



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

January 31, 2011

Ana Tinta
Senior Policy Advisor
Ministry of the Environment
Environmental Programs Division
Toxic Reduction Project
135 St. Clair Avenue West
Toronto, Ontario
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Dear Ana Tinta,

Re: EBR Registry Number 011-1191 Amendment O. Reg. 455/09

Background

For decades it has been a strategic priority of the Canadian Environmental Law Association (CELA) to shift Ontario environmental law and policy on toxic substances from a command and control regime to one focused first on prevention and avoidance of the health and societal costs caused by harmful exposures to these substances. Ontario's emission loadings have demonstrated that new measures are called for to cut back our large contributions to the toxic burden of North America. CELA has had an extensive involvement in campaigning for the Toxics Reduction Act in Ontario. To ensure the strongest regime we researched best laws and practices and wrote *Our Toxic-Free Future: An Action Plan and Model Toxics Use Reduction Law for Ontario*. We also drafted a Model Law and shared that law with Ministry of Environment Legal Staff, made submissions to the government's expert panel and at the Standing Committee on General Governance hearings on the Act and participated in every stage of consultation on development of the Act, its regulations and on its successful implementation.

Throughout this process CELA has worked together with members of the Provincial Environmental and Occupational Carcinogens Stakeholder Group convened by the Canadian Cancer Society Ontario Branch to ensure that the health and safety benefits of this law flow to the public and workers who will be the first to benefit from reduced exposures to these substances in the work place. This was recognised by Premier McGuinty when he announced his commitment to this act. For this reason we are endorsing this group's detailed comments submitted to you by our Take Charge on Toxics Campaign group (attached).

Our research on the US experience demonstrated that the States like Massachusetts that had established a Toxic Reduction Institute have had the most successful programs because the State had stated targets and objectives, infrastructure that;

- invested in rigorous training of pollution prevention planners,
- involved these planners at an early stage in the process,
- had planners work along side of facility staff to seek the best solutions,
- had developed and disseminated their expertise on safer substances and processes for individual sectors and,
- had reported their progress on pollution prevention plans and success stories to the mutual benefit of industry, government and the public.

This model has been very enabling and valuable in the difficult job of shifting the business culture to pollution prevention. We were disappointed that no such institute was created for Ontario that could centralise, coordinate and create a permanent centre of excellence for pollution prevention planning.

Concerns Regarding Amendments to O. Reg. 455/09

Amending O. Reg. 455/09 in the first year that implementation of the Toxic Reduction Act is underway has the potential to weaken its foundations as well as the Act's pollution prevention plan outcomes. The delay of all of the regulations required for the full implementation of this Act, such as administrative penalties and substances of concern, means that important aspects of the Act are unknown at this time. This lack of information may harm the overall implementation of the Act.

The proposal to extend the deadline for Phase 1 toxic substances reduction plans and plan summaries for another year will mean data is now being collected prior to the existence of guidance materials and without the oversight of pollution prevention planners. There are many good precedents from other jurisdictions such as Massachusetts and New Jersey which could be used and modified for Ontario guidance materials.

The failure to have landed on the qualifications necessary for pollution prevention planners means facilities who want to use their own employees are unsure if they are qualified. This also makes it difficult to encourage the growth and certification for new expert pollution prevention planners outside of facilities. Colleges and universities who may want to specialise in training and developing new curriculum in this emerging field of pollution prevention planning do not have the foundation to do so.

The lack of involvement of planners from the early implementation of the Act is a departure from what was expected. Because data collection for the first year of reporting mandated by the Act is now underway without the involvement of certified planners, the benefits that could accrue from early learning from planner involvement in the data collection may be lost and may not adequately be integrated into the delayed pollution prevention plans. This could lead to weaker plans.

CELA is also concerned that potential candidates may also be discouraged from becoming qualified pollution prevention planners because those qualifications have not yet been determined. Additionally, the Act requires that these planners sign the pollution prevention plans and vouch for the accuracy of data the plans are addressing – data which will now be collected in their absence. Because the

penalties sections of the regulation have not be drafted, this could be an additional deterrent to those seeking to become planners because they do not yet know the extent of their liabilities.

CELA supports the most rigorous training for pollution prevention planners because this is a new discipline in Ontario. We would hope the Government staff doing the training will provide sector specific training for Ontario's diverse manufacturing and industrial sectors. We would hope that that training is not limited to plan approval but will extend to best practices and safer substitution in sectors they are training expert planners for. CELA strongly supports that this includes training in occupational health and safety.

Open for Business and the Amendments to O. Reg.455/09

During the consultations in January 2011 we learned that this regulation had been subject to review under the Open for Business Act allowing the business sector to have additional influence on this Act not shared by other sectors of Ontario society. However, it is not transparent how this has impacted matters being consulted on in this EBR posting that revisits issues in this regulation initially consulted on in 2009. Disclosure, reporting and public right-to-know about exposure to toxic substances are all central to the Toxic Reduction Act and to the objectives of having an Environmental Bill of Rights in this Province. We have made other recommendations on reporting in the attached group submission. CELA recommends that the public be given more information on how the Open for Business Act has already influenced this regulation and how it is to be applied to future components of regulation under this Act.

Premier McGuinty's original intent for this Act was "to help protect the health and environment of Ontarians". This Act has the potential to improve business practices and profits in Ontario while protecting human health and the environment in new ways which could include the creation of new jobs, innovations in pollution prevention and other efficiencies such as significant reduction of hazardous waste.

Yours truly,



Sarah Miller
Policy Researcher



Theresa McClenaghan
Executive Director and Counsel

Copy to: Gordon Miller, Environmental Commissioner of Ontario

CELA Publication No. 768

**Public Consultation: Toxics Reduction Act – Regulations 455/09
(011-1191)**

**Ana Tinta
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Environmental Programs Division
Toxics Reduction Project**

Submission from the *Take Charge on Toxics* Campaign

January 31, 2011



Response to Public Consultation on the *Toxics Reduction Act* – Regulations

Introduction

The Take Charge on Toxics (TCOT) Campaign appreciates the opportunity to provide comments to the provincial government on the draft regulations – 455/09 for the *Toxics Reduction Act*. This process enables improvements to be made to ensure the *Toxics Reduction Act* provides Ontarians with the strongest health protection possible from toxic substances.

Members of the *Take Charge on Toxics* Campaign have been advocating to the Government of Ontario since 2007 starting with the July 2007 release of the *Cancer and the Environment in Ontario: Gap Analysis on the Reduction of Environmental Carcinogens*. Campaign members have submitted comments to all Environmental Bill of Rights public consultation sessions and attended all of the Ministry of the Environment's public consultation sessions. Since 2007 we have been consistent with our recommendations for strong toxic use reduction legislation and regulations.

The *Toxics Reduction Act* is the first of its kind in Canada, which implies a special obligation for Ontario to produce as robust a regime as possible. This is the case because of the health, societal and economic benefits that will accrue for Ontario residents from reducing toxic chemicals and because such a law will be a precedent for other provinces that might be contemplating developing similar legislation.

The *Take Charge on Toxics* Campaign believes strong regulations are required to achieve the government's objective for Bill 167, which is to "help protect the health and environment of Ontarians".

The *Take Charge on Toxics* Campaign is comprised of a broad coalition of respected health, environment and labour organizations aimed at ensuring Ontario's *Toxics Reduction Act* reduces Ontarians risk of developing cancer by effectively addressing toxic chemicals where people live, work and play. The Campaign is supported by:

- Canadian Cancer Society, Ontario Division
- Canadian Environmental Law Association
- Ontario Public Health Association
- United Steelworkers
- Toronto Cancer Prevention Coalition
- Canadian Association of Physicians for the Environment
- Ontario College of Family Physicians
- Registered Nurses' Association of Ontario
- Prevent Cancer Now
- Women's Healthy Environment Network (WHEN)
- Toxics Free Canada

The *Take Charge on Toxics* Campaign is very concerned about toxic substances in our air, water, land and consumer products. The Campaign strongly believes that as community members, workers and consumers, we all have the right to know about the environmental and occupational risks we are being exposed to allow Ontarians to

make informed decisions affecting our health. In particular, we believe people have the right to know if they are being exposed to cancer-causing substances.

Detailed Recommendations

The *Take Charge on Toxics* Campaign calls on the Government of Ontario to enhance the regulations (455/09) for the *Toxics Reduction Act* by including the following recommendations.

Extension of the due date for Phase I toxic substance reduction plans and plan summaries by one year

Recommendation # 1: Extend the deadline for only 6 months instead of 1 year.

It is unfortunate that a delay is necessary. The main reason that has been offered regarding the delay has been the lack of guidance documents. Given that there are good models available in jurisdictions such as Massachusetts and that there has been sufficient time and consultation, it is not clear why the guidance documents for facilities are not available.

If there is to be a delay, it should only be for six months. While we appreciate the desire to keep the federal and provincial reporting schedules in sync, this is not a sufficient reason to delay the planning process. A six month delay is a reasonable compromise between getting the planning right and not slowing down the implementation more than necessary.

Requirements related to toxic substance reduction planners

Recommendation # 2: A planner licensing system is essential.

The Campaign believes a licensing system is essential to ensuring the plans will continue to be developed by qualified and knowledgeable individuals. A licensing system will ensure that there are clear and relevant criteria that must be met to gain a licence. If they are not met, the system also has criteria for withdrawing or not renewing a licence.

The plans are a key element to reducing toxic substances and the public requires assurance that Ontario has adequate tools in place to ensure the process is effective.

Recommendation # 3: There should be at least 120 hours of continuing education between licence renewals.

To ensure the toxics substance reduction planners are up-to-date on best practices the Campaign believes that the continuing education hours should be doubled. Since the period between renewals is three years longer than in Massachusetts, a requirement to stay current through continuing education should be stronger than the proposed 60 hours. Twenty-four hours per year of continuing education should not present a hardship to planners and will result in stronger plans.

Continuing education programs could be taken through Massachusetts' Toxics Use Reduction Institute, courses offered through the REACH program in Europe and Ontario Universities.

Other bodies including the Canadian Institute of Chartered Accountants (CICA) have professional development standards that are much stronger than the 60 hours per five years that the Ministry is proposing. CICA requires their members

- complete a minimum of 120 hours of Continuing Professional Development over a three-year cycle, including at least 60 hours of verifiable study;
- complete at least 20 hours of study annually¹

Successful toxic reduction planning is a complex process that requires up-to-date knowledge of the latest technologies and research. For the program to be successful, planners should be at least as current as chartered accountants.

Recommendation # 4: Planner's background should include workplace health and safety and knowledge of environmental management.

To ensure that the planners have appropriate skills and knowledge their background should include workplace health and safety. Reducing exposure to toxics could potentially reduce on the job illness and injury and improve the business case for reducing toxic substances.

Planners should also have experience in environmental management. Although a wide-range of disciplines are involved in operating a facility, knowledge of environmental management and workplace health and safety should be seen as core areas of expertise.

Recommendation # 5: The Ministry should develop conflict of interest requirements for companies using in-house planners.

The Campaign believes that planners should be arms length from the facilities whose plans they are approving. We are concerned that other influences such as job security and economic considerations may influence evaluation and approval of Toxic Substance Reduction Plans.

Recommendation # 6: Importance of employee engagement should be emphasised in the Ministry's planner curriculum.

Engaging employees should be presented as the preferred method of developing the toxic reduction plans. The experience in Massachusetts demonstrates that employee involvement has led to the identification of significant opportunities to reduce toxins² Since employees often work directly with the substances included under the Act, employees are knowledgeable stakeholders that should be utilized in the planning process.

¹ <http://www.cica.ca/about-the-profession/protecting-the-public-interest/minimum-cpd-and-insurance-requirements/item9332.aspx> (accessed January 19, 2011)

² Roelofs, Cora R. Rafael Moure-Eraso and Michael J. Ellenbecker (2000) Pollution Prevention and the Work Environment: The Massachusetts Experience, Applied Occupational and Environmental Hygiene 15(11), p. 850

Public Reporting

Recommendation # 7: Public reporting should be exact numbers, with few exceptions.

Although information reported to the government will not be in ranges, there is a concern that only reporting ranges to the public, as opposed to actual quantities, will make it difficult for the public to determine trends and track increases or decreases in the use of toxics over time in particular communities where such facilities are located.

Exact numbers are also valuable to professionals including academics, public health agencies, other governments and agencies (e.g. Cancer Care Ontario and Ontario Agency for Health Protection and Promotion). Furthermore, in order to make informed decisions about their health, the public needs as much information as possible. If the quantity of substances appears only on as a range (e.g. 1000-10,000 tonnes) the public will not have sufficient information to make informed decisions.

Industry should be required to provide full justification and documentation in writing as to why certain information should be kept confidential. Health and safety information should not be eligible for confidential business information protection.

While the protection of limited information may be acceptable in some specific cases, health and safety information should never be kept from workers who come in contact with toxic substances as a result of employment. The regulations should include requirements that government make readily and publicly available as much information as possible about substances as well as documentation of decisions and the basis for them.

Recommendation # 8: If the Ministry decides to only require reporting in exact numbers for some substances, then carcinogens should be included in that group.

The public has the right to know about cancer causing substances where they live work and play. Ranges do not offer sufficient information for the public to make informed decisions about their health. Using IARC (International Agency for Research on Cancer) classifications and the US National Toxicology Program, the Ministry should determine substances which are carcinogenic and ensure they are reported in exact quantities.

Recommendation # 9: The public should have access to a broad range of information about the use and release of toxic substances.

The Campaign feels it is vital that this information be presented in the most useful manner possible. Our recommendations regarding the planned public website are described below.

Plain Language

To ensure the site is accessible to the public, it is important that the site avoid technical jargon and be written clearly. Many of the site users will not have a science

or environmental background. In addition, the reading abilities of Ontarians vary due to educational or literacy levels, and other issues. Finally, a plain language site will help everyone to read and digest the information quickly and easily.

Toxic substance list

The list of toxic substances should be available in several searchable formats. For example, an alphabetical list, a list according to reported quantity. The list of substances should also be accompanied by an explanation.

Explanations

Context for the site contents should be provided. A simple listing of substances will not serve the intended purpose of the site; instead, we recommend that a description of the substances including information about their potential harm from health and environmental perspectives be included.

Geographic location

Users of the site should be able to quickly and easily identify locations they are interested in searching. This should include searches by postal code and other geographic area such as counties, towns and cities.

Mapping

A GIS mapping feature should be available to help the public understand the data. The maps should allow users to visually identify specific substances as well as toxic substances used in particular geographic areas. The map should be able to illustrate toxic substance use by postal codes, municipally, regionally (e.g. southern Ontario), and provincially. In addition, reports by airshed (according to the Federal comprehensive airshed management system) and comparisons against National Ambient Air Quality Standards should also be incorporated. The mapping should be done in collaboration with the Ontario Health and Environment Information System.

Identifying facilities

Facilities should be identified by the name they use publicly. Many corporations are registered with names or numbers that are not part of their public identity. To make the site serve its intended purpose, it should include the public name. Easy identification will help the public see the improvements that facilities make over time as well.

Exemption criteria for dioxins, furans and hexachlorobenzene

<p>Recommendation # 10: The Ministry should conduct a toxicological risk assessment before adopting this measure.</p>
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The Campaign has some concerns with the Ministry's proposal to exempt facilities that demonstrate that the concentrations of dioxins, furans and hexachlorobenzene are below the levels of quantification specified by NPRI not only in the amounts released, disposed and transferred (in current regulation) but also below the levels of quantification for amounts used and contained in product. The Campaign has some concerns with the Ministry's proposal to exempt facilities that demonstrate that the concentrations of dioxins, furans and hexachlorobenzene are below the levels of quantification specified by NPRI not only in the amounts released, disposed and transferred (in current regulation) but also below the levels of quantification for amounts used and contained in product. We question that products

with up to 20 pg/L of dioxins (liquids) and 9 pg/g of dioxins (solids) are considered the minimum reporting limit (NPRI's current reporting limit) based on ability to quantify below these levels, while the Ministry of Environment reporting limits in drinking water is 15 pg/L and soil is 7 pg/g.

Limits of quantification levels are not health based. They are not designed to be protective of health. Therefore we suggest that the Ministry conduct a toxicological risk assessment to determine an acceptable health based reportable limit. We recommend a toxicological risk assessment of hexachlorobenzene as well, even though the levels of quantification appear to be lower than MOE standards. This would ensure that the Ministry is mandating reporting based on the most recent toxicological science.

Outstanding regulations and policies:

Deferral of substances of concern and administrative penalties

Recommendation # 11: The substance of concern and administrative penalties regulations should be developed and implemented as soon as possible.

Deferring the requirement for a substance of concern report unnecessarily delays the benefits of the Act. There should be some urgency to proceed with inclusion of substances of concern because we lack information on their use and prevalence in Ontario.

At this stage in the process, the Campaign feels that all stakeholders have had sufficient time to share their views with the Ministry on the subject and the time has come to move forward.

When the regulation is developed we encourage the government to ensure that:

- There should be a legal requirement to ensure a decision is made regarding the status of each substances of concern.
- The substance of concern plans should cover multiple years and should not be a one time report. Reporting on one year of data does not provide sufficient information to make a decision regarding a substance.
- The registration process under consideration for Modernization of Environmental Approvals should not apply to activities which emit any substances subject now or in the future to the *Toxic Reduction Act, 2009*
- The public should have access to the reports.

The penalties section (#30) of the Act should also be implemented as soon as possible. The government needs to ensure companies are penalized if they do not submit a Toxic Reduction Plan. There is no clear prohibition on withholding health and safety information. The government could start with a paper audit of facilities that are expected to report. The audit would ensure the facility determined the use of the priority substances and reporting thresholds.

Adequate consumer notification about toxic substances in products

Recommendation # 12: Section 50(1)(o.2) regarding consumer products proclaimed as soon as possible and regulations promulgated thereunder.

Members of the *Take Charge on Toxics* Campaign strongly encourage the Government of Ontario to proclaim new authorities regarding consumer products. Implementing this section, would give the province the authority to:

- Ban or restrict manufacture, distribution or sale of designated toxic substance and products known to contain a toxic substance.
- Require manufacturers and/or sellers to publicly report on products containing a toxic substance.

Living list process

Recommendation # 13: Section 50(1)(o.1) should be proclaimed as soon as possible and regulations promulgated thereunder.

By proclaiming this section, Ontario will have the ability to add substances to the list. Since the substances are constantly changing, Ontario needs to be able to act swiftly in order adequately protect the health of its citizens. There should also be a detailed process for adding substances to the list.

Best Practice Repository

Recommendation # 14: A best practice repository will assist government, industry and the public learn about best practices in Ontario and other jurisdictions.

Without the creation of a Toxics Use Reduction Institute many of the roles it plays will need to be picked up by the Ontario Government. The *Take Charge on Toxics* Campaign is pleased the Government of Ontario is going to produce comprehensive guidance documents on toxics reduction. We would recommend including best practices on a sector by sector basis that draw on such practices world-wide. A best practice repository should be established and be required as part of the reporting to the public. Safer substitution and elimination are best practices and, as such, should be encouraged in plans and reporting requirements under the *Toxics Reduction Act*.

Employee engagement

Recommendation # 15: Employers should be mandated to engage their employees through existing joint health and safety committee and where there are less than 20 workers, their worker health and safety representative.

The Campaign is still waiting for an official decision from the Ministry about employee engagement. Our members including volunteers from around the province made submissions calling for a high degree of employee engagement during the previous EBR process. It would be unfortunate if the views of the public were not fully considered on this matter.

The Campaign believes that employee input into the creation of toxic reduction plans is essential for the success of the Act. The experience in Massachusetts demonstrates that employee involvement has led to the identification of significant opportunities to reduce toxins.³ Since employees often work directly with the substances included under the Act, employees are knowledgeable stakeholders that should be utilized in the planning process. A mandatory committee is the best way to ensure full input into the creation of toxic use reduction plans.

A mandatory advisory committee provides a structure that ensures workers are engaged in the process. If the committee is not mandatory, some employers will not thoroughly consult their workers. The lack of consultation will lead to less innovative plans and the Act will be less effective at meeting its objectives. A mandated advisory committee structure will provide a forum for discussion and opportunities for workers to formally present their perspectives about toxics.

Many of the effective workplaces already have established Health and Safety Committees established by OSHA requirements. In order to avoid duplication these Committees should bring their expertise to the Toxic Reduction Plans. However, these Committees are not mandated by OSHA for workplaces under twenty employees. In those cases, the role of employee health and safety representative should be utilized to engage employees.

It is essential that these workplaces have the same protections and opportunities to participate as larger workplaces. This can only be guaranteed if their participation is made mandatory by regulation.

It would be most effective if the OSHA regulations are amended to reflect the introduction of the Toxics Reduction Act in Ontario.

Requiring an advisory committee will also help develop and enhance front-line worker expertise in toxic reduction. If employees are consulted without a structure, the input into the plans may be general and due to technical restrictions, difficult to implement. In contrast, a standing advisory committee will enable better cross-company dialogue which will result in better, more informed worker advice.

In unionized workplaces a committee structure will ensure that the right to represent worker interests is respected. Offering unions an opportunity to appoint members to an advisory committee ensures that the legal representatives of workers are fully connected and engage in the toxics reduction planning process.

Occupational health and safety training also needs to be modified to include principles and practice of toxic use reduction so that employer and worker health and safety representatives can effectively participate in the process.

In all workplaces, a full and mandatory employee engagement will be beneficial. With employee input across industry, better plans will be produced and because they had strong input, there will be a greater degree of worker commitment to support the implementation of plans.

³ Roelofs, Cora R. Rafael Moure-Eraso and Michael J. Ellenbecker (2000) Pollution Prevention and the Work Environment: The Massachusetts Experience, *Applied Occupational and Environmental Hygiene* 15(11), p. 850

Conclusion

The *Take Charge on Toxics* Campaign urges the Government of Ontario to take this opportunity to lead by strengthening the draft regulation – 455/09 for *Toxics Reduction Act*, as described in our recommendations. Doing so will help make Ontario a leader in toxics reduction in Canada.

Although we are pleased to provide recommendations and continue to meet with the Ministry and other stakeholders, the campaign has been disappointed about the progress of the legislation. *The Toxics Reduction Act* was announced as a health measure. The 2007 at the announcement Premier said:

As Premier, but more importantly as a parent, I know how critically important it is to do whatever we can to protect Ontarians from potential health threats posed by environmental toxins.

In spite of this commitment at the announcement, throughout the process, almost every recommendation put forward by NGOs concerned about health, including hidden toxins and carcinogens has not been adopted. For example:

- Toxic Reduction Institute
- Lower Thresholds that would have included more than large-scale facilities
- Employee Engagement
- Targets for reductions
- Community Right-To-Know (more information about toxic substances being released and used by facilities)

In addition, as noted in the body of this document, there are also several unresolved issues such as:

- Enactment of sections dealing with consumer products
- Living list
- Penalties and enforcement
- Substances of concern
- Public website

The Ministry continues to refer to the success of Massachusetts as an example of successful voluntary programs. However, we are concerned that many of the best practices of the model have not been fully considered.

During the consultation process on this regulation we learned that in the summer of 2010 proposals related to this regulation were revisited as part of the “Open for Business” strategy. The effect of this decision meant that one sector of stakeholders had the opportunity to have a higher degree of influence than others. As a group that is not able to comment through the “Open for Business” strategy, we are concerned that the issues we raise regarding toxic reduction and health may not be receiving as much consideration as groups that have access to the “Open for Business” consultation processes.

Take Charge on Toxics campaign members do however, appreciate the opportunity to provide feedback on the draft regulations. Although concerned about the progress to date, we also emphasise that it is still possible to strengthen the act through effective regulations.

We look forward to further discussions with the Ministry of the Environment about opportunities to collaborate on our shared goal of reducing toxic substances and protecting Ontarians' health and environment.