



Canadian Environmental Law Association
L'Association Canadienne Du Droit De L'Environnement

SUBMISSIONS

TO THE

ONTARIO MINISTRY OF THE ENVIRONMENT

ON

**CREATING ONTARIO'S
TOXICS REDUCTION STRATEGY
DISCUSSION PAPER**

EBR Registry Number: 010-4374

September 2008

Prepared by:

**Joseph F. Castrilli
Counsel**

CELA publication # 628
ISBN # 978-1-926602-01-1

TABLE OF CONTENTS

I.	INTRODUCTION.....	3
II.	CANADIAN ENVIRONMENTAL LAW ASSOCIATION	4
III.	GENERAL COMMENTS ON DISCUSSION PAPER ON CREATING ONTARIO'S TOXICS REDUCTION STRATEGY.....	4
A.	OVERVIEW: THE NATURE OF THE PROBLEM	4
B.	BENEFITS OF TOXICS USE REDUCTION.....	5
C.	SCOPE OF GOVERNMENT LEGISLATIVE PROPOSAL.....	6
D.	MATTERS NOT RAISED IN DISCUSSION PAPER FOR INCLUSION IN NEW LEGISLATION	7
1.	<i>Purposes of Law</i>	7
2.	<i>Targets</i>	8
3.	<i>Fund</i>	8
4.	<i>Fees</i>	8
5.	<i>Role of the Public</i>	9
a.	Right to Know Other Information	9
b.	Right to Review	10
c.	Right of Action.....	10
6.	<i>Technical Assistance Programs for Employees</i>	11
E.	DISCUSSION PAPER UNCLEAR ON WHETHER CERTAIN MATTERS TO BE INCLUDED IN PROPOSED LEGISLATION.....	11
1.	<i>Regime for Substitution of Safer Alternatives</i>	11
2.	<i>Conflict with Municipal By-Laws</i>	13
IV.	SPECIFIC COMMENTS ON DISCUSSION PAPER.....	14
A.	NEW REQUIREMENTS GOOD AS FAR AS THEY GO, BUT ARE NOT ENOUGH.....	14
B.	SCOPE OF REGULATED COMMUNITY TOO NARROW	15
1.	<i>Too Few Toxics Designated For Immediate Action</i>	15
a.	NPRI Chemicals	15
b.	Non-NPRI Chemicals	16
c.	Potential Lack of Consistency with Ecosystem and Precautionary Approaches.....	17
2.	<i>Too Many Schedules That Defer Action on Many Toxics to Indeterminate Future</i>	18
3.	<i>Phasing Too Slow, Even if Appropriate</i>	19
4.	<i>Thresholds Too High</i>	19
5.	<i>Too Few Sectors</i>	20
C.	GREATER CLARITY REQUIRED ON APPLICATION OF LAW TO CONSUMER PRODUCTS	21
D.	CERTIFIED TOXICS PLANNERS ARE CRITICAL TO SUCCESS OF GOVERNANCE MODEL	22
V.	RESPONSE TO SELECTED MINISTRY QUESTIONS.....	22
A.	MATERIALS ACCOUNTING	22
B.	TOXICS USE REDUCTION PLANS	23
C.	REPORTING REQUIREMENTS	23
D.	PUBLIC DISCLOSURE.....	23
E.	LIST, SCHEDULES, AND PHASES WITH RESPECT TO TOXIC SUBSTANCES.....	23
F.	THRESHOLDS AND SECTORS.....	24
G.	CONSUMER PRODUCTS.....	24
H.	INSTITUTIONS AND TOXICS USE REDUCTION PLANNING.....	25
I.	TECHNICAL ASSISTANCE	25
J.	ALTERNATIVES	25
K.	PUBLIC ACCESS TO INFORMATION	26
VI.	CONCLUSIONS AND RECOMMENDATIONS	26

I. INTRODUCTION

On August 27, 2008, the Ontario Ministry of the Environment (“MOE”) placed on the *Environmental Bill of Rights* registry for 45-day comment a Discussion Paper on *Creating Ontario’s Toxics Reduction Strategy*. The Discussion Paper announces the Ontario Government’s commitment to “introducing new toxic reduction legislation that would reduce pollution, and inform and help protect Ontarians from toxic chemicals in the air, water, land, and consumer products.” As a first step in this process the government is developing a Toxics Reduction Strategy made up of three components: (1) proposed legislation, (2) capacity building, and (3) support for facilities to reduce toxics. The overall strategy is designed to “foster a greener economy, and inform Ontarians about toxics, including carcinogens, in the environment and consumer products.”¹

The Canadian Environmental Law Association (“CELA”) strongly supports measures to reduce toxic substances in the environment and the corresponding disease burden such substances impose on human health. In this regard, CELA congratulates the provincial government in releasing the Discussion Paper for consultation and comment before proceeding to the development of legislation in this area.

The purpose of these submissions is to meet the requirements of *EBR* Registry Notice No. 010-4374 by providing written submissions to the MOE by the comment deadline of October 11, 2008.

Part II of these submissions provides brief background information on CELA and some of our recent initiatives directly related to reduction of toxic substances.

Part III summarizes CELA’s general views on the Discussion Paper by briefly reviewing the nature of the problem that justifies such legislation and the benefits to be expected from the law. Part III also discusses (1) matters not raised for inclusion in the new legislation, and (2) matters where it is unclear what the government’s intentions are with respect to new legislation.

Part IV provides specific comments on the Discussion Paper including (1) the nature of the new requirements proposed, and (2) the scope of the regulated community. Part IV raises a number of concerns, particularly with respect to the latter issue.

Part V provides response to selected questions raised by MOE throughout the Discussion Paper.

Part VI provides final conclusions and summarizes recommendations that appear throughout these submissions.

¹ Ontario Ministry of the Environment, *Creating Ontario’s Toxics Reduction Strategy – A Discussion Paper*, *EBR* Registry Notice Number 010-4374 (August 2008) [hereinafter “*Discussion Paper*”].

II. CANADIAN ENVIRONMENTAL LAW ASSOCIATION

CELA is a public interest group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and groups in the courts and before administrative tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

For many years, CELA has advocated strong federal and provincial laws controlling toxic substances and the right of the public to know about such substances in their communities. CELA is a co-founder of the “Pollution Watch” website (www.pollutionwatch.org), which provides members of the public with information about potential environmental contamination in their communities based on information from the National Pollutant Release Inventory (“NPRI”) authorized under the *Canadian Environmental Protection Act, 1999*.

In 2006, CELA researched and wrote a major report for the City of Toronto on various legal options for implementing community right to know measures at the municipal level. The organization is also a member of the Occupational and Environmental Working Group of the Toronto Cancer Prevention Coalition and has participated in a number of law reform initiatives in this regard.

In 2007, CELA was awarded a grant by the EJLB Foundation of Montreal, Quebec to prepare both a report and model bill on toxics use reduction and community right to know. The CELA Report and Model Bill may be found at the CELA website (www.cela.ca). Portions of the comments in the submissions that follow are based on this work, which was completed in August 2008. Accordingly, the CELA Report and Model Bill should be treated as part of these submissions.

III. GENERAL COMMENTS ON DISCUSSION PAPER ON CREATING ONTARIO’S TOXICS REDUCTION STRATEGY

A. Overview: The Nature of the Problem

There are over 23,000 chemicals in use in Canada today, but very little data available on the effects of many of them on human health and the natural environment.² The effects of multiple toxics in the environment also are not known. However, the Discussion Paper notes that a 2006 report of the Commission for Environmental Cooperation identified a variety of adverse health effects associated with environmental pollution including

² Canadian Environmental Law Association, *Our Toxic-Free Future: An Action Plan and Model Toxics Use Reduction Law For Ontario* (August 2008) at 5 [hereinafter “CELA Report and Model Bill”].

cancer, birth defects, learning, developmental, and behavioural disabilities, impaired endocrine function, and respiratory problems.³

The situation is particularly acute in Ontario as the Discussion Paper indicates:

“...Ontario is one of the top dischargers of toxics in North America and the number one discharger in Canada:

- Ontario industries release the second largest amount of recognized developmental and reproductive toxicants in North America, behind Tennessee.;
- Ontario industries release the fifth largest amount of known and suspected carcinogens in North America behind Texas, Ohio, Indiana, and Louisiana;
- Ontario industries account for 36 per cent of the total Canadian discharges of reportable chemicals into the air and 50 per cent of discharges to water.” (references omitted)⁴

Direct discharges of contaminants to air and water, and indirect discharges via municipal sewage treatment plants that are not designed to treat complex mixtures of chemical compounds, have resulted in notable incidents of environmental and human health contamination over the years in the Great Lakes Basin, which contains over 90 per cent of Ontario’s population.⁵

Moreover, for chemicals that originate in consumer products, increasing evidence points to indoor air, surfaces (such as water containers and food), and household dust as important exposure media, in some cases the single largest exposure media, particularly for children. Releases occur during normal use, and often can increase over time as products age. A wide variety of chemicals can be found in house dust and indoor air⁶ and the sources of many of these chemicals include a wide array of products on the Canadian market.⁷

B. Benefits of Toxics Use Reduction

In the face of problems of this magnitude posed by environmental contamination from toxic substances, the potential benefits of toxics use reduction are particularly significant. These benefits include:

³ *Discussion Paper, supra* note 1, at 30.

⁴ *Ibid.* at 28-29.

⁵ *Ibid.* at 30.

⁶ Canadian Environmental Law Association, *Regulating Toxic Substances in Consumer Products – Response to the Discussion Paper on Canada’s Food and Consumer Safety Action Plan* (Toronto: CELA, 2008) (chemicals include fluorinated chemicals, phthalates, brominated flame retardants, nonylphenol ethoxylates, parabens, volatile organic compounds, organotins, numerous metals such as lead and mercury, and pesticides). Available at: < www.cela.ca >.

⁷ *Ibid.* (products include baby and children’s products, toys, cosmetics, personal care products, cookware, food containers and packaging materials, household cleaners, building materials, home maintenance products, furniture and fabrics, art materials, and many different types of electronic equipment).

- Less pollution leading to a cleaner environment and safer products;
- Reduction in public health risks, and contribution to safer and cleaner workplaces;
- Savings in money to companies through implementation of pollution prevention plans;
- Promotion of cleaner, more innovative technologies and development of greener products;
- Lower compliance costs for companies and lower enforcement costs for government agencies; and
- Reduction in the need for further management of hazardous wastes.⁸

As the Discussion Paper states “Reducing toxics in Ontario’s economy will not only benefit the environment, it will also create opportunities for developing new ways of doing business.”⁹

C. Scope of Government Legislative Proposal

The province proposes to augment its traditional “end of pipe” approach to control of toxic substances by focusing on reducing or eliminating toxics at the beginning of the cycle, particularly with respect to the use of toxics. In this regard, there are four elements to the government’s proposed legislation:

- New requirements for toxics (materials accounting, toxics use reduction plans, reporting, and public disclosure);
- Identifying the regulated community (through designated lists of toxic substances, thresholds for the application of the requirements, and phasing);
- Addressing toxics in consumer products (restrictions on toxics in products, and public disclosure of toxic contents in products); and
- Governance model (MOE – to ensure compliance; and new external body – to deliver technical and scientific support on toxics

⁸ CELA Report and Model Bill, *supra* note 2, at 7-8.

⁹ *Discussion Paper*, *supra* note 1, at 4.

reduction, train and possibly certify toxics reduction planners, and provide education and outreach).¹⁰

Unlike traditional “command and control” legislation, which may specify particular technologies to be employed to meet environmental standards, what the MOE proposes is “information-based regulation” that seeks to spur reductions in industrial emissions by uncovering and disclosing information on pollution sources to industry managers, regulators, and the public.¹¹ With some exceptions noted more fully below, such as the particulars with respect to thresholds and phasing, CELA supports the overall approach outlined in the Discussion Paper but, of course, reserves final judgment on the adequacy of the proposed law until the actual wording of the legislation itself is available.

D. Matters Not Raised in Discussion Paper for Inclusion in New Legislation

Despite CELA’s overall support for the government initiative on toxics reduction, there are some concerns with what does not appear to be contained in the legislative proposal as it is set out in the Discussion Paper. Some of these observations may well not be of concern once the full draft of the legislation is released. However, for the moment, and out of an abundance of caution, CELA identifies the following matters of concern.

1. Purposes of Law

The trend in modern environmental legislation is to include a purpose section, both as an aid to public understanding and support of the law’s objectives as well as to assist judicial interpretation and enforcement of the law’s provisions. CELA expects that the new toxics bill will contain such a purpose section but did not see any explicit reference to the issue in the Discussion Paper. The Model Bill CELA has prepared contains a multi-pronged purpose section: (1) protect human health and the environment by reducing the use of toxic substances, (2) promote the use of safer alternatives to such substances, (3) recognize the public right to know the identity and amounts of toxic substances in their community from various facilities, and (4) apply the precautionary principle and principles of sustainable development to these issues. (See text of Model Bill for complete wording).¹²

Recommendation # 1: Include a purpose section in the Act that recognizes the need to (1) reduce the use of toxic substances, (2) promote safer alternatives, (3) facilitate public right to know about such substances, and (4) apply precautionary and sustainable development principles.

¹⁰ *Ibid.* at 9-24.

¹¹ D. O’Rourke & E. Lee, “Mandatory Planning for Environmental Innovation: Evaluating Regulatory Mechanisms for Toxics Use Reduction” (2004), 47 *Journal of Environmental Planning and Management* 181, 181-182.

¹² CELA Report and Model Bill, *supra* note 2, at 48 [section 1(a)-(d)].

2. Targets

The Discussion Paper does not discuss establishing numerical goals or targets for reduction of the use of toxic substances in the legislation. The CELA Report notes the importance of setting clear and ambitious goals for toxics use reduction in order to galvanize efforts to spur innovation as well as provide benchmarks to measure progress. The CELA Report proposes such goals and also points to statutory precedents for this approach in other jurisdictions (e.g. Massachusetts and New Jersey).¹³ These targets have been included in the CELA Model Bill along with a provision requiring the government to report periodically on progress in achieving them. (See text of Model Bill for complete wording).¹⁴

Recommendation # 2: Include provincial toxics use reduction targets in the legislation.

3. Fund

The Discussion Paper is silent on the establishment of a Fund dedicated to financing the programs and institutions that will be needed to ensure proper implementation of the Act and achievement of its purposes. The value of a dedicated Fund includes: (1) crystallizing the importance within government of the on-going need for secure financing of a regime dedicated to reduction of toxic substances, (2) instilling confidence in the public that the necessary financing will be in place for the program, (3) underscoring for the regulated community the importance the government places on the program succeeding in achieving its objectives, including with respect to technical assistance measures for businesses that must make production adjustments as a result of meeting the Act's requirements, and (4) providing assurance to employees who must make re-employment adjustments that programs will be in place to meet their needs. The CELA Model Bill contains such a Fund. (See text of Model Bill for complete wording).¹⁵

Recommendation # 3: Authorize establishment of a Toxics Use Reduction and Safer Alternatives Fund in the legislation.

4. Fees

The Discussion Paper also is silent on the need for a financial engine to ensure the toxics program will be funded adequately. In Massachusetts the program is entirely financed by a fee on the use of toxic substances and precedents exist under Ontario law for the imposition of environmental fees in a variety of contexts.¹⁶ The principle financing mechanism for the Fund should be a fee on industrial facilities and toxics use reduction

¹³ *Ibid.* at 15.

¹⁴ *Ibid.* at 60 [section 7(1)(2)].

¹⁵ *Ibid.* at 77-78 [section 16].

¹⁶ *Ibid.* at 33-34.

and safer alternatives planners. The CELA Model Bill contains such a requirement. (See text of Model Bill for complete wording).¹⁷

Recommendation # 4: Authorize imposition of a toxics use fee on industrial facilities that are subject to the Act’s requirements and on toxics use reduction and safer alternatives planners that seek to be certified under the Act.

5. Role of the Public

a. Right to Know Other Information

The Discussion Paper indicates that the provincial government is committed to including “legislative requirements to make, at a minimum, Toxic Reduction Plan summaries, use data from Materials Accounting and Reports publicly available. The Ministry is currently exploring a number of methods to provide access to this information, such as a web-based portal.”¹⁸ The Discussion Paper notes further that:

“The Ministry is proposing to provide the public with accessible, easy-to-understand information about toxics, including carcinogens, in the environment and consumer products to help Ontarians make informed choices.

Telling Ontarians about toxic substances in our environment would provide valuable information to the public, industry, government and environmental and health organizations. Enhanced transparency would help keep Ontarians informed about the use of toxics in the province and the progress in toxics reductions. Other jurisdictions have been successful in encouraging toxics reductions and compliance by providing the public with access to information on the use of toxics by facilities and outlining the planned toxic reduction actions explored by those facilities.

The Ministry is proposing to use education and outreach programs that would include a ‘one stop’ web-based portal to provide straightforward, searchable information about the type and amount of toxic substances used and emitted in Ontario. This proposal could allow the public to be better informed about toxics at a community level and provide links to other organizations and sources of information on toxics reduction.

...”¹⁹

CELA supports the government commitment to information disclosure to the public as noted in the above statements. In the CELA Model Bill we set out provisions that are very compatible with the above government commitments.²⁰

However, CELA submits that the role of the public in a toxics use reduction law should be enhanced further beyond the above commitments in order to improve the overall

¹⁷ *Ibid.* at 78-79 [section 17].

¹⁸ *Discussion Paper, supra* note 1, at 14.

¹⁹ *Ibid.* at 27-28.

²⁰ CELA Report and Model Bill, *supra* note 2, at 81-82 [sections 20-21].

effectiveness of the law reform initiative. For example, the CELA Report and Model Bill address public access to environmental information acquired by government from industry that historically has not been readily accessible to the public. This includes web-site searchable access to contaminated lands, air emissions, and water discharge monitoring information periodically submitted to the MOE under existing environmental laws.²¹ Such a reform is compatible with the above principles that the province supports and may well introduce in the forthcoming government Bill, though it is difficult to be certain about this at this time until the Bill is introduced in the Legislature.

Recommendation # 5: Include a public right to know other information compiled under the authority of existing environmental laws.

b. Right to Review

Furthermore, the Discussion Paper is silent on the right of members of the public to request that the Minister review an industrial facility's toxics use reduction plan or (as we recommend in the CELA Model Bill) substitution implementation plan²² to determine if they comply with the Act's requirements. The precedent for such an approach is already contained in the *Environmental Bill of Rights, 1993* ("EBR").²³ However, resort to that legislation may be hampered by the fact that such plans may not qualify as "instruments" as defined under the *EBR*.²⁴ Accordingly, it would be sensible in the circumstances, to extend the *EBR* principle to plans under the new Act or, in the alternative, extend the *EBR* itself to include such plans.

Recommendation # 6: Include a public right under the new Act to apply to the Minister for review of toxics use reduction and safer alternatives plans or, in the alternative, amend the *EBR* to ensure that such plans are included in the definition of "instruments" and, therefore, subject to review under the *EBR*.

c. Right of Action

Finally, the Discussion Paper is silent on the right of members of the public to resort to the courts where, for whatever reasons, government does not act. CELA would expect a government enlightened enough to enact a toxics use reduction law to vigorously enforce its requirements. If nothing else, such a government has a vested interest in the success of a regime that it has staked some of its policy credibility and legacy upon. However, governments change and over time less enlightened governments might administer and enforce the law differently, less effectively, or not at all. In those circumstances, the

²¹ *Ibid.* at 28-29, and 83-85 [section 22].

²² *Ibid.* at 85-86 [section 23].

²³ S.O. 1993, c. 28, (Part IV – application for review).

²⁴ *Ibid.* at s. 1(1) ("instrument" means any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued under an Act, but does not include a regulation).

public should not be locked out of the process of ensuring that the Act's basic requirements are complied with. In this regard, CELA includes in its Model Bill a public right of action provision. (See text of Model Bill for complete wording).²⁵

Recommendation # 7: Include a public right of action to enforce key provisions of the Act.

6. Technical Assistance Programs for Employees

While the Discussion Paper addresses the issue of technical assistance for businesses,²⁶ the document is silent on technical assistance for employees who may require re-employment assistance, vocational re-training, or other assistance as a result of the implementation of the new law. The CELA Model Bill explicitly addresses this issue. (See text of Model Bill for complete wording).²⁷

Recommendation # 8: Include statutory authority for the development and implementation of technical assistance programs for employees.

E. Discussion Paper Unclear on Whether Certain Matters to be Included in Proposed Legislation

Despite the overall quality of the Discussion Paper, there is some ambiguity with respect to certain key issues that, in the view of CELA, ought to be explicitly addressed in new provincial legislation. The CELA submission comments on a number of these matters below.

1. Regime for Substitution of Safer Alternatives

In several places throughout the Discussion Paper there is reference to the issue of substitution of less toxic substances:

“...the government recognizes that solutions and known substitutions are not always readily available to deal with the use of toxics, and that there is a need over time to build capacity and focus our efforts to develop and implement less toxic alternatives.

To harness the broad range of Ontario expertise, the Ministry proposes the following approaches to help build capacity for toxics reduction:

...

- Partnerships and linkages with government agencies, stakeholders and academia to support research into emerging science and engineering dealing with less toxic alternatives and substitutions;

²⁵ CELA Report and Model Bill, *supra* note 2, at 86-87 [section 24].

²⁶ *Discussion Paper*, *supra* note 1, at 25-26.

²⁷ CELA Report and Model Bill, *supra* note 2, at 80-81 [section 19].

...

- Economic and other incentives to encourage innovations, reductions and substitutions, and to maximize the potential for economic benefits.”²⁸

...

“Input substitutions...are potential options that facilities can consider implementing as a result of receiving technical assistance.”²⁹

...

“The Ministry is also exploring the use of social marketing campaigns to inform Ontarians about the health and environmental benefits of using alternatives to toxics, such as less-toxic substitutes or greener products. Both of these approaches would be developed in consultation with stakeholders and partners to determine the most effective ways of reaching and meeting the needs of Ontarians.”³⁰

However, none of these references are found under the headings of the Discussion Paper that review the content of the proposed new legislation. Indeed, by the very wording of the above quotations, it appears that the province hopes that safer alternative substitution will occur as a result of the regulated community seeing the benefits thereof, not as a result of legal requirements to do so.

In the view of CELA, this might have been an acceptable approach two decades ago, but not today and certainly not in light of Ontario’s position as “one of the top dischargers of toxics in North America and the number one discharger in Canada.”³¹ After two decades of experience with toxics use reduction legislation in Massachusetts, that state has now decided that it is necessary to implement safer substitution requirements as a matter of law and currently has a Bill in the Massachusetts legislature in this regard. Other jurisdictions in North America and Europe have come to the same conclusion.³² It is past due for Ontario to reach the same conclusion. In this regard, the CELA Report and Model Bill make recommendations³³ and contain explicit statutory wording, respectively, for establishing four key components of a safer alternatives legislative regime:

- Identification of priority substances for substitution;³⁴
- Safer alternatives assessment reports;³⁵

²⁸ *Discussion Paper, supra* note 1, at 25.

²⁹ *Ibid.* at 26.

³⁰ *Ibid.* at 28.

³¹ *Ibid.* at 28-29.

³² CELA Report and Model Bill, *supra* note 2, at 31-32.

³³ *Ibid.* at 33.

³⁴ *Ibid.* at 67-69 [section 11] (requirement to identify potential priority toxic substances from list of reportable toxic substances established elsewhere in Bill based on criteria set out in section 11 and following public consultation).

³⁵ *Ibid.* at 69-71 [section 12] (requirement for Minister to direct Institute established under Bill to prepare safer alternatives assessment report for each priority toxic substance selected based on report content requirements set out in section 12 and following public consultation).

- Provincial priority toxic substance alternative action plans;³⁶ and
- Industrial facility substitution implementation plans.³⁷

CELA urges the provincial government to clarify its position on safer alternatives before introducing the Bill for first reading and to include requirements for safer alternatives as a matter of law.

Recommendation # 9: Authorize statutory provisions for safer alternatives containing at least the following components (1) identification of priority substances for substitution, (2) safer alternatives assessment reports, (3) provincial priority toxic substance alternative action plans, and (4) industrial facility substitution implementation plans.

2. Conflict with Municipal By-Laws

The Discussion Paper notes that:

“Jurisdiction for the environment in Canada is shared between the federal and provincial governments. In general, the federal government has the responsibility for matters of national concern, whereas the provinces tend to manage matters of a local nature, such as industrial and municipal emissions.

Municipalities may further impose reporting requirements or bylaws. In particular, the City of Toronto is currently developing its Environmental Reporting and Disclosure Program, which would aim to track and reduce 25 key toxic substances present in Toronto’s environment. Toronto is proposing that the program would require businesses and municipal operations to track and report to the public on their use and emission of toxics that have been designated as of priority health concern. Additionally, the program would support affected businesses in undertaking actions to reduce those toxics.

...

As the Strategy is developed the Ministry will work to consult with the City of Toronto to better align the approaches to reducing toxics and to minimize duplication and potential burdens on Ontario facilities.”³⁸

However, the Discussion Paper is otherwise silent on the issue of whether and, if so, how provincial legislation will address potential conflicts with municipal by-laws that might purport to impose greater toxics use reduction or other requirements on industrial facilities than that proposed under the new provincial law. In the respectful submission of

³⁶ *Ibid.* at 71-73 [section 13] (requirement for Minister to establish provincial alternatives action plan for each priority substance that is the subject of a safer alternatives assessment report based on plan content requirements set out in section 13 and following public consultation).

³⁷ *Ibid.* at 73-76 [section 14] (requirement for industrial facility that manufactures, processes or uses priority toxic substance to develop and complete a substitution implementation plan for any substance that is the subject of a provincial alternatives action plan, with such plan becoming part of the facility’s toxics use reduction plan).

³⁸ *Discussion Paper, supra* note 1, at 31.

CELA, the trend in both legislation³⁹ and judicial interpretation,⁴⁰ with some exceptions⁴¹ has been and should continue to be toward expanding, not contracting, municipal authority to act to protect the environment.⁴² In this regard, the CELA Model Bill contains explicit authority that would allow municipalities to enact more restrictive toxics use provisions, or grant greater information access, if necessary. (See text of Model Bill for complete wording).⁴³

Recommendation # 10: Include a conflicts provision that allows for municipal by-laws to operate in conjunction with the new provincial law.

IV. SPECIFIC COMMENTS ON DISCUSSION PAPER

A. New Requirements Good as Far as They Go, But Are Not Enough

The Discussion Paper outlines four new requirements that would be imposed with respect to toxic substances in the new legislation:

- (1) materials accounting,⁴⁴
- (2) toxics reduction plans,⁴⁵
- (3) reporting to the MOE or a designated body,⁴⁶ and
- (4) public disclosure.⁴⁷

³⁹ See, e.g., *Smoke-Free Ontario Act*, S.O. 1994, c. 10, s. 12 (if there is a conflict between certain sections of Act and a provision of another Act, regulation, or municipal by-law that deals with smoking, the provision that is more restrictive of smoking prevails).

⁴⁰ See, e.g., *Croplife Canada v. Toronto (City)* (2005), 75 O.R. (3d) 357 (Ont. C.A.) (upholding by-law limiting application of pesticides within City under s. 130 of *Municipal Act* despite existence of federal and provincial pesticide legislation dealing with same subject matter).

⁴¹ See *Pesticides Act*, R.S.O. 1990, c. P.11, s. 7.1(5) (municipal by-laws inoperative if address use, sale, offer for sale or transfer of pesticide that may be used for cosmetic purpose) (not yet in force).

⁴² Graham Rempe, "How Green is My By-Law? The Expanding Role of Canadian Municipalities in Environmental Regulation" in *Environmental Law: The Year in Review – 2006*, Stanley Berger & Dianne Saxe, eds. (Aurora: Canada Law Book, 2007) at 177 (historic municipal mandate to act to protect environment recently expanded by provincial legislators as well as by approach courts have taken in relation to environmental jurisdiction, interpretation of municipal statutes, and application of principle that law-making and implementation often best achieved at local level).

⁴³ CELA Report and Model Bill, *supra* note 2, at 91 [section 58].

⁴⁴ *Discussion Paper*, *supra* note 1, at 10-11 (ability to monitor, track, and report upon inputs and outputs of toxics).

⁴⁵ *Ibid.* at 11-13 (plans based on materials accounting outlining manufacture, processing, and use of toxics and ways to avoid or reduce use; development of plan mandatory, implementation of plan voluntary; plan summary to be provided to MOE).

⁴⁶ *Ibid.* at 13-14 (reporting of data required under CEPA- NPRI program; materials accounting information; plan updates; progress in achieving plan options; any quantifiable reductions in use, generation, or emission of substances).

In general, these are all recognized components of existing law in Massachusetts and New Jersey. CELA supports each of the above components for the reasons set out in the CELA Report⁴⁸ and has provided statutory language for each in the CELA Model Bill.⁴⁹

However, CELA submits that the four components are not enough in and of themselves to compensate for gaps in, and/or ambiguities with respect to, coverage under such proposed legislation noted above. Nor are the four components adequate to compensate for problems in the proposed scope of the regulated community set out below.

B. Scope of Regulated Community Too Narrow

The Discussion Paper notes that there are four key elements in determining the scope of the regulated community that will be subject to the legislation (1) a substance is used that appears on the province's designated list of toxics, (2) the amount of the substance used exceeds a specified threshold, (3) more than the designated minimum number of persons are employed, and (4) the facility is part of a designated sector.⁵⁰ CELA agrees with this view but disagrees on how the province has applied several of these elements.

1. Too Few Toxics Designated For Immediate Action

a. NPRI Chemicals

The Discussion Paper states that developing a list of toxics plays an important role in the legislative framework the province contemplates because it helps (1) define the regulated community, (2) inform the public about chemicals of concern, and (3) develop programs in support of implementation of the legislative regime.⁵¹ CELA agrees as well with this observation.

However, where CELA departs from the province's position is with respect to the number of substances to which the province proposes to apply the legislation immediately as well as over the longer term. Quite simply too few substances (45 NPRI substances under proposed Schedule 1) are designated for immediate action (i.e. in Phase 1 as defined by the MOE).⁵² The 45 substances represent just 14 per cent of the total

⁴⁷ *Ibid.* at 14 (plan summaries but not plans themselves; use data from materials accounting and reporting).

⁴⁸ CELA Report and Model Bill, *supra* note 2, at 24-26 (materials accounting), 22-24 (plans), 27 (reporting), 28-29 (public disclosure).

⁴⁹ *Ibid.* at 49, 50, 63 [section 2 – definitions of materials balance, input and output; section 9(3)(e) – requirements to include materials balance in annual report to Minister]; 64-67 [section 10 – toxics use reduction plan]; 62-64 [section 9 – industrial facility annual report to Minister on toxic substances]; 81-85 [sections 20-22 – establishment of registry, and public access to information].

⁵⁰ *Discussion Paper*, *supra* note 1, at 15.

⁵¹ *Ibid.*

⁵² *Ibid.* at 16-17.

number of substances (320) that currently are subject to the NPRI. Moreover, the 45 substances represent just 1.5 percent of the total annual tonnage of emissions of NPRI reportable chemicals for the two industrial sectors (manufacturing and mineral processing) that MOE does propose to address under the new legislation (11,000 tonnes out of 717,000 tonnes).⁵³ That percentage drops to about one percent of the total annual tonnage of emissions of NPRI reportable chemicals when one includes the other sectors covered by NPRI that MOE does not propose to address under the new legislation.⁵⁴

In the respectful submission of CELA, full coverage under the proposed law (materials accounting, toxics reduction planning, and reporting) of just one percent of NPRI emissions by 2012⁵⁵ is simply not good enough. By contrast, any company in New Jersey or Massachusetts that is required to report emissions of substances under the Toxics Release Inventory (“TRI”) under federal law in the United States must also report annually on their use and release of these chemicals to the respective state governments. Because TRI requires reporting on about 600 substances to the federal government, the New Jersey and Massachusetts laws require reporting on all 600 substances as well and did so from their inception.⁵⁶

Recommendation # 11: Apply obligations to engage in materials accounting, toxics reduction planning, and reporting for all 320 NPRI substances from the time the legislation comes into force.

b. Non-NPRI Chemicals

Furthermore, the CELA Report noted that because NPRI does not capture all toxic substances of concern in Ontario, it will be necessary to create an expanded list of reportable substances under a new Ontario law. Based on the lists of substances contained in the CELA Model Bill⁵⁷ (from NPRI,⁵⁸ *CEPA* Chemicals Management Plan – High Hazard Chemicals,⁵⁹ International Agency for Research on Cancer – “IARC”,⁶⁰ California’s Toxics law also known as Proposition 65,⁶¹ and the U.S. National

⁵³ Ontario Ministry of the Environment, *Creating Ontario’s Toxics Reduction Strategy*, Consultation Session (Toronto, September 15, 2008) at slides 15 and 29 [hereinafter “Toronto Consultation”].

⁵⁴ *Ibid.* During the Toronto Consultation the audience was advised by MOE that the emissions covered by the two sectors MOE does propose to address under the legislation constitute approximately 75 per cent of total annual emissions of all sectors reporting under the NPRI program. Accordingly, approximately 1 million tonnes annually of which 11,000 tonnes would constitute roughly one percent.

⁵⁵ *Ibid.* at slides 29 and 39.

⁵⁶ CELA Report and Model Bill, *supra* note 2, at 17. TRI is the equivalent of NPRI in the United States.

⁵⁷ *Ibid.* at 60-61 [section 8(1)(a)-(e)].

⁵⁸ 320 substances.

⁵⁹ 193 substances.

⁶⁰ Known human carcinogens (Group 1) – 100; Probable human carcinogens (Group 2A) – 68; Possible human carcinogens (Group 2B) – 246. International Agency for Research on Cancer, *Agents Reviewed by the IARC Monographs: Volumes 1-95* (January 2007).

⁶¹ *Discussion Paper*, *supra* note 1, at 35 (775 substances).

Toxicology Program)⁶² there may be many more substances of concern that should be subject to the law.⁶³ MOE proposes to add another 155 (20 in proposed Schedule 3 and 135 in proposed Schedule 4) plus the 320 NPRI substances for a total of 475.

CELA understands that MOE went through a process of identifying substances of potential concern that could be in use in Ontario that are not caught by NPRI. In principle, CELA fully supports MOE's decision to go beyond NPRI. However, it is also apparent that MOE really does not have the information to know which substances are in use in Ontario beyond those caught by NPRI.⁶⁴ In these circumstances, it is difficult to know whether the MOE erred on the side of caution and chose, even for the purposes of reporting,⁶⁵ as wide a universe of chemicals as possible so that this information can be obtained from industry. In the respectful submission of CELA, a wide universe of chemicals should be caught, at least in first instance for reporting purposes. The lists of substances referred to in the CELA Report and Model Bill may be of assistance in this regard.⁶⁶

Recommendation # 12: Clarify the rationale for why only 20 (of 155) non-NPRI chemicals identified by MOE are subject to reporting requirements in Phase 1 and consider including more substances from the lists produced by CMP, IARC, California's toxics law, and the U.S. National Toxicology Program.

c. Potential Lack of Consistency with Ecosystem and Precautionary Approaches

There is a further reason why CELA makes the above submissions with respect to both NPRI and non-NPRI substances. The MOE Statement of Environmental Values, produced pursuant to the *EBR* establishes a set of guiding principles that MOE committed to applying when making decisions that might significantly affect the environment. One category of decision identified is the enactment of new legislation.⁶⁷ Among the principles that the MOE commits to applying under its SEV when developing new legislation is the ecosystem approach:

⁶² Adding the chemicals on the last three lists together produces approximately 800 substances. When NPRI and CMP are added the numbers approach 1,200. Eliminating possible duplication with NPRI and CMP could reduce the number from 1,200 but would not reduce it below 800.

⁶³ CELA Report and Model Bill, *supra* note 2, at 19.

⁶⁴ *Discussion Paper*, *supra* note 1, at 18 (as with the non-NPRI chemicals in Schedule 4 little is known about the use of the 20 non-NPRI chemicals proposed for Schedule 3; available data are limited on the use and emission into Ontario's environment of the 135 non-NPRI chemicals in Schedule 4 other than they are classified as reproductive toxins, neurotoxins, mutagens, and carcinogens; however, many of these chemicals are likely present in the Ontario environment).

⁶⁵ *Ibid.* at 20 (only 20 of the 155 non-NPRI chemicals will be subject to reporting requirements in Phase 1).

⁶⁶ CELA Report and Model Bill, *supra* note 2, at 19, 60-61 [section 8(1)(a)-(e)].

⁶⁷ Ontario Ministry of the Environment, *Statement of Environmental Values* (1994), Part VI (the ministry will apply the purposes of the *EBR* and the guiding principles listed in Part III and integrate them with those considerations set out in Part V, as it develops legislation) [hereinafter "MOE SEV"].

“The Ministry will adopt an ecosystem approach to environmental protection...When making decisions, the Ministry will consider: cumulative effects on the environment...”⁶⁸

A further SEV principle that applies to the development of legislation is the precautionary approach:

“The Ministry’s environmental protection strategy will place priority on preventing and second on minimizing the creation of pollutants that can damage the environment....The Ministry will exercise a precautionary approach in its decision-making. Especially where there is uncertainty about the risk presented by particular pollutants or classes of pollutants, the Ministry will exercise caution in favour of the environment.”⁶⁹

One example from Schedule 1 illustrates CELA’s concerns about whether the ecosystem and precautionary approaches have been applied properly. MOE describes Schedule 1 as containing priority toxics reported to NPRI by Ontario facilities that have been identified on the basis of (1) volumes emitted to air and water, and (2) toxicity.⁷⁰ Not included in Schedule 1 are volatile organic compounds (“VOCs”).⁷¹ However, in 2005 there were over 75 million kilograms of VOCs released or transferred in Ontario.⁷² VOCs are a large group of substances that may cause a variety of toxic effects. In the respectful submission of CELA, it strains credulity to suggest that VOCs do not meet both the tests of volumes of emissions and toxicity in Ontario.

For the foregoing reasons and in the context of proposed legislation on toxic substances, it would not appear to be appropriate to (1) exclude over 85 per cent of NPRI chemicals and 99 per cent of the emissions from NPRI chemicals from the application of the proposed law when it comes into force, and (2) not at least require reporting for a wider list of non-NPRI substances so that the province has basic information from industry on exactly what substances are being manufactured, processed, or otherwise used in Ontario.

2. Too Many Schedules That Defer Action on Many Toxics to Indeterminate Future

The Discussion Paper recommends creating four schedules of substances: (1) Schedule 1 – 45 NPRI substances; (2) Schedule 2 – 275 NPRI substances; (2) Schedule 3 – 20 non-NPRI substances; and (4) Schedule 4 – 135 non-NPRI substances.

By 2012, reporting will apply to Schedule 1 and Schedule 3 substances (total of 65 substances from the two schedules). By 2012, materials accounting and toxics reduction planning will apply to just Schedule 1 substances (45 substances).

⁶⁸ *Ibid.* at Part III.

⁶⁹ *Ibid.*

⁷⁰ *Discussion Paper, supra* note 1, at 17.

⁷¹ *Ibid.* at 38 (VOCs listed in Schedule 2).

⁷² PollutionWatch, *Province Profile: Ontario* (2008) (total reported releases and transfers with combined air releases for Ontario – 2005: volatile organic compounds – 75,702,859 kg). PollutionWatch compiles and reports industry data received by the federal government under the NPRI program.

Thereafter, the Phase 2 application of the law to over 85 per cent of the substances MOE has identified [Schedules 2 (275 substances) and Schedule 4 (135 substances)] would be deferred to “potentially 2-4 years after Phase 1,” which is somewhat unclear since the report also suggests that Phase 2 would begin in 2012 (which is the year that Phase 1 becomes fully operational). Furthermore, it is even more unclear when these requirements would apply to Schedule 4 substances. “Voluntary reductions” appear to be the primary approach contemplated into the indefinite future for this Schedule, apart from possible re-assignment of some Schedule 4 substances to other schedules.⁷³

In the respectful submission of CELA, this approach is too complex and leisurely, and not sufficiently precautionary.

Recommendation # 13: Consolidate all NPRI chemicals from Schedules 1 and 2 into a single schedule that becomes subject to all the requirements of the law by 2012. Consolidate all non-NPRI chemicals from Schedules 3 and 4 into a single schedule and impose reporting requirements on them upon the coming into force of the law, with materials accounting and toxics reduction planning requirements imposed on these substances within a reasonable time thereafter.

3. Phasing Too Slow, Even if Appropriate

For the reasons set out above, even if phasing is appropriate, the phasing of multiple schedules of substances is too slow and uncertain for the vast majority of substances MOE has identified as potentially subject to the new law. For there to be no remotely determinable date for the application of the law to the 135 Schedule 4 substances, which MOE has classified as “reproductive toxins, neurotoxins, mutagens, and carcinogens”⁷⁴ is particularly egregious in the circumstances. In this regard, CELA refers MOE to our Recommendation # 13.

4. Thresholds Too High

MOE proposes that thresholds for the designated list of toxic substances be based on those used in the NPRI program (i.e. for most designated substances use of 10,000 kg per year or more, and employment of 10 or more employees). Where NPRI has adopted lower thresholds (e.g. 5 kg for mercury) Ontario would follow suit. For smaller facilities, MOE would rely on voluntary initiatives, education and outreach.⁷⁵

The CELA Report characterizes the default NPRI threshold of 10,000 kg as “too high” and recommends adoption of a much lower threshold (50 kilograms) for designated substances that are (1) carcinogenic, or toxic to reproduction, or that are (2) persistent,

⁷³ *Discussion Paper, supra* note 1, at 19-20.

⁷⁴ *Ibid.* at 18.

⁷⁵ *Ibid.* at 20-21.

bioaccumulative, and toxic.⁷⁶ The City of Toronto's proposed by-law proposed a 100 kg threshold as the default level for most of the substances that would be covered by that by-law.⁷⁷

There are some very cogent and compelling reasons for MOE to lower the thresholds from those used in the NPRI program. NPRI data analyzed by the Commission for Environmental Cooperation ("CEC") for 2004 shows that many smaller facilities (i.e. those reporting total pollutant releases and transfers of less than 10,000 kg in 1998) showed substantial increases in all types of releases and transfers, in contrast with a decreasing trend for the largest facilities (i.e. those reporting more than 1,000,000 kg in 1998). The CEC also noted that facilities reporting that they undertook pollution prevention measures are generally showing greater progress in reducing their pollutant releases and transfers than those not having undertaken pollution prevention. The CEC recommended that to make better progress in reducing pollution all categories of reporting facilities should be showing decreases.⁷⁸ Accordingly, unless MOE reduces its proposed thresholds it likely will not be capturing smaller facilities and their corresponding emissions and use of toxic substances under the proposed new legislation.

The CELA Model Bill recommends that the issue of thresholds be addressed by regulation.⁷⁹

Recommendation # 14: Consider lower thresholds than those contained in NPRI at least for substances that are carcinogens, reproductive toxins, persistent and bioaccumulative.

5. Too Few Sectors

The Discussion Paper indicates that the proposed legislation will apply to the manufacturing and mineral processing sectors.⁸⁰ As noted above, the emissions covered by these two sectors would constitute approximately 75 per cent of the total emissions of all sectors reporting under the NPRI program (once all 320 NPRI chemicals are covered by the new legislation). Accordingly, MOE does not propose to capture 25 per cent of the pollutant emissions of NPRI-reporting sectors under the new law. Based on information from the Toronto Consultation this would amount to almost 200,000 tonnes of pollutants per year.⁸¹ This would appear to be a significant gap in coverage under the new law and a step back from NPRI itself.

⁷⁶ CELA Report and Model Bill, *supra* note 2, at 20.

⁷⁷ City of Toronto, *Environmental Reporting and Disclosure: Understanding the Proposed Bylaw* (June 2008) at 31 (Schedule A).

⁷⁸ Commission for Environmental Cooperation, *Taking Stock: 2004 North American Pollutant Releases and Transfers* (September 2007) at 3, 67-69 [hereinafter "CEC Report"].

⁷⁹ CELA Report and Model Bill, *supra* note 2, at 62 [section 2 – definition of "threshold quantity"; and section 9].

⁸⁰ *Discussion Paper*, *supra* note 1, at 21-22.

⁸¹ Toronto Consultation, *supra* notes 53-55.

In the circumstances, it would appear appropriate for MOE to consider options for expanding the number of sectors to which the new law would apply. One option is for the law to cover all sectors that report to NPRI, which is recommended in the CELA Report.⁸² A further option is to consider applying the law to any industrial facility that has an approval to emit contaminants to air or deposit them on land under the *Environmental Protection Act* (“EPA”) or discharge contaminants to water under the *Ontario Water Resources Act* (“OWRA”).

Recommendation # 15: Expand the number of sectors to which the law would apply to all sectors that report to NPRI, including applying the law to any industrial facility possessing an approval for emission or discharge of contaminants under the EPA or OWRA.

C. Greater Clarity Required on Application of Law to Consumer Products

The Discussion Paper indicates that the MOE proposes a number of new legislative authorities that would enable the MOE to (1) ban or restrict the manufacture, distribution, or sale of a designated toxic substance and products known to contain a toxic substance, and (2) require manufacturers and/or sellers of consumer products to publicly report on products containing a toxic substance.⁸³ CELA supports these approaches.

From the Toronto Consultation, however, it appeared that (1) MOE is not currently going to propose regulations for consumer products, and (2) MOE was only proposing to address consumer products where the federal government does not act. If the MOE is only proposing residual authority to act it is not clear what form of action this would take or whether it will be on a substance by substance basis or more systematic (e.g. enabling authority to address a broad range of consumer products by regulation; emergency authority to ban or restrict only individual substances in products where another level of government does not act; selective labeling, etc.). It would be helpful to know what exactly MOE has in mind with respect to consumer products.

The CELA Model Bill would authorize labeling and warnings with respect to toxic substances in consumer products where the substances are capable of causing cancer or effects such as reproductive toxicity.⁸⁴

Recommendation # 16: Clarify the application of the proposed toxics law to consumer products (e.g. enabling authority to address broadly toxic substances in consumer products and, if so, how; emergency authority to ban or restrict individual products, etc.). At a minimum, consider including in Bill authorization for immediate labeling and warnings for toxic substances in consumer products where the substances are capable of causing cancer or effects such as reproductive toxicity.

⁸² CELA Report and Model Bill, *supra* note 2, at 21 (Recommendation # 5).

⁸³ *Discussion Paper*, *supra* note 1, at 22.

⁸⁴ CELA Report and Model Bill, *supra* note 2, at 84-85 [section 22(2)(j), (7)].

D. Certified Toxics Planners are Critical to Success of Governance Model

The Discussion Paper indicates that apart from MOE being responsible for compliance and related measures under the proposed law it also is proposing an external body, such as a university or college-based institute to deliver technical and scientific support, education and information outreach, provide training on toxics reduction planning, and “potentially offer training and certification for individuals as toxics reduction planners.”⁸⁵

In general, CELA supports this approach. The CELA Report and Model Bill call for (1) establishment of an institute, and (2) mandatory training and certification of toxics use reduction and safer alternatives planners.

The CELA Report notes that one of the key features to the success of the law in Massachusetts has been the requirement for toxic use reduction plans to be approved by state-certified planners trained by the institute.⁸⁶ The CELA Model Bill sets out the particulars of this approach for Ontario.⁸⁷

Recommendation # 17: Establish an Institute to, among other things, train and certify toxics reduction planners.

V. RESPONSE TO SELECTED MINISTRY QUESTIONS

The Discussion Paper also seeks the answers to 44 questions that are posed throughout the document. The following constitute CELA’s summary response to a selected number of these questions. Questions appear in **boldface**. The CELA response appears in regular text.

A. Materials Accounting

Q.3: Do you have comments about materials accounting and how it should work?

A.: CELA supports materials accounting. See CELA Report and Model Bill.⁸⁸

⁸⁵ *Discussion Paper, supra* note 1, at 23-24.

⁸⁶ CELA Report and Model Bill, *supra* note 2, 26-27.

⁸⁷ *Ibid.* at 58-60 [section 6 – Institute; section 10(2)9(e) – certification of toxics use reduction plan by planner; section 14(2)(e) – certification of industrial facility substitution implementation plan by planner; section 15 – requirements to be met by planners for certification].

⁸⁸ *Ibid.* at 24-26 and Recommendation # 7; and 49-50 [section 2- definitions for materials balance, input, and output], 62-64 [section 9(2)(e) – materials balance for industrial facility annual report on toxic substances].

B. Toxics Use Reduction Plans

Q.5: What is an appropriate update schedule for Toxics Reduction Plans – annually, every two years, every five years, other?

A.: Every 2 years. See CELA Report and Model Bill.⁸⁹

Q.6: Do you have comments on the contents of the Toxics Reduction Plan summaries?

A. Yes. See CELA Report and Model Bill.⁹⁰

C. Reporting Requirements

Q.8: Do you have any comments on the frequency of reporting – annual, every two years, every five years unless significant changes to plans are made, other?

A.: Report should be annual. See CELA Report and Model Bill.⁹¹

Q.9: Are these the right elements on which to report?

A. In general, yes. See CELA Report and Model Bill.⁹²

D. Public Disclosure

Q.11: Do you have suggestions regarding the public disclosure of Toxics Reduction Plan summaries, use data from materials accounting and reports?

A.: Yes. In general, these should be disclosed. For the particulars of this approach see CELA Report and Model Bill.⁹³

Q.13: Do you have any suggestions on how the Province should protect confidential business information?

A.: Yes. See CELA Report and Model Bill.⁹⁴

E. List, Schedules, and Phases With Respect to Toxic Substances

Q.14: Do you have any comments on the proposed list of toxics?

⁸⁹ *Ibid.* at 22-24 and Recommendation # 6; and 64-67 [section 10(4) – toxics use reduction plan update].

⁹⁰ *Ibid.* at 22-24; and 67 [section 10(6) – plan summary].

⁹¹ *Ibid.* at 62 [section 9 – industrial facility annual report on toxic substances].

⁹² *Ibid.* at 62-64 [section 9].

⁹³ *Ibid.* at 81-82 [section 21 – public access to variety of information including annual report, which includes materials accounting information, under section 9, and plan summary under section 10(6)].

⁹⁴ *Ibid.* at 28 and Recommendation 10; and 90-91 [section 56 – confidential business information].

Q.15: Do you have any comments on the Province’s proposal to organize toxics into schedules and to tailor requirements for each schedule?

Q.16: Do you have any comments on the proposed phase-in timetable?

A.: See Part IV.B.1-3 of these Submissions and Recommendations 11-13.

F. Thresholds and Sectors

Q.18: Are the NPRI thresholds appropriate for Ontario?

A.: No. Not in light of Ontario’s position as “one of the top dischargers of toxics in North America and the number one discharger in Canada.”⁹⁵ Nor in light of the CEC’s findings regarding the increasing emissions of smaller facilities.⁹⁶

Q.19: What are the workable and effective approaches to address lower thresholds?

A.: Technical and financial assistance for smaller facilities.⁹⁷

Q.20: Are there additional sectors that the province should consider for inclusion?

A.: Yes. All of the sectors covered by NPRI and any other facilities in sectors that have an approval to emit contaminants to air and deposit them on land under the *EPA*, or discharge contaminants to water under the *OWRA*. See Part IV.B.5 and Recommendation # 15 of these Submissions.

G. Consumer Products

Q.21: Do you support creating new authority for Ontario to ban or restrict toxics and consumer products containing toxics? Should this authority be limited to a designated list or be broad enough to include any toxic substance?

A.: Yes to the first question. Authority can be based on a list (and, in addition, on the need to act in an emergency situation). See Part III.E.1 and Recommendation # 9 of these Submissions.

Q.22: Should the legislation include authority for the Province to take precautionary action when, with limited scientific evidence, it suspects that a toxic substance poses a serious risk of harm to human health or the environment?

A.: Yes. The precautionary principle is now widely accepted as a principle in both international and domestic law. The principle is included in the CELA Model Bill.⁹⁸

⁹⁵ *Discussion Paper*, *supra* note 1, at 28-29.

⁹⁶ CEC Report, *supra*, note 78 and accompanying text.

⁹⁷ CELA Report and Model Bill, *supra* note 2, at 30-31 and Recommendation # 12; and 79-81 [sections 18-19 technical assistance programs for businesses and employees].

⁹⁸ CELA Report and Model Bill, *supra* note 2, at 48 [section 1(d) – purpose section of Bill], 51 [section 2 – definition of precautionary principle], 55 [section 3(4) – Ministerial consideration of precautionary principle], 56 [section 4(2) – government conduct generally], 58 [section 5(5) – advisory council actions], 60 [section 6(3) – institute actions], 62 [section 8(4) – development of list of reportable toxic substances],

Q.23: What are workable and effective ways to ensure the public has useful information on toxics and consumer products?

A.: The use of a website and consumer product labeling and warnings among other options would be both workable and effective.

H. Institutions and Toxics Use Reduction Planning

Q.24: What should be the division of responsibilities between the government and other parties? Why?

A.: The division of responsibilities proposed in the Discussion Paper appears reasonable. It also would help to protect MOE from a defence of officially induced error in the event of the need to prosecute under the Act.

Q.25: What parties, such as a university, agency or centre of excellence, are most effective and efficient for particular functions and types of activities?

A.: See CELA Report and Model Bill.⁹⁹

Q.26: Do you have any comments on the proposal to establish a training and certification program for toxics reduction planners?

A.: Yes. See Part IV.D and Recommendation # 17 of these Submissions.

I. Technical Assistance

Q.30: How can technical assistance best be targeted to reduce barriers?

A. Among other measures, target smaller facilities.

J. Alternatives

Q.33: How should information on feasible alternatives be disseminated to maximize access to and use of this information?

A.: Among other information dissemination approaches, use provincial chemical action plans. See Part III.E.1 and Recommendation # 9 of these Submissions.

67 [section 10(8) – industrial facility development of toxics use reduction plan], 69 [section 11(7) – development of list of priority toxic substances], section 12(6) – development of safer alternatives assessment reports], 73 [section 13(7) – development of provincial priority toxic substance alternative action plans], 76 [section 14(10) – development of industrial facility substitution implementation plan].

⁹⁹ *Ibid.* at 58-60 [section 6 – establishment of institute that may be affiliated as part of one or more universities or colleges in the province].

K. Public Access to Information

Q.41: What concerns do you have regarding existing reporting systems and how could we improve upon them?

A.: See Part III.D.5.a and Recommendation # 5 of these Submissions.

Q.44: What is the most effective way, such as website or through outreach, to educate consumers?

A.: Both plus establishment of Institute as recommended in the CELA Report and Model Bill.¹⁰⁰

VI. CONCLUSIONS AND RECOMMENDATIONS

Ontario has proposed an important legislative initiative on the reduction of toxic substances to protect human health and the environment. CELA supports strong measures in this area and submits that in certain respects the provincial proposal has made the correct policy choices. However, in other respects it has not. Given that Ontario is one of the top dischargers of toxics in North America and the number one discharger in Canada, CELA has some serious reservations about what the provincial proposal is silent or ambiguous about, as well as what appears to be aspects of the initiative that are too narrow, limited, or will be implemented too slowly.

Accordingly, CELA re-states below its recommendations contained throughout these submissions on how to correct these problems for the consideration of the province as this legislative initiative moves forward:

Recommendation # 1: Include a purpose section in the Act that recognizes the need to (1) reduce the use of toxic substances, (2) promote safer alternatives, (3) facilitate public right to know about such substances, and (4) apply precautionary and sustainable development principles.

Recommendation # 2: Include provincial toxics use reduction targets in the legislation.

Recommendation # 3: Authorize establishment of a Toxics Use Reduction and Safer Alternatives Fund in the legislation.

Recommendation # 4: Authorize imposition of a toxics use fee on industrial facilities that are subject to the Act's requirements and on toxics use reduction and safer alternatives planners that seek to be certified under the Act.

¹⁰⁰ *Ibid.*

Recommendation # 5: Include a public right to know other information compiled under the authority of existing environmental laws.

Recommendation # 6: Include a public right under the new Act to apply to the Minister for review of toxics use reduction and safer alternatives plans or, in the alternative, amend the *EBR* to ensure that such plans are included in the definition of “instruments” and, therefore, subject to review under the *EBR*.

Recommendation # 7: Include a public right of action to enforce key provisions of the Act.

Recommendation # 8: Include statutory authority for the development and implementation of technical assistance programs for employees.

Recommendation # 9: Authorize statutory provisions for safer alternatives containing at least the following components (1) identification of priority substances for substitution, (2) safer alternatives assessment reports, (3) provincial priority toxic substance alternative action plans, and (4) industrial facility substitution implementation plans.

Recommendation # 10: Include a conflicts provision that allows for municipal by-laws to operate in conjunction with the new provincial law.

Recommendation # 11: Apply obligations to engage in materials accounting, toxics reduction planning, and reporting for all 320 NPRI substances from the time the legislation comes into force.

Recommendation # 12: Clarify the rationale for why only 20 (of 155) non-NPRI chemicals identified by MOE are subject to reporting requirements in Phase 1 and consider including more substances from the lists produced by CMP, IARC, California’s toxics law, and the U.S. National Toxicology Program.

Recommendation # 13: Consolidate all NPRI chemicals from Schedules 1 and 2 into a single schedule that becomes subject to all the requirements of the law by 2012. Consolidate all non-NPRI chemicals from Schedules 3 and 4 into a single schedule and impose reporting requirements on them upon the coming into force of the law, with materials accounting and toxics reduction planning requirements imposed on these substances within a reasonable time thereafter.

Recommendation # 14: Consider lower thresholds than those contained in NPRI at least for substances that are carcinogens, reproductive toxins, persistent and bioaccumulative.

Recommendation # 15: Expand the number of sectors to which the law would apply to all sectors that report to NPRI, including applying the law to any industrial

facility possessing an approval for emission or discharge of contaminants under the *EPA* or *OWRA*.

Recommendation # 16: Clarify the application of the proposed toxics law to consumer products (e.g. enabling authority to address broadly toxic substances in consumer products and, if so, how; emergency authority to ban or restrict individual products, etc.). At a minimum, consider including in Bill authorization for immediate labeling and warnings for toxic substances in consumer products where the substances are capable of causing cancer or effects such as reproductive toxicity.

Recommendation # 17: Establish an Institute to, among other things, train and certify toxics reduction planners.