# The Federal Cabinet Directive on Streamlining Regulation

Commentary from the Pembina Institute

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## Introduction and Background

The federal cabinet directive on streamlining regulation came into force on April 1, 2007 (http://www.regulation.gc.ca/default.asp@language=e&page=thegovernmentdirectiveon2.htm)

The directive replaces the Government of Canada Regulatory Policy, first adopted in 1978, and revised in 1986, 1994 and 1999. The regulatory policy and now directive apply to all regulatory initiatives by federal departments and agencies requiring cabinet approval. This includes, for example, the regulation of 'toxic' substances (including greenhouse gases and criteria air pollutants) under the *Canadian Environmental Protection Act 1999*, energy efficiency standards made under the *Energy Efficiency Act* and food and drug safety standards adopted under the *Food and Drug Act*.

The new cabinet directive is the most important product to date of the federal 'smart regulation' initiative launched by former Prime Minister Chretien in 2002. The revised directive follows a number of key themes that emerged in the September 2004 report of the External Advisory Committee on Smart Regulation.

## Instrument Choice Under the New Directive

On the positive side, the new directive removes much of the explicit bias against the use of regulatory instruments by federal agencies contained in the earlier regulatory policies. These policies made it clear that regulation was to be considered the option of last resort in the achievement of policy goals. The new policy adopts a more neutral approach to the issue of choice of policy instrument, although the transactional barriers to the use of regulatory instruments relative to other options, implicit in the existence of the directive and its requirements, remain.

The new directive also adopts a more flexible approach to the analysis of the costs and benefits associated with the use of regulatory instruments, eliminating previous explicit

requirements for the demonstration of net economic benefits. In addition, the directive recognizes the need to consider qualitative as well as quantitative costs and benefits, environmental and social factors as well as economic ones, the distribution of costs and benefits in society and that economic efficiency may not be the only or overriding public policy objective. References to the goal of maximizing net benefits however, remain in the policy, as do requirements to minimize the cumulative administrative burden and to impose the least possible cost on Canadians and businesses to achieve intended policy objectives.

## No 'Made In Canada' Standards

On a less positive note, the directive places a very strong emphasis on limiting the number of specific Canadian regulatory requirements, and relying international standards, guidelines and recommendations wherever possible. This is consistent with the recommendations of the External Advisory Committee on Smart Regulation to limit 'made in Canada' requirements as much as possible. Such an approach carries with it the implication of always following, rather than leading, other jurisdictions in the development of health, safety and environmental standards.

## Compliance With Trade Obligations Before All Else

Although the directive makes reference to Canada's international obligations in such areas as human rights, health, safety, security, and the environment, there is an overwhelming emphasis on compliance with international trade obligations, particularly the World Trade Organization Agreement and the North American Free Trade Agreement. Regulatory agencies are required to seek the advice of the Department of Justice and Department of Foreign Affairs and International Trade and to comply with international trade obligations in the development regulatory initiatives.

Detailed specific direction is provided regarding compliance with international trade obligations with respect to the design and implementation of technical regulations, conformity assessment procedures and sanitary and phytosanitary measures. These requirements affect regulatory initiatives regarding any products and materials that may be imported or exported into or from Canada, ranging from hazardous wastes to foods and drugs. The provisions require that sanitary and phytosanitary standards (largely affecting foods imports) be based on international standards, guidelines or recommendations, where they exist. This is despite the consideration that such international standards are usually developed on a consensus basis, and typically reflect lowest common denominator outcomes.

## Conclusions and Observations

The overall results indicate that the interventions of environmental and other public interest organizations in the consultations on the development of the directive did have some impact in reducing the explicit anti-regulatory biases incorporated into previous versions of the federal government's regulatory policy. This is a welcome, if not

surprising, result given the overwhelming evidence that has emerged over the past decade of the failures voluntary and non-regulatory initiatives in the protection of public goods, ranging from drinking water safety to climate change.

However, it is also clear that international trade obligations continue to be given overriding priority in the federal government's approach to the protection of public goods, regardless of their implications for the protection of the environment, and public health and safety. At the same time, the federal government has adopted a policy more resistant than ever to the notion that Canada might lead the world in development of health, safety and environmental standards. The implications of all of this for the government's 'made in Canada' climate change plan remain to be seen.

**For more information contact:**

Mark S.Winfield, Ph.D.
Director, Environmental Governance
The Pembina Institute
Tel: 416-644-1016
e-mail: markw@pembina.org
www.pembina.org

Read Dr. Winfield's keynote address on regulatory reform in Canada to the second annual conference of the Journal of Environmental Law and Practice — Governance and the Environment in Canada: From Regulatory Renaissance to 'Smart Regulation' — in the current edition of JELP.