a permit issued under it, to take specific actions to remedy the damage caused by the contravention. There are also no express obligations on that person to take immediate remedial measures when such a contravention has occurred.

##### ***Possible Approach to Address the Issue***

CEPA could be amended to add the express authorities to direct a person who has contravened Division 3 of Part 7 of CEPA or a disposal at sea permit to take specific measures to remedy the impacts of the offense, and/or add specific requirements on such a person to take immediate remedial measures. This is related to the approach identified in item 6.3, related to remedial measures.



## 4.5 Improve the functioning of the disposal at sea regime

### *Issue*

A number of minor issues impact the functioning of the regime:

- Under paragraph 127(2)(d) of the Act, a disposal at sea permit applicant is required to publish a notice of the application in a local newspaper circulating in the vicinity of the proposed site of the loading or disposal. Some Canadian communities do not have newspapers of local circulation.
- In order to dispose of a substance in Arctic waters, a proponent must seek both a disposal at sea permit under CEPA and an authorization under the *Arctic Waters Pollution Prevention Act*.
- CEPA does not explicitly provide that disposal at sea permits can be transferred in cases where, for example, a company is sold or restructured during the term of a valid permit. This creates unnecessary administrative burden.

### *Possible Approach to Address the Issue*

CEPA could be amended to address these issues as follows:

- Formally allow the Minister to specify any manner for the publication of notices of application.
- Reduce duplication between CEPA DAS and the *Arctic Waters Pollution Prevention Act*.
- Expressly allow companies that have obtained permits to transfer them, subject to regulations.

## 4.6 Extend the authority to revoke or suspend permits

### *Issue*

Subsection 129(3) of the Act authorizes the Minister to suspend or revoke a disposal at sea permit or vary its conditions, in very specific circumstances (consideration of Schedule 6 or in relation to the establishment of a board of review). In cases where the Minister suspects that a disposal at sea permit holder has contravened the permit or its conditions, there are no express authorities in the Act to suspend or revoke the permit. Express authority would be useful to stop a proponent from continuing with a disposal, allowing ECCC to assess if any damage to the marine environment resulted from the proponent's contravention.

### *Possible Approach to Address the Issue*

CEPA could be amended to clarify that the Minister may suspend or revoke a permit when she suspects that a proponent has contravened the permit or its conditions.

## 5. Preventing pollution from the transboundary movement of hazardous waste and hazardous recyclable material

Through authorities provided under Division 8 of Part 7 of CEPA, Environment and Climate Change Canada is responsible for regulating transboundary movements of waste and recyclable material. Under this program, regulations were made to ensure that the hazardous waste and hazardous recyclable material (as defined in those regulations) that are transported across borders are managed in an environmentally sound manner that protects the environment and human health. This Division and its regulations were also enacted to contribute to Canada's ability to meet its obligations under various international agreements, including:

- The *Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Hazardous Recyclable Materials and their Disposal*;
- The Decision C(2001)/107/Final of the Council of the Organization for Economic Co-operation (OECD) Concerning the Control of Transboundary Movements of Wastes Destined for Recovery Operations; and
- The *Canada-USA Agreement on the Transboundary Movement of Hazardous Wastes*.

Regulations under CEPA also prescribe conditions for inter-provincial/territorial and international movements of hazardous waste and hazardous recyclable material. With respect to international movements, ECCC issues over 2,300 permits per year to authorize more than 58,000 shipments of hazardous waste and hazardous recyclable materials.

### 5.1 Formally enable appropriate response to illegal imports or exports

#### *Issue*

Division 8 of Part 7 of CEPA prohibits the import, export or transit of hazardous waste and hazardous recyclable material, unless the Minister is notified, a permit is issued, and any prescribed conditions are met.

In circumstances where waste or recyclable material is illegally exported from Canada, CEPA lacks the express authority to order an exporter to return it back to a facility in Canada to manage it in an environmentally sound manner, or to manage it in an environmentally sound manner at a facility in the importing country or the country of transit.

Similarly, CEPA does not provide the express authority to order a person who has imported waste or recyclable material in contravention of Division 8 of Part 7 to either return it to the country of export or manage it in an environmentally sound manner in Canada.

In addition, if the government takes action itself (if the non-compliant importer or exporter fail to take the necessary corrective action), there are no express authorities in CEPA to allow for the recovery of the resulting costs.

### ***Possible Approach to Address the Issue***

CEPA could be amended to provide the express authority to allow the Minister to:

- require a person who has exported waste or recyclable material in contravention of Division 8 of Part 7 of CEPA or the associated regulations to return it to a facility in Canada for management in an environmentally sound manner or manage it in an environmentally sound manner at a facility in the importing country or the country of transit;
- require a person who has imported waste or recyclable material in contravention of Division 8 of Part 7 of CEPA or the associated regulations to similarly manage it in an environmentally sound manner, either in Canada or after return to the country of export;
- recover the costs incurred by the Government of Canada for taking measures to take-back or return or manage the waste or material, if the exporter or importer fails to do so within the time required.

## **5.2 Expressly allow tailoring of conditions in permits**

### ***Issue***

Division 8 of Part 7 of CEPA provides the authority to make regulations prescribing the conditions and duration of permits for the import, export or transit of hazardous waste, hazardous recyclable material and prescribed non-hazardous waste. However, this does not expressly provide the flexibility to tailor the permit conditions or duration of a permit to address specific circumstances on a case-by-case basis.

### ***Possible Approach to Address the Issue***

CEPA could be amended to address this issue by expressly allowing conditions and duration of the permit to be set out clearly in the permits themselves.

## **5.3 Extend the authority to revoke or suspend permits**

### ***Issue***

There is currently no express authority in the Act to suspend or revoke a permit issued under subsection 185(1) for the import, export or transit of hazardous waste, hazardous recyclable material and prescribed non-hazardous waste. This could be an appropriate action to take in a number of situations, for example:

- if the Minister of ECC has reason to believe that the permit holder is in contravention of the terms or conditions of the permit;
- if the Minister has reason to believe that a person provided false or misleading information in his notification to obtain the permit;
- if the authorities of the country of destination or transit or of the jurisdiction of destination in Canada suspended or revoked their authorization.

### ***Possible Approach to Address the Issue***

CEPA could be amended to expressly provide the authorities to suspend or revoke permits issued under subsection 185(1), in certain circumstances, such as those listed above.

## **6. Preventing and responding to emergencies**

CEPA contains various authorities related to emergency situations.

Part 8 of CEPA addresses environmental emergencies related to specific substances, defined as the uncontrolled, unplanned or accidental releases (or the likely releases) of those substances. Part 8 authorizes the government to make regulations and take non-regulatory measures, such as guidelines and codes of practice, to prevent, prepare for, respond to and recover from such environmental emergencies. The *Environmental Emergency Regulations* have been promulgated under this Part, and require the preparation of environmental emergency plans for the substances prescribed in the regulations.

In addition, various provisions throughout CEPA help the Department respond to environmental emergencies. For example, under sections 95, 169, 179, 201 and 212, a person who has contravened the Act is required to report to an enforcement officer on the contravention and to take all reasonable remedial measures to protect the environment and public safety. Sections 99, 119 and 148 provide the Minister the authority to direct an offender to take specific remedial measures. In all cases, the Government is able to take those measures if the person failed to take them and to recover the associated costs.

### **6.1 Expressly allow for field research related to environmental emergencies**

#### ***Issue***

Section 195 of CEPA authorizes the Minister to release substances in order to conduct field research on causes, effects and response to environmental emergencies. However, the provision does not explicitly exempt the Minister from all potentially applicable prohibitions that would otherwise prevent the research (e.g., section 5.1 of the *Migratory Birds Convention Act*, etc.), nor does it allow the Minister to authorize other individuals to conduct the research.

Additionally, the definition of environmental emergency is limited to research related to substances that are identified in regulations or interim orders made under Part 8 of CEPA.

#### ***Possible Approach to Address the Issue***

CEPA could be amended to expand the scope of section 195 to allow for authorization of 3<sup>rd</sup> party field research related to environmental emergencies and for research on any substance, and to expand the list of provisions of federal laws from which authorized research on environmental emergencies will be exempt.

## **6.2 Formally allow for exemptions for urgent, time sensitive issues of national security**

### ***Issue***

The regulatory process through which the Department of National Defense (DND) currently obtains exemptions from CEPA or its regulations may not be appropriate in time-sensitive situations.

### ***Possible Approach to Address the Issue***

This issue could be addressed by formally allowing the Governor in Council to issue an order exempting government activities from regulations or provisions of the Act on a case-by-case basis, for urgent, time sensitive issues of national security.

## **6.3 Expand reporting and remedial measure provisions**

### ***Issue***

Sections 95 to 98 of CEPA require a person who releases a substance in contravention of section 92.1 or section 93 regulations, or a section 94 interim order, to notify an enforcement officer of the release and to take all reasonable measures to mitigate this release. These provisions also allow enforcement officers to take the measures him/herself or to require the person to take the measures if the person fails to do so. These provisions do not expressly capture all the situations where the release of a substance can pose a health or environmental risk.

In addition, there are some discrepancies between the remedial measures under sections 99, 119 and 148, and between those under sections 95 to 98, 169 and 170, 179 and 180, 201 to 203 and 212 to 215.

### ***Possible Approach to Address the Issue***

CEPA could be modified to expressly extend sections 95 to 98 to cover situations where a person has released a substance in contravention of a Ministerial condition or prohibition that restricts the use of a substance, such as under subsections 84(1) and 109(1). In addition, changes to the various remedial measures provisions could be made to ensure their consistency, where appropriate. This is related to the approach identified in item 4.4, which is also related to remedial measures.

## **7. Supporting environmental protection related to federal activities and on federal and Aboriginal lands**

Under Canada's Constitution, provincial environmental laws do not necessarily apply to federal government operations or on federal lands (including water). This means that these federal operations and activities on federal lands, including activities on certain Aboriginal lands, may not be subject to provincial regulations or permit systems covering emissions, effluents,

environmental emergencies, waste handling and other environmental matters. Part 9 of CEPA provides some enabling authorities to address this gap.

## **7.1 Facilitate incorporation by reference of provincial regimes**

### ***Issue***

‘Incorporation by reference’ describes a mechanism by which a document or part of a document, as it exists on a particular date or as it is amended from time to time, may be included in a statute or regulation, without needing to reproduce the text of the document in the legislation itself. Once incorporated, the document is considered to be part of the legislation and acquires the force of law.

Incorporation by reference of provincial environmental legislation, or a part thereof, into federal regulations made under Part 9 of CEPA, could help address some of the gaps that exist due to provincial regulations not applying. However, some additional authorities would be needed in Part 9, in order for incorporation by reference of provincial legislation to function effectively.

### ***Possible Approach to Address the Issue***

CEPA could be amended to:

- Modify Part 9 regulation making powers to facilitate the incorporation by reference of provincial permitting regimes.
- Formally allow Part 9 regulations to incorporate provincial regimes by reference, on a jurisdiction-by-jurisdiction basis.
- Expressly allow Part 9 regulations to distinguish, not only on the basis of jurisdiction, but also on the basis of classes of entities or areas, or specific entities or areas.

## **8. Updating regulation-making provisions**

### **8.1 Facilitate regulatory alignment**

#### ***Issue***

Unless warranted by different environmental or health protection objectives, regulatory differences among jurisdictions can impose unnecessary costs on citizens and businesses, particularly in relation to integrated markets such as those for vehicles, engines, and fuels, as well as other products. In order to maintain harmonized regulatory requirements with another country, it is advantageous for the Government to be able to respond quickly to changes the other government makes to its regulations. However, the Canadian regulatory process can take several years to finalize a regulatory amendment.

CEPA contains a tool that allows for a quick response for the purpose of maintaining alignment with another country’s regulation. However, it only formally applies to one regulation-making authority. The interim order power in section 163 allows the Minister to modify or suspend any

portion of vehicle, engine and equipment regulations under CEPA to the extent necessary to maintain alignment with foreign regulations, for a temporary period, to allow time for the regulation to be amended.

### ***Possible Approach to Address the Issue***

CEPA could be amended to expressly allow the Minister to issue an interim order (similar to that in section 163), to be used for any regulation under CEPA, to the extent necessary to maintain alignment with a foreign regulation. This would provide the Minister with a quick and efficient means of maintaining regulatory alignment while regulatory amendments are developed and finalized.

The effective period of the interim order could be set to reflect the fact that Canadian regulations typically take at least two years to finalize, and the deadline for obtaining the Governor in Council's approval of the interim order could be extended from the typical 14 day period found in CEPA to 30 days.

This authority would be limited in scope, and could only be exercised in respect of inconsistencies with foreign legislation, with which a CEPA regulation is intended to be harmonized.

## **8.2 Expand the authority to incorporate by reference**

### ***Issue***

'Incorporation by reference' describes a mechanism by which a document or part of a document, as it exists on a particular date or as it is amended from time to time, may be included in a statute or regulation, without needing to reproduce the text of the document in the legislation itself. Once incorporated, the document is considered to be part of the legislation and acquires the force of law.

Incorporation by reference is a timely and effective means of responding to advances in areas such as science, technology, and any associated technical standards; it can help ensure that legislation remains current without requiring the full legislative amendment process.

Various authorities related to incorporation by reference were provided to the federal government through recent amendments to the *Statutory Instruments Act*. However, there remain some limitations with respect to incorporating by reference documents that Ministers produce themselves, or produce jointly with other another Minister or body in the federal public administration. While designed to ensure that the legislative process is not circumvented or sub-delegated to departmental officials, these limitations may impact on departments' ability to respond to scientific or technical advances in a timely and effective manner.

### ***Possible Approach to Address the Issue***

CEPA could be amended to expressly allow incorporation by reference of the following types of material, as amended from time to time:

- Formal instruments made under the Act, such as guidelines and codes of practice.
- Internally generated technical documents that specify: 1) how to quantify prescribed data to be reported, including factors to be used for quantification; and 2) how to conduct prescribed tests, measurements, sampling, monitoring, and analyses.
- Documents produced jointly by the Minister of ECC and/or the Minister of Health, with another Minister or body in the federal public administration.

When dealing with internally or jointly produced documents, CEPA could be amended to ensure that an appropriate framework is in place to provide accountability for these documents.

## **9. Improving information gathering provisions**

Information gathering under CEPA relies on provisions in Parts 3, 5 and 6 of the Act, and information-related provisions found in the various regulations and instruments throughout the Act.

### **9.1 Enhance the transparency of collected information**

#### ***Issue***

Section 313 of CEPA allows persons who are required to report information under CEPA to request, in writing, that the information be treated as confidential. CEPA does not require the person to provide reasons why this information should be treated as confidential, unless it is required under a Governor in Council regulation issued under paragraph 319(a).

The Minister is unable to disclose any information for which a request for confidentiality has been submitted, except in certain situations specified in sections 315 to 317 of CEPA. For example, the Minister may disclose information for which a request for confidentiality has been made if the public interest in health, safety, or protection of the environment outweighs any material financial loss or prejudice to the competitive position of the person who provided the information, and any damage to the privacy, reputation or human dignity of any individual that may result from the disclosure. However, it is difficult for the Minister to assess these competing interests when no information has been provided to support the confidentiality request.

#### ***Possible Approach to Address the Issue***

CEPA could be amended to require persons who submit a request for confidentiality under section 313 to provide the Minister with reasons to support the request. This could be tailored to allow the Minister to require information on request or to require that reasons be provided in certain situations.



## 9.2 Expand information gathering authorities

### *Issue*

There are some limitations associated with CEPA's information gathering authorities.

Subsection 71(1) of CEPA authorizes the Minister to require persons, via a notice, to submit certain information related to a substance for the purpose of assessing whether a substance is toxic or capable of becoming toxic.

- When issuing a notice under paragraph 71(1)(b), CEPA does not expressly provide the authority for the Minister to request the submission of information such as the methodology, data or models used in developing information or collecting or processing samples. This limits the departments' ability to compare and properly interpret the information collected.
- When issuing a notice under paragraph 71(1)(c), CEPA does not expressly provide the authority for the Minister to request that samples of toxicological tests or other tests be submitted along with the results of the tests. This is needed in order to verify the information provided.

### *Possible Approach to Address the Issue*

CEPA could be amended to:

- Provide the Minister with the express authority to request the following information under section 71 for the purpose of assessing whether a substance is toxic or capable of becoming toxic:
  - other information, such as methodology, data, models used, etc.
  - samples of the toxicological tests and/or the other tests.

## 9.3 Facilitate administration of information gathering authorities

### *Issue*

Certain information gathering and information reporting authorities under CEPA are missing the express administrative tools needed to facilitate and modernize the information gathering process.

- The sections 46 and 71 information gathering provisions do not expressly require persons to update the information they provide. As a result, the Minister may be in possession of information that is not up to date.
- Most CEPA authorities related to making regulations or instruments or to gathering information can require the regulatee to maintain and retain records. The period of time during which these records will be maintained is not always clear.

### *Possible Approach to Address the Issue*

CEPA could be amended to:

- Allow sections 46 and 71 notices to require some information to be updated if it changes

- Ensure that there are clear, consistent time frames (e.g. 7 years) for the maintenance and retention of records related to regulations, instruments and information gathering, but also allow these timeframes to be tailored if needed, in specific circumstances.

## 10. Strengthening the enforcement of CEPA

Environment and Climate Change Canada's Enforcement Branch is responsible for the enforcement of CEPA. Enforcement is an essential component of the regulatory-compliance continuum and plays a crucial role in ensuring that regulatory instruments enacted by the Government are implemented fairly, consistently, and predictably.

ECCC's Enforcement Branch relies on provisions throughout the Act, but mainly on Part 10.

### 10.1 Provide explicit authorities for illegal imports/exports of substances and living organisms

#### *Issue*

If a person *imports* a substance or living organism in contravention of the Act or its regulations, there are no express authorities for the government to order this person to either return it to its country of export or to manage it in Canada. In addition, if the government takes action itself (if the importer fails to do so), there are no express authorities in CEPA to allow for the recovery of the resulting costs. CEPA is also lacking similar authorities related to the illegal *export* of a substance or living organism (i.e., authorities to order a person who has exported a substance or living organism in contravention of the Act to bring it back to manage it in Canada and if the exporter fails to do so and the government takes action itself, allow for the recovery of the resulting costs).

#### *Possible Approach to Address the Issue*

CEPA could be amended to expressly provide the necessary authorities to ensure that:

- A person who has exported a substance or living organism in contravention of Parts 5 or 6 or the associated regulations is required to take the substance back and manage it in Canada in accordance with the Act and its regulations;
- A person who has imported a substance or living organism in contravention of Parts 5 or 6 or the associated regulations is required to either return it to its country of export or manage it in Canada in accordance with the Act and its regulations;
- The government may recover the costs of conducting the take-back/return/management of the substance or living organism, if the person fails to act.

## **10.2 Formally provide effective enforcement tools for illegally imported vehicles, engines and equipment**

### ***Issue***

There is no express authority under CEPA to require the removal from Canada or the return to the country of origin of any vehicle, engine, or equipment that are reasonably believed to have been illegally imported.

### ***Possible Approach to Address the Issue***

CEPA could be amended to expressly allow the Minister to order the removal of illegally imported vehicles, engines, machines or equipment.

## **10.3 Expressly allow refusal and revoking of permits for unpaid fines**

### ***Issue***

The *Environmental Violations Administrative Monetary Penalties Act* (EVAMPA) has limited means to recover unpaid penalties. In comparison, the *Contraventions Act*, a statute also used to enforce regulatory instruments under CEPA, contains provisions to refuse or revoke permits when an offender who is convicted in a proceeding does not pay its fine.

### ***Possible Approach to Address the Issue***

EVAMPA could be amended to allow persons responsible for issuing or revoking licenses or permits under environmental acts to which EVAMPA applies to refuse to issue or to revoke permits for unpaid administrative monetary penalties.

# **11. Facilitating intergovernmental cooperation**

In Canada, protection of the environment is a shared responsibility among governments. This makes close cooperation among the federal, provincial, territorial and Indigenous governments important to Canada's environmental well-being. Intergovernmental cooperation is one of CEPA's guiding principles, and the Act includes provisions to help ensure that federal actions are complementary to, and avoid duplication with, other governments.

## **11.1 Facilitate the use of equivalency agreements**

### ***Issue***

The equivalency regime, set out in section 10 of the Act, gives the Governor in Council the authority to "stand down" a CEPA regulation – i.e., to declare that the regulation does not apply – in a province, a territory or an area under the jurisdiction of an Indigenous government that has provisions in force that are equivalent to those of the CEPA regulation. This tool reduces federal-provincial overlap, and recognizes that other governments may be better placed to manage particular environmental issues in their jurisdictions.

It could be helpful to clarify that the test of “equivalent provisions” can be met by provisions that have similar environmental effect. Recent experience with equivalency agreements has also raised questions about the utility of requiring an agreement before the issuance of an order.

### ***Possible Approach to Address the Issue***

CEPA could be amended to:

- Mirror the language in the *Fisheries Act* by replacing the term “equivalent provisions” with “equivalent in effect”.
- Remove the precondition of a written agreement between the federal government and the other jurisdiction, before the Governor in Council can stand down the federal regulation.

## **11.2 Expand list of parties that can formally enter into administrative agreements**

### ***Issue***

Administrative agreements are work-sharing arrangements that can cover any matter related to the administration of the Act. Such matters can include inspections, investigations, information gathering, monitoring and reporting of collected data. These agreements do not release the federal government from any of its responsibilities under the law, nor do they delegate legislative power from one government to another.

Section 9 of CEPA explicitly authorizes the Minister to enter into an administrative agreement with a government or an aboriginal people. It does not list other entities. For example, offshore oil and gas is regulated by the National Energy Board and by two federal–provincial offshore petroleum boards in Newfoundland and Labrador and Nova Scotia through the Accord Acts. The boards are the primary regulators of these activities and, in certain circumstances, might be in the best position to administer a federal regulation that relates to them.

### ***Possible Approach to Address the Issue***

CEPA could be amended to expand the list of parties with whom the Minister may formally enter into administrative agreements under section 9. Parties added to the list could include bodies or entities responsible for the administration of another Act of Parliament or an Act of the Legislature of a province.

## **11.3 Expressly allow the expiry date of administrative agreements to be negotiated**

### ***Issue***

CEPA requires that administrative agreements expire after five years. In some cases, this may impose an unnecessary obligation to negotiate a new agreement when a current arrangement is satisfactory.

### *Possible Approach to Address the Issue*

CEPA could be amended to replace the automatic five-year termination date for administrative agreements with an authority that allows the parties to negotiate a longer agreement. The current ability for either party to terminate an agreement with reasonable notice could be retained to ensure that ineffective agreements can be dissolved.

## **12. Further encouraging public participation and removing administrative barriers**

### **12.1 Lower the precondition for public to initiate Environmental Protection Actions**

#### *Issue*

Under Part 2 of CEPA, members of the public can initiate a suit, known as Environmental Protection Actions, against someone whom they suspect has committed an offence under the Act. There are strict tests for using Environmental Protection Actions set out in section 22 of the Act, one of which being that the alleged offence must have caused significant harm to the environment. The Senate Committee, during the last review of CEPA, recommended that the Act be amended by removing the need for a citizen to show that an action has caused *significant* harm to the environment before being able to proceed with an environmental protection action.

#### *Possible Approach to Address the Issue*

CEPA could be amended to lower the threshold for bringing an environmental protection action from an allegation that the offence caused “significant harm” to simply that it caused “harm” to the environment.

### **12.2 Improve board of review provisions**

#### *Issue*

Only one Board of Review has been set up under the Act: the Board of Review for Decamethylcyclotrasiloxane (Siloxane D5). In implementing a Board of Review for the first time under CEPA, the Departments identified some possible improvements to the related provisions.

The Act states that when a Board of Review is *established*, the time period by which a final preventive or control regulation or instrument must be published is paused until the board has submitted its report to the Minister (subsection 92(2)). However, this period continues to run from the time the Minister makes a decision to constitute a Board of Review until the time that the Board is actually established, which ultimately reduces the Ministers’ time to develop and propose a risk management instrument. In addition, there is currently no requirement for the Minister or Ministers to indicate their intention to proceed with a Board of Review following a notice of objection.

### ***Possible Approach to Address the Issue***

CEPA could be amended to ensure the Board of Review provisions function efficiently and result in the best possible risk management decisions. Amendments could include such things as:

- Requiring the Minister or Ministers to publish a notice indicating the intention to establish a Board of Review and
- Allowing the 18-month period in subsection 92(1) to be suspended by this notice, rather than the establishment of the Board.

## **12.3 Consider whether certain laws of general application should apply to CEPA**

### ***Issue***

Some laws of general application, such as the provisions of the *User Fees Act*, impose onerous requirements that may not be appropriate for some environmental regulations. For instance, the *User Fees Act* imposes process requirements that largely duplicate requirements relating to notice and consultation that are part of the regulatory impact analysis process (per the *Cabinet Directive on Regulatory Management*) as well as requirements, under CEPA, for consultation on regulations respecting fees and charges. In addition, federal funding rules can limit the spending of funds in a fiscal year other than the one in which they were collected. This can impact the ability to conduct activities needed to properly administer regimes and ensure environmental protection – such as the monitoring performed related to disposal at sea activities.

### ***Possible Approach to Address the Issue***

Consider amendments to CEPA to exempt certain regulations made under it from the application of the *User Fees Act*. In addition, consideration could be given to a mechanism that would provide flexibility for funding activities such as monitoring, etc.

## **12.4 Provide for a more appropriate frequency of Parliamentary Reviews**

### ***Issue***

Subsection 343(1) requires Parliamentary review of the Act every 5 years. However, both the Parliamentary review process and the development and finalization of legislation take a long time. A 5 year review period is not long enough to allow amendments based on a prior review to be enacted and assessed. A 10 year window would reflect more realistic review and legislative timelines.

### ***Possible Approach to Address the Issue***

CEPA could be amended to require a Parliamentary review every 10 years, rather than every 5 years.