



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

VIA ELECTRONIC MAIL  
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Dear Mr. Borg:

**Re: Discussion Paper: A Greenhouse Gas Cap-and-Trade System for Ontario – EBR Registry No. 010-6740; Environmental Protection Amendment Act, (Greenhouse Gas Emissions Trading) 2009 – EBR Registry No. 010-6467**

The following constitute the submissions of the Canadian Environmental Law Association (“CELA”) regarding the above matters.

### **Introduction**

Both EBR Registry notices indicate the following:

“Ontario is working actively with other North American jurisdictions to pursue a common approach to cap-and-trade. In July 2008, Ontario joined the Western Climate Initiative – group made up of seven western states and Quebec, British Columbia and Manitoba. In June 2008, Ontario signed a Memorandum of Understanding with Quebec to collaborate on a regional cap-and-trade system for greenhouse gases. Ontario is also a member of The Climate Registry, participates as an observer in other greenhouse gas cap-and-trade initiatives, and is exploring opportunities for further cooperation with the federal government to develop a cap-and-trade program that reflects Ontario’s priorities and is aligned with other systems to provide broad access trading.”

CELA submits that a cap-and-trade system must: (1) ensure a robust and increasing price on greenhouse gas emissions at a level necessary to ensure significant emissions reductions occur in the capped sectors; (2) ensure absolute emission reductions in the sectors and activities covered by the system; (3) avoid loopholes such as price caps and offset systems that allow Ontario

emission sources to avoid implementation of cost-effective reductions in their own operations; (4) implement auctioning of 100% of emission permits, and ensure the revenue is used to reduce emissions and accelerate a shift to a low-carbon, high-efficiency economy; and (5) ensure Ontario becomes a leader in greenhouse gas emission reductions in order to meet the challenges posed by climate change.

In general, CELA supports the principles set out in the Discussion Paper and the regulatory enabling authority proposed in the amendments to the *Environmental Protection Act* on greenhouse gas emissions trading. However, CELA submits that the particulars of how the principles will be implemented require further work. In this regard, the organization reserves the right to address these matters in greater detail when the draft regulations themselves become available for comment.

CELA cautions, however, that greenhouse gas emissions trading in Ontario should remain part of a package of tools and not be viewed as a substitute for the use of traditional and other regulatory measures including those available under the *Canadian Environmental Protection Act, 1999* (“*CEPA, 1999*”).

### **Ontario’s Greenhouse Gas Reduction Goals**

The Discussion Paper indicates that “Ontario has a comprehensive plan for moving on climate change” (page 7). However, CELA notes that the Discussion Paper is silent on how Ontario will address mobile, as opposed to stationary, sources of greenhouse gas emissions. This is not an inconsiderable omission. The Discussion Paper indicates that the percentage of greenhouse gas emissions attributable to the top three sectors in Ontario based on 2006 data is as follows: (1) transportation – 33%; (2) industry – 25%; and (3) electricity – 16% (chart on page 8). With transportation constituting one-third of Ontario’s greenhouse gas emissions problem, the Discussion Paper should address what role, if any, the province sees for cap-and-trade in relation to this sector.

### **Ontario’s Key Design Principles for Cap-and-Trade**

The Discussion Paper sets out certain key principles that will guide the design of Ontario’s greenhouse gas emissions trading system, including: (1) absolute emissions reductions; (2) simple, consistent, transparent trading rules; (3) administratively efficient program; (4) equitable treatment among capped sectors; (5) availability of credit for early action; (6) accurate emissions measurement, monitoring and reporting; (7) integration of clean technologies with the trading program; and (8) facilitation of trading opportunities with comparable regional and national trading systems. As noted above, in general, CELA supports these principles.

In the review that is set out in the Discussion Paper (pages 14-27) the province sets out potential courses of action in relation to such matters as (1) emissions caps; (2) scope and point of regulation; (3) distribution of allowances; (4) offsets; (5) credit for early action; (6) banking and borrowing; and (7) compliance and reporting.

## **CELA's Views on Key Components of Emissions Trading Program**

The following constitute the views of CELA on what should be key components of an emissions trading program for Ontario.

### ***Legal Definition and Effect of the Allowance or Credit***

Jurisdictions that have developed emissions trading programs have had to consider the nature of the legal interest created by the allowance or credit. For an emissions trading market to develop, interests in the allowance or credit must be sufficiently protected to merit investment. However, creating a property right or interest in the allowance or credit may potentially hamper the ability of regulatory agencies to intervene where necessary, or to develop public support for a program perceived by some to be authorizing a “right to pollute.” Consequently, in most jurisdictions that have established emissions trading programs the nature of the entitlement that has been created is that of a revocable licence. For example under the U.S. *Clean Air Act Amendments of 1990* (“CAA”) with respect to sulphur dioxide emissions trading the U.S. Congress made it clear that property rights are not created in allowances (“an allowance...is a limited authorization to emit sulphur dioxide in accordance with [Title IV of the CAA]. Such allowance does not constitute a property right. Nothing in [Title IV or other laws] shall be construed to limit the authority of the United States to terminate or limit such authorization...” 42 U.S.C.A. § 7651b(f) (West 2009)). CELA recommends that such an approach be adopted for Ontario’s program. From the Discussion Paper, it is not clear what the province intends in this regard (pages 20-21).

### ***When a Trade Will Be Recognized***

From the Discussion Paper it is not clear if Ontario will include provision for offsets (page 22). In general, CELA does not support the inclusion of offsets in an emissions trading program. However, if the province decides to include them in the program, trades involving emission reduction credits should only be recognized if the reductions in emissions are (1) real (result in actual reductions in emissions); (2) surplus (exceed the reductions mandated by a source’s permit or other applicable instrument); (3) quantifiable or verifiable (measurable according to a method acceptable to the applicable level of government); (4) enforceable (by the appropriate level of government by permit, agreement, or other legal instrument or authority); and (5) permanent (assured, through an enforceable mechanism, for the lifetime of the credit). The Discussion Paper appears to recognize these criteria would be necessary (page 22).

### ***Regulatory Agency Ability to Measure Source Emissions***

The regulatory agency responsible for overseeing the program must possess the legal authority to require the measurement of emission levels at source by the regulated entity. The obligation on the regulated entity should include the requirement to measure the baseline emission level and the changes from that baseline that allow the source to generate tradable emission allowances or credits. The baseline emission level for a source is usually defined as that level of emission below which the source will produce emission reductions that will generate allowances or credits. Consequently, an emissions trading program requires a strict monitoring regime to ensure the integrity of the process. For example, under CAA, emissions must be measured by a

continuous emission monitoring system (“CEMS”) that records actual utility emissions of sulphur dioxide. Where the monitoring system is not working the CAAA makes it clear that the source will be deemed to be operating in an uncontrolled manner during the entire period for which data is not available. The effect of such a presumption is that there is an incentive to ensure that the monitoring system at a source is operating correctly at all times, otherwise the sources emissions will be presumed to be higher and will start eating up allowances. This principle should be applied to greenhouse gas emissions as well.

U.S. Environmental Protection Agency regulations promulgated under CAAA also allow state governments to impose different monitoring, record-keeping, and reporting requirements on sources subject to their respective emissions trading programs. These alternate methods usually are employed for smaller sources that could not otherwise afford to install a CEMS.

The Discussion Paper is largely silent on the issues that CELA has raised here although the Discussion Paper does state that industrial sources would be regulated at the point of greenhouse gas emission (page 18), that there must be mandatory tracking of emissions (page 25), but “onerous” reporting requirements should be avoided (page 26). At a minimum, the questions of measuring baseline and changes in emissions, whether CEMS will be mandatory, and for what sources should all be clarified.

### ***Clear Government Legal Authority to Implement and Enforce Program***

Explicit legislative authority to embark on an emissions trading program is necessary to avoid a number of problems. First, if a legal basis for a program is ambiguous, opponents can delay its implementation by raising court challenges. Second, the absence of express legal authority for emissions trading is likely to make government more hesitant about embarking on such a regime in comparison to other more clearly authorized programs. This is particularly the case where an emissions trading program requires particular attributes to succeed such as allowances, auctions of allowances, an audit program, CEMS or other monitoring network, or excess emissions administrative penalties and offsets, not otherwise authorized by statute. In such circumstances, the lack of express statutory authority can only jeopardize fulfillment of the objectives of the program by making it more vulnerable to third party challenge. Third, the lack of express statutory authority for such a program is likely to make the regulated community reluctant to participate.

The proposed amendments to the *Environmental Protection Act* contain broad enabling authority for a greenhouse gas emissions program. However, the particulars of the regime to be created will be left to future regulations. The Discussion Paper suggests that the proposed program may have certain characteristics of the type CELA has mentioned above. It remains to be seen exactly how robust is the regime future regulations will establish.

### ***Equitable and Simple Method for Allocating Allowances or Credits***

A fair method of allocating allowances or facilitating trades is necessary to induce firms to pursue emissions trading. In addition to private trades between sources subject to the program, the CAAA authorizes two additional methods. First, sulphur dioxide allowances are allocated

based on historical emissions scaled down so that aggregate emissions meet the cap with each allowance authorizing the emission of one ton per year of the pollutant. Second, auctions are authorized for the purchase of allowances on an annual basis. This approach increases the likelihood that the allowance will reflect what the market will bear, and that the allowances will be distributed in an equitable manner. In general, the Discussion Paper appears to be considering such approaches. However, again the particulars of what will be adopted will be left to future regulations. Consequently, CELA reserves full judgment on the adequacy of the program until that time.

### **Summary of CELA Recommendations**

1. Address what role, if any, the province sees for cap-and-trade in relation to the transportation sector.
2. Ensure that the allowance or credit does not create a property right but is in the nature of a revocable licence.
3. If the province authorizes offsets, ensure they are real, surplus, quantifiable or verifiable, enforceable, and permanent.
4. The questions of measuring baseline and changes in emissions, whether CEMS will be mandatory, and for what sources should all be clarified.
5. Ensure there is clear legal authority to embark on an emissions trading program with particular characteristics.
6. Ensure that a fair method for allocating allowances or facilitating trades is established.

Yours truly,  
CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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