



CIELAP Brief on Ontario's Toxics Reduction Act, 2009 June 2009

On April 7, 2009, the Ontario Government introduced Bill 167, the *Toxics Reduction Act, 2009* (TRA). The Act received Third Reading and Royal Assent on June 3, 2009. The Act is intended to prevent pollution and protect human health and the environment by reducing the use and creation of toxic substances, and to inform Ontarians about toxic substances.

Requirements of the TRA

Designated Ontario facilities subject to the Act will be required to:

- Undertake toxic substances accounting and other procedures to examine how they use designated toxic substances and identify reduction opportunities;
- Develop a Toxic Substance Reduction Plan to identify and develop options for reducing their use of designated toxic substances – implementation of this Plan will be voluntary.
- Prepare a report to the Ministry of the Environment (MOE) on how much of each designated substance is being used and created, as well as progress on the implementation of their Plan; and
- Inform the public about their use and creation of designated toxic substances by giving public access to Plan summaries and certain information in MOE reports – regulations made under the Act would detail which components would be available to the public.

Facilities Subject to the TRA

The TRA will apply to all Ontario facilities that meet the following criteria:

- 1) The facility uses or creates toxic substances that appear on a prescribed list
Scientific experts from the government, in consultation with the Minister of Environment's Toxics Reduction Scientific Expert Panel, have proposed a List of Toxic Substances (categorized as Phases 1 and 2) and a List of Substances of Concern. It is anticipated that regulations will prescribe these lists under the Act.¹ Designated facilities will then be required to meet the four requirements listed above for the substances on the lists according to the phases set out.

The proposed List of Toxic Substances contains substances tracked through federal National Pollutant Release Inventory (NPRI) while substances on the proposed List of Substances of Concern are not. The proposed List of Toxic Substances includes substances for which effects on the environment and human health are fairly well known. Substances of Concern are those that are of concern to human health or the environment and for which information about their nature and effects is limited. The purpose of the List of Substances of Concern is to gather information to help determine who uses these substances and how they are used in Ontario. It is expected

¹ The proposed lists can be found in the MOE Backgrounder "The Proposed Toxics Reduction Act Planned Consultations And Next Steps": <http://www.ene.gov.on.ca/en/news/2009/040701mb.pdf>.

that draft regulations will propose one-time reporting requirements for facilities in Ontario using or creating these substances in order to gather this information.

- 2) The facility uses or creates prescribed toxic substances that exceed specific thresholds
The proposed regulations would establish toxic substance thresholds that are the same as the thresholds in place for the federal NPRI (i.e. 10,000 kg, or an alternate threshold under NPRI if applicable). This is intended to minimize duplication of efforts for facilities currently reporting under the NPRI.

It is expected that the proposed regulations would set out lower thresholds for Substances of Concern because there is so little information on the use and creation of such substances in Ontario. The draft regulations are expected to propose an initial threshold of 100 kg, consistent with federal reporting requirements under the *Canadian Environmental Protection Act, 1999*.

- 3) The facility has more than a prescribed minimum number of employees
The proposed regulations for facilities using or creating toxic substances are also expected to follow the NPRI threshold (and its exceptions) for the minimum number of employees at subject facilities. NPRI requirements apply to facilities that have a minimum of 10 full time equivalents. This would maintain consistency with NPRI reporting and provide clarity for the regulated community. For facilities using or creating Substances of Concern, the regulations are not expected to propose a minimum threshold for the number of employees.

- 4) The facility belongs to a prescribed sector
The draft regulations are expected to prescribe facilities within the manufacturing sector and engaged in mineral processing within the mining sector to be subject to the TRA in relation to toxic substances. These two sectors combined account for the bulk of the total releases of the toxic substances reportable to the NPRI. It is anticipated that draft regulations will propose that requirements for facilities using Substances of Concern will apply to all sectors, but that the first List of Substances of Concern will apply only to facilities in the manufacturing and mineral processing sectors.

More details concerning substance release thresholds have yet to be determined.

The following sections provide further information about the *Toxics Reduction Act* as well as stakeholder comments and perspectives.

Further Provisions of the TRA

The TRA will require the Minister of Environment to consult at least once every five years with experts and the public about potential changes to the lists of toxic substances and substances of concern. Such a change might include transferring a substance of concern to the List of Toxic Substances once further information regarding the nature of a Substance of Concern is available. The TRA will also provide for an agreement between the Province of Ontario and the Federal Government to allow for the disclosure of information for the administration or enforcement of a law,

The Bill proposes that the Lieutenant Governor in Council would have authority to make regulations to: ban or restrict the manufacture, distribution or sale of a toxic substance, a Substance of Concern or a product known to contain these substances; and to require manufacturers, distributors and or sellers of those substances or products to publicly report on these substances.

To ensure compliance with the Act, the Bill includes standard compliance and enforcement provisions including inspection powers for provincial affairs, orders, administrative penalties

and offences similar to those in existing environmental protection legislation such as the *Safe Drinking Water Act, 2002*, the *Ontario Water Resources Act* and the *Environmental Protection Act*.

Stakeholder Perspectives

Perspectives on the *Toxics Reduction Act* are varied. While many stakeholders across a range of sectors see the TRA as a strong and positive piece of legislation, others are not supportive of the Act. An April 2009 press release put out jointly by a number of industry associations highlights industry concerns that the TRA places too much emphasis on the process and should focus instead on achieving results, that the Ontario government is moving away from federal-provincial harmonization, and that the TRA will be an additional burden to industry that will be a disadvantage for business in the province.²

Other groups such as Environmental Defence, the Ontario Bar Association (OBA), the Canadian Environmental Law Association (CELA) and the Canadian Institute for Environmental Law and Policy (CIELAP) are generally supportive of the TRA. Environmental Defence has stated that it supports government reforms that encourage green chemistry and require manufacturers to provide comprehensive safety data for all chemicals released onto the market. It also feels that the TRA will help Ontario protect the environment and human health, create green jobs, and comply with European Union (EU) REACH regulations that prohibit products containing certain chemicals from entering the EU.³ The OBA supports the Ontario government's proposal to fully regulate only NPRI substances for harmonization and efficiency purposes.

While supportive of the TRA, these stakeholders have also put forth the following concerns and recommendations:

Exclusion on Major Polluters

Policy Director for Environmental Defence, Aaron Freeman, has stated that although the TRA provides an important approach to reduce toxic pollution, it leaves out some major polluters, namely sewage treatment plants. Environmental Defence recommends that the TRA include sewage treatment plants in addition to mining and manufacturing facilities proposed for the regulations.⁴

Proposed List of Substances of Concern

The Ontario Bar Association (OBA) recommends that Ontario work with the federal government to expand, where necessary, the NPRI substances list.⁵ While the OBA understands that the Toxics Reduction Scientific Expert panel will assist in providing information on certain prescribed Substances of Concern, the Association encourages the government to work within the federal Chemicals Management Plan (CMP) to designate any non-NPRI substances to the List of Toxic Substances prescribed in the TRA. The CMP is transparent, comprehensive and respected. By further harmonizing federal and provincial approaches, the government will make more efficient and effective use of public and private resources.

² A copy of the press release "Industry asks Ontario for consistency with federal government on toxics" can be found on the website of the Canadian Manufacturers & Exporters at <http://www.cme-mec.ca/on/media.asp?ID=1409>.

³ Environmental Defence's press release "New Ontario Toxics Law will Clean up Environment and Create Green Manufacturing Jobs" can be found at <http://www.environmentaldefence.ca/pressroom/viewnews.php?id=555>.

⁴ Environmental Defence's press release "Toxics Bill Ignores Ontario's Biggest Reported Water Polluters" can be found at <http://www.environmentaldefence.ca/pressroom/viewnews.php?id=581>.

⁵ Full OBA comments at http://envirolaw.com/wp-content/uploads/bill_167_toxic_reductions_7may09.pdf.

Better Understanding the Costs and Benefits of Bill 167

The OBA recommends that a comprehensive regulatory impact analysis including costs and benefits of Bill 167 the *Toxics Reduction Act* be provided to the public as it will facilitate meaningful public comment. The Ministry should also provide a regulatory impact analysis with each proposed Act or regulation to facilitate meaningful public participation.

CELA has put forth the following concerns,⁶ which are shared by other stakeholders:

Need for Provincial Targets

The Act contains no defined, numerical provincial targets for the reduction of toxic substances. Such targets are necessary to stimulate innovative industrial processes and alternative chemical inputs. Targets are also essential to measure success.

Fees and Funding

Bill 167 does not direct any funds towards financing the programs and institutions necessary to effectively implement the Act. These funds could be secured through fees imposed on the regulated community. Such fees could also catalyze immediate and active implementation of reduction strategies. Financial support for these programs would emphasize their importance and the government's commitment to them.

Inclusion of Substitution of Safer Alternatives

The Government should include in the *Toxics Reduction Act* the requirement for industries to substitute toxic substances with safer alternatives.

Conflict with Existing Municipal By-laws

Bill 167 does not address the potential conflicts that may arise between it and municipal by-laws that also address the reduction of toxics use and emissions. It is important to clearly state whether provincial law overrides municipal law in areas where they differ.

Establishment of a Toxics Reduction Institute

Should the Government require that professionals assess and certify facility reduction strategies, it will be essential to establish a facility to train toxics reduction planners and educate the public, as well as to sponsor and conduct research. Such an institution has been instrumental to the success of the 1989 Massachusetts *Toxics Use Reduction Act*.

Granting Programs for Small Businesses

Many small businesses that will not be subject to the Act because of their size will, all the same, contribute significant quantities of toxic emissions. It is not clear however, whether provincial grants will extend to include such businesses and the legislation should make this point clear. Small businesses will require assistance to make adequate reductions in their toxics emissions and the Government would do well to include them in granting programs.

Public Right to Know

In addition to its public information requirements, Bill 167 should be amended to provide the public with rights to: have access to other information compiled under the authority of existing environmental laws; apply to the Minister for reviews of toxics use reduction plans and safer alternative plans; and act to enforce key provisions of the *Toxics Reduction Act*.

CELA also recommended that the following measures be improved:

Purposes

In addition to the stated purposes set out in the Act, the following purposes should be added: promotion of the use of safer alternatives; and the application of the precautionary

⁶ Full CELA remarks at <http://www.cela.ca/sites/cela.ca/files/655a%20Remarks%20Bill%20167.pdf>.

and sustainable development principles.

Timing and Number of Toxic Substances to be Prescribed

Too few toxic substances have been designated as requiring immediate action and the time allotted for adding more toxics is too long. The Government must take steps to ensure significant reforms to toxics use and creation in Ontario if the Act is to be effective. To designate only a small number of toxic substances that require immediate attention undermines the importance of this Act and impedes its intention to support the development of alternatives, including green chemistry. Therefore, the government should designate more toxic substances to the proposed list.

Sectors Covered

Although Bill 167 suggests that the Act will apply to varying sizes of facilities, there is no mention in the Act of which sectors it will target. While the province's August 2008 discussion paper suggested that the law would apply to the manufacturing and mineral processing sectors, these sectors only constitute about 75 per cent of the total emissions of the sectors that report under the NPRI program. It is important that MOE consider expanding the number of sectors to which the Act will apply to reflect all sources of emissions.

Thresholds

It is anticipated that Ontario will use federal NPRI employee and quantity thresholds in the TRA. However, small businesses may emit toxins at levels below NPRI thresholds. MOE should consider establishing lower thresholds than those contained in NPRI, at least for substances that are carcinogens, reproductive toxins, persistent and bioaccumulative.

Consumer Products

The TRA will enable the Government to develop regulations that address toxic substances in consumer products and impose public notice obligations on the regulated community. In addition, the Government should clarify how the toxics law applies to consumer products and consider including authorization for immediate labelling and warnings for toxic substances in consumer products where the substances are capable of causing cancer or effects such as reproductive toxicity.

CIELAP perspective

CIELAP strongly supports the stated objectives of the TRA, which are to prevent pollution and protect human health and the environment by reducing the use and creation of toxic substances, and to inform Ontarians about toxic substances. CIELAP views this legislation as a means to increase transparency about the toxic chemicals prevalent in our communities and to encourage companies to seek innovative alternatives in order to satisfy increasing demand for non-toxic products. It is also hoped that this legislation will encourage the use of safe alternatives which will reduce the cost of waste disposal and decrease health care costs for the Government, thus resulting in financial gain in the long term. CIELAP supports the recommendations put forth by CELA and noted in the previous section.

This brief is one of seven policy briefs prepared by CIELAP in the spring of 2009. CIELAP's other briefs and publications can be found on the CIELAP website at www.cielap.org.