The Canadian Environmental Law Association's Responses to the Ministry of Environment's Toxics Reduction Act, 2009 Workshop

WORKBOOK

2 WORKBOOK QUESTIONS

4.3 – Toxic Substance Accounting

1. What are your views on the concepts of "process", "use" , "creation", "destruction", "transformation", "product", and "intermediate product", as they are presented on slides 19-21 of the presentation?

In CELA's model bill we provided definitions for "process", and "product" that we continue to support (See section 2 of CELA model bill).

Regulations under the Massachusetts Toxic Use Reduction Act ("MTURA"), define "intermediate product" "otherwise use" or "other use" in a manner that we believe is appropriate for adoption under Ontario's law (See 310 CMR 50.10 issued by the Massachusetts Department of Environmental Protection).

CELA believes the other terms "creation", "destruction", "transformation" proposed by the Ministry are appropriate.

CELA is aware of industry concerns that all these terms should be aligned with NPRI under the Canadian Environmental Protection Act, 1999 ("CEPA, 1999"). To the extent that can be accomplished without prejudicing the purposes, goals and objectives of the Toxics Reduction Act, 2009 ("TRA") CELA agrees. However, as the Ministry is aware the purposes, goals and objectives of the two laws may differ and Ontario's constitutional authority to act beyond what may be authorized under CEPA, 1999 is clear. Just to take one example, the TRA, unlike CEPA, 1999, will focus on uses as well as releases as a matter of law.

2. What are your views on the regulatory proposal related to process flow diagrams, as presented on slide 22?

CELA agrees with the inclusion of process flow diagrams as a requirement of the regulations to be developed under TRA. In Massachusetts, the process flow diagram is intended to be included in the plan for each production unit at a facility. It is not clear that Ontario under TRA is going to require process flow diagram information in the plans at the production unit level. CELA believes such information should be required at that level and urges the Ministry to clarify its intentions in this regard at the earliest opportunity.

CELA is aware that industry prefers that the flow diagrams be simplified and that prescriptive approaches be avoided. CELA does not agree. There must be minimum

requirements and sufficient detail to make the process flow diagrams effective in furtherance of the TRA's overall purposes, goals, and objectives.

3. What are your views on the regulatory proposal related to the quantification requirements, as presented on slides 23-25?

In general, CELA agrees. However, CELA defined "materials balance", "input", and "output" in the CELA model bill and believes these definitions should be employed as well by the Ministry in the proposed regulations under TRA.

CELA is aware that industry prefers that reporting by production unit be optional. CELA disagrees. Production unit level reporting has been integral to the success of MTURA and should be included under the TRA regulations.

CELA also is aware that industry prefers that the "approximate balance" concept (slide 25) should not be regulated. CELA disagrees. The concept is part of the reporting requirements in Massachusetts (See 310 CMR 50.33) and makes sense in the Ontario context.

4. What are your views on the regulatory proposal to request that toxic substance accounting be conducted on an annual basis covering the period January-December, as presented on slide 19?

CELA agrees.

5. Should there be any exclusions from the toxic substance accounting requirements (e.g. processes, activities, or sources of toxic substance)? Please see slides 26-28.

No.

4.4 & 4.5: – Toxic Substance Reduction Plan and Plan Summary

1(a) What are your views on the regulatory proposal related to the inclusion of facility information, in a plan, as presented on slide 33?

As long as this information does not become a substitute for meeting requirements of TRA and its regulations, CELA has no objections.

(b) What are your views on the regulatory proposal to require that where a facility sets targets, that they be numeric and time-bound, as presented on slide 34?

Agree. However, calculations of expected reductions should be mandatory in the plan for each production unit (See 310 CMR 50.46). Furthermore, if facilities are to have targets the Province also should have overall targets so as to better define and measure indicators of success.

(c) What are your views on the regulatory proposal to require facilities to identify all options available to reduce the use and creation of the toxic substance that are relevant to the facility, as presented on slide 34?

Agree

(d) What are your views on the regulatory proposal related to feasibility analysis, as presented on slides 35 and 36?

In general, agree. CELA reserves the right to comment on the particulars when the draft of the regulations becomes available.

CELA is aware of industry concerns about having to produce separate technical and economic analyses. However, the approach has been employed successfully in Massachusetts (See 310 CMR 50.46and 50.46A). There is no reason to believe it cannot work under TRA as well.

(e) What are your views on the regulatory proposal related to estimates of toxics reduction, as presented on slide 37?

In general, agree. Estimates also should address some of the additional matters identified as a matter of law in Massachusetts (See 310 CMR 50.46(1); i.e. expected reduction in amount of toxic substance: (1) used in each production unit; (2) used per unit of product for each production unit; (3) generated by each production unit; and (4) generated as by-product per unit of product for each production unit).

2. What are your views on the regulatory proposal to require plans by December 31 of the year after the facility completes its first year of accounting, as presented on slide 38?

In general, agree. CELA is aware of industry concern that this is a shorter timeframe than required under CEPA, 1999 for the production of pollution prevention plans. However, we note that such plans are not generally required under CEPA, 1999 unless so ordered by the Minister. Ontario, on the other hand, is attempting to produce a comprehensive framework for toxics reduction accounting, reporting, and planning under TRA. Accordingly, some rigour is required in order to make the information both timely and useful. It will be particularly important to establish baselines at the outset.

3(a) What are your views on the regulatory proposal to require a facility to review all aspects of the plan in undertaking a review, as presented on slide 38?

Agree.

(b) What are your views on the regulatory proposal to establish fixed dates upon which all facilities must review their plans beginning with the first fixed date review in 2018 and then every following five years (i.e. 2023, 2028 etc.), as presented in slide 39?

CELA submits that five years is too infrequent. The CELA model bill used a two-year turn-around for the updating of plans. In Massachusetts, the requirement is to update the plan every two years (See 310 CMR 50.48).

(c) What are your views on the regulatory proposal to require that plans also be reviewed if there is a significant process change, as presented on slide 39?

In principle, a good idea. However, in practice defining and properly characterizing what would constitute "a significant process change" would be an unproductive and distracting exercise. CELA submits that updates on a two-year basis is preferable.

(d) What are your views on the regulatory proposal related to retention of records, as presented on slide 41?

Agree.

4(a) What are your views on the proposed additional contents for a plan summary, as presented on slide 43?

There should be more information required. Such additional information should include (1) the expected change in the use of each covered toxic substance and in the amount of each covered toxic substance generated as by-product (based on the reduction techniques chosen to be implemented), (2) the amount in kilograms by which the facility plans to decrease the use of a toxic substance, and (3) the amount in kilograms by which the facility plans to decrease the use of a toxic substance generated as a by-product. This type of information is required under MTURA regulations (see 310 CMR 50.43(3)). CELA reserves the right to suggest more information at a later date.

(b) What are your views on the regulatory proposal related to projection of effectiveness, as presented on slide 44?

Estimates also should address some of the additional matters identified as a matter of law in Massachusetts (See 310 CMR 50.46(1) (i.e. expected reduction in amount of toxic substance: (1) used in each production unit; (2) used per unit of product for each production unit; (3) generated by each production unit; and (4) generated as by-product per unit of product for each production unit).

5(a) What are your views on the regulatory proposal to require plan summaries to be submitted on the dates by which the plans are to be completed or reviewed, as presented on slide 44?

Agree.

(b) What are your views on the regulatory proposal to require the electronic submission of the plan summary to the Ministry in a prescribed format, as presented on slide 44?

Agree.

4.6: Reports on Toxic Substance Reduction Plan

1(a) What are your views on the regulatory proposal to require annual reports to be submitted by June 1 covering the previous year's accounting information (January-December), as presented on slide 47?

Agree.

(b) What are your views on the regulatory proposal to require facility information in the report, as presented on slide 47?

In general, CELA agrees. However, CELA also refers the Ministry to its model bill in this regard (see s. 9(3) respecting report content) as well as MTURA (310 CMR 50.33).

(2(a) What are your views on the regulatory proposal related to the summary of accounting results, as presented on slides 48-49?

In general, CELA agrees. However, CELA also refers the Ministry to its model bill in this regard (see s. 9(3) respecting report content) as well as MTURA (310 CMR 50.33).

(b) What are your views on the regulatory proposal related to the comparison to previous reporting periods, as presented on slides 50-51?

In general, CELA agrees. But see also response to question 2(a).

3(a) What are your views on the regulatory proposal related to the assessment of effectiveness, as presented on slide 52?

In general, CELA agrees. However, CELA also refers the Ministry to its model bill in this regard (see s. 9(3) respecting report content) as well as MTURA (310 CMR 50.33).

4(a) What are your views on the regulatory proposal to require facilities to notify the Ministry within 14 days of a gross error in any or all of the information contained in a previously submitted report is discovered and submit corrections within 30 days of the notification, as presented on slide 53?

Agree. A similar provision is contained in Massachusetts (310 CMR 50.32(8)).

(b) What are your views on the regulatory proposal to require reports previously submitted to be amended, upon request of the Ministry, as presented on slide 53?

Agree. A similar provision is contained in Massachusetts (310 CMR 50.32(9)).

(c) What are your views on the regulatory proposal to require the report to be certified by the highest-ranking employee at the facility who has management responsibilities related to the facility, as presented on slide 54?

Agree, but should also ensure that the employee has authority to bind the owner. See CELA model bill (s. 9(3)(f)) as well as Massachusetts regulations under MTURA (310 CMR 50.10 [definition of senior management official] and 50.32(5)). We understand that this certification is in addition to the certification required under s. 4(3) of TRA by a person with prescribed qualifications, which qualifications will be established by a separate regulation under TRA.

(b) What are your views on the regulatory proposal to require the electronic submission of the reports to the Ministry in a prescribed format, as presented on slide 54?

Agree.

5(a) What information proposed for inclusion in the report should be publicly releasable and why?

In principle, a report under this type of law is not part of the plan. Therefore, anything in the report should be public information. That includes, for example, materials balance information. In this regard, see 310 CMR 50.33 for an example of what would be in a report and available as public information.

(b) What information proposed for inclusion in the report do you consider confidential and why? Please provide specific illustrative examples, to the extent possible.

See the CELA report that accompanied the CELA model bill (pages 27-28).

ADDITIONAL COMMENTS

1. TRA will require good surveillance, including mapping, as part of the reporting requirement.

2. Reductions in workplace exposures also should be reported.

3. Plans should report at the production-unit as well as the facility wide level.

4. The regulations need to better clarify what are the indicators of success under *TRA*. One measure authorized by the Act is the setting of targets (See s. 50(1)(d) of *TRA*). Others could include: reduced toxics found in Ontario wildlife, in worker's body burdens, in air and water emissions, in transfers off site, in hazardous waste disposed of on site and off site, in ambient air within facilities and in transfers to products. Recycling, reuse, and reduction should all be monitored and recorded for each substance used in the process(es). Other measures such as equipment improvements, systems efficiencies, and

other mechanical and process innovations that lead to toxic reductions should be part of reporting.

5. The Ministry should be prepared to produce comprehensive guidance documents on toxics reduction best practices on a sector by sector basis that draws on such practices world-wide. A best practice repository should be established and be required as part of the reporting to the public. Safer substitution and elimination are best practices and, as such, should be encouraged in plans and reporting requirements under *TRA*.

Submitted electronically on July 24, 2009 by Joseph F. Castrilli
Counsel
Canadian Environmental Law Association

CELA Publication no.: 663
ISNB: 978-1-926602-20-2