

CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY

L'INSTITUT CANADIEN DU DROIT ET DE LA POLITIQUE DE L'ENVIRONNEMENT

Est. 1970

October 1, 1999

CIELAP Shelf:

Mitchell, Anne; Winfield, Mark S.; Canadian Institute
for Environmental Law and Policy

Comments on Consultation Paper on the Future of
ARET

RN 27340

ARET Secretariat
National Office of Pollution Prevention
Environment Canada
Place Vincent Massey
351 Blvd St. Joseph
Hull, Quebec
K1A 0H3

Re: Consultation Paper on the Future of ARET.

To Whom it may concern.

We are writing to you regarding the "Consultation Paper on the Future of ARET," released by Environment Canada in September 1999.

Unfortunately, many of the options outlined in the Consultation Paper fail to address the concerns regarding ARET raised by the Commissioner for the Environment and Sustainable Development, and through the ARET review process itself.

The paper outlines two major options for the future of ARET: A New Challenge Program; and Negotiated Agreements.

As noted in the paper, the Negotiated Agreements options raises a number of serious concerns, particularly with respect to the transaction costs of negotiation, and the potential to generate different obligations in different regions or sectors. The issue of transaction costs is of particular concern given the reduced resources of environmental agencies throughout Canada. What limited resources are available should be focused on addressing gaps in the existing regulatory framework for environmental protection.

Negotiated agreements could also further erode the degree to which Canadians can expect any common level of environmental protection either across Canada or within an individual province. Major concerns were raised by the Institute's predecessor, the Canadian Environmental Law Research Foundation in the early 1980's (Control Orders and Industrial Pollution in Ontario, 1983) regarding the use of such approaches within a regulatory context. The use of such approaches in a voluntary context would tend to



reproduce the problems associated with the 'control order' regime of the 1970's and early 1980's without the results of the negotiations being enforceable through public law.

A renewed challenge program, on the other hand, would have to address the major concerns which have been raised regarding the existing program. These have included the following:

- * the lack of independent verification of claimed results, and the lack of penalties for the presentation of false or misleading information;
- * inconsistency in reporting practices among facilities,
- * the incomplete participation among and within industrial sectors known to generate ARET substances as waste (the 'free rider' problem);
- * the focus of the program on reducing releases to the environment of ARET substances, rather than reducing their use and generation as waste. This is contrary to the definition of pollution prevention adopted by the government of Canada, and may provide perverse incentives to use end-of-pipe pollution control technologies rather than the pursuit of pollution prevention options; and
- * the lack of consequences for failures to meet program goals and targets.

A number of these weaknesses could be addressed through the following steps:

- * The addition of all ARET Substances to the National Pollutant Release Inventory. This step would address the problems of verification, consistency of reporting practices, lack of consequences for reporting false or misleading results, and the 'free rider' problem. New, lower reporting thresholds would have to be established for ARET substances in the NPRI. However, work is already under way within the NPRI program to establish new reporting thresholds for 'micropollutants' that are not currently captured by the NPRI. These additions should be achieved for the 1999 reporting year.
- * Reports of progress under ARET should be provided on an annual basis, and be generated by Environment Canada on the basis of NPRI data. Annual reports should highlight facilities that make major progress in reducing their generation of ARET substances, and facilities that fail to make progress or report significant increases in their generation of ARET substances.
- * Consistent with the government of Canada's July 1995 National Pollution Prevention Strategic Framework and section 3(1) of the Canadian Environmental Protection Act, 1999, progress under ARET should be measured in terms of the

reduction of the use and generation (i.e.: releases + transfers to treatment/disposal + transfers to 3Rs) of ARET substances at source, rather than simple direct releases to the environment. This would address the problem of providing perverse incentives to adopt pollution control rather pollution prevention techniques in relation to ARET substances.

A revised ARET program should seek the elimination of the use and generation of List A-1 and A-2 substances by 2005, and a 90% reduction in the use and generation of other ARET substances by that date, using the year 2000 NPRI data as a baseline.

In effect, under these proposals, the ARET program would be transformed into a format similar to the United States Environmental Protection Agency's 33/50 program with respect to air pollutants, where a challenge would be issued by government, and performance measured and verified through the national pollution release and transfer registry program.

Incentives

The offering of 'regulatory burden relief' to companies participating in ARET is not supported. Canada's regulatory framework for the protection of human health and the environment from environmental contaminants has been significantly weakened by regulatory 'reform' initiatives at the federal and provincial levels over the past few years. These initiatives can be increasingly linked to measurable declines in the environmental conditions. Further erosion of the baseline regulatory framework, within which significant gaps have been identified by many independent observers, cannot be supported, for these reasons. Such approaches also undermine the principles of fairness and equal application of the law. The offering of 'regulatory, licensing and policy stability,' raises similar concerns. These issues were addressed in detail in the Institute's submission on the Ontario Ministry of Environment's REVA program, a copy of which is attached to this submission.

The provision of technical assistance to facilities wishing to improve their pollution prevention performance is strongly supported by the Institute.

Public recognition of good performance is implicit in the Institute's proposal regarding the future of ARET, as is the highlighting of facilities which fail to improve their performance, or whose performance declines.

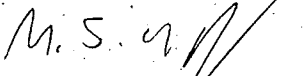
The use of financial incentives specifically within the ARET program is not supported, given the problems associated with effectively targeting such instruments. (See CIELAP, Putting the Environment into Green Industry Strategies, 1995):

As highlighted by the Commissioner for Environment and Sustainable Development in his most recent report to Parliament, Environment Canada cannot rely on ARET or similar voluntary programs as its primary instrument to reduce the use, generation and release of toxic substances. Rather, such a program must exist in the context of the application of the full range of policy instruments available to protect the health and environment of Canadians from toxic substances.

A renewed ARET program should not, therefore, preclude the adoption of a tax on the use or generation of toxic substances. Facilities reducing their use or generation of substances targeted by such a tax would, by definition, achieve tax savings relative to facilities which do not undertake such activities. Similarly, a renewal of ARET should not preclude the possibility of the adoption of significant new regulatory measures in relation to toxic substances. Rather, it should be adopted as an adjunct to such measures, and used to assist in the evaluation of their effectiveness.

We would be pleased to answer any questions you might have regarding our views on this matter.

Yours sincerely,



Mark S. Winfield, Ph.D.
Director of Research

MW / per

Anne Mitchell,
Executive Director.