

VIA EMAIL

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Toxics Reduction Program
Ministry of the Environment, Conservation and Parks
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RE: Submissions on Bill 66 – Restoring Ontario’s Competitiveness Act, 2018, Schedule 5: “Repeal of the Toxics Reduction Act, 2009 and all associated regulations by December 31, 2021” (ERO # 013-4234) and “Planning and reporting changes under the toxics reduction program and Ontario Regulation 455/09” (ERO # 013-4235)

These are the submissions of the Canadian Environmental Law Association (“CELA”) in respect of the above matters. CELA does not agree with the Ministry of the Environment, Conservation and Parks (“MECP”) that the *Toxics Reduction Act, 2009* (“TRA”) is duplicative of requirements under federal law on control of toxic substances and, therefore, does not find persuasive the MECP argument that repealing the *TRA* will reduce a burden on industry from having to comply with duplicative programs. Ontario has also previously identified many toxic substances in Ontario not covered by federal requirements that if they are still present in the province could benefit from application of the *TRA*. Accordingly, CELA recommends that:

1. MECP not repeal the *TRA*;
2. MECP not revoke the regulations or eliminate any of the planning and reporting requirements of the *TRA*, including the requirement on industry to prepare toxics reduction plans;
3. MECP proclaim in force sections 11, 15.1, 20.1, 26.1, 30, 38, and 50(1)(o.1)(o.2) of the Act;
4. MECP list under the *TRA* as substances of concern the 135 substances identified in the 2008 Discussion Paper if they are still present in commerce and the environment in Ontario; and
5. Pursuant to the authority under s. 50(1)(d) of the Act, MECP set targets relating to toxic substances under O. Reg. 455/09.

The submissions are divided into a brief description of CELA, a summary of the MECP proposals, our comments with respect thereto, and our recommendations. Appendix I of the

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submissions sets out the full MECP rationale for repealing the *TRA* and reducing planning and reporting obligations on industry between now and the December 31, 2021 repeal date for the Act.

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, including problems arising from exposure to toxic substances in the environment. CELA uses both existing laws to protect the environment and, where necessary, advocates environmental law reforms. CELA has considerable experience regarding the *TRA* and O. Reg. 455/09 having made extensive submissions on both to the Legislative Assembly of Ontario and the Government of Ontario when these laws were under development in 2008-2009, and most recently in connection with amendments to O. Reg. 455/09 in the 2017-2018 period.

II. The MECP Proposals

The MECP proposals identified above are part of a broader omnibus bill (Bill 66, Schedule 5). Bill 66, Schedule 5 would repeal the *TRA* by December 31, 2021, and revoke both of its regulations, O. Reg. 455/09 (general) and O. Reg. 296/18 (service of documents). The particulars of these proposals are set out immediately below and more fully in Appendix I.

A. Proposal to Repeal the *TRA* and Regulations

In early December 2018, MECP posted on the Environmental Registry for 45-day comment a proposal to repeal the *TRA* by December 31, 2021 and all its associated regulations. The MECP's justification for this proposal is that: "This will remove unnecessary duplication with the federal program [the Chemicals Management Plan ("CMP") under the *Canadian Environmental Protection Act, 1999* ("*CEPA*") and reduce burden for industry by not having to comply with duplicative programs". The proposal goes on to say that: "By 2021, all Ontario toxic substances will [be] covered by the [CMP]" and that by that time "Ontario proposes to repeal the [*TRA*] and will defer to the federal government's comprehensive program".

B. Proposal to Implement Planning and Reporting Changes Under the Toxics Reduction Program and O. Reg. 455/09

In December 2018, MECP also posted on the Environmental Registry for 45-day comment a proposal to implement planning and reporting changes under the toxics reduction program and O. Reg. 455/09. According to the posting, MECP would no longer require facilities with existing toxics reduction plans to review those plans, and would exempt certain facilities from all future planning and reporting obligations. This would, according to the MECP posting: "...remove unnecessary duplication with the federal program and reduce burden for industry".

III. Comments

The MECP proposals are based on the assumptions that: (1) the *TRA* and its planning and reporting requirements are duplicative of federal requirements; and (2) eliminating the *TRA* and its requirements will save industry money but still result in protecting human health and the environment. The assumptions are not correct. The concept at the heart of *TRA* of mandatory preparation, but voluntary implementation, of toxics reduction plans has a record of demonstrated success in jurisdictions such as Massachusetts that have had such a law in place for approximately three decades. The *TRA* has only really been fully in effect since 2013. There is no reason, and more importantly, no evidence, to assume it cannot work in Ontario given time and dedication.

A. The *TRA* Does Not Duplicate *CEPA*; It Supplements It

1. Nature of the Problem

The purpose of the *TRA* is to prevent pollution and protect human health and the environment by reducing the use and creation of toxic substances and informing Ontarians about toxic substances. Pre-*TRA* legislation in Ontario (e.g. *EPA*, *OWRA*) focused on, and continues to focus on, pollution abatement, not pollution prevention. This problem explained, and continues to explain, why Ontario's emissions of toxic substances to air, land, and water are some of the highest in North America.

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)¹

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

¹ The quantities identified in Table A are for all industry sectors and not just the chemical sector.

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

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 Canada's National Pollutant Release Inventory ("NPRI") and the U.S. 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 be more visible in undertaking. Establishing targets under the *TRA* relating to reduction of toxic substances would help in such an endeavor. Repealing the *TRA* and relying on federal law is not the answer. Ontario has a "made in Ontario" problem with toxic substances. It should not restrict itself to a "made in Ottawa" solution. Ontario needs to be part of the solution.

2. Limitations of Federal Law

TRA was designed to deal with the Achilles heel of *CEPA*; its failure to deal more aggressively with preventing pollution from toxic substances on a company by company basis. To fill that gap, Ontario enacted the *TRA* to reduce the use and creation of toxic substances by requiring companies to develop and hopefully implement plans that do just that, modelled on the very successful *Massachusetts Toxics Use Reduction Act*.² *TRA* was not modelled on *CEPA*.

Indeed, there are several limitations under *CEPA*. The reporting requirements pursuant to notices issued under s. 46 of *CEPA* that result in the NPRI, address the obligation on companies to report on the release, but not the use, of toxic substances. Accordingly, a focus on the use (and creation) of toxic substances, as is the case with *TRA*, represents new, not duplicative, legal authority in

² Mass. Gen. L. ch. 211. The Massachusetts law's goal of achieving 50% reduction from 1987 quantities of toxic or hazardous by-products generated by industry in the state, was reached in 1998.

Ontario. As the Environmental Commissioner of Ontario has observed: “While the existing federal NPRI program focusses on gathering and publishing information on industrial emissions...the driving intent of the *TRA* is toxics reduction”.³

Moreover, the ministerial authority under s. 56 of *CEPA* that requires persons on notice to prepare and implement a pollution prevention plan⁴ has been used too infrequently and in relation to far too narrow a number of industrial sectors or companies to constitute a systematic response to the problem of increasing releases and use of toxic substances into the Ontario environment.⁵ Quite simply, few substances covered by *TRA* have been subject to pollution prevention measures under *CEPA*.

Furthermore, the CMP, which developed out of the requirements of s. 73 of *CEPA*, is not designed to substitute for the *TRA*. CMP is an assessment of the toxicity of existing substances that had never previously been tested, or had only been inadequately tested, to determine which should be restricted or prohibited. With some exceptions, it has resulted in allowing existing substances to remain in commerce with restrictions. Therefore, *TRA* is designed to pick up where *CEPA* leaves off by getting companies to use less of, or not create in the first place, potentially problematic substances the federal government allows to remain in commerce.

3. Benefits of Toxics Reduction

In the face of the many health and environmental problems posed by the presence of toxic substances in commerce and industry, the benefits of toxics reduction have long been understood to be significant. These include:

- 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.

The 2008 discussion paper prepared by the provincial government that led to the enactment of the *TRA* understood these benefits of a toxics reduction law when it stated: “Reducing toxics in

³ Environmental Commissioner of Ontario, “Moving from End-of-Pipe to Front-End Toxics Reduction in Ontario”, in *Redefining Conservation: Annual Report 2009/2010* (September 2010), at 94.

⁴ Section 3 of *CEPA* defines “pollution prevention” as: “the use of processes, practices, materials, products, substances or energy that avoid or minimize the creation of pollutants and waste and reduce the overall risk to the environment or human health”.

⁵ See generally Ontario, Legislative Assembly, Standing Committee on General Government, in *Debates*, No. G-30 (May 25, 2009), at G-764 (Dr. Miriam Diamond, Co-Chair, Ontario Toxics Reduction Scientific Expert Panel).

Ontario's economy will not only benefit the environment, it will also create opportunities for developing new ways of doing business".⁶

B. Planning and Reporting are Necessary if Industry is to Reduce the Use and Creation of Toxic Substances and Derive Economic Benefits Therefrom

The planning and reporting requirements of *TRA* are the heart of the statute and how it fills the gaps in the inadequacies of federal law (*CEPA*). By eliminating the *TRA* and its unique requirements, MECP jeopardizes both the human health and environmental protections of the statute as well as its potential economic benefits to industry in identifying where reductions in the use and creation of toxic substances may be possible. Recent data from the Minister's own annual reports illustrates these points.

Table B, below, identifies for the five-year period 2012-2016 the total amount of toxic substances used, created, and contained in product in Ontario.⁷ Review of Table B suggests that quantities in each of these categories have remained comparatively steady in the last five years, neither dramatically increasing nor decreasing.

Table B: Amount of Toxic Substances Used, Created, and Contained in Product in Ontario for 2012-2016 (tonnes)

Year	Used	Created	Contained in Product
2012	11,744,238	27,788,689	8,809,167
2013	10,965,273	20,641,909	8,415,042
2014	16,216,010	29,411,605	8,207,272
2015	10,870,239	26,949,221	8,610,353
2016	10,241,773	26,314,311	7,826,090

However, **Table C**, based on the *Minister's 2017 Report*, suggests that **where facilities** have indicated they **intend to implement an option to reduce amounts of a toxic substance used, created, or contained in product** there have generally been declines in all three categories for the 2012-2016 period.⁸ This translates into not only environmental health gains but economic ones as well.

Table C: Amount of Toxic Substances Used, Created, and Contained in Product in Ontario for 2012-2016 for Facilities Intending to Reduce (tonnes)

Year	Used	Created	Contained in Product
2012	2,172,669	1,063,284	1,448,013
2013	1,092,017	1,161,219	752,739
2014	977,887	1,067,170	620,413
2015	945,932	1,050,611	589,195
2016	876,291	999,525	534,023

⁶ Ontario Ministry of the Environment, "Creating Ontario's Toxics Reduction Strategy: Discussion Paper" ERO # 010-4374 (Toronto: MOE, August 27, 2008) at 4 [hereinafter 2008 Discussion Paper].

⁷ See Ontario Ministry of the Environment and Climate Change, *Minister's Report on Toxics Reduction 2017* (Toronto: Queen's Printer, 2018) (*Minister's 2017 Report*).

⁸ *Ibid.*

However, **Table D**, also based on the *Minister's 2017 Report*, shows that for each year between 2013 and 2016 the total amounts of **toxic substances released to air, land, and water for all facilities** were **greater** than in 2012. This suggests that not enough facilities are committing to toxic substance reduction to make a dent in overall amounts released to the environment.

Table D: Amount of Toxic Substances Released to Air, Land, and Water in Ontario for 2012-2016

Year	Amounts of Toxic Substances Released to Air, Land, and Water (tonnes)
2012	415,485
2013	447,052
2014	434,052
2015	435,108
2016	425,628

What is perhaps of most concern and, therefore, a challenge that must be met is that for the 2012-2016 period, as reflected in **Table E**, also from the *Minister's 2017 Report*, total **releases by all facilities to air, land, and water of substances linked to cancer have not declined** and have been greater for each year since 2012. The amounts identified in Table E are approximations based on Graph 5 of the *Minister's 2017 Report*.

Table E: Approximate Amounts of Toxic Substances Linked to Cancer Released to Air, Land, and Water in Ontario for 2012-2016

Year	Approximate Amounts of Toxic Substances Linked to Cancer Released to Air, Land, and Water (tonnes)
2012	25,750
2013	30,250
2014	27,250
2015	26,900
2016	26,100

Tables B-E demonstrate where the *TRA* has achieved success and also where improvements are necessary and capable of being realized. What is clear is that **facilities indicating an intention to implement a reduction option are the ones where reductions in the use and creation of toxic substances have occurred**. It should be remembered that the Act has only really been in full effect since 2013, so five years is not really a long enough period to gauge the success or failure of the law. Abandoning *TRA* at this stage is neither prudent nor helpful to either environmental health protection of the public or potential economic benefits to industry from reduced use and creation of toxic substances.

C. Better Implementation of the Act Could Lead to Better Results

The *TRA* needs to be improved, not abandoned and the need for these improvements dwarfs any concern with alleged “red tape” under the program. Some of these needed improvements are noted below.

1. 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. Proclaiming these provisions is far more important than the alleged benefits associated with repealing the Act identified under the MECP proposals.

2. 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 (now MECP) 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 did not list 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).**⁹ Ontario should be trying to determine whether these substances are still present in the province. If they are, listing these 135 substances as substances of concern pursuant to section 49 of the *TRA* and thereby bringing section 11 into force rank as far superior priorities to the exercise MECP is engaged in under its current proposals.

3. Lack of Toxics Reduction Targets

Section 50(1)(d) of O. Reg. 455/09 authorizes the provincial cabinet to set, by regulation, targets relating to toxic substances. However, after eight years under the *TRA* there still are no targets set under the regulations. As noted above, Table A showed what the on-site releases to air of carcinogens were in Ontario in 2013 and compared them to New Jersey for those substances in both jurisdictions with comparable reporting thresholds. The comparison demonstrated the need for dramatic improvement in reducing toxics substances in Ontario, a need that the *TRA* should

⁹ 2008 Discussion Paper, *supra* note 9, at 18.

be more visible in undertaking. Establishing targets relating to toxic substances would help in such an endeavor and would be a far more valuable initiative than repealing the Act.

IV. Recommendations

Arising from the foregoing submissions, CELA recommends that:

1. MECP not repeal the *TRA*;
2. MECP not revoke the regulations or eliminate any of the planning and reporting requirements of the *TRA*, including the requirement on industry to prepare toxics reduction plans;
3. MECP proclaim in force sections 11, 15.1, 20.1, 26.1, 30, 38, and 50(1)(o.1)(o.2) of the Act;
4. MECP list under the *TRA* as substances of concern the 135 substances identified in the 2008 Discussion Paper if they are still present in commerce and the environment in Ontario; and
5. Pursuant to the authority under s. 50(1)(d) of the Act, MECP set targets relating to toxic substances under O. Reg. 455/09.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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APPENDIX I

FULL SUMMARY OF MECP PROPOSALS

A. Proposal to Repeal the *TRA* and Regulations

In early December 2018, MECP posted on the Environmental Registry for 45-day comment a proposal to repeal the *TRA* by December 31, 2021 and all its associated regulations. The MECP's justification for this proposal is that: "This will remove unnecessary duplication with the federal program [the Chemicals Management Plan ("CMP") under the *Canadian Environmental Protection Act, 1999* ("CEPA")] and reduce burden for industry by not having to comply with duplicative programs". The proposal goes on to say that: "By 2021, all Ontario toxic substances will [be] covered by the [CMP]" and that by that time "Ontario proposes to repeal the [*TRA*] and will defer to the federal government's comprehensive program".

The MECP posting goes on to state that: "The Toxics Reduction Program has not achieved meaningful reductions. Preliminary results indicate an overall reduction of 0.04% of substances used, created and released for all regulated facilities". The MECP posting notes further that: "Both Ontario and the federal government require industry to take action on similar toxic substances:

- The Ontario Toxics Reduction Program requires industry to report publicly on their use of toxic substances and identify options to reduce those substances through toxic reduction plans.
- The federal [CMP] requires industry to reduce the use and/or release of certain toxic substances. The federal approach is more comprehensive than the existing provincial program."

Finally, the MECP posting says that: "This proposal cuts red tape and reduces regulatory burden for businesses. Addressing duplication and overlap associated with the [*TRA*] was a theme during the Red Tape Challenge sector consultations".¹⁰

B. Proposal to Implement Planning and Reporting Changes Under the Toxics Reduction Program and O. Reg. 455/09

In December 2018, MECP also posted on the Environmental Registry for 45-day comment a proposal to implement planning and reporting changes under the toxics reduction program and O. Reg. 455/09. According to the posting, MECP would no longer require facilities with existing toxics reduction plans to review those plans, and would exempt certain facilities from all future planning and reporting obligations. This would, according to the MECP posting: "...remove unnecessary duplication with the federal program and reduce burden for industry". In particular, under this proposal, MECP would: (1) no longer require facilities with existing toxics reduction

¹⁰ See generally, Ontario Ministry of the Environment, Conservation and Parks, "Repeal [of] the Toxics Reduction Act, 2009 and all associated regulations by December 31, 2021", ERO # 013-4234 (Toronto: MECP, December 6, 2018).

plans to conduct reviews of those plans (they would still be able to amend their plans and choose to implement toxic substance reduction options); (2) exempt certain facilities from all future planning and reporting obligations for certain substances (the exemptions would impact (a) facilities that have never planned or reported under the program, but now meet the reporting threshold for one or more toxic substances, (b) facilities that have been out of the program for three or more years for a toxic substance, but are coming back into the program because they meet a reporting threshold again, or (c) facilities that are currently planning and reporting under the program, and now meet the reporting thresholds for a new toxic substance at the facility);¹¹ and (3) maintain annual reporting obligations for facilities with existing plans (only facilities with current plans for substances that meet reporting thresholds would continue to annually report on the amounts of those substances under the toxics reduction program). According to the MECP posting: “This proposal cuts red tape and reduces regulatory burden for businesses”.

The regulatory impact statement (“RIS”) portion of the posting notes that the amendment would apply to facilities in the manufacturing and mineral processing sectors that report under the toxics reduction program. There would no longer be new or reviewed plans for toxics substance reduction planners to provide recommendations on and certify. Planners would only be required if facilities choose to voluntarily amend their plans. The RIS states that a costing analysis was carried out by MECP and it was found that the annual average savings of this proposal will far exceed the annual average administrative costs. The MECP proposal will cost current facilities an annual average administrative cost of \$818,000 to learn about the changes to the regulations and to continue reporting on existing substances until 2021. These costs are said by the MECP to be offset by the total annual average administrative net savings of approximately \$4 million for all facilities to stop planning and for the program to end in 2021 (when the federal government has completed its chemical assessments and taken action on many substances). All cost analysis was calculated as Average Annual Present Value costs discounted at 2.5% over 10 years.¹²

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¹¹ Thus, the exemptions for the substances referred to above would apply to the following obligations: (1) creating a toxic reduction plan; (2) tracking and quantifying toxic substances; (3) annual reporting on planned reductions; and (4) reviewing the toxic reduction plan.

¹² See generally, Ontario Ministry of the Environment, Conservation and Parks, “Planning and Reporting Changes Under the Toxics Reduction Program and Ontario Regulation 455/09”, ERO # 013-4235 (Toronto: MECP, December 6, 2018).