

Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

517 College Street, Suite 401, Toronto, Ontario M6G 4A2
Telephone (416) 960-2284
Fax (416) 960-9392

**SUBMISSIONS OF THE
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TO THE
MINISTRY OF THE ENVIRONMENT AND ENERGY
RESPECTING "EXEMPTING REGULATIONS"**

Publication #220

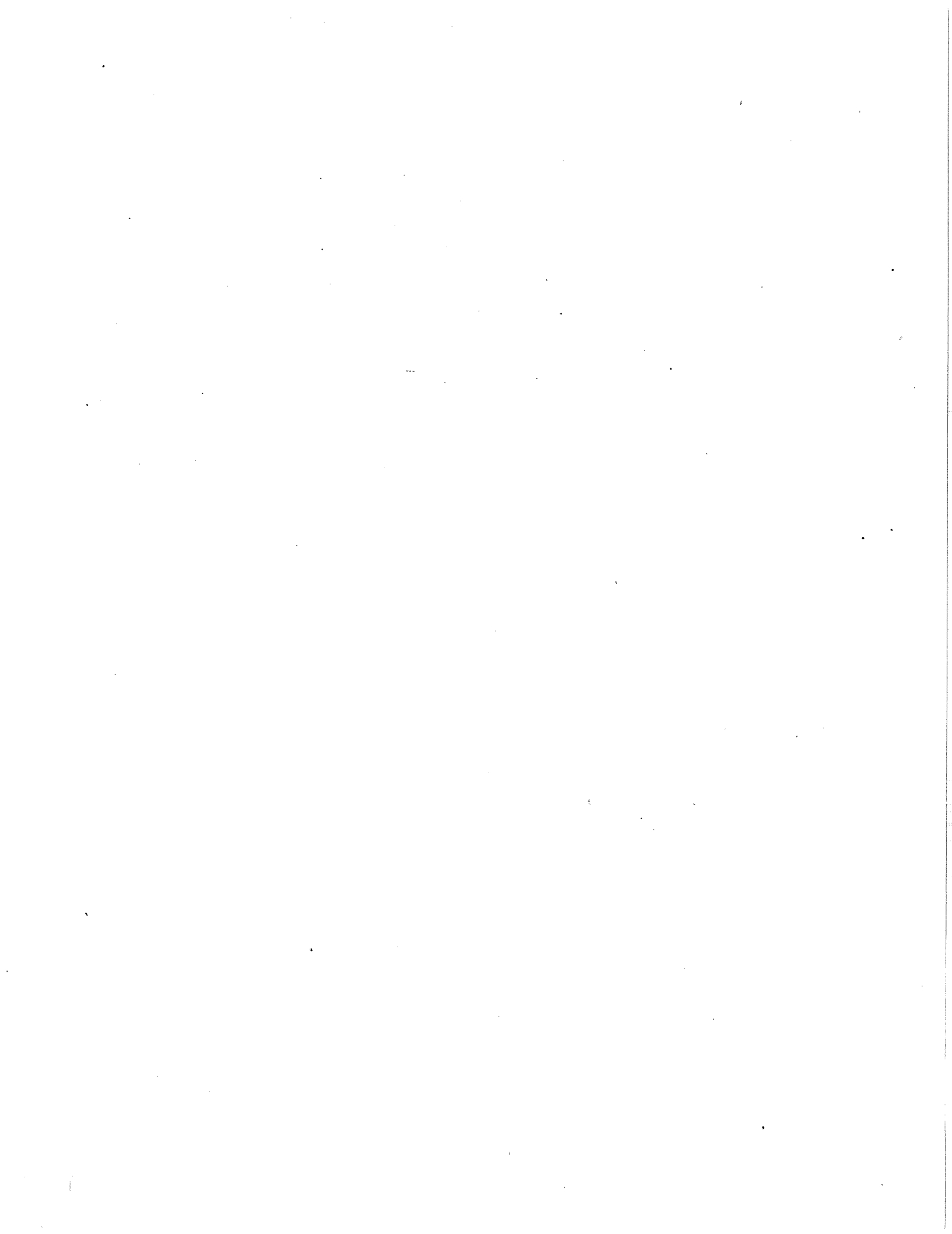
ISBN# 978-1-77189-510-1

Prepared by:

*Richard D. Lindgren
Counsel*

April 7, 1993

VF:
CANADIAN ENVIRONMENTAL LAW
ASSOCIATION.
CELA BRIEF NO. 220; Submissions
of the Canadian Environ...RN10988



**SUBMISSIONS OF THE
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TO THE MINISTRY OF THE ENVIRONMENT AND ENERGY
RESPECTING "EXEMPTING REGULATIONS"**

PART ONE: INTRODUCTION

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest law group dedicated to the enforcement and improvement of environmental law. Funded as a legal aid clinic, CELA also provides a free legal advisory service to the public on matters of environmental law. In addition, CELA lawyers represent citizens and citizens' groups in the courts and before statutory tribunals on a wide variety of environmental matters.

CELA supports an environmental approvals process which is equitable, efficient and effective. In addition, CELA strongly advocates meaningful opportunities for public participation in the environmental approvals process. Accordingly, CELA has endorsed various initiatives (i.e. the Environmental Bill of Rights, the Intervenor Funding Project Act, and the Environmental Assessment Act) which have been designed to entrench and enhance public participatory rights in relation to environmental protection and resource conservation.

More recently, the Ministry of the Environment and Energy (MOEE) has proposed to "streamline" the environmental approvals process by exempting classes of projects from certain legal requirements under the Environmental Protection Act (EPA) and the Ontario Water Resources Act (OWRA). In particular, the MOEE has proposed to exempt a number of projects which are "small-scale" or involve "routine" applications with little or no environmental

impacts. Once exempted, these projects would be planned and implemented in accordance with operational standards prescribed by regulation rather than individual certificates of approval.

CELA appreciates the need for the efficient use of MOEE resources respecting environmental approvals. However, CELA is unconvinced that the proposed "exempting regulations" would, in fact, permit the Ministry to "protect the environment and provide better service to the business community", as the MOEE has claimed in its consultation package dated January 12, 1993. In CELA's view, the proposal leaves too many unresolved issues and unanswered questions. Moreover, the MOEE's justification for the proposal has not been adequately documented, and the proposal appears to run contrary to the recent trend of increasing, not decreasing, the public's right to be notified and consulted about pending environmental approvals. For these and other reasons, CELA does not support the proposed exempting regulations, particularly since the proposed content of the regulations has not been provided by the MOEE.

The purpose of this brief is to describe some of CELA's concerns with respect to the MOEE proposal described in the January 12th consultation package.

PART TWO: MOEE DISCUSSION DOCUMENT

GENERAL

In light of recent conversations with MOEE staff about exempting regulations, it appears as if this initiative will proceed regardless of public input because of the political priority apparently being placed on "speeding up approvals". If this is true, then CELA seriously questions the utility of the consultation process if the government's mind is already made up on this matter. However, CELA trusts that the following comments will be considered by Cabinet even if MOEE officials may be predisposed in favour of this initiative.

As a preliminary matter, it appears as if the EPA and OWRA may require legislative amendments to permit the implementation of this initiative. CELA notes that the government appears to be behind in its legislative agenda, but we expect that such amendments will nevertheless be subject to full and open public debate if they are undertaken by the Ontario government.

I. BACKGROUND

The MOEE material suggests that disparate applications ranging from kitchen exhausts to complex sewage treatment plants undergo "same administrative procedures" when being considered by the MOEE. In the Ministry's view, "the result is that substantial Ministry

resources must be devoted to processing applications which operate on a very small scale or which pose little, if any, threat to the environment."

In CELA's opinion, it is somewhat misleading to imply that an individual application for a kitchen exhaust receives the similar amount of MOEE attention as an individual application for a sewage treatment plant. The process for reviewing such applications may be similar, but it is readily apparent that on an individual basis, there is a vast difference in the actual amount of time and resources spent assessing such applications.

More importantly, CELA rejects the suggestion that kitchen exhausts are somehow "less important" than other applications. In our view, it is clear that kitchen exhausts can cause a number of adverse effects (i.e. material discomfort, loss of use or enjoyment of property). In addition, it is our understanding that odour is one of the largest sources of complaints received by the MOEE from the public. Accordingly, we are unclear as to why the MOEE would believe that it is necessary or appropriate to exclude kitchen exhaust from site-specific review under the EPA. This is particularly true since it is unlikely that all restaurants which require approvals actually apply for them in any event.

The MOEE material goes on to suggest that the need for technical review of routine, small-scale applications is questionable. CELA strongly disagrees with this general statement if the MOEE is attempting to imply that such reviews are entirely useless and costly exercises. In fact, such reviews can lead to modifications in the project design or construction in order to

minimize or avoid potential problems. This, in turn, should minimize or avoid the uncertainty and costs associated with proceeding with ill-conceived (or unreviewed) projects (i.e. cost of responding to complaints, cost of attempting to retro-fit the project, etc.). CELA therefore submits that the benefits of individual application review generally outweigh the costs of MOEE review and/or subsequent corrective action. Hence, we strongly disagree with the MOEE's view that "no value is added by requiring such applications to be reviewed by Ministry staff".

The MOEE material also contends that by removing application requirements for small-scale projects, "protection of the environment will be maintained" through strict performance standards set out in the regulations. CELA notes that no actual performance standards have been described in the MOEE material; therefore, the strictness of these standards is unknown at this time. More importantly, CELA remains concerned about the willingness or ability of the MOEE respecting the investigation and enforcement of these standards. We also query whether the promulgation and non-enforcement of such standards may give rise to "regulatory negligence" claims against the MOEE.

For example, if kitchen exhausts are causing nuisances, we seriously question whether the MOEE has sufficient staff to respond adequately to complaints. This is particularly true since restaurant odours tend to be intermittent and therefore hard to verify. We also doubt that the MOEE will be prescribing numerical standards for odour in the regulations. Thus, CELA maintains that the most practical way to deal with such concerns is to continue case-by-case review of such applications.

The MOEE material concludes that the exempting regulations will decrease the number of applications, which, in turn, will reduce the workload of the MOEE. The MOEE provides statistics in Table 1 which purport to support the MOEE claim. While it is helpful to include the number of applications potentially caught by this proposal, Table 1 does not permit CELA to assess whether the MOEE's estimates are accurate or reasonable. For example, we have no way of determining the actual reduction in workload: was this determined on the basis of number of applications? Staff time? Cost? In addition, the MOEE material provides no information on any relevant trends (i.e. are the numbers of applications for the proposed exemption candidates going up, down, or remaining constant?). Given that the excessive expenditure of MOEE resources on application review is offered by the MOEE as the primary justification for this initiative, we find this section of the material to be exceptionally brief and ambiguous. It also begs the important question of how much actual time is spent by MOEE staff in reviewing these so-called routine applications. Accordingly, it is our position that the need for this initiative has not been adequately documented in the MOEE material.

The MOEE indicates that persons who wish to carry out an activity pursuant to an exemption must meet the eligibility criteria and the performance standards in the regulations. If the MOEE decides to proceed with this initiative, then CELA suggests that such persons should also notify the MOEE of their reliance upon the exemption and provide other key information (i.e. waste volumes, contaminant types, etc.), and the MOEE should maintain an index record of such information for monitoring purposes. Without individual certificates of approval, how is the Ministry going to collect important data on the number of sources, locations of sources,

source size, and other parameters?

II. CANDIDATE LIST

If the MOEE proceeds with this initiative, then CELA submits that there should be full and open public participation in the selection of appropriate candidates for exemption and the development of the regulations. In CELA's view, the draft regulations should be subject to the public notice and comment regime contemplated by the Environmental Bill of Rights.

With respect to the ten exemption candidates tentatively identified by the MOEE, CELA's comments are as follows:

(a) Comfort and Process Heating Equipment

The MOEE has indicated that the calculations associated with air emission rates are "routine". If such calculations are routine, how much time can it really take to carry them out or review them? More importantly, if the calculations are to be left to the applicants, who will be certifying the results? Professional engineers should provide the calculations under their seal; however, the use of professional engineers may not always be necessary under the regulations. Nevertheless, there must be full legal accountability for these calculations regardless of who performs them, particularly if eligibility for exemption becomes an issue in specific cases. In addition, these calculations should be retained on-site and remain available for inspection.

Periodic audits of such records should be undertaken by the MOEE for deterrence purposes. These comments apply generally to each of the exemption candidates proposed by the MOEE.

CELA also notes that nitrogen oxides and sulphur dioxide, which are commonly associated with such equipment, are acid rain gases and contribute to the greenhouse effect and ground-level ozone formation. Therefore, we question the implicit assumption that such equipment deserves less rigorous individual scrutiny by the MOEE.

Finally, it would have been helpful if the MOEE had provided the actual number of applications received for this and other candidates.

(b) Emergency Generators

In addition to producing nitrogen oxides and sulphur dioxide, excessive noise is frequently associated with this equipment. Again, if these calculations are relatively straightforward, how much time does it realistically take to assess these applications?

(c) Food Odour Ventilation

Several of CELA's concerns about exempting food odour ventilation systems have been discussed above and need not be repeated here.

The MOEE material suggests that the standard controls imposed on this equipment are commercially available grease filters. CELA questions whether there are situations where off-the-shelf filters are not sufficient to avoid off-site problems. Similarly, it seems apparent that for some installations, the MOEE should undertake site-specific dispersion calculations (i.e. taking into account the location and height of the exhaust relative to the potential points of impingement).

The MOEE material refers to the fact that EPA orders or prosecutions can be undertaken if exempted kitchen exhausts cause contraventions of the EPA. In CELA's view, this provides little certainty or comfort, particularly since these remedies are expensive, time-consuming, and inconsistent with a preventative approach to controlling contaminants at source.

(d) Minor Modifications (Air)

Given the lack of precision as to what constitutes a "minor modification", CELA is concerned that many applicants will attempt to avoid permitting requirements by claiming to fall under this exemption. This has certainly been the experience with Class Environmental Assessments, which are roughly analogous to the MOEE proposal (ie. both procedures involve self-assessment and no formal approvals).

In addition, the MOEE material indicates that, inter alia, "relocation" of exhaust vents will be exempted. In CELA's experience, such relocations can often make a significant difference in

the potential impact upon the surrounding community (i.e. the emission may be re-directed at new or sensitive points of impingement, even if the overall contaminant concentration does not increase).

Similarly, the MOEE has indicated that the installation of a new baghouse filter system should be exempt. In our view, the installation of a more efficient baghouse filter may give rise to additional operational matters which should be subject to site-specific scrutiny. For example, a filter which collects greater amounts or concentrations of contaminants may necessitate special handling, storage and disposal requirements, which should be prescribed in conditions to a certificate of approval.

More fundamentally, CELA is concerned that without an independent MOEE check on the calculations, it is going to be difficult to assess whether overall emission rates have remained constant or have decreased. In our view, this is precisely what approvals engineers should be assessing through site-specific reviews. If these calculations are routine, then how long can they really take to perform?

(e) Small Spraybooths

The MOEE has indicated that small, solvent-based coating operations should be exempted from EPA approval requirements. CELA notes that solvents are among the most toxic and volatile substances in use today, and a number of solvents are suspected carcinogens and

leukogens. Accordingly, CELA seriously questions the wisdom of the MOEE proposal to divest the MOEE of approval powers respecting such activities.

(f) Non-Subject Waste Management Systems

CELA has a number of concerns respecting the MOEE proposal to exempt non-subject waste management systems. First, how will the MOEE continue to gather critical information on waste volumes, hauler statistics, and other important data if applications are no longer necessary? Second, how much time can these applications really take? Third, waste hauling is a highly competitive business, and some waste haulers may be tempted to contravene the terms of the regulation if they no longer are in jeopardy of losing the certificate they currently require to stay in business (i.e. the payment of fines, if any, may be viewed as a cost of doing business). In other words, the revocation of a licence may have a greater deterrent effect than a mere fine under the regulations.

(g) Temporary Facilities for Collecting Household Hazardous Waste

CELA has no comments on this proposed exemption candidate, but we suggest that it would have been helpful to provide the actual numbers for these applications.

(h) Storm Sewer and Sanitary Sewer Appurtenances

The MOEE material properly suggests that unless significant changes are introduced in tributary areas, sewage flow and characteristics are usually not affected by the number and location of appurtenances. However, it is readily apparent that in many areas of southern Ontario, profound and sometimes unanticipated changes in land use and densities are occurring in tributary areas. Accordingly, CELA questions the rationale for providing a blanket exemption for the installation or modification of appurtenances. Again, how long does it take to perform these routine calculations?

(i) Watermain Appurtenances

The foregoing comments about sewage appurtenances apply with necessary modifications to watermain appurtenances.

(j) Minor Modifications (Industrial Wastewater)


The lack of precision respecting the phrase "minor modification" raises concern about the potential for misuse of this proposed exemption. In addition, it is unclear why this section uses the broad term "Industrial Wastewater" if the MOEE intent is to only catch modifications to sewage works. Once again, how long can these calculations take to perform?

III. DRAFTING PROCEDURE

As discussed above, CELA submits that if the government proceeds with this initiative, then the individual exempting regulations should be developed with full participation using the regulatory notice-and-comment model from the Environmental Bill of Rights.

PART THREE: CONCLUSIONS

In light of the foregoing discussion, CELA does not support the MOEE proposals respecting exempting regulations. In our view, the public need and justification for the proposal has not been adequately documented. In addition, there are a number of important issues that the MOEE has not adequately addressed or resolved, particularly in relation to monitoring, investigation and enforcement. These problems are compounded by the lack of the draft regulations, which would have allowed CELA and others to comment in greater detail about the nature and scope of the proposed exemptions and performance standards. Accordingly, CELA cautions against proceeding with this initiative at this time; however, if the government chooses to proceed with the proposal, then CELA wishes to remain involved in the next phase of this consultation.



Richard D. Lindgren
Counsel

