Canadian Environmental Law Association
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VIA EMAIL
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RE: Submissions on the Proposed Amendments to O. Reg. 455/09 under the Toxics Reduction Act – EBR Registry Number 012-8583

These are the submissions of the Canadian Environmental Law Association ("CELA") in respect of the above matter. The submissions are divided into a brief description of CELA, a summary of the Ministry of the Environment and Climate Change ("MOECC") proposals, our comments with respect thereto, and recommendations.

I. The Canadian Environmental Law Association

CELA is an Ontario Legal Aid Clinic whose lawyers appear before the courts and administrative tribunals representing individuals and groups experiencing environmental problems. CELA uses both existing laws to protect the environment and, where necessary, advocates environmental law reforms. CELA has extensive experience regarding the *Toxics Reduction Act* ("*TRA*") and O. Reg. 455/09 having made extensive submissions on both to the legislative assembly and the government when these laws were under development in 2008-2009.

II. The MOECC Proposal - 2017 Proposed Amendments to O. Reg. 455/09

In late July 2017, the MOECC posted on the Environmental Registry for 60-day comment a proposed series of what it called "minor amendments" to O. Reg. 455/09 under the *TRA***.** The purpose of the proposed amendments is to reduce "red tape", including reducing the reporting burden, simplify the toxic substance reduction planning process, adjust the schedule and timing of the plan review process, protect business confidentiality, clarify language and intent, better align with the federal National Pollutant Release Inventory ("NPRI") under the *Canadian Environmental Protection Act, 1999* ("*CEPA, 1999*") where appropriate, and correct minor errors. A summary of the proposals appears below.

A. Reduce Reporting Requirement from Annual Report for Regulated Community

MOECC proposes to require facilities to report on the estimated amounts of toxic substances reduced from the implementation of more than one option in aggregate, rather than per option, as is currently the case. The MOECC rationale for the proposed regulatory amendment is to reduce a small amount of the burden of current reporting requirements.

B. Modify the Planning Process to Focus on Technically Feasible Options

MOECC also proposes to simplify the toxic substance reduction planning process so that estimates of reductions in the use, creation, and discharge of a toxic substance included in the plan would only be required for those reduction options determined to be technically feasible as opposed to all identified options. Currently the regulation requires that facilities follow a five-step toxic substance reduction planning process: (1) identify at least one option for each of the seven reduction categories specified in the regulations; (2) provide estimates of the amount by which the use, creation, and discharge of the substance would be reduced at the facility; (3) determine which of the identified options are technically feasible; (4) undertake an economic feasibility analysis of those options determined to be technically feasible; and (5) provide a list of the options that are both technically and economically feasible. The MOECC rationale for the proposed regulatory amendment is that by modifying the process so that estimates of reduction would only apply to technically feasible options, it focuses efforts on options facilities would be more likely to implement.

C. Simplify the Toxic Substance Plan Review Process

MOECC proposes to clarify and simplify the toxic substance plan review process by removing the requirement that new versions of a plan include additional contextual information that address changes from the previous plan. Facilities would still be required to provide a new statement of intent to reduce toxic substances, or provide reasons for not making such a statement. The MOECC rationale for this proposed regulatory amendment is that it will be less burdensome for facilities, reduce redundancy, and clarify legal requirements.

D. Adjust Schedule and Timing of Plan Review Process

MOECC proposes to change the date by which facilities must review and prepare a new version of their toxic substance reduction plans from December 31, 2018 to December 31, 2019, and require that subsequent reviews of plans take place every sixth year instead of every fifth year as currently required. The MOECC rationale for this proposed regulatory amendment is that the federal government is currently consulting on a number of changes for the 2018-2019 NPRI notice and the MOECC proposals would better align with the anticipated federal changes and, thereby, reduce the burdens on facilities trying to reconcile compliance with NPRI notice changes and *TRA* obligations.

E. Protect Business Confidentiality

MOECC proposes to require year-over-year comparison reporting for the use, creation, and contained in product categories to be expressed in percentages only, and not also in actual units of measurement for substances, as is currently the case. The MOECC rationale for this proposed regulatory amendment is that the regulation currently requires that the public have access to calculations that can potentially be used to determine confidential business and proprietary information. The information would still be required to be reported to MOECC.

F. Align with Changes Made to NPRI Reporting Requirements

MOECC proposes to: (1) automatically provide facilities with an extension to a due date for submitting annual reports and other records if the federal government extends NPRI reporting deadlines; (2) provide the director with discretion to extend the due date for submitting plan summaries, if technical difficulties arise; and (3) align administrative information required by the toxics reduction program with that required by NPRI, such as with respect to the North American Industry Classification System ("NAICS"). The MOECC rationale for this proposed regulatory amendment is that O. Reg. 455/09 adopts NPRI notice reporting requirements and, therefore, aligning with changing federal requirements reduces the burden on regulated facilities in complying with both federal and provincial measures.

G. Clarify Language and Intent of the Regulation

MOECC proposes to clarify: (1) language in the regulation to make its intent easier to understand regarding what must be submitted to the director; and (2) how long facilities are to make available to the public through the internet annual reports and plan summaries (i.e. for the duration they are current).

H. Correct Minor Errors

MOECC proposes to correct minor errors contained in ss. 18.1((b)(i) and 27(5) of the regulations.

I. Remove Provisions That No Longer Apply

Because the regulation was phased in over two years, MOECC proposes to amend O. Reg. 455/09 to remove references to dates and requirements that are no longer relevant to the program or the reporting requirements.

III. Comments

The MOECC proposals are designed to reduce what MOECC describes as "red tape" in O. Reg. 455/09. Individually, each item may not amount to much of a change but cumulatively proposals II.A-C and E above may reduce, not the burden of the regulation on business, but rather the overall effectiveness of a regime designed to foster reductions in the use and creation of toxic

substances in the province and public access to information with respect thereto. Accordingly, CELA submits that proposals II.A-C and E, above, should be reconsidered by MOECC.

Furthermore, there are many existing problems with the Act and regulations pertaining to the environmental effectiveness of the toxics reduction regime that are not addressed at all in the proposed amendments to the regulations. These problems, in the view of CELA, dwarf any concern with alleged "red tape" under the program. Some of these problems are noted below.

A. Key Provisions of the Act are Still Not in Force

Despite the fact that the *TRA* has been in force since 2010, there are key provisions under the Act that are still not in force. These include:

- Section 11 (substance of concern report);
- Section 15.1 (inspection of vehicles);
- Section 20.1 (warrantless search);
- Section 26.1 (order for use of tracking devices);
- Section 30 (administrative penalties);
- Section 38 (amount of administrative penalties);
- Section 50(1)(o.1)(o.2) (toxic substances in products).

The failure to proclaim the substance of concern, administrative penalties, and toxics in-products authorities is of particular concern because these provisions go to the heart of the scope of the Act and enforcement thereunder. In the view of CELA, proclaiming these provisions is far more important to the effectiveness of the Act than the "red tape" concerns identified under the MOECC proposals.

B. Lack of a Robust List of Substances of Concern

One of the apparent reasons why section 11 (substance of concern report) is not in force is because of the MOECC failure to establish a robust list of substances of concern to complement toxic substances otherwise listed under the federal NPRI. The living list process (developed by MOECC to be implemented in conjunction with section 49 of the Act) has been remarkably slow in developing to date. What is regrettable is that MOECC has not listed under the authority of section 49 of the Act, the 135 substances it identified in 2008 as "reproductive toxins, neurotoxins, mutagens, and carcinogens" that it viewed at that time as likely present in the Ontario environment (and not otherwise listed in the NPRI).[1] In the view of CELA, listing these 135 substances as substances of concern pursuant to section 49 and thereby bringing section 11 into force rank as far superior priorities to the exercise MOECC is engaged in under its current proposals.

[1] Ontario Ministry of the Environment, *Creating Ontario's Toxics Reduction Strategy: Discussion Paper*, EBR Registry No. 010-4374 (August 27, 2008) at 18 [hereinafter "2008 Discussion Paper"].

C. Lack of Targets and the Need for Clarity on How TRA Interacts with Other Laws

Section 50(1)(d) of O. Reg. 455/09 authorizes the provincial cabinet to set, by regulation, targets relating to toxic substances. However, after seven years under the *TRA* there still are no targets set under the regulations. This gap has implications for other federal and provincial laws that address toxic substances. For example, the NPRI produces a list of certain toxic substances released to the environment. Table A, below, shows what the on-site releases to air of carcinogens were in Ontario in 2013 and compares them to New Jersey for those substances in both jurisdictions with comparable reporting thresholds.

Table A: 2013 On-site Releases to Air of Carcinogens by Ontario and New Jersey Where NPRI and TRI Have Similar Reporting Thresholds for Substances Reported (Tonnes)[2]

Substance	Ontario	New Jersey
Styrene	234	16.351
Acetaldehyde	103	0.023586803
Formaldehyde	260	0.491694129
Benzene	173	10.4
Dichloromethane	70	10.099
Tetrachloroethylene	107	0.03628739
Ethylbenzene	168	10.319
1,3-Butadiene	12	0.057152639
Naphthalene	34	7.16
Trichloroethylene	25	6.742
Vinyl Acetate	0.615	0.55701143
Vinyl Chloride	0.402	7.942
Nickel and its Compounds	77	0.295742225
Ethyl Acrylate	0.02	0.013154179
Mercury and its Compounds	596	0.03447302
Lead and its Compounds	21,590	1.418585263
Chromium and its Compounds	2.2	0.139706480
Antimony and its Compounds	0.115	0.045812829
Cobalt and its Compounds	3.1	0.014016004
Acrylamide	0	0.003628739
Aniline	0.002	0.290299117
Asbestos	0	0
Benzyl Chloride	0	0.680388555
CI Food Red 15	0	0
Chloroform	0.226	0.020865249
Di (2-Ethylhexyl) Phthalate	0.049	0.003175147
Ethylene Oxide	0	0.545671621
N-Methylolacrylamide	0	0.003175147
Total	**23,352.73**	**73.71**

[2] The quantities identified in Table A are for all industry sectors and not just the chemical sector.

What Table A shows is that for 2013 Ontario's on-site releases to air of carcinogens common to both Canada and the United States, where the NPRI and Toxics Release Inventory ("TRI" is the U.S. program equivalent to NPRI) reporting thresholds are similar, were more than **300 times** greater than those of New Jersey. If the releases to air of lead are removed from the comparison (21,590 tonnes in Ontario and 1.4 tonnes in New Jersey), Table A shows that for 2013 Ontario's on-site releases to air of carcinogens common to both Canada and the United States, where the NPRI and TRI reporting thresholds are similar, were more than **24 times** greater than those of New Jersey (Ont. = 1,762.73 tonnes vs. N.J. = 72.31 tonnes). The above comparison demonstrates the need for dramatic improvement in reducing toxics substances in Ontario, a need that the *TRA* should to be more visible in undertaking. Establishing targets relating to toxic substances would help in such an endeavor.

Similarly, the recently enacted *Resource Recovery and Circular Economy Act, 2016*, S.O. 2016, c. 12, s. 2(a)(g)(i) ("*RRECA*") establishes that it is in the provincial interest to have a system of resource recovery and waste reduction that aims to, among other things: (1) protect the natural environment and human health; (2) decrease hazardous and toxic substances in products and packaging; and (3) minimize the environmental impacts that result from resource recovery activities and waste reduction activities, including from waste disposal. If the province set targets relating to toxic substances under O. Reg. 455/09, this would go a long way to ensuring that the goals and objectives of *RRECA* also were achieved.

IV. Summary of Recommendations

Arising from the foregoing submissions, CELA recommends that MOECC:

1. Reconsider proposals II.A-C and E, above.

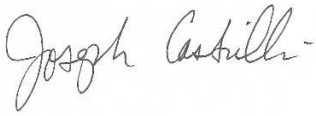
2. Proclaim in force sections 11, 15.1, 20.1, 26.1, 30, 38, and 50(1)(o.1)(o.2) of the Act.

3. List as substances of concern the 135 substances identified in the 2008 Discussion Paper.

4. Pursuant to the authority under s. 50(1)(d) of the Act, set targets relating to toxic substances under O. Reg. 455/09.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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