Canadian Environmental Law Association
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Dear Ms Epifania:

RE: Living List Framework to Guide Review and Possible Changes to the Lists of Substances Prescribed under the Toxics Reduction Act – EBR Registry No. 012-0764

These are the submissions of the Canadian Environmental Law Association ("CELA") with respect to the above matter.

About CELA

CELA, established in 1970, is an Ontario Legal Aid Clinic that represents people with environmental problems and uses existing laws to protect the environment as well as advocates environmental law reforms, where necessary. CELA has a long history of involvement in matters respecting control of toxic substances both in our casework and law reform efforts. In particular regard to the *Toxics Reduction Act, 2009* ("*TRA*" or "Act"), CELA has been involved since the early stages of this law's development, including drafting a model toxics reduction law supported by many groups in Ontario prior to the introduction of what became the *TRA*. Subsequent to the enactment of the *TRA*, CELA also filed extensive submissions with the Ontario Ministry of the Environment ("MOE") on draft regulations for what became the primary regulation under the Act when the law came into force in January 2010. Since that time, CELA has maintained a watching brief on, and participated in, developments respecting the *TRA*, including with respect to the issue of the Living List.

The MOE Living List Framework Proposal

As part of the program under the *TRA* to nudge industry toward greater focus on "reducing the use and creation of toxics at the front end of the industrial process" MOE, in cooperation with a multi-stakeholder group, has drafted a proposed framework, entitled the Living List Framework, designed to review and make changes to the list of prescribed substances under the Act. The framework contains three key steps:

(1) **nomination and screening** (where the public and MOE can nominate substances for addition, deletion, or change to the prescribed list of substances, and use screening criteria to determine which substances would be reviewed);

(2) **review and public consultation** (where the MOE would seek input from stakeholders and experts on substances selected, and post proposals on the EBR registry for public consultation); and

(3) **decision-making** (where MOE would review input received during public consultation, make adjustments to the posted proposal, with the government then making a final decision on the proposal).[1]

The legislative context for this initiative is s. 49 of the *TRA*, which requires that the Minister consult with experts and the public every five years regarding possible changes to the lists of prescribed toxic substances and substances of concern and the regulations with respect thereto. Section 49 also requires the Minister to publish from time to time lists of substances that are neither toxic substances nor substances of concern that the Minister proposes to consider during the Minister's s. 49 consultation.

History of MOE Attempts to Address Substances Not on the NPRI

On its face, the Living List Framework proposal is designed to help the MOE meet a statutory obligation under the *TRA* in a fashion that seems straight-forward. However, in the respectful submission of CELA that is not the whole story. The original MOE *TRA* proposal of 2008 was expected to expand the number of chemicals that are subject to the program. The part of the long history of the development of the *TRA*, its enactment, and subsequent implementation not captured by the Living List Framework document is how MOE has addressed the issue of substances not on the NPRI going back approximately six years.

The *TRA* defines a toxic substance and a substance of concern by reference to whether it is prescribed as such by regulation under the Act (S.O. 2009, c. 19, s. 2). The regulations define a toxic substance as any substance listed in the National Pollutant Release Inventory ("NPRI") (a program under federal law). The Act also requires that the owner and operator of a facility must ensure that a report on a substance of concern (i.e. a substance not on the NPRI) is prepared and given to the designated MOE director, if:

[1] See generally Ontario Ministry of the Environment, *The Draft Living List Framework Under Ontario's Toxics Reduction Program: Draft Discussion Paper* (Toronto: Queen's Printer, March 2014).

- the facility is part of a class of facilities prescribed by the regulations;
- the substance of concern is used or created at the facility and the amounts that are used or created meet the criteria prescribed by the regulations; and
- other criteria are prescribed by regulation (S.O. 2009, c. 19, s. 11).

However, currently section 11 is not in force because there is no regulation promulgated under the *TRA* identifying any substances of concern, and the list of toxic substances has remained unchanged from whatever happens to be on the NPRI list in any particular year.

As part of the process of developing the 2008 *Discussion Paper* that preceded the introduction of Bill 167 (which eventually became the *TRA*), MOE went through an exercise of identifying substances of potential concern that could be in use in Ontario but not caught by NPRI. At the time of release of the *Discussion Paper* in 2008, MOE was proposing to establish two schedules to the Act of non-NPRI substances. Schedule 3 of this proposal contained 20 substances for which there would be reporting requirements during Phase I. Schedule 4 of this proposal contained an additional 135 substances and would be deferred to Phase II or later. Substances in this latter schedule were likely going to be addressed through "voluntary reductions" into the indefinite future, unless they were re-assigned to other schedules [Ontario Ministry of the Environment, *Creating Ontario's Toxics Reduction Strategy: Discussion Paper*, EBR Registry No. 010-4374 (August 27, 2008) at 19-20].

According to the *Discussion Paper*, little is known about the use or emission in Ontario of the substances listed in Schedules 3 and 4. However, substances in Schedule 4 were classified by MOE as "reproductive toxins, neurotoxins, mutagens, and carcinogens" and described as likely present in the Ontario environment (*Discussion Paper*, at 18). For there to be no date for the application of the new law to the 135 substances, or a clear indication that the law would in fact be applied to what MOE classified as "reproductive toxins, neurotoxins, mutagens, and carcinogens" is problematic for a law whose purpose is to "prevent pollution and protect human health and the environment" (S.O. 2009, c. 19, s. 1). This is particularly the case in a jurisdiction with the status of being one of the highest emitters of carcinogenic, developmental, and reproductive toxicants in North America (*Discussion Paper*, at 28-29).

On the other hand, inclusion of "substances of concern" as a category of substances under the law, separate and apart from "toxic substances", was controversial from the perspective of industry. Several industrial and chemical trade associations as well as the provincial bar association all took the view during the notice and comment period on Bill 167 and its consideration before a standing committee of the provincial legislature that MOE only consider regulating NPRI substances. Otherwise, in their view, Ontario should work with the federal government to expand, where necessary, the list of substances under the NPRI. See letters from Ontario Bar Association to the Hon. John Gerretsen, Minister of the Environment (14 October 2008) and to Ana Tinta, Policy Analyst, Ontario Ministry of the Environment (7 May 2009). See also Ontario, Legislative Assembly, Standing Committee on General Government, *Debates*, No. G-30 (25 May 2009) at G-762 (Canadian Chemical Producers' Association).

There are precedents in the United States, however, for state toxics reduction or pollution prevention laws to authorize designation of substances not on the federal TRI (U.S. equivalent to NPRI) list. See *New Jersey Pollution Prevention Program Rules*, New Jersey Administrative Code, Title 7, Chapter 1K, § 3.6. Moreover, there is no particular constitutional or jurisdictional reason for Ontario to rely solely on a made-in-Ottawa solution to a serious made-in-Ontario problem.

In the Fall 2009, MOE released a background document on toxic substances and substances of concern proposed to be prescribed under the Act. In this document, MOE noted that because less information is available on how proposed substances of concern are being used in Ontario, the intent is that regulated owners and operators of manufacturing and mineral processing facilities would be required to report on their use, creation, and releases. This is essentially the s. 11 authority noted above. The background document also noted that details regarding the proposed contents of these reports are under development and would be set out in a future regulation. An appendix to the background document sets out the criteria for and describes 19 proposed substances of concern. The document also describes how the earlier list of 20 substances was reduced to 19 substances. However, there is no discussion in this document about, or list with respect to, the 135 substances listed in the 2008 *Discussion Paper*. See Ontario Ministry of the Environment, *Backgrounder - Development of Lists of Substances Proposed to be Prescribed under the Toxics Reduction Act, 2009: Toxic Substances and Substances of Concern* (September 21, 2009), at 1-2, and Appendix 3B [hereinafter "*Backgrounder*"].

On the eve of the coming into force of the Act, an MOE overview document on O. Reg. 455/09 noted that a second regulation would be proposed in 2010 to address, among other matters, substances of concern. See Ontario Ministry of the Environment, *The Toxics Reduction Act, 2009: General Regulation 455/09* (December 21, 2009), at 9 [hereinafter "*General Regulation Document*"]. However, no regulation was proposed in 2010 and as of January 2011, MOE was indicating that a list of substances of concern would be developed in a "future regulation", with no time-frame for introduction [See Ontario Ministry of the Environment, "Update and New Proposals – Toxics Reduction Act, 2009: January 2011 Consultation", at 7 (January 2011 Consultation")].

It was only in 2012, that MOE established an advisory committee to develop a "living list" of substances that could be candidates for identification as substances of concern. However, what MOE produced in March 2014 with the Living List Framework document is not a list, but rather a process to develop a list.

Why the MOE Living List Framework Proposal is Not, by Itself, What Ontario Needs

CELA has gone through the above history to underscore why what MOE has produced is not adequate. The Living List proposal does very little to advance implementation of the law despite a multi-year stakeholder process. Ontario, by MOE's own admission, is a jurisdiction with the status of being one of the highest emitters of carcinogenic, developmental, and reproductive toxicants in North America.

As early as 2008, MOE already had a list of 155 substances (20 in the 2008 Discussion Paper's Schedule 3, and 135 in that paper's Schedule 4) that were not on the NPRI list and that MOE admitted little is known about in terms of their use or emissions in Ontario. Moreover, 135 of those substances were classified by MOE as "reproductive toxins, neurotoxins, mutagens, and carcinogens" and described as likely present in the Ontario environment.

What happened to these 155 substances? In the six years since MOE published its 2008 paper not a single one of those substances has ended up in Table A of the *TRA* regulations. The Living List Framework Proposal does not discuss any of the above history, let alone include the list of 155 substances, or explain why we still don't have a list. What we have instead is a proposal to create a framework about how to add, or delete, substances from Table A of the *TRA* regulations – and this after six years!

Conclusions and Recommendations - What MOE Should Do Now

MOE's approach on this issue has been far too leisurely. In fact, MOE's approach has been far too leisurely with respect to proclaiming in force key sections of the *TRA*, such as:

- s. 11 (respecting substances of concern);
- s. 30 (respecting administrative penalties); and
- s. 50(1)(o.1)-(o.2) (respecting toxic substances in consumer products).

If MOE wants to regain credibility on this issue it needs to immediately (1) proclaim in force the above referred to sections, (2) propose adding the 155 substances to Table A of the *TRA* regulations, and (3) if, it does not immediately add the 155 substances, explain why it does not need to do so – substance by substance. The Ontario public needs a credible and detailed explanation for what happened to these 155 substances over the past six years and whether human health or the environment has been compromised as a result of their not being added to the *TRA*.

After that it should proceed with the framework proposal subject to the following further caveats:

1. No substance on the NPRI or the European Union REACH program lists should be deleted from Table A of the *TRA* regulations [O. Reg. 455/09, as amended] if the substance is used in Ontario;
2. Time limits should be set under this process for adding substances;
3. Additional criteria should be employed for getting a substance added to Table A such as whether it is an endocrine disruptor;
4. All "CEPA-toxic" chemicals should immediately be added to Table A of the *TRA* regulations [O. Reg. 455/09, as amended];

5. Nanomaterials should be considered for addition to the list; and

6. Develop an alternatives assessment and substitution strategy for chemicals (e.g. carcinogens, developmental, and reproductive toxicants) listed in Table A.

CELA would be pleased to answer any questions MOE may have regarding this submission. Should you have any other questions in the interim, please do not hesitate to contact either of the undersigned.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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