

Submission to Environment Canada

Regarding

The

Policy Framework on

Environmental Performance Agreements

By:
Canadian Institute for Environmental Law and Policy

Prepared for:
Canadian Environmental Network
Toxics Caucus

The following organizations support this submission:

The Ark Angel Foundation
Canadian Environmental Law Association, ON
Centre for International Studies, University College of Cape Breton, NS
Citizens' Environment Alliance of Southwestern Ontario, ON
Citizens' Network on Waste Management, ON
Conservation Council of New Brunswick, NB
Ecology Action Centre, NS
Ecotourism Society of Saskatchewan, SK
Edmonton Chapter-Canadian Parks and Wilderness Society, AB
Environmental Law Centre, AB
Great Lakes United, QC
Greenpeace Canada, ON
The Humane Society of Canada
Ontario Toxic Waste Research Coalition, ON
Reach for Unbleached, BC
Saskatoon Nature Society, SK
Société pour vaincre la pollution, QC
St. Clair River International Citizens' Network, ON
Time to Respect Earth's Ecosystem, MB
Toronto Environmental Alliance, ON
The Wild Circle, NB

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Environmental Performance Agreements

Position Statement

Presumption in Favour of Regulation

Regarding the use of Environmental Performance Agreements (EPAs), it is the position of the undersigned groups that Environment Canada should set as its overall policy that it will *regulate first* and only then look for the specific exceptions where an EPA would best achieve the objectives of the regulation.

Policy Must Inform Decision to Resort to EPAs

The decision to resort to an EPA to achieve a solution to a pressing environmental problem should be supported by a clear policy that sets out more than merely criteria but also well-articulated goals and objectives consistent with regulatory objectives.

EPAs Must Not Provide Concessions to Industry

Finally, Environment Canada, in participating in these agreements, must not afford to any regulated industry any concessions or dispensations from existing *or future* regulatory requirements.

Introduction

Environment Canada (EC) proposes in its consultation document “Policy Framework on Environmental Performance Agreements” to use Environmental Performance Agreements (EPAs) as one of a number of mechanisms to improve environmental protection in Canada.

The discussion that follows provides analysis supporting the position statement that begins this paper.

EPAs as a Public Relations Mechanism

The stated goals of EPAs are to address pressing environmental problems as well as other, unrelated (to the environment) goals such as improved industry-government relationships and an improved public image for the regulated industry.¹

Certainly, the latter two goals are laudable, but it is not clear why Environment Canada (EC) needs to subsidize industry public relations strategies.

¹ Environment Canada, “Policy Framework on Environmental Performance Agreements,” August 2000, at 1.

The undersigned groups recognize as the only positive element of these agreements that they may, under specific conditions, successfully address pressing environmental problems.

The rest of this discussion weighs this single benefit against the numerous concerns the undersigned groups have with EPAs.

Voluntary Agreements Are Not Effective in Achieving Pollution Prevention

The Accelerated Reduction / Elimination of Toxics (ARET) program is Canada's best example of the limited value of voluntary initiatives. The Review Branch "Evaluation" document notes:

The evaluation found that participating in ARET was not one of the main motivating factors for industry to reduce their releases of toxic substance. Other factors such as regulations, modernization and business decisions were considered to be more important in the decisions made by industry about the management of toxic substances. Examples of these other motivating factors are the Pulp and Paper Effluent Regulations, which were promulgated in 1992 but only became fully in effect in 1996.²

This finding supports arguments made since the mid-1990s against voluntary programs (see Appendix A for selected articles).³ In a 1995 report (see appendix B) the Canadian Institute for Environmental Law and Policy argued that regulations are the best engine to drive innovation in environmental protection.⁴ ARET proves this. Indeed, although the evaluation report asserts that the reductions cited are ARET-related, it is clear on the face of the evidence that most reductions attributed to ARET arise from the regulations.

Agreements Give Rise to Concessions from Government to Industry

Noted early on in the history of voluntary agreements in Canada was "the 'objective danger' of government involvement in agreements...[where] it puts itself in a position where it is seen to favour the concerns of the industry it regulates over the interest of the public."⁵ Governments have consistently resisted acknowledging this danger, but that, if anything, makes the danger worse.

² Environment Canada Review Branch, "Evaluation of the Accelerated Reduction and Elimination of Toxics Initiative (ARET)," Final Report, April 2000, at 8.

³ See, generally, Robert B. Gibson, ed. Voluntary Initiatives: the new politics of corporate greening. (Peterborough: Broadview Press, 1999).

⁴ Karen Clark, The Use of Voluntary Pollution Prevention Agreements in Canada: An Analysis and Commentary, (Toronto: CIELAP, April 1995) at 14 ff.

⁵ *Ibid.*, at 11.

EC's consultation draft notes at least two instances where concessions (or dispensations) will be granted to regulated industries:

EC will design regulatory backstops that target non-participants while seeking *not to impose an additional burden on companies meeting EPA requirements* [emphasis added]⁶

And

EC may consider performance under an EPA when determining such matters as *whether and how to regulate*, what reporting requirements to impose and how *frequently to inspect a regulated facility*.⁷

The “deal” that these agreements really make is that government signs away certain enforcement and regulatory rights in return for industry doing something it should be doing anyway and at the further cost of delaying regulatory activity.

... if industry wishes to go beyond what is required by regulation, then it should do so ... However ... when a voluntary agreement [between government and industry] is struck ... ‘there is concern that the real reason is to undertake some activities that will pre-empt or delay regulatory action by government.’⁸

These Agreements Limit Public Involvement

Part of the ‘objective danger’ noted above is the fact that these agreements have tended in the past to be negotiated behind closed doors.⁹ More than this, industry partners in earlier agreements made it clear that public involvement in the agreements would be fatal to the deal.¹⁰ The consultation document notes, however, that “all parties to an EPA must be publicly accountable for the commitments they make and for their performance against the commitments”¹¹ and that there will be a “likelihood of support from external stakeholders.”¹²

The question these requirements raise is, will public involvement to a degree that garners “support from external stakeholders” make it almost impossible to negotiate these agreements with the regulated industries?

And, if these requirements do increase the difficulty of reaching agreement, then, the question must also be asked, where are the potential benefits of voluntary agreements

⁶ Environment Canada, “Policy Framework on Environmental Performance Agreements,” August 2000, at 6.

⁷ *Ibid.*, at 7.

⁸ Lynda Lukasik, “The Dofasco Deal,” in Gibson, ed., *supra*, 141 at 143.

⁹ See Clark, *supra*, at 10 and, Gibson, ed., *supra*, at 144 ff.

¹⁰ *Ibid.*

¹¹ Environment Canada, *supra*, at 5.

¹² *Supra*, at 4.

over regulations, especially when one of the criteria is supposed to be “cost-effectiveness”?

These Agreements are Risky to Negotiate, May Fail at Any Time and as Such Can Be a Poor Use of Government Resources

Following up on the point made in the previous section, the criteria set out in the discussion paper – EPAs must be appropriate, must have a supportive Policy and Regulatory Framework, must have highly qualified participants, must be cost effective, AND must meet the design criteria of effectiveness, credibility, accountability and efficiency – makes EPAs apparently as difficult and time-consuming to negotiate as regulations are to draft and pass.

Given the uncertainty of the results of voluntary initiatives, another observation from the ARET evaluation report applies here:

... the cost to the Department is around \$2 million ... The question of whether this was the most efficient use of EC’s budget can be raised when considering that other factors played a more important role in reducing the releases of toxic substances for ARET participants.¹³

Conclusion

For all of the following reasons ...

- EPAs are unproven as effective means to achieve pollution prevention
- EPAs give rise to concessions from government to industry
- EPAs exclude public involvement
- EPAs are expensive, risky and as such, are a poor use of government resources

... it is the position of the undersigned groups that Environment Canada should set as its overall policy that it will *regulate first* and only then look for the specific exceptions where an EPA would best achieve the objectives of the regulation.

The decision to resort to an EPA to achieve a solution to a pressing environmental problem should be supported by a clear policy that sets out more than merely criteria but also well-articulated goals and objectives consistent with regulatory objectives.

¹³ Review Branch, *supra*, at 11.

Finally, Environment Canada, in participating in these agreements, must not afford to any regulated industry any concessions or dispensations from existing *or future* regulatory requirements.

Appendix A

Robert B. Gibson, ed. Voluntary Initiatives: the new politics of corporate greening. (Peterborough: Broadview Press, 1999)

Selected Chapters:

Chapter One: R.B. Gibson, Questions About a Gift Horse

Chapter Ten: R. Hornung, The VCR Doesn't Work

Chapter Eleven: L. Lukasik, The Dofasco Deal

Appendix B

Karen Clark, *The Use of Voluntary Pollution Prevention Agreements in Canada: An Analysis and Commentary*. (Toronto: CIELAP, April 1995)