North American Environmental Law and Policy

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PROFILE

In North America, we share vital natural resources including air, oceans and rivers, mountains and forests. Together, these natural resources are the basis of a rich network of ecosystems that sustain our livelihoods and well-being. If they are to continue being a source of future life and prosperity, these resources must be protected. Protecting the North American environment is a responsibility shared by Canada, Mexico and the United States.

The Commission for Environmental Cooperation (CEC) is an international organization whose members are Canada, Mexico and the United States. The CEC was created under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts and to promote the effective enforcement of environmental law. The Agreement complements the environmental provisions of the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the highest-level environmental authorities from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of fifteen citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

MISSION

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States.

LAW AND POLICY PROGRAM

The Law and Policy Program of the CEC addresses regional priorities regarding obligations and commitments in the NAAEC related to environmental standards and their implementation. The program monitors and reports regional trends in implementing and enforcing environmental standards, including innovations in regulation, economic instruments and voluntary initiatives. The program also addresses NAAEC commitments to public participation in processes for establishing and enforcing environmental standards.

The program is delivered in two parts. The first part, Environmental Standards and Performance, focuses on NAAEC objectives of strengthening regional cooperation in the development and improvement of environmental laws and regulations, as well as making private standards more compatible. It provides a regional forum for the exchange of alternative domestic strategies for implementing improved environmental standards, mechanisms for public participation in standard setting processes and exchange of methodologies. The program also supports the implementation of processes directed at greater regional compatibility of environmental technical regulations, standards and conformity assessment procedures consistent with NAFTA, as well as promoting the compatibility of voluntary standards in the private sector.

The second part of the program, Enforcement Cooperation, responds directly to the Parties' obligations for the effective enforcement of their respective environmental laws and regulations. In response to the Council mandate to ensure regional cooperation in enforcement, the program supports a regional forum of senior enforcement officials. It also addresses alternative approaches to effective enforcement and private access to remedies.

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Marc Paquin
Editor, North American
Environmental Law and Policy

ENVIRONMENTAL IMPACT ASSESSMENT

LAW AND PRACTICE IN NORTH AMERICA

ENVIRONMENTAL IMPACT ASSESSMENT

Law and Practice in North America

Introduction

The following paper provides a comparative overview of the federal environmental impact assessment processes of the three countries, with selected examples of the process in place in some of their states and provinces. It was developed in the context of CEC's project on Transboundary Environmental Impact Assessment (TEIA). The TEIA project arises from Article 10(7) of the North American Agreement on Environmental Cooperation (NAAEC) which states:

> Recognizing the significant bilateral nature of many transboundary environmental issues, the Council shall, with a view to agreement between the Parties pursuant to this Article within three years on obligations, consider and develop recommendations with respect to:
>
> (a) assessing the environmental impact of proposed projects subject to decisions by a competent government authority and likely to cause significant adverse transboundary effects, including a full evaluation of comments provided by other Parties and persons of other Parties;
>
> (b) notification, provision of information and consultation between Parties with respect to such projects; and
>
> (c) mitigation of the potential adverse effects of such projects.

On 12 June 1997, the Council of the CEC considered recommendations of an inter-governmental expert group for an agreement on transboundary environmental impact assessment. As a result, the Council decided that the Parties would complete a legally binding agreement on TEIA by 15 April 1998.[1] The Expert Group recommendation is available on the CEC web site <http://www.cec.org>.

1. At the time of publication, the Parties were still negotiating the legally-binding agreement on TEIA.

The Secretariat would like to acknowledge the work of the following individuals and organizations in the preparation of the following paper: the Canadian Institute of Resources Law, the Center for International Environmental Law (CIEL), the Environmental Law Institute (ELI), the Mexican Center for Environmental Law (CEMDA), Wilehaldo Cruz-Bressant and Howard Mann.

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CANADA

1. OVERVIEW OF CANADA'S ENVIRONMENTAL ASSESSMENT REGIME

1.1 General Introduction

The environment is not, as such, a subject matter for legislation under the Canadian Constitution. Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial.[1] As a result, both governmental levels, federal and provincial, have adopted environmental assessment processes.

Environmental assessment was first adopted as a formal process in Canada in 1972 when the federal government introduced the Environmental Assessment and Review Process (EARP)[2] as a policy document for government departments to follow. This document was refined in the 1984 Environmental Assessment and Review Process Guidelines Order (EARPGO), which was ultimately found by the courts to have the force of law.[3]

The *Canadian Environmental Assessment Act* (CEAA),[4] proclaimed into law in 1995 to replace the EARPGO, represents the current legal framework for the federal government to consider potential environmental consequences when making decisions on projects. Triggering the application of the CEAA's provisions is a statutory definition of "project," inclusion and exclusion lists, and a required role for the federal government regarding the project in question. For projects covered by the CEAA, the process involves a preliminary determination by the responsible federal authority of the level of environmental assessment required for each project decision. There are four such levels: a screen-

1. See *A.G. of Canada* v. *Hydro Québec*, Supreme Court of Canada, File No.: 24652, 18 September 1997, par. 112.
2. *Provisions of the Policy of the Government of Canada establishing the Federal Assessment and Review Process*, undated.
3. *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, *Canada Gazette* II, 118/14, p. 2794. The status of EARPGO as binding law was confirmed by the Supreme Court of Canada in *Friends of the Oldman River Society* v. *Canada*, [1992] 1 S.C.R. 3.
4. *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. CEAA was adopted by Parliament in 1992 but not proclaimed into force until 1995 when several critical regulations were adopted as well.

ing, a comprehensive study, and public review either by a panel or by mediation. The results are advisory in nature, with the final decision on projects made by the federal department or agency with authority to undertake or provide support to the project (i.e., the "responsible authority").

Determining the scope of the environment assessment (scoping) is done with reference to the components of the project under review, factors specified under the CEAA, and the specific issues raised by the project and its environmental setting. The CEAA requires that alternatives to the project, mitigation measures, and follow-up be considered. The CEAA also contains specific transboundary provisions and provides for federal-provincial harmonization, delegation of certain functions, and joint panel reviews.

Public involvement is most formal in the case of major projects, for which the review is conducted by an independent panel or a mediation process and follows the completion of a comprehensive study. The CEAA also contains provisions regarding funding of participants for public reviews and access to information through a public registry.

Given that the "environment" is a shared responsibility between the federal government and the provinces, by the end of the 1980s, all ten provinces had also introduced environmental assessment legislation and established formal environmental assessment processes. In recent years, most provinces have developed new environmental assessment regimes to reflect institutional changes and heightened public expectations. Provincial and territorial environmental assessment processes follow generally similar procedures, although some differences can be noted.

As well, municipal governments have recognized the need for incorporating environmental assessment into their development planning, and a number of Canadian municipalities have instituted formal environmental assessment processes, either independently or in concert with provincial governments. Environmental assessment processes have also been introduced as part of native land claim agreements.

Today, a comprehensive environmental assessment system, composed of some thirty formal environmental assessment processes, exists in Canada, reflecting the constitutional division of power over the environment, the outcome of major legal challenges, the development of environmental authorities within each jurisdiction, and the results of experience, research, and public comments.

This report is intended to provide an overview of Canada's environmental assessment regime with a detailed analysis of the CEAA, and a summary of the key features of provincial and territorial environmental assessment processes.

1.2 Federal Environmental Assessment Processes

Over the years, the EARP has evolved into a series of environmental assessment processes designed to ensure that environmental factors are integrated into all levels of federal decision-making, including policies, plans, programs and projects.

The environmental assessment process administrated by the federal government are:

- The CEAA first introduced as part of the 1990 EARP reform package, replaces the EARPGO. It was passed by Parliament in 1992 and proclaimed into force on 22 January 1995. The CEAA provides for a more defined process to be applied to projects. It requires that a responsible (federal) authority, that initiates, funds, grants land, or issues specific regulatory approvals for certain projects, ensures that these proposals undergo an environmental assessment before they proceed. The federal Minister of the Environment (Minister) is accountable to Parliament for the administration of the CEAA. The Canadian Environmental Assessment Agency (Agency) provides support to the Minister in meeting federal obligations.

- The James Bay and Northern Quebec Agreement, established in 1975 to oversee development projects in northern Quebec, provides specific requirements for the federal review of projects that fall under federal jurisdiction in that area. Projects under provincial jurisdiction are reviewed according to the provincial process established for that region.

- Other aboriginal land claims agreements are now incorporating environmental assessment processes into their regimes as well. These focus on cooperative environmental assessment processes that include participation of aboriginal government.[5]

5. See, for example, the *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, 1993, *Sahtu Dene and Metis Comprehensive Land Claim Agreement, Vol. 1, 1993,* Article 12; Art. 25.3.

- The Environmental Assessment Process for Policy and Program Proposals, issued as a directive of the federal Cabinet in 1990 as part of the EARP reform package, is a non-legislated environmental assessment process applied to policy and program proposals submitted for Cabinet consideration. The process requires federal departments and agencies to assess and document the potential environmental effects of their policy and program proposals, and to make public the results of the assessment at the time of their announcement, including potential environmental effects and how these are to be managed.

2. CANADIAN ENVIRONMENTAL ASSESSMENT ACT

2.1 Projects Covered by the CEAA

The CEAA sets out four conditions that must be met if the federal environmental assessment process is to apply to a proposal. First, the proposal must concern a "project," which can be either a physical work or a physical activity. "Project" is defined in the CEAA to mean: (a) any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to a physical work; or (b) any proposed physical activity not relating to a physical work that is listed in the Inclusion List Regulation.[6]

Second, the project must not be excluded from the requirement for an environmental assessment under the CEAA. A project may be excluded if it is carried out in connection with an emergency or for national security reasons. As well, the Exclusion List Regulation describes types of projects that are excluded because they have insignificant environmental effects.

The third condition is that an environmental assessment must be triggered by the action of a "federal authority." This term is defined to include federal Ministers, agencies or other bodies of the federal government that are accountable to Parliament through Ministers, federal departments or departmental corporations, or any other bodies prescribed in regulations under the CEAA. Most federal Crown corporations are excluded from the application of the CEAA.[7]

Finally, the CEAA requires that the federal authority: (a) be the project proponent; (b) provide money or other financial assistance to the project; (c) grant an interest in land to enable the project to be carried out;

6. CEAA, Section 2(1).
7. CEAA, Section 2(1).

or (d) exercise a regulatory duty in relation to a project, such as issuing a permit, licence or approval, under a statute or regulation included in the Law List Regulations. The federal authority that may take any of these actions with respect to a project is referred to as the "responsible authority."[8]

2.2 Scoping

The CEAA contains a number of provisions regarding the scope of the environmental assessment. That is, the scope of the project (components of a proposed development to be included in the environmental assessment), as well as the factors (e.g., environmental effects, comments from the public, mitigation measures, etc.) to be considered in the environmental assessment.

2.2.1 Scope of the Project

Scoping the project involves identifying those components of the proposed development that should be considered for the environmental assessment. The scope of the project can be defined as the sum of the physical works, the undertakings associated with the physical works, and the physical activities that are identified through the following three questions:

- What is the physical work or physical activity that triggers the CEAA (i.e., for which a power, duty or function is being exercised)?
- What other associated physical works or physical activities (identified in the Inclusion List regulations) must be undertaken to carry out the triggering project?
- What are the other undertakings associated with the physical works identified through questions 1 and 2?[9]

Under the CEAA, the federal authority responsible can combine two or more triggering projects into the same environmental assessment if it determines that the projects are so closely related that they can be

8. CEAA, Sections 5, 2(1).
9. The issue of the scope of the project has generally arisen in the context of whether an assessment should include elements that may be either preliminary (exploratory) or future components of the project in the EA. See, e.g., *Quebec (A.G.)* v. *Canada (National Energy Board)*, [1994] 1 S.C.R. 159; and *Community before Cars Coalition* v. *National Capital Commission*, F.C.T.D. T-1830-96, T-2865-96, T-2866-96, T-2481-96, 7 August 1997, Muldoon J.

considered to form a single project.[10] Relevant criteria are interdependence, linkage and geographic proximity.

2.2.2 Scope of the Factors to be Considered

The second component dealing with the scope of the environmental assessment concerns the factors to be considered in the environmental assessment itself. The CEAA sets out factors to be considered, depending on the stage of the process (screening, comprehensive study, mediation or review panel). Section 16(1) requires that the following factors be considered under all four of these cases:

- the environmental effects of the project, including effects of malfunctions or accidents that may occur and any cumulative environmental effects that are likely to result from the project, in combination with other projects or activities that have been or will be carried out;
- the significance of these environmental effects;
- public comments received;
- technically and economically feasible measures that would mitigate any significant adverse effects; and
- any other matter relevant to the assessment that the responsible authority may require, such as the need for and alternatives to the project.

In addition to these factors, every comprehensive study, mediation or review panel is also required to consider:[11]

- the purpose of the project;
- technically and economically feasible alternative means of carrying out the project as well as the environmental effects of these alternative means;
- the need for and requirements of any follow-up program; and
- the capacity of renewable resources that are likely to be affected by the project to meet present and future needs.

10. CEAA, Section 15(2).
11. CEAA, Section 16(2).

The responsible authority determines the scope of these factors. In particular, the geographic boundaries, the range of environmental impacts, and the time frames over which effects may be felt will need to be established.

2.3 Environmental Effects

The CEAA requires that every environmental assessment consider the environmental effects of the project and their significance. Such environmental effects are broadly defined and include the impacts on both the physical and socio-economic environments.[12] Environmental effects of malfunctions or accidents that may occur in connection with the project and "any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out" are also to be included. [13]

More specifically, the term "environmental effects" is defined to include "any change that the project may cause in the environment, including any effect of any such change on health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance." The term also applies to "any change to the project that may be caused by the environment." As defined in the CEAA, the term "environment" means: "the components of the Earth, and includes: (a) land, water and air, including all layers of the atmosphere, (b) all organic and inorganic matter and living organisms, and (c) the interacting natural systems that include components referred to in paragraphs (a) and (b)."[14]

2.3.1 Transboundary Effects

All assessments conducted under the CEAA must consider potential transboundary effects, since this is included in the definition of environmental effects.[15] In addition, specific sections of the CEAA include provisions for projects having interprovincial or international transboundary environmental effects or effects on "lands of federal

12. The breadth of this approach was both noted and approved by the Supreme Court of Canada in the *Friends of the Oldman River* decision, *op. cit.*, n. 3.
13. CEAA, Section 16(1)(a).
14. Both of these definitions are found in Section 2(1) of the CEAA.
15. This is seen in the concluding words of the definition of environmental effects, "whether any such change occurs within or outside Canada."

interest." Under the transboundary provision,[16] the Minister of the Environment has the authority to refer a project directly to a mediator or panel, if the Minister believes that the project may cause significant adverse transboundary effects in cases when the project would otherwise not require an environmental assessment under the CEAA and where there is no federal involvement in the project pursuant to any federal law. However, such a referral shall not be made where the federal government and interested provinces have agreed on an environmental assessment (meeting certain conditions) to consider transboundary effects.

2.4 Mitigation and Alternatives

The CEAA requires that every environmental assessment consider "measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project."[17] The need for the project and alternatives to the project (e.g., different ways of achieving the same end) may also be considered. In addition, every comprehensive study, mediation process, and panel review must consider "alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means." Alternative means are methods that are technically similar or variations on the same functional approach to achieving the project's objectives.[18]

2.5 Environmental Assessment Report Contents

An environmental assessment report must be prepared based on the results of the screening, comprehensive study, mediation process, or panel review:

- Screening reports should cover the topics noted in the above section on scoping (2.2).

  In addition, the CEAA provides for the designation of "class screening reports" where the Agency determines that a screening report

16. CEAA, Sections 46-48.
17. CEAA, Section 16(1)(d).
18. CEAA, Section 16(2)(b). Previous court decisions have ruled that the consideration of alternatives is not an open ended exercise to review all possible alternatives, but is limited to those reasonably available to achieve the same ends. See, e.g., *Re Alberta Wilderness Association and Express Pipelines Ltd. et al.* (1996), 137 D.L.R. (4th) 177, F.C.A.; leave to appeal to the Supreme Court of Canada sought, 30 October 1996, S.C.C. No. 25618; leave to appeal dismissed as abandoned, 20 March 1997.

could be used as a model in conducting screenings of other projects within the same class.[19] In applying a class screening report to a project, the responsible authority must still take into account site-specific circumstances and cumulative effects. Proposed class screening reports are available for public comment, and these comments must be considered by the Agency in deciding whether to accept a report as a class screening report. The Agency's decision must be published and class screening reports made available to the public through the environmental assessment registry.

- Comprehensive study reports must address the factors identified in the above section on scoping (2.2).

  A completed comprehensive study report must be submitted to the Minister and to the Agency.[20] The Agency is then required to publish a notice stating when the report will be available to the public, how copies may be obtained, and the deadline for filing comments. The comprehensive study report and any public comments will be filed in the public registry for the project.

- If the project is referred to mediation, the mediator submits a final report to the responsible authority and the Minister whether or not an agreement has been reached. When the Minister or the mediator determines that the mediation is not likely to produce a result that is satisfactory to the participants to the mediation, the Minister shall refer the issue to a review panel. Upon receipt of the mediator's report the Minister must give public notice that the report is available.[21]

- The report of a panel review shall contain the panel's rationale, conclusions and recommendations, including any proposed mitigation measures and follow-up program. A summary of public comments will also be provided. Once the report is submitted to the responsible authority and the Minister, the latter will provide public notice that the report is available.[22]

2.6 Judicial or Administrative Review

Actions taken under the CEAA may be subject to judicial review according to general principles of administrative law. In practice, the availability of judicial review will depend, in large measure, on the

19. CEAA, Section 19.
20. CEAA, Sections 21, 22.
21. CEAA, Sections 32, 36.
22. CEAA, Sections 34, 36.

degree of discretion provided for in the relevant provisions of the CEAA. Applications for judicial review will be refused where the sole ground for relief is "a defect in form or a technical irregularity."[23]

Although the CEAA was proclaimed only in 1995, significant cases have been commenced, and some completed, on its provisions.[24] Equally relevant, however, are the accumulated principles and results of litigation under the preceding legislation, *EARPGO*, from 1988 to 1997.[25]

2.7 Follow-up

The CEAA provides that the environmental assessment process includes, where applicable, "the design and implementation of a follow-up program." These are defined as programs to verify the accuracy of a project's environmental assessment and determine the effectiveness of mitigation measures.[26] As previously noted, a comprehensive study, mediation, or review panel must address the need for and requirements of any follow-up program. In addition, when a responsible authority decides to approve a project, it shall design and arrange for the implementation of any follow-up program that it considers appropriate for the project. When such a program is designed, the responsible authority is required to advise the public of both the program and its results.[27]

2.8 Federal-Provincial Harmonization and Joint Panel Reviews

The CEAA's provisions regarding cooperation with other jurisdictions and joint panel reviews are an important component of the federal environmental assessment process. Where another jurisdiction also has authority to conduct an environmental assessment, the responsible authority may cooperate with that jurisdiction at the screening or comprehensive study stages. These "jurisdictions" include provincial governments or agencies, bodies with environmental assessments powers established pursuant to land claims agreement or pursuant to legislation

23. CEAA, Section 57.
24. For example, *Re Alberta Wilderness Association and Express Pipelines et al., op. cit.*, n. 18; *Union of Nova Scotia Indians* v. *A.G. Canada*, [1997] 1 F.C. 325 (Trial Division).
25. The first case on *EARPGO* was the *Canadian Wildlife Federation* v. *Canada (Minister of the Environment)*, [1989] 3 F.C. 309 (T.D.). What is likely to be the last case on *EARPGO – Community Before Cars Coalition* v. *National Capital Commission*, *op. cit.*, n. 9 – includes summaries of the state of the law on many of the issues raised in this report at the end of the *EARPGO* period.
26. CEAA, Sections 14(c), 2(1).
27. CEAA, Section 38.

that relates to the self-government of Indians.[28] The responsible authority may also delegate to another jurisdiction the screening or comprehensive study, the preparation of the screening or comprehensive study report, or the design and implementation of a follow-up program. Any decision-making authority to be exercised following screening or comprehensive study cannot, however, be delegated. Furthermore, decision making cannot be exercised unless the responsible authority is satisfied that any delegated functions have been carried out in accordance with the CEAA and its regulations.[29]

Joint panel reviews may be conducted with other jurisdictions that also have authority over a project.[30] The term jurisdiction is defined to include provincial governments or agencies, bodies established under land claims agreements, governments or agencies of a foreign state or a subdivision of a foreign state, and international organizations and agencies. Any joint panel agreement must be published prior to the commencement of the joint panel review. Joint panels are required to consider the factors specified in the CEAA for panel reviews. In addition, a number of procedural requirements are set out, including: appointment or approval of the panel chairperson (or one co-chairperson) and appointment of at least one panel member by the Minister; impartiality and relevant expertise of panel members; terms of reference fixed or approved by the Minister; specified powers for the panel; public participation; submission of a report to the Minister; and publication of the report.

2.9 Public Involvement

Public involvement in screening is at the discretion of the responsible authority. Where public participation in screening is considered to be appropriate, an opportunity for public review and comment on the screening report will be provided prior to the making of a decision on the project. In addition, the screening report must be included in the public registry established for the project.[31]

Although it is not specifically required by the CEAA, the Agency strongly encourages responsible authorities and proponents to involve the public early in the preparation of the Comprehensive Study. Responsible authorities are encouraged to prepare a Public Involvement Plan

28. CEAA, Section 12(5).
29. CEAA, Section 17.
30. CEAA, Sections 40-45.
31. CEAA, Section 18(3).

outlining the opportunities for public participation in the process. For example, the responsible authorities may want to involve the public in determining the scope of the assessment and obtain comments on the early draft of the comprehensive study report. This early involvement of the public contributes to the identification of issues which can be addressed and resolved before the submission of the report to the Agency and Minister.

After the submission of the comprehensive study report, the Agency is required by the CEAA to facilitate public access to the report for a review and comment period. The manner in which this review period will be handled and the time required for it will depend on how extensive has been the public involvement program during the environmental assessment itself. Prior to the deadline set out in the notice published by the Agency, any person may file comments with the Agency relating to the conclusion and recommendations and any other aspect of the comprehensive study report. The Minister will take these comments into account in reaching a final determination.

The most extensive provisions for public involvement under the CEAA relate to panel reviews for major projects.[32] The CEAA specifies that review panels shall ensure that information required for the assessment is available to the public and shall hold public hearings. Furthermore, the panel report must include a summary of public comments. These requirements under the CEAA are supported by a very strong tradition of public involvement in the independent panels which began under the *EARPGO* process (independent not only of the proponent, but also of the government agency making the project decision). Indeed, the material describing the panel review process provided to panel members indicates that public input is the single most important feature of the process. This is underlined by the requirement in the CEAA that the Minister establish a participant funding program to facilitate public involvement in mediation and panel reviews.[33]

Regardless of how the responsible authority decides to proceed following an environmental assessment, public notice of the decision is required. If federal support for the project is not provided, a notice of that course of action must be filed in the public registry. If federal support is provided, the responsible authority must notify the public of its course of action, any required mitigation measures, and any follow-up program (and the results of that program).

32. CEAA, Sections 34-36.
33. CEAA, Section 58(1.1).

Access to information is also an important component of effective public participation. The CEAA provides for a public registry to ensure access to information relating to projects for which an environmental assessment is conducted.[34]

3. SUMMARY OF PROVINCIAL AND TERRITORIAL ENVIRONMENTAL ASSESSMENT PROCESSES

3.1 Introduction

Processes for conducting environmental assessments exist in each of Canada's provinces and territories. Although these processes provide similar approaches and procedures, there are important differences. Furthermore, in some jurisdictions (e.g., Quebec, Yukon and Northwest Territories), agreements with First Nations have resulted in special environmental assessment regimes that apply only in certain regions.

3.2 Application

Provincial environmental assessment processes apply to both private and public sector projects except in Ontario, where only public sector projects are automatically included. Private sector projects may be designated as subject to environmental assessment in Ontario. Statutory definitions (e.g., "undertakings," "developments," etc.) are usually quite broad. Environmental assessment legislation often allows considerable discretion regarding the applicability of the environmental assessment process to projects. The determination whether provincial processes apply to a project may involve a discretionary determination of the significance of environmental effects, or it may be based on defined categories of included or excluded projects. If a more detailed review is necessary, the proponent is generally required to prepare an environmental impact statement (EIS). The scope of this document may be set out in legislation, or may be determined through project-specific terms of reference. The EIS will generally be examined by government officials and public comments may be solicited. Additional information may be requested to fill gaps. A public review of the project may follow if there is uncertainty regarding its effects or evidence of significant public concern.

34. CEAA, Section 55.

3.3 Scoping and Contents of Reports

Provincial legislation may define the scope of projects and related activities that must be examined in an environmental assessment. Some provincial statutes enumerate the types of impacts and other issues to be addressed in the EIS or any other environmental assessment report that may be required. Specified factors to be considered may include alternatives to the project, alternative methods for carrying out the project, cumulative environmental effects, mitigation measures, monitoring programs, etc. Issue scoping is also an important component of provincial environmental assessment processes. It is often carried out mainly by, or on behalf of, the proponent.

3.4 Public Participation

Public involvement in environmental assessment varies from a right to review and comment on written material (e.g., proposed terms of reference for the EIS, or the EIS itself) to participation in formal quasi-judicial hearings. In some cases, financial assistance to intervenors or participants may be provided.

Some provinces have established permanent environmental assessment boards to conduct hearings, while in others *ad hoc* panels are created. In Alberta and Ontario, the environmental assessment panels have decision-making authority regarding projects. In other jurisdictions, panel reports are advisory only, with final decision-making usually at the ministerial level.

3.5 Relationship with other Processes

The relationship between environmental assessment and other processes is formalized in some jurisdictions. In Ontario, the *Consolidated Hearings Act* creates a joint board consisting of members from the Environmental Assessment Board and the Ontario Municipal Board to hold hearings under a number of statutes pertaining to environmental and land-use authorities. In Alberta, the *Environmental Protection and Enhancement Act* provides for written public comments on environmental assessment documentation prepared by the project proponent. If a public hearing is required, the environmental assessment process merges into the project review process of the Alberta Energy and Utilities Board or the Natural Resources Conservation Board, the mandates of which are broader than the existing environmental assessment process. In the Yukon and under certain land claims processes, some effort is made to integrate environmental assessment with land-use planning.

3.6 Transboundary Environmental Assessment

Transboundary effects are not generally addressed in provincial environmental assessment legislation. However, most definitions of the environment or environmental effects either include the environment outside the province or do not exclude it.[35] Thus, the provincial processes are generally able to include transboundary effects when required. An exception is British Columbia's recently enacted *Environmental Assessment Act* which states that the participation of neighbouring jurisdictions in the environmental assessment process is one of its purposes. This Act provides for consideration of transboundary effects at several places in the environmental assessment process, and for the participation of neighboring jurisdictions in the project committee charged with an initial review and advisory function, and in the associated public advisory committee. Provision is also made for circulating notices which invite comments from neighboring jurisdictions during the review process.

35. The major exception here is Ontario, whose definition of environment is limited to that falling within provincial boundaries. However, other provisions of the legislation suggest some scope for the inclusion of transboundary impacts. *Ontario Environmental Protection Act*, R.S.O. 1990, c. E-19, Sections 1(k) and 3(2).

MEXICO

1. THE ENVIRONMENTAL IMPACT ASSESSMENT PROCESS IN MEXICO

1.1 Basic Features of the Environmental Impact Assessment Process in Mexico

The legal framework pertaining to the environmental impact assessment (EIA) process is contemplated under the General Law of Ecological Equilibrium and Environmental Protection *(Ley General del Equilibrio Ecológico y la Protección al Ambiente*–LGEEPA),[1] and in the Regulation under the General Law of Ecological Equilibrium and Environmental Protection Regarding Environmental Impact *(Reglamento de la Ley General del Equilibrio Ecológico y la Protección al Ambiente en Materia de Impacto Ambiental,* hereinafter "EIA Regulation").[2]

The LGEEPA was amended in 1996 for the purpose of adapting and broadening the environmental policy instruments provided for under the law itself. Among the reasons behind the LGEEPA reform initiative was the acknowledgment that the former legal framework contained certain deficiencies, for example the excessive centralization of decision making at the federal level, the difficulty to determine the type of works or activities submitted to the EIA process, and the lack of clear administrative procedures and mechanisms for public participation. Thus, the principal reforms focused on:

- Clarifying and adding to the listing of works and activities subject to the EIA process. The listing covers those works and activities that may or will generate significant impacts on the environment and natural resources, and that cannot be adequately regulated through other such instruments as standards, licenses, and ecological zoning. It is intended to ensure that all works and activities having significant impact are assessed by the federal government. The listing is also intended to provide proponents with increased legal certainty as to which projects must be submitted to the EIA process.

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1. Published in the *Official Gazette of the Federation (Diario Oficial de la Federación)* of 28 January 1988 and amended by Decree published on 13 December 1996.
2. Published in the *Official Gazette of the Federation* of 7 June 1988.

- Including in the LGEEPA a reference to the EIA Regulation regarding the works and activities [...] which, due to their location, size, characteristics or scope, will not produce significant impacts and therefore do not require an EIA.

- Providing the Secretariat of the Environment, Natural Resources and Fisheries *(Secretaría de Medio Ambiente, Recursos Naturales y Pesca* – Semarnap) the authority to request an EIA of works and activities which, although not expressly listed under the LGEEPA, are likely to cause ecological imbalances, harm public health or the ecosystems, or exceed legal standards and conditions.

- Raising the profile of the preventive report (PR), by integrating this tool in the law itself. The PR was previously contemplated under the EIA Regulation only in connection with those cases that did not require the filing of an environmental impact statement (EIS).

- Simplifying the EIA procedures for works and activities under local jurisdiction.

- Linking the EIA procedures to the ecological zoning and land-use regulations set forth under the legislation governing human settlements.

- Broadening public participation in EIA procedures.

- Defining more precisely the responsibility of the experts who assist in the preparation of EISs.

Articles 28 through 35 bis 3 provide the legal framework of the EIA process. Article 28 of the LGEEPA defines EIA as the process through which Semarnap "sets forth the conditions which shall govern the carrying out of works and activities likely to cause ecological imbalances or exceed the limits and conditions established [...for...] the protection of the environment and the preservation and remediation of ecosystems with a view to prevent or mitigate to the extent possible their negative impacts on the environment."

The LGEEPA empowers the federal, state and municipal governments to conduct EIAs. Article 28 lists the works and activities subject to the federal EIA process. Article 35 bis 2 provides that the works and activities not contemplated in Article 28 will be assessed by state govern-

ments, with the assistance of the relevant municipalities, when such works and activities are expressly listed in the environmental law of a state and they are of the type that cause significant environmental impacts as a result of their location, importance or characteristics.

At the federal level, Semarnap, through a decentralized agency, the National Institute of Ecology *(Instituto Nacional de Ecología* – INE), carries out the EIA process. Within INE, the responsible department is the General Directorate of Ecological Zoning and Environmental Impact *(Dirección General de Ordenamiento Ecológico e Impacto Ambiental* – DGOEIA*)*, which has the following duties, among others:[3]

- Assessing and resolving the PRs and EISs submitted in connection with proposed public or private works or activities that fall under its jurisdiction;

- Convening and holding, when deemed necessary, technical and public hearings on projects undergoing an EIA;

- Organizing consultations on PRs and EISs and publishing information on the planned works and activities in official and other media;

- Establishing, in accordance with the law, technical and administrative guidelines governing the filing, processing and review of EIA documents.

1.2 Provisions regarding the Transboundary Effects of EIAs

With regard to the transboundary effects of the EIA process, the LGEEPA states the following principle: "It is in the Nation's interest that the projects carried out within the domestic territory, and those areas where it exercises its sovereignty and jurisdiction, do not affect the ecological balance in other countries or zones under international jurisdiction."[4] The EIA Regulation specifically provides that proposed private or public works or activities that may cause ecological imbalances outside Mexican jurisdiction be submitted to an EIA.[5]

3. Bylaws of Semarnap (*Secretaría de Medio Ambiente, Recursos Naturales y Pesca)*, published in the *Official Gazette of the Federation* of 8 July 1996.
4. Article 15, Section XVII.
5. EIA Regulation, Article 5, Section XIII.

2. ANALYSIS OF THE EIA PROCESS

2.1 Projects subject to the Federal EIA Process

The LGEEPA provides that proponents of the following works or activities specified in its Article 28 must obtain an environmental impact authorization from INE prior to their initiation. Those are:

I.- Hydraulic works, highways and other roadways, pipelines for oil, gas, hydrocarbons, and multi-purposes pipelines;

II.- Oil, petrochemical and chemical industries, iron and steel works, pulp and paper mills, sugar refineries, cement works and power generation facilities;

III.- Exploration, exploitation and benefaction of minerals and substances reserved to the Federation in accordance with the law governing mining, as well as that implementing Article 27 of the Constitution in regard to nuclear matters;

IV.- Facilities for the treatment, containment or disposal of hazardous and radioactive waste;

V.- Management of woodlands in tropical forests and of species which do not regenerate easily;

VI.- Forestry;

VII.- Changes in land use in woodlands, as well as in jungles and arid zones;

VIII.- Industrial parks where highly hazardous activities are projected;

IX.- Real estate developments affecting coastal ecosystems;

X.- Works and activities in wetlands, mangrove swamps, lagoons, rivers, lakes and estuaries connected to the sea, as well as along their littorals, or in federal zones;

XI.- Works in federally protected natural areas;

XII.- Fishing, aquaculture or agribusiness likely to jeopardize the preservation of one or more species or cause harm to ecosystems; and

XIII.- Works or activities under federal jurisdiction that may cause serious and irreparable ecological imbalances, damage to public health or ecosystems, or exceed the standards and conditions specified in the legal provisions pertaining to the preservation of ecological balance and environmental protection.

With regard to a proposed work or activity covered by Section XIII, Article 28 provides that, should Semarnap decide to require that any such work or activity be submitted to the EIA process, it shall advise the proponent of the proposed work or activity of its decision.

Article 28 also provides that the EIA Regulation will determine those proposed works and activities which, although covered by Article 28, do not need to undergo an EIA because they do not or can not cause significant environmental impacts or ecological imbalances, nor exceed the standards and conditions established under environmental regulations because of their location, size, characteristics or scope.

2.2 The EIA Procedure

2.2.1 Preventive Reports (PRs)

Article 31 provides that proponents of works and activities listed in Article 28 which fall into any of the following categories must file a PR instead of an EIS:

- There exist NOMs or other provisions that regulate the releases, discharges, exploitation of natural resources and, in general, all the environmental impacts that may result from the proposed work or activity;

- The proposed work or activity is specifically contemplated under a partial plan of urban development or an ecological zoning plan that has previously been assessed by the Semarnap; or

- The installations in question are located in authorized industrial parks.

Where the EIA process is initiated through the filing of a PR, the INE will first determine whether or not the proposed work or activity falls within one the three above-mentioned categories. If it does not, INE will determine the type of EIS the proponent must file.

2.2.2 Environmental Impacts Statements (EISs)

Proponents of works and activities that do not fall within the three categories of projects covered by Article 31 must file an EIS to obtain an environmental impact authorization.[6]

"Environmental impact statement" is defined in the law as the "document which, based on studies conducted, discloses the potential significant environmental impact that would be generated by works or activities, as well as the means to prevent or mitigate such an impact, if it were to be negative."[7]

There are three types of EISs: general, intermediate and specific. The main difference among them is their level of specificity. Indeed, while the general EIS is intended to present generic information about the proposed work or activity, the intermediate and specific EISs request more specific information about how the environment will be affected by the work or activity.[8]

When the proponent gathers that its proposed work or activity requires the presentation of an EIS, it will usually file an EIS of the general type. The intermediate or specific types of EISs are usually filed at INE's request when more complete and detailed information is required about the characteristics of a proposed project (size, potential for causing significant environmental impacts) or the characteristics of its proposed location.

6. Article 30 of the LGEEPA indicates that "the contents of the preventive report, as well as the characteristics and the types of environmental impact statements and risk assessment reports, will be set forth in the EIA Regulation."
7. Article 3, Section XX.
8. The general and intermediate EISs require that promoters of a project identify impacts at the various stages of the project and that they select the most appropriate methodology for doing so. The intermediate type requires in addition that the promoter provide a description of those impacts generated at each stage of the project, pointing out their origin, evolution, incidence and recurring effects on the environment. As well, the promoter must identify and describe in detail the social and economic changes brought about by the project development. This type of EIS must also include a description of the natural characteristics of the area before siting the project, as well as an analysis of the most significant environmental impacts that the area will sustain, taking into consideration the synergetic effects that might result from those impacts. The specific EIS requires a more in-depth description, evaluation and interpretation of the project's impacts. Like the intermediate type, the specific type requires a description of the changed environment and of the current and projected physical, chemical, biotic, abiotic, socio-economic, cultural and political factors. In this type of EIS, interested parties must identify, measure, evaluate, interpret and compare not only the direct and indirect impacts of the project, but also the reversible, irreversible, inevitable, cumulative and residual impacts over the short and long term.

2.2.3 The Decision

Under the LGEEPA, the INE is given 60 days to decide whether or not to issue an environmental impact authorization for a proposed project.[9] The INE may authorize or not a proposed project, or may also grant a conditional authorization subject to specific requirements intended to prevent or mitigate the adverse environmental impacts of the project. The deliverance of an environmental impact authorization does not exempt a proponent from complying with any other obligation accruing under state or federal permits.

2.2.4 Risk Analysis

Under the EIA Regulation, "risk analysis" is defined as a document that states those risks posed by a proposed work or activity to the environment or its ecological balance, as well as the technical safety measures, of a preventive and corrective nature, intended to avoid, mitigate, minimize or control those adverse effects, should an accident occur while the project is being developed or during its normal operation.[10] The LGEEPA specifies that, where highly hazardous activities[11] are to be involved, the EIS must include a risk analysis.[12]

2.2.5 Who may prepare an EIS

The LGEEPA states that PRs, EISs and risk assessments may be prepared by the proponents, research institutions, or professional colleges or associations. The parties preparing such documents are responsible for their contents.[13]

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9. LGEEPA, Article 35 bis. This time limit may exceptionally be extended for 60 additional days whenever, due to the complexity and the scope of the work or undertaking, the INE requires a longer period of time to carry out the assessment.
10. EIA Regulation, Article 3(II). See also Articles 32–35 of the LGEEPA.
11. Highly hazardous activities are specified in two lists published in the *Official Gazette of the Federation* on 28 March 1990 and 4 May 1990. The first lists those activities involving the use or handling of toxic substances and the second, those using flammable materials and explosives.
12. The INE has prepared two guidelines pertaining to risk analysis: Guide for the Preparation of the Preliminary Risk Report (*Guía para la Elaboración del Informe Preliminar de Riesgo*) and the Guide for the Preparation of the Risk Analysis (*Guía par la Elaboración del Análisis de Riesgo*)(unpublished documents that may be obtained from INE).
13. LGEEPA, Article 35 bis 1.

2.2.6 Provisions regarding Publication and Consultation

The LGEEPA provides that Semarnap shall make available to the public the PRs[14] and EISs that have been filed, along with its own assessments of the EISs.[15] In addition, since the 1996 reform of the LGEEPA, a public participation and consultation process is now contemplated in the Law.

The DGOEIA is the administrative division responsible for organizing the public consultations, "convening and conducting, whenever it is deemed necessary, technical and public hearings on projects undergoing an EIA"[16] and publishing the relevant information on planned works or activities in the *Ecological Gazette* (*Gaceta Ecológica*) and other media. [17]

Although prompted by a citizen request, the decision to hold a public consultation is left to the discretion of the authorities. Article 34 of the LGEEPA reads as follows:

> Semarnap, at the request of any person of the affected community, may hold a public consultation in accordance with the following:
>
> I.- Semarnap shall publish, in its *Ecological Gazette*, the environmental impact authorization request. In addition, the proponent shall publish, at his own expense, a summary of the projected work or activity in a newspaper with wide circulation in the federated state involved, no more than five days after the filing of the EIS with the Semarnap;
>
> II.- Any citizen may, within ten days after the publication of the project summary and in the manner referred to above, request that Semarnap make the EIS available to the public of the relevant federated state;
>
> III.- Whenever, according to the provisions of the EIA regulation, works or activities likely to bring about serious ecological imbalance or cause harm to public health or ecosystems are involved, Semarnap, in coordination with local authorities, may organize a public information meeting at which the proponent of the project shall explain the technical environmental aspects of the proposed work or activity.

14. *Ibid.*, Article 31.
15. *Ibid.*, Article 34.
16. *Ibid.*, Article 35 bis 1, Section VI.
17. Bylaws of Semarnap *(Reglamento Interior de la Semarnap)*, Article 60, Sections VII.

IV.- Any interested party may, within twenty days from the release by Semarnap of the EIS to the public, in accordance with the provisions of Section I above, propose the implementation of additional prevention and mitigation measures and make comments it may deem appropriate; and

V.- Semarnap shall include the comments made by interested parties in the respective file and shall record, in its decision [about the proposed project], the public consultation process, as well as the results from those comments and proposals submitted in writing.

2.2.7 Restrictions on Public Participation

A proponent may request that information included in its EIS be kept confidential, whenever industrial property rights and the confidentiality of commercial information it submitted might be jeopardized by public disclosure.

2.3 Mitigation and Alternatives

Mitigation of the environmental impacts of proposed works and activities must be addressed in any EIS. Depending on the type of EIS (general, intermediate, specific) the requirements related to the identification of the potential environmental impacts of the project and the mitigation measures contemplated at the various stage of the project will vary.

For each proposed mitigation measure, a proponent must specify the extent to which it will contribute to abating the targeted impact. The proponent must also provide an estimate of the costs of the proposed mitigation measures. Moreover, when submitting an EIS of the specific type, a proponent must submit an abandonment program that foresees the use of the site, its infrastructure and the surrounding areas, at the end of the project's useful life.

2.4 Administrative and Judicial Review

Administrative and judicial review of governmental action is available to the proponents and to the public through various procedures such as: the 'citizen complaint' (*Denuncia Popular*), the 'revision recourse' (*Recurso de Revisión*), and the *amparo* suit (*Juicio de Amparo*).

2.5 Monitoring

The surveillance role of the government and the public does not end with the INE's approval of an EIS. Profepa is the principal authority responsible for monitoring compliance with the LGEEPA and the EIA Regulation.[18] Compliance is monitored by Profepa through: (1) citizen complaints; (2) notifications by INE of environmental impact violations; and (3) Profepa's own audits and inspections.[19]

If Profepa has reason to believe that a private party or public entity is not complying with the conditions and mitigation measures set out in an EIS, or with any other applicable environmental legal provisions, it may launch an inspection for the purpose of verifying compliance.[20]

Should violations be uncovered, Profepa, either during the course of the inspection or afterwards, shall issue and send by registered mail a notice of corrective actions required, indicating the violations detected and the actions that the corporation must implement at once.[21] The concerned party has 15 working days to respond to this notice and provide support documents or evidence. Once Profepa has received the response to its initial notification or the time allowed for submitting the evidence has elapsed, it has 20 working days to prepare and issue an administrative decision. This decision is an order describing the specific actions that the concerned party must undertake, the compliance deadline, and the sanctions imposed.[22] Within five working days of the date set by the order, the offender must notify the authority of its compliance.

When the deadline set by the administrative order has passed, Profepa may impose additional fines for each day that the offender is out

18. Bylaws of Semarnap, Article 38.
19. Interview with the Head of Profepa's Verification Division.
20. Bylaws of Semarnap, Article 62, Section I.
21. LGEEPA, Article 167, and Federal Law of Administrative Procedure *(Ley Federal de Procedimiento Administrativo)*, Articles 35–39.
22. LGEEPA, Article 171. Profepa has the authority to impose five types of administrative sanctions: (1) fines in the amount of 20 to 20,000 times the daily minimum wage; (2) the temporary or permanent, partial or total, shutdown of the polluting source; (3) the "administrative arrest" of the person acting on behalf of the corporation, for up to thirty-six hours; (4) the seizure of instruments, specimens, products or byproducts directly related to infringements of the regulations pertaining to forest resources, wild flora and fauna species or genetic resources; and (5) the suspension or revocation of the corresponding concessions, licenses, permits or authorizations. In establishing the sanction, Profepa must take into account the seriousness of the infringement, its impact on human health and the environment, the financial condition of the offender and the number of violations committed by the offender.

of compliance, provided that the total amount of the fine does not exceed 20,000 times the daily minimum wage in the Federal District.[23] Should the private party become a repeat offender, Profepa is authorized under the LGEEPA to impose an additional fine in an amount double that of the initial fine, provided that the overall fine does not exceed twice the maximum fine meted out to one-time offenders.

3. SUMMARY OF EIA STATE LAW AND PRACTICE

Currently, all 31 states and the Federal District have enacted environmental laws that embody EIA provisions. As mentioned earlier, activities that are not specifically contemplated in Article 28 of the LGEEPA, fall under the jurisdiction of states and municipalities as far as EIA is concerned.[24] States usually have jurisdiction over the following activities:

- State public works;
- Country roads;
- Industrial zones and parks;
- Rubber industry and its byproducts, brickworks, *maquiladoras*, foodstuffs, textiles, tanneries, glassworks, pharmaceutical and cosmetics industries;
- Activities or industries that are not considered highly hazardous by the Federation;
- Exploration, exploitation and manufacturing of mineral substances found in deposits whose nature is similar to that of soil components;
- Private and state tourist developments;
- Facilities for the treatment, confinement or disposal of waste waters and nonhazardous solid wastes; and
- Land distribution, housing units and new urban centers.

23. *Ibid.,* Article 171.
24. *Ibid.,* Article 35 bis 2, which provides that the works and activities not contemplated in Article 28 will be assessed by state governments, with the assistance of the relevant municipalities, when such works and activities are expressly listed in the environmental law of a state and they are of the type that cause significant environmental impacts as a result of their location, importance or characteristics.

Other activities regulated under state EIA legislation include the exploitation of natural resources that are not reserved to the Federation, those activities not requiring the use of hazardous materials, and hydraulic projects in waters under state jurisdiction.

State EIA laws establish mechanisms similar to those provided in the LGEEPA. For example, the laws refers to PRs, the three types of EISs, and Risk Analysis.[25] Further to the LGEEPA reform, public consultation mechanisms will probably be introduced in the different laws and regulations of each one of the states in the Republic to ensure consistency between federal and state EIA legislation.[26]

One of the purposes of the 1996 LGEEPA reform was to simplify the EIA process for works and activities under the jurisdiction of local authorities. The reform was intended to prevent the proliferation of administrative procedures requiring several authorities to authorize projects that, in fact, could be handled in a single procedure and to further the integration of urban development with environmental management.

25. A risk assessment must be submitted when a proponent intends on carrying out hazardous activities, but not the highly hazardous ones falling under federal jurisdiction.

26. Such amendments must be introduced pursuant to the Third Transitory Article of the Congress Decree *(Artículo Tercero Transitorio del Decreto del Congreso de la Unión)* amending, adding and repealing various provisions of the LGEEPA, which states: "The governments of the Federate Entities as well as the City Councils shall adapt their laws, regulations, ordinances, police and good government edicts and other applicable provisions to those established in the present Decree." Published on 13 December 1996 in the *Official Gazette of the Federation.*

THE UNITED STATES OF AMERICA

1. OVERVIEW OF THE FEDERAL REGIME: THE NATIONAL ENVIRONMENTAL POLICY ACT

1.1 Basic Features

The *National Environmental Policy Act of 1969* (NEPA),[1] signed into law on 1 January 1970, directs federal government agencies to prepare an environmental impact statement (EIS) on every proposal for a major federal action significantly affecting the quality of the human environment. NEPA's mandate must be followed by all agencies with respect to virtually all of their major actions.[2] The Supreme Court has said that NEPA is primarily a procedural statute and does not set substantive standards governing agency decisions. Through court decisions in over 2,000 cases brought by private parties and environmental groups against government agencies for failure to prepare an EIS or preparation of an inadequate EIS, federal courts have defined the scope of the EIS requirement and established its required content.

In 1978, drawing on court interpretations, the President's Council on Environmental Quality (CEQ, established under another section of NEPA) promulgated regulations giving definitive guidance to federal agencies on the implementation of NEPA's environmental impact assessment provisions.[3] The CEQ regulations establish a three-step process. First, the agency decides whether the proposed action falls within the NEPA mandate for preparing an EIS (i.e., is it a "major Federal action" that may "significantly affect" the environment). Each agency must publish implementing NEPA procedures which should identify

1. 42 U.S.C. 4321-4370d.
2. There are only two general exceptions to the EIS requirement. First, no EIS is required if preparing one would cause a direct conflict with another statutory requirement. Second, most administrative actions of the US Environmental Protection Agency (EPA) are not formally subject to NEPA requirements due, in part, to statutory exemptions such as under the *Clean Air Act* and the *Clean Water Act*. In issuing permits and making other regulatory decisions, the Agency generally follows a systematic and thorough environmental review process, including public participation, that constitutes the "functional equivalent" of NEPA requirements. Some EPA permits, such as certain permits for new sources under the *Clean Water Act*, are formally subject to NEPA.
3. 40 C.F.R. Parts 1500-1508.

those categories of actions that normally do not individually or cumulatively have a significant environmental effect, and for which, therefore, no environmental analysis is required. For actions not categorically excluded, the second step is to conduct a concise environmental assessment to determine if an EIS should be prepared.[4] If no potential for significant effect is found, the agency may conclude the process after the environmental assessment with a "Finding of No Significant Impact" (FONSI). For proposed actions that may have a significant effect, the third step is to prepare a complete EIS following the requirements of NEPA and the CEQ rules.

Court decisions since 1978, including Supreme Court decisions, have acknowledged the authoritative nature of the CEQ and have deferred to agency discretion about the content of the analysis. Federal agencies, on average, prepare 450 – 500 EISs and tens of thousands more environmental assessments each year.

By agreement with the CEQ, the Office of Federal Activities in the Environmental Protection Agency (EPA) is the official repository of all draft and final EISs. As part of this function, the EPA publishes each week in the *Federal Register* a "notice of availability" of all draft and final EISs it has received. In addition to its record-keeping responsibility, under Section 309 of the *Clean Air Act* the EPA has the responsibility to review and comment on all EISs.[5] EPA uses a standard grading system that addresses both the adequacy of the document and the environmental consequences of the proposed action. EPA has the authority, exercised only rarely, to find an EIS inadequate and a proposed federal action environmentally unsatisfactory, leading to a referral to CEQ for resolution of the matter.

1.2 Provisions for Transboundary Effects

The applicability of NEPA to potential environmental effects that may occur outside US jurisdiction has been a point of legal controversy from the beginning. The statute itself makes no distinction between domestic, transboundary, or global loci of action or loci of environmental effect. Under US law, a presumption exists against applying statutes extraterritorially.[6] In this regard, two legal questions are presented: (1) does the mandate to prepare an EIS with respect to transboundary

4. Of course, for any proposed action the agency may decide to proceed directly to the preparation of an EIS.
5. 42 U.S.C. 7609.
6. See e.g., *Foley Bros*. v. *Filardo*, 336 U.S. 281 (1949) and *Equal Employment Opportunity Commission* v. *Arabian American Oil Co. et al*., 499 U.S. 244 (1991).

impacts involve the extraterritorial application of US law; and (2) is there sufficient evidence of congressional intent to overcome the general presumption against extraterritorial application? These issues remain unresolved in many respects.

While the applicability of NEPA to transboundary environmental effects may be subject to debate, Executive Order 12114, promulgated by President Jimmy Carter in 1979, provides that the Order "represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the *National Environmental Policy Act*, with respect to the environment outside the United States, its territories and possessions" (including agency actions inside and outside the United States).[7] The Executive Order does not purport to define legal obligations under NEPA, but only to define policy within the Executive Branch that "furthers the purpose" of NEPA.

Four basic categories of major Federal actions require some kind of environmental impact assessment under the Order:

- those significantly affecting the environment of the global commons;
- those significantly affecting the environment of a foreign nation not participating with the United States or not otherwise involved in the action;
- those significantly affecting the environment of a foreign nation which provide to that nation certain products or physical projects (for example, a project which in the United States is prohibited or strictly regulated by Federal law to protect the environment against radioactive substances); and
- those actions outside the United States which significantly affect certain resources of global importance.

Certain actions, even if they would otherwise fall within the scope of the Order as outlined above, are exempt from EIA requirements, for example, actions taken by the President; intelligence activities; export licences; certain actions related to national security or armed conflict; votes in international organizations; and disaster/emergency relief. In addition, agencies are accorded flexibility in the contents and timing of

7. 44 *Fed. Reg.* 1957 (1979).

environmental documentation where, for example, prompt action is required or foreign relations would be adversely affected. Unlike NEPA (which, as described elsewhere, can be judicially enforced through the EPA), the Order does not provide a cause of action.

2. ANALYSIS OF CONTENTS AND PROCEDURES

2.1 When an EIS is required

The mandate for EISs appears in section 102(2)(C) of NEPA.[8] The key phrase defining the scope of the requirement is that an EIS should be prepared for "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." Each word in this phrase has been interpreted by courts and defined in the CEQ regulations.

As a threshold matter, a question often arises about how the acting agency may carry out its NEPA responsibility. It is up to the agency to assure that the EIS meets NEPA requirements and follows proper procedures. In cases where more than one federal agency is involved, one of the agencies will be selected as the "lead" agency with responsibility for the NEPA process.

2.1.1 "Proposal"

The agencies and the courts have struggled with the question of when a course of action becomes concrete enough or specific enough to constitute a "proposal." Agencies constantly engage in long-range planning and reform of policies and procedures. They also establish policies or programs that have no immediate effect in themselves but may encourage or permit later specific decisions that will have effects. Among the factors to be considered in this regard are how connected the actions are, whether they are more than speculative, whether state and

8. The key text of 102 reads as follows:
The Congress authorizes and directs that, to the fullest extent possible,... (2) all agencies of the Federal Government shall... (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on: (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitment of resources which would be involved in the proposed action should it be implemented.

federal agencies have negotiated an approach, and considerations of feasibility and necessity.

2.1.2 "Legislation"

The application of NEPA to agency proposals for legislation has been called NEPA's "neglected mandate." Several difficulties have stood in the way of regular use of environmental impact assessment for legislative proposals. One is the Supreme Court's holding that this mandate does not extend to requests for appropriations.[9] More fundamentally, this aspect of NEPA is viewed as an intrusion into the constitutional relationship between the executive and legislative branches of government. If Congress wants an EIS on a bill proposed by the executive, it can enforce that requirement by simply refusing to act on the legislation until an EIS is prepared. If Congress is prepared to approve legislation without an EIS, the courts have declined to intrude into this executive-legislative relationship. If an agency does prepare a legislative EIS, however, it will be held to the normal procedural requirements and tests of adequacy. In this context, the CEQ regulations recognize the exceptional circumstances of a legislative EIS, and call for a one-step process for a statement to accompany the legislation rather than the standard draft EIS – comment – final EIS sequence.[10]

2.1.3 "Major" and "Significant"

For the most part, the question whether an action is "major" and whether it may have "significant" effects is treated as a single inquiry. The CEQ regulations, in defining "major Federal action," state: "[the adjective] 'major' reinforces but does not have a meaning independent of 'significantly'."[11]

Defining "significantly" has been an issue in many cases. Building on interpretations by the courts, the CEQ regulations call for a consideration of both the context of the action and its intensity in determining significance. Context includes such factors as whether the effects are local or regional and whether they are long-term or short-term. Intensity is even more complex: the rules list ten factors for evaluating the intensity or severity of the possible effects, including effects on human health, effects on endangered species, the uncertainty of the effects, and the degree to which the effects are likely to be "highly controversial." In practice, agencies are more likely to prepare an EIS if there is a high level

9. *Andrus* v. *Sierra Club*, 442 U.S. 347 (1979).
10. 40 C.F.R. 1506.8.
11. 40 C.F.R. 1508.18.

of local public interest and concern about the project. This is consistent with the objective of public disclosure and education that is part of the environmental impact assessment philosophy.

2.1.4 "Federal"

NEPA applies only to federal agencies. Federal permits, approvals, loans, leases, financial assistance and similar connections to an action are sufficient to make it "federal." The more difficult matter to resolve is the degree of federal involvement that will trigger the requirement for an EIS. What happens when there is a small proportion of federal funding or when federal approval may be needed for a small part of the project? In most cases, the critical issue is whether the federal agency has the ability to direct, control, or influence the project in some way. Thus, non-specific federal funding through general revenue sharing with a local government is usually not sufficient to make a local project a "federal" activity, but specific, restricted federal share of funding for a project like a highway may satisfy the "federal" test.

2.1.5 "Human Environment"

Over the years, cases involving NEPA have established that the assessment of impacts on the "human environment" should include impacts on cultural and historical artifacts. The human environment includes social and economic conditions as well as the physical environment, but only if there is some change to the physical environment that induces the socio-economic changes. Thus, potential effects on crime in the neighborhood should be examined as part of the EIS for an urban jail building,[12] but psychological stresses related to fear of radiation would not be an effect on the environment in a case where the proposed action will cause no perceptible change to the physical environment but might allegedly cause fear.[13] However, socioeconomic impacts cannot, in themselves, be the trigger for an EIS.

2.2 NEPA and CEQ Procedures for Environmental Impact Statements

2.2.1 Timing

The policy behind the law favors beginning the EIS as early as possible in the project planning stage. The CEQ regulations call for an EIS to

12. *Hanly* v. *Mitchell*, 460 F. 2d 640 (2d Cir. 1972).
13. *Metropolitan Edison Co.* v. *People Against Nuclear Energy* (PANE), 460 U.S. 766 (1983).

be initiated at the feasibility analysis stage or, in the case of applications for licences or approvals, as soon as the application is received. The environmental impact assessment should be part of the decision about whether and how to proceed with the action, and should not become an after-the-fact rationalization for a decision already taken. Nevertheless, the advantage of early environmental assessment must be balanced against the need to have a specific proposed action to assess. In some instances where such dilemmas arise, agencies have prepared "programmatic" EISs discussing the general scope and effect of a nationwide government program, with separate environmental assessments or EISs done for specific projects or actions under that program.

There is no systematic procedure for public notice or participation prior to the initiation of an environmental impact statement or receipt of an application for a permit, licence, or approval. There may be public notice and participation requirements that apply to the underlying action, however, so the public will usually become aware of the proposed action at an early stage.

2.2.2 Scoping

The CEQ regulations have a separate provision on scoping, which calls for publication in the *Federal Register* of a notice of intent to prepare an EIS as soon as possible after the decision to prepare one has been made.

This public notice should define the scope of the EIS and the significant issues it will cover, and invite other Federal, state, and local agencies; Indian tribes; and private citizens to participate in the EIS process. Thus, the agency preparing the EIS will make the first determination of the scope of the assessment, but that determination may be modified based on the basis of input from other interested parties.

2.2.3 Impacts

As noted in Section 2.1, the EIS should evaluate effects on the natural or physical environment and also related social or economic impacts. Several difficult questions may arise in determining which effects need to be evaluated. One question is the cumulative impact of an action, along with that of other actions which may precede or follow it. If the other actions are reasonably connected to the proposed action, or are reasonably foreseeable, their potential impacts should be included, but it is not always easy to draw such lines. Another question is the indirect impact that the action may have. For example, the construction of a high-

way may lead to commercial or residential development of land near the highway. Here, too, the test is one of foreseeability and degree of connection to the proposed action. If a port development project is intended to promote some industrial development, the EIS should evaluate the environmental effects of that industrial development, but it may not need to guess about the residential development that may or may not occur as a further consequence.

Another issue that often arises in this context is "segmentation" – whether the proposed action stands alone or is part of a larger plan that should be evaluated for its overall effect. If there is sufficient connection between the activity described in the EIS and other planned activities, the EIS should evaluate the environmental effects of the total project concept. If, however, the project segment under review is viable as an independent project, and if related projects are not reasonably foreseeable, an EIS on the segment alone is usually adequate.

A final question in determining what impacts to assess is how to manage uncertainty. For example, in the assessment of a project to construct a terminal for oil tankers, does the EIS need to evaluate the consequences of a catastrophic oil spill? After a debate spanning many years, CEQ modified its regulations to abandon the concept of assessing the "worst case" in all such instances, but agencies are still required to apply the best available evidence about reasonably foreseeable possibilities, however low the probability, along with the best available evidence about the likelihood that such an event will in fact occur.[14]

2.2.4 Alternatives

Many courts and commentators agree with the CEQ regulations that the analysis of alternatives is the "heart" of the impact assessment process. As noted earlier, the alternatives analyzed should always include the "no action" alternative. It has also been held, and CEQ regulations state, that an agency is required to consider reasonable alternative means to the same objective even if those alternatives are outside the agency's authority – e.g., energy conservation as an alternative to building a new power plant or on-shore gas development as an alternative to offshore oil leasing.[15]

There may be countless alternatives to a particular action; the choice of which alternatives to examine and how intensively to examine them is not always easy. Once again, the "rule of reason" governs, and

14. 40 C.F.R. 1502.22.
15. 40 C.F.R. 1502.14(c).

different courts and different agencies reach widely varying judgments about what is reasonable. Moreover, which alternatives are considered reasonable depends in part on how the objective or purpose of the proposed action is defined. Leaving such complex considerations aside, there are some typical questions that arise frequently. Alternative sites for a project should be examined, but may be reasonably limited by availability of suitable sites in the context of a particular project, such as a highway between two cities. Another kind of alternative is different project designs; these may be limited by physical, engineering, economic, or other constraints. The analysis of alternatives should contain at least enough detail to allow a reasonable comparison of the environmental effects of the "preferred" or "proposed" action and the alternatives.

During the planning and impact assessment process, the public may suggest alternatives to the proposed action. If they do so, they should provide enough information about their alternative to persuade the agency that it is reasonable and should be analyzed.

2.2.5 Mitigation

Mitigation is a weak link in the NEPA EIS process – following the Supreme Court decision in *Robertson* v. *Methow Valley Citizens Council*.[16] In that case, reaffirming that NEPA is procedural only and not substantive, the Court held that it was sufficient for an EIS to discuss possible mitigation measures to show that environmental impacts had been "fairly evaluated," and that there was no substantive requirement that the proposed action contain specific plans for mitigation measures or commitments to engage in them.

The CEQ regulations require that descriptions of alternatives and assessments of their impacts include consideration of appropriate mitigation measures. They also provide a generic definition of mitigation, including measures to avoid, minimize, or rectify the impact, reduce the impact over time, or replace the affected resource. However, where a decision is based on mitigation measures, then the agency is required to implement them pursuant to CEQ regulations.[17]

2.2.6 Contents of Environmental Assessment Documents

As described earlier, three types of documents can be prepared during the environmental impact assessment process: an environmental assessment, a FONSI, and an EIS. The first two documents result from a

16. 490 U.S. 332 (1989).
17. 40 C.F.R. 1505.3.

preliminary assessment of environmental effects. The contents of a full EIS are discussed in Section 2.2.7 below.

In situations when the agency is considering whether or not to prepare an EIS, it can prepare an environmental assessment, a brief and concise statement that is a public document. The environmental assessment should contain a brief discussion of the expected environmental effects of the proposed action and alternatives, with a view to aiding the agency's decision about whether to prepare an EIS. If, as a result of the environmental assessment the agency decides to prepare a full EIS, the environmental assessment will serve as the starting point for the more detailed EIS. If the environmental assessment shows that the environmental impact will not be significant, the agency will issue a FONSI.

Both the environmental assessment and the FONSI shall be made available to the public and the latter shall include the environmental assessment on which it is based and may incorporate its conclusions by reference. If the proposed action is one for which the agency would normally prepare an EIS or if it is an action without precedent in the agency, the FONSI should be made available for public review and comment for 30 days before the agency makes a final determination.[18]

2.2.7 Contents of Environmental Impact Statements

A full EIS is a "detailed statement" containing the types of analysis and consideration of alternatives described above. Through many court decisions interpreting the elements of an EIS spelled out in the statute, there is substantial legal guidance about the scope and degree of analysis that an EIS must contain. This guidance, which covers many of the issues discussed above, is summarized in 25 sections of the authoritative CEQ regulations.[19]

The CEQ regulations require a draft EIS covering all the issues decided upon in the scoping process that "must fulfill and satisfy to the fullest extent possible" the NEPA requirements for an EIS. The draft EIS is a public document circulated to other federal agencies, interested or affected Indian tribes and state and local agencies, project applicants, citizen groups, and others. All these parties have the opportunity to comment in writing on the draft EIS.

In addition to covering the environmental effects of the proposed action and alternatives to the proposed action, the final EIS must contain

18. 40 C.F.R. 1501.4(e).
19. 40 C.F.R. Part 1502.

a summary of the comments received on the draft EIS and the agency's response to those comments, which may include new alternatives, new analysis of effects, or reasons why the agency did not make any change from the draft. No decision on the proposed action shall be made by a Federal agency until 30 days after publication of the notice of availability for a final EIS, and the final EIS must be completed and available to the agency decision maker and the public before the final decision on the proposed action.[20]

There are two common circumstances in which the final EIS may not provide a sufficient evaluation of the environmental effects at the time the final action decision is being made. First, new information may have become available, particularly if the agency decision has been delayed for a long time, and the agency has a continuing responsibility to accumulate and consider new information. Second, the proposed action may have changed enough that the original EIS no longer fairly describes the proposed action or its effects. In either case, the agency will need to supplement the EIS. Preparation of a supplemental EIS normally follows the same pattern and procedure as for the original EIS, except that the scope may be limited to the new information or the modification of the proposed action, and scoping is not required.

2.2.8 Administrative and Judicial Review

As noted previously, the US procedure has both administrative and judicial review. The administrative review is conducted by the EPA under Section 309 of the *Clean Air Act*, and can result in an EPA comment that the EIS is inadequate or that the underlying action is environmentally unsatisfactory. By law, the EPA's comments are public. If the EPA makes negative comments and the problems are not corrected in the final EIS, or the lead agency wants to proceed with the action, the EPA may refer the matter to CEQ. Other agencies objecting to a proposed action may also initiate referrals to CEQ.

The referral procedure is spelled out in the CEQ regulations.[21] It requires the referring agency to be specific in its objections, and allows the acting agency an opportunity to respond. Since the referral is a matter of public record, CEQ will also take public comments into account. CEQ may call interagency meetings or conduct public meetings or hearings in its effort to resolve the disagreement. In rare instances, the matter may be referred to the President for decision. Agencies have invoked

20. 40 C.F.R. 1506.10(b).
21. 40 C.F.R. Part 1504.

CEQ referral infrequently (an average of one per year) but often with great effect, mostly to protect important resources under their jurisdiction from the effects of another agency's proposed action.

Judicial review of agency actions has played a central role in establishing NEPA's environmental impact assessment mandate and in defining its requirements. NEPA itself does not provide for judicial review, so all review actions have been brought under the Administrative Procedure Act (APA), which allows judicial review of final agency actions that are alleged, among other things, to be contrary to law. The earliest NEPA cases were generally brought against agencies that had decided on an action without preparing an EIS. As agencies began to accept their obligations to prepare an EIS, the focus in later cases shifted to review of the adequacy of the EIS. In either situation, the courts have the power to enjoin implementation of the agency action until the NEPA requirements are properly fulfilled. In many instances, the extra study and delay involved in EIS preparation, or the publication of findings of no significant environmental impact, have caused agency or private project applicants to abandon the action or substantially modify it. The delay also allows opponents of projects time to marshal political support to get the Congress or federal or state agencies with some control over the project to take steps to block or modify it. In some cases, political involvement has resulted in Congressional action to exempt a particular project from NEPA. The Alaska oil pipeline in Alaska is a notable beneficiary of such an exemption.

2.2.9 Post EIA Monitoring

Neither NEPA nor the CEQ regulations include a general requirement to monitor the environmental effects of actions taken. However, the CEQ regulations do require monitoring and enforcement "where applicable for any mitigation."[22] In addition, the CEQ regulations note that agencies "may provide for monitoring to assure that their decisions are carried out and should do so in important cases."[23] The record on post-action monitoring, however, is poor. Agencies and scholars who have attempted to assess the benefits of environmental impact assessment have been frustrated by the scant amount of objective data available to evaluate whether the predictions of effects in EISs have been reasonably accurate.

22. 40 C.F.R. 1505.2(C).
23. 40 C.F.R. 1505.3.

2.2.10 Public Notice and Participation

One of the primary functions of the environmental impact assessment process under NEPA is to educate and inform the public, as well as government decision makers, about the environmental consequences of planned actions. NEPA itself requires that the EIS and federal, state, and local agency comments on the EIS be made available to the public.[24] The CEQ regulations set forth comprehensive procedures for "public involvement" in the environmental impact assessment process.[25] In particular, the CEQ regulations call for extensive public notice of the availability of documents and of any hearings or meetings related to NEPA. This includes direct mail notice to those who have expressed interest or reside in the immediate vicinity of a project site, publication in the *Federal Register* for cases of national interest, and notice through state and area wide clearinghouses, local newspapers, and other local media in the affected local areas. Hearings or meetings should be convened whenever "appropriate" or required by law, for example because of the degree of environmental controversy, or if they are requested by other interested agencies. CEQ regulations require that agencies allow a minimum of 45 days for comments on draft EISs.

The *Freedom of Information Act*, a federal agency disclosure law, limits its disclosure of information under certain conditions, most notably for the protection of privately-developed confidential business information and for the protection of classified government secrets. Thus, the Supreme Court has held that the Department of Defense must prepare an EIS for a weapons storage facility that would presumably store nuclear weapons, but that it could keep the EIS secret in order not to disclose whether nuclear weapons would in fact be stored there.[26]

3. SUMMARY OF STATE LEGISLATION

Fourteen states, the District of Columbia, and Puerto Rico have complete statutory programs requiring environmental impact assessments. Three other states have partial environmental impact assessment requirements under executive order, and nine states have procedures that cover particular activities or particular state agencies. This section provides a brief analysis of the statutory programs in two key border states – California and New York – that have long-standing and fully developed programs. It also notes the circumstances of two other border states – Texas and Michigan – that lack comprehensive statutory programs.

24. 5 U.S.C. 552.
25. 40 C.F.R. 1502.19, Part 1503, and 1506.6.
26. *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139 (1981).

3.1 California

The *California Environmental Quality Act* (CEQA)[27] requires an environmental impact report (EIR) on any project that a state agency or local government intends to carry out, support financially, or for which it intends to grant a permit, licence, certificate, or similar government entitlement. Nondiscretionary "ministerial" actions are excluded, as are feasibility studies and emergency actions. When comparing this coverage to the federal NEPA, it should be kept in mind that most private development projects involving construction or other physical alteration of the environment will require the approval of one or more state or local agencies, so most private projects are covered by the CEQA.

The general structure of the CEQA process is similar to the federal system. Some actions or project types are categorically excluded. For non-excluded actions, the agency begins with a quick assessment of the potential environmental effects. If those are not significant, the agency may issue a "negative declaration" stating that an EIR is not required. If the potential effects are significant, the agency proceeds to preparation of the EIR. Unless extensions are granted, the EIR must be completed within one year.

The scope and content of an EIR and the procedures associated with EIR preparation are also similar in most respects to a federal EIS. There are two important differences, however, that are worth highlighting.

3.1.1 Mitigation and Alternatives

Unlike the purely procedural approach under NEPA, the CEQA environmental assessment process has a substantive element. In California, mitigation of environmental effects is required whenever the project could have at least one significant environmental effect, unless mitigation is infeasible. To satisfy this requirement, mitigation measures that are incorporated into the proposed action must be enforceable by government permit conditions or binding agreements. The requirement to consider alternatives is also more strongly stated than in NEPA: agencies have a "strong duty" to consider alternatives and must give reasonable substantive consideration to alternatives in light of the nature of the project. The "no action" alternative should be examined if there are no other feasible alternatives.

27. Cal. Pub. Res. Code 21000–21174.

3.1.2 Judicial Review

The scope of judicial review of California EIRs is somewhat different than under the federal NEPA system. The agency action is generally reviewable only when there is a prejudicial abuse of discretion. Such abuse of discretion may be found for failure to prepare an EIR when the action may have a significant environmental effect, if the statement fails to meet statutory requirements, or if the conclusions of the EIR are not supported by substantial evidence.

3.2 New York

New York's *State Environmental Quality Review Act* (SEQRA) governing environmental impact assessment, like the California law, is modeled closely on NEPA, but expands upon or fills gaps in the NEPA process. It has the same broad scope, applying to state and local agency actions including permits, leases, licences or other entitlements. It also applies to agency decisions on policies, regulations, or procedures. Only ministerial acts, repair and maintenance activities, and enforcement actions are excluded. The term "environment" is broadly defined to include "existing community or neighborhood character" and population concentration, distribution, or growth, in addition to the physical, historical and aesthetic environment.

3.2.1 Mitigation

The SEQRA, like the CEQA, has a substantive element lacking in the federal system. In the New York procedure, the agency taking the action must make an explicit finding that all requirements of the SEQRA have been carried out and that all practicable means will be taken to minimize or avoid adverse environmental effects. Moreover, under a separate law, the New York Commissioner of Environmental Conservation is empowered to base any determinations in relation to licences, orders and other acts of the commission on the cumulative impacts on all state resources, including fish and wildlife, water, land and air.

3.3 Texas and Michigan: Partial Programs

In view of their significance as states where activities with potential transboundary environmental effects might be carried out, and given their much less complete approach to environmental impact assessment, the existing requirements in Texas and Michigan are worth a brief mention.

3.3.1 Texas

Texas has no comprehensive law or regulation requiring environmental impact assessment. Four separate provisions of the Texas codes, however, call for some kind of environmental assessment in specific circumstances. The Texas Water Code calls for draft EIAs that "comply with NEPA" to accompany applications to lease state-owned navigation district lands.[28] The Texas Administrative Code contains three other EIA requirements. The Texas School Land Board can require draft EISs from private parties for projects on state-owned lands; this section of the code contains detailed guidelines on the form and content of such statements.[29] The Texas Water Development Board can require an EIS as part of the evidence for hearings on proposed agency actions; again, the Code provides guidance on form and content, including social and economic impacts.[30] Finally, the Texas Department of Transportation requires EISs for any state highway improvement projects with significant environmental impacts.[31]

3.3.2 Michigan

In 1971, 1973, and again in 1974, the governor of Michigan promulgated executive orders addressing the subject of environmental impact statements. The 1974 order was superseded in 1989 by another order, Executive Order 1989 – 3, establishing the Governor's Council on Environmental Quality and charging the Council, among other duties, "To set forth guidelines to be used by state agencies for the preparation of environmental impact statements and environmental assessments which shall be required for each proposed major state action significantly affecting the environment, and to monitor compliance with the guidelines." As of 1995, however, the Governor's Council on Environmental Quality has been disbanded, and no other state agency has been charged with the development of EIA guidelines. Lacking any set state policy or procedures, Michigan state agencies do not prepare such assessments.[32]

28. Texas Water Code 61.116.
29. 31 Tex. Admin. Code 155.21, 155.24.
30. Tex. Admin. Code 353.21-353.26.
31. 43 Tex. Admin. Code 11.87–11.88
32. This summary is based on a copy of the 1989 executive order obtained from the Governor's Legal Office and a conversation with Mr. Dennis Armbrister of the Environmental Assistance Center in the Michigan Department of Natural Resources.

PUBLIC ACCESS TO GOVERNMENT-HELD ENVIRONMENTAL INFORMATION

REPORT ON NORTH AMERICAN LAW, POLICY AND PRACTICE

PUBLIC ACCESS TO GOVERNMENT-HELD ENVIRONMENTAL INFORMATION

Report on North American Law, Policy and Practice

INTRODUCTION

Background to the Report

In 1993, Canada, Mexico and the United States entered into the North American Agreement on Environmental Cooperation (NAAEC). In tandem with establishing a regional, cooperative framework for environmental protection, the NAAEC emphasizes the importance of public participation in conserving, protecting and enhancing the environment. The agreement commits the Parties to provide opportunities to the public to obtain information about environmental laws and decisions and to participate in environmental decision-making processes. The Council, established under the NAAEC, is mandated to promote and, as deemed appropriate, to develop recommendations regarding public access to environmental information held by the Parties' public authorities, including information on hazardous materials and activities in their respective communities. The Council is also mandated to promote and recommend opportunities for the public to participate in decision-making processes related to public access.

In September 1995, in furtherance of these related obligations and commitments, the Commission for Environmental Cooperation (CEC) brought together an ad hoc group of representatives from North American government agencies, non-governmental organizations and the private sector with expertise in policies and procedures for access to environmental information to provide their advice. The result was a consensus report recommending a list of essential elements necessary for the Parties to the NAAEC to ensure effective public access to environmental information, including reforms to law, policy and procedure to ensure public right of access in a timely, affordable manner.

The Council of the CEC responded in October 1995 with a joint policy statement issued through Council Resolution 95-8 entitled Public Access to Environmental Information. The resolution reaffirms the commitment by the Parties to public participation in environmental protection and the importance of promoting public access to environmental information, subject to the sovereign right of the Parties to establish their own environmental policies as well as mechanisms to access and disseminate information. By the resolution the Council agreed:

a) To identify present laws and practices pertaining to public access to environmental information in the three countries in accordance with the respective laws of the Parties, within the scope of work undertaken by the Commission;

b) To implement actions and initiatives aimed at improving education and communication programs concerning environmental issues and access to environmental information in our respective nations;

c) To explore ways of facilitating ease of access, affordability and timeliness of obtaining information to which members of the public are entitled as prescribed by domestic law;

d) To promote an effective and timely exchange of information among museums and biodiversity research institutions of our countries.

The Report

In 1995 the CEC Secretariat commissioned this report in support of these undertakings. The purpose of this report is to provide information on the laws, policies and practices of Canada, Mexico and the United States for providing public access to environmental information held by governments. While the report focuses on current regimes for providing public access to environmental information, it also references any reform processes proposed or underway where that information was revealed.

The report surveys federal regimes for providing public access to environmental information in each of the three countries, with selected additional examples, where appropriate, of state and provincial regimes.

For the purposes of this report, the term "access" is intended to include affirmative efforts on the part of government agencies to provide environmental information to the public. Consistent with the «elements of effective access to environmental information» as outlined above, the report addresses the following matters:

- legal right of access;
- access policies;
- ease of access;
- timeliness;
- affordability of the processes.

For the purposes of the report, the term "public" includes any interested citizen or resident of any NAFTA country, as well as non-governmental organizations, companies, industry associations, labour unions and others. "Public" does not include governments, whether federal, state, provincial, territorial or municipal.

Finally, the term "environmental information" is understood to include a broad range of categories of information generated by, or otherwise in the possession of, a public authority including information related to:

- environmental assessments of proposed projects;
- issuance of licences and permits for proposed projects;
- proposed regulations, policies, programs or plans that affect the environment;
- enforcement and compliance actions related to environmental laws; and
- toxic substances release inventories.

These categories of environmental information were selected on the basis of several considerations. A primary consideration is that Article 10(5) of NAAEC provides that the CEC is to develop recommendations regarding public access to government-held environmental information relating to opportunities of the public to participate in deci-

sion-making, and to information on hazardous materials and activities in communities. The first four categories of information conform closely to the CEC's function to develop recommendations relating to public access to environmental information in support of public participation in decision-making. The fifth category of information, release inventories of toxic substances, conforms closely to the reference in Article 10(5) to information on hazardous material and activities.

Methodology

The report was prepared for the CEC by a team of legal consultants with particular expertise in access to environmental information. The information provided is based for the most part on interviews with government officials, government documents and related literature.

The focus of the report is in direct response to the Council Resolution 95-08 and the elements of effective access to environmental information proposed by the Expert Advisory Committee to the CEC.

Disclaimer

The report does not necessarily reflect the opinions or views of either the Parties or the CEC. The CEC also wishes to clarify that while efforts were made to update the report to include current reforms to the Parties' laws, polices and practices, the information is considered valid only to December 1997.

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CANADA

1. CONSTITUTIONAL AND LEGAL FRAMEWORK FOR PUBLIC ACCESS TO INFORMATION

1.1 Introduction

This document describes and evaluates public access to five categories of environmental information at the federal level in Canada, and on a selected basis, at the provincial level.This first section provides an overview of constitutional provisions and federal and provincial laws that are relevant to public access to environmental information in Canada. Generic access to information laws are dealt with in some detail, given their prime importance for public access to the environmental information held by federal and provincial governments. The federal *Access to Information Act*[1] is discussed, as is the *British Columbia Freedom of Information and Protection of Privacy Act*.[2]

1.2 Overview of Constitutional Provisions

The Canadian Constitution[3] recognizes each level of government (federal and provincial) as having its own proper legislative powers such that every individual is subject to the laws of both the federal and a provincial government (excepting residents of the two northern territories, whose territorial governments are creations of federal law). Neither level of government is subordinate to the other, and both have important legislative powers with respect to the environment. In documenting and evaluating public access to environmental information held by the various governments in Canada, the federal and provincial legislatures are empowered to legislate with respect to the public's access to information held by the federal and provincial governments respectively, subject to any constitutional provisions that might limit those powers.

The Canadian Constitution does not explicitly set out the rights of individuals to obtain access to environmental information held by gov-

1. R.S.C. 1985, c. A-1.
2. S.B.C. 1992, c. 61, as amended by S.B.C. 1993, c. 46.
3. Enacted as the *British North America Act*, 1867, 30 & 31 Victoria, c. 3 (UK), renamed by item 1 of the Schedule to the Constitution Act, 1982, being Schedule B of the *Canada Act*, 1982, c. 11 (UK).

ernments. However, several provisions of the Constitution are relevant, if of limited importance. Sections 18 and 19[4] require the statutes, records and journals of Parliament and the New Brunswick legislature respectively to be printed and published in both English and French. Thus for these jurisdictions there is a constitutionally entrenched obligation to publish environmental statutes and the records of parliamentary debates and committees dealing with environmental issues, among others, in both official languages.

The *Canadian Charter of Rights and Freedoms*[5] in the Canadian Constitution sets out several rights and freedoms relevant to public access to environmental information. The Charter declares that everyone has the right to freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication, as well as freedom of peaceful assembly. The Charter also includes the right of any member of the public in Canada to communicate with and receive available services from the head or central office of an institution of Parliament or government of Canada in both English and French. Together, these provisions could be interpreted to imply certain obligations on the part of the government of Canada to provide public access to information held by the government.

Finally, the Charter provides that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. It is arguable that fundamental justice in this context guarantees the right to participate in environmental decisions that put life, liberty or personal security at risk.[6] The right to participate in decision making would include a right of access to environmental information. Laws denying such public access could be held by a court to be unconstitutional.

In summary, the Canadian Constitution and Charter provide limited guarantees, if any, of public access to environmental information held by either level of government.

4. *Ibid.*
5. Being Part I of the *Constitution Act, 1982.*
6. See M. Jackman. Rights and participation: The use of the Charter to supervise the regulatory process. *Canadian Journal of Administrative Law and Practice* Vol. 4, p. 23.

1.3 Overview of Federal Access Legislation, Policies and Practices

1.3.1 Access to Information Act

Legal Right of Access to Information

The *Access to Information Act*[7] (AIA) is the cornerstone legislation for access to environmental information at the federal level in Canada. Enacted in 1983, the AIA establishes an enforceable right of access to federal governmental information for Canadians, subject to a number of important exceptions. The AIA provides a process of appeal for refusal of access to an independent Information Commissioner and then to the Federal Court.

As legislation that applies to all information held by the Government of Canada, the AIA is relevant to public access to environmental information in all of the information categories of interest in this study. Due to its importance, the AIA regime is explained in detail below.

The AIA guarantees the rights of Canadians to information held by the federal government, including environmental information, subject to specific exemptions. The stated purpose of the AIA is to provide a right of access to information in records under the control of a governmental institution in accordance with the principles that governmental information should be available to the public, that necessary exemptions to the right of access should be limited and specific, and that decisions on the disclosure of governmental information should be reviewed independently of government.

An independent Office of the Information Commissioner reporting to Parliament is established under the AIA. The Information Commissioner is an information ombudsman, with powers to investigate complaints and to seek judicial review where an information seeker may have been improperly denied access to information. The Information Commissioner reports annually on the implementation of the AIA, reporting on public complaints and their disposition, as well as any emerging barriers to access, such as fees or slow response times to requests for information.

Under the AIA, Canadians and landed immigrants have a right to and shall, on request, be given access to any record under the control of a governmental institution. The right of access is elaborated to include the

7. *Supra*, note 1.

right to be given an opportunity to examine the record or part thereof, or be given a copy thereof subject to regulations.

The right of access is limited by provisions in the AIA which set out exclusions and mandatory and discretionary exemptions. A key difference between exempted documents and excluded documents (such as Cabinet confidences) is that the Information Commissioner and the Federal Court of Canada have the authority to examine the former but not the latter. The most important exclusion is that the AIA does not apply to Cabinet confidences, including memoranda, discussion papers, briefing papers, Cabinet meeting agendas and minutes, and draft legislation. Thus, the only legislation that applies to Cabinet confidences is the *Official Secrets Act*,[8] which is designed to prohibit and control access to sensitive governmental information. The unauthorized release to the public of Cabinet confidences that have been in existence for less than 20 years could result in criminal charges being brought against the individuals involved.

A second exclusion is that the AIA does not apply to published material or material available for purchase by the public. When combined with this exclusion, the Crown's copyright to works published by or under the direction or control of any government department pursuant to the *Copyright Act*[9] becomes a tool to control public access to government information. The prospect of revenue generation from the licensing of publication of works subject to Crown copyright is likely to act as a disincentive to providing access under the AIA.

The AIA sets out numerous exemptions, some of which are detailed below. Heads of governmental institutions must refuse to disclose any requested record that was obtained in confidence from foreign, provincial or municipal governments or international organizations of states unless the government or organization consents to the disclosure or makes the information public. Similarly, access to third-party trade secrets or financial, commercial, scientific or technical information that is confidential is prohibited unless the third party consents to disclosure, or disclosure is in the public interest as it relates to public health, public safety, or protection of the environment.

Heads of governmental institutions may refuse to disclose any requested record that could "reasonably be expected to be injurious" to the conduct of international or federal-provincial relations, the defense of Canada, or to Canada's econo mic interests; that could threaten the safety of individuals; or is subject to solicitor-client privilege, among

8. R.S.C. 1985, c. O-5, as amended.
9. R.S.C. 1985, c. C-42, as amended.

other discretionary exemptions. For the first set of exemptions, the information must be released if there is no reasonable expectation of injury. Access to trade secrets or to financial, commercial, scientific, or technical information that belongs to the Canadian government and has substantial value may also be refused.

Another limitation is that only Canadians and permanent residents within the meaning of the *Immigration Act*[10] (landed immigrants) are entitled to take advantage of the rights set out in the AIA.

Access Policies

A number of Canadian governmental policies are relevant to public access to environmental information under the AIA. The 1993 Access to Information Policy issued by the Treasury Board states that:

> It is the policy of the government to carry out the spirit and requirements of the *Access to Information Act* in a manner which:
>
> - Recognizes the duty to inform as the essential principle underlying the access legislation;
>
> - Discloses to requesters the maximum information possible which is not injurious to the public and private interests identified in the exemptions in the legislation and does so in the most timely and consistent manner given the nature and scope of the request; [...][11]

The 1990 Communications Policy issued by the Treasury Board states that it is governmental policy to:

> Provide information to the public about its policies, programs and services that is accurate, complete, objective, timely, relevant and understandable.[12]

With respect to availability and dissemination of information, the Communications Policy states:

> The government has a clear responsibility to ensure that information about federal policies, programs and services is disseminated or made available to all regions of Canada. [...] However, the provision of information is costly and should be undertaken only where there is a clear duty to

10. R.S.C. 1985, c. I-2, as amended.
11. Treasury Board. Access to information. In: *Information and administrative management*. Ottawa: Minister of Supply and Services Canada. 1993. Chap. 1-1, p. 1.
12. Treasury Board. Communications. In: *Information and administrative management*. Ottawa: Minister of Supply and Services Canada. 1991. Chap. 1-1, p. 1.

> inform the public or where the user is willing to pay for it. The full cost of providing information to serve the proprietary interests of individuals should not be borne by taxpayers at large.[13]

Thus, the Communications Policy suggests that disseminating governmental information at an affordable price should occur only where there is a clear duty to inform. This could be interpreted to mean that the full costs of any information disseminated should be recovered where there is no clear duty to disclose (i.e., where the head of government has discretion whether or not to disclose).

Guidelines issued by the Interdepartmental Working Group on Database Industry Support (IWGDIS) in 1991 support licensing governmental information to private sector vendors as a way to generate revenues. Such licensing is a way of publishing the data such that it would no longer be subject to access requests under the AIA. Royalties and fees generated from such licensing can now be retained by the department under a 1993 Treasury Board policy.

The 1994 Information Management Policy issued by the Treasury Board goes so far as to require governmental institutions to make their information holdings available for purchase by the public where appropriate and where there is a significant public demand.[14] Wide-scale application of this policy could have the effect of limiting the application of the AIA to governmental information where there is no significant public demand.

Ease of Access

Several barriers to convenient public access to information under the AIA deserve mention. The first is that the AIA requires that a request for access to a record "be made in writing to the governmental institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record." Thus, the onus is placed on the person seeking access to identify the governmental institution and provide enough information about the record to which access is sought to enable the institution's personnel to identify that record.

The duty of the governmental institution is limited to making information available only to requests in writing that identify the

13. *Ibid.* Application of the policy, Chap. 1-4, p. 6.
14. Information Commissioner. *Information technology and open government*. Information Commissioner of Canada. 1994, pp. 15-16.

records sought. The governmental institution has no duty to take positive steps to ease public access to information.

The AIA provides minimal guidance regarding the format of records to be disseminated. For example, the AIA does not indicate in which situations governmental institutions should or must provide records in particular formats (e.g., computer diskette, Braille, large print).

One measure of the convenience of public access to information is the number and disposition of complaints made to the Information Commissioner against the government. In 1994-95, 960 complaints were made, of which 63 percent were resolved through remedial action by the Information Commissioner and 29 percent were considered not to be substantiated.[15] This compares to 768 complaints in 1993-94, 720 complaints in 1992-93, and 873 complaints in 1991-92.[16]

Timeliness

The AIA requires that the governmental institution, subject to certain caveats, notify the information seeker, within 30 days after the request is received, as to whether or not access will be given. If access is to be given, the person must also be given access to the record within 30 days after the request is received. The 30-day time period may be extended "for a reasonable period of time" where the request is for a large number of records or where consultations are necessary to comply with the request.

In 1994, the Information Commissioner concluded that processing times in response to access requests were "sluggish."[17] The percentage of requests processed within 30 days fell from 75 percent in 1983-84 to 58 percent in 1992-93. The percentage of requests that took longer than 60 days to process increased from six percent in 1983-84 to 21 percent in 1992-93.

Affordability

The AIA permits regulations to be developed setting out fees that may be charged to those seeking information. The application fee cur-

15. Information Commissioner. *Annual report: 1994-1995.* Information Commissioner of Canada. 1995, p. 59.
16. Information Commissioner. *Annual report: 1993-1994,* p. 43; *Annual report: 1992-1993,* p. 35; *Annual report: 1991-1992,* p. 34. Information Commissioner of Canada.
17. *The Access to Information Act*: *10 years on.* Information Commissioner of Canada, 1994, p. 21.

rently prescribed by the regulations is C $5.00. Additional fees may be charged for costs associated with document reproduction, and for every hour in excess of five hours that is reasonably required by employees of the governmental institution to search for the record and prepare it for disclosure. The fee for photocopying is C $0.20 per page, and for microfiche duplications, C $0.40 per fiche. In 1994, the Information Commissioner reported that according to 1992 statistics, the government collected on average C $12.30 in fees for each completed request.

1.3.2 Other Federal Access to Information Laws

1.3.2.1 Workplace Hazardous Materials Information System

The Workplace Hazardous Materials Information System (WHMIS) is a combination of federal and provincial laws designed to guarantee workers' right to know the potential dangers of hazardous materials and products encountered in the workplace. The WHMIS includes three main sets of requirements: labeling, disclosure by means of material safety data sheets and worker training and education. The federal *Hazardous Products Act*[18] obliges importers, manufacturers, processors and sellers to warn of the hazardous nature of such products and materials. Provincial and territorial legislation and the Canada Labor Code require employers to ensure that hazardous materials are appropriately labeled, that material safety data sheets are readily available to workers and that workers are educated and trained to handle hazardous materials safely.

The products and materials regulated under the Act fall into the following classes: compressed gas, flammable and combustible material, oxidizing material, poisonous and infectious material, corrosive material, and dangerously reactive material. The *Hazardous Materials Information Review Act*[19] sets out a system to address claims of confidentiality that arise when information is provided in order to comply with the *Hazardous Products Act*.

1.3.2.2 Canadian Environmental Assessment Act

The *Canadian Environmental Assessment Act*[20] (CEAA) sets out additional rights of public access to environmental information at the federal level. One of the purposes of the CEAA is to ensure that there be an

18. R.S.C. 1985, c. H-3, as amended.
19. R.S.C. 1985, c. 24 (3rd Supp.), Part III.
20. S.C. 1992, c. 37.

opportunity for public participation in the environmental assessment process. The CEAA requires federal authorities to establish public registries to facilitate public access to records relating to environmental assessments, and that these public registries be established and operated in a manner that ensures convenient public access. The Minister of the Environment is obliged to report annually to Parliament on the administration and implementation of the CEAA.

1.3.2.3 Canadian Environmental Protection Act

The *Canadian Environmental Protection Act* (CEPA) sets out as duties of the Government of Canada the obligation to provide information to the people of Canada on the state of the Canadian environment and to encourage the participation of Canadians in the making of decisions that affect the environment. The CEPA requires the Minister of Environment to publish notification of substances to be evaluated for toxicity, the toxicity declaration for substances, and proposed regulations and orders to be made under the CEPA in the *Canada Gazette.* Any person may file a notice of objection to the proposed regulation or order within 60 days of such publication, and the Minister may establish a Board of Review to investigate the objection. The CEPA requirements relating to publication of an annual report and to citizen applications for investigations of alleged offenses under the CEPA also afford opportunities for public access to environmental information.

Further, the Minister may publish a notice in the *Canada Gazette* requiring any person to provide the Minister with any information needed to determine whether or not a substance is toxic. Persons providing information are entitled to submit a request that such information be kept confidential, and subject to the other provisions in the CEPA, the Minister and other persons are required to keep the information confidential. Except for information to which the *Hazardous Material Information Review Act* applies, the Minister may disclose information notwithstanding the AIA if the disclosure is in the interest of public health, public safety, or the protection of the environment, and the public interest outweighs the material financial loss or prejudice to the competitive position of the person on whose behalf it was provided.

Finally, the Minister of the Environment is authorized to publish or distribute both information about all aspects of the quality of the environment and a report on the state of the Canadian environment to be prepared on a periodic basis.

1.3.2.4 Pest Control Products Act

The federal *Pest Control Products Act*[21] and related regulations govern the production and registration of pesticides. The legislation requires that pesticides toxic to plants and animals be registered, conform with certain specified safety standards, and be properly labeled and packaged before they may be imported, exported or sold. On 1 April 1995 the Pest Management Regulatory Agency was established to consolidate federal pest management regulations and to oversee the Pest Management Information Service (PMIS).

The PMIS answers questions about pest control products and use of pesticides; undertakes research and provides information about different categories of pesticides; and responds to inquiries about the pesticide registration process in Canada, product labels, safety precautions, possible preventative measures and alternative pest management practices. Information is not provided about non-active ingredients of pesticides, nor is proprietary or confidential business information made accessible. The PMIS provides a national toll-free telephone service for Canadians and maintains a Web site on the Internet.

1.3.2.5 Other Governmental Policies

Certain governmental policies such as the Regulatory Policy enhance public access to government-held environmental information. Other policies, such as the Information Management Policy and the Communications Policy, are now restricting, and may further restrict, public access to environmental information through the imposition of fees and other charges designed to recover the costs to government associated with producing the information.

Finally, it is noteworthy that the *Official Languages Act*[22] requires that much information held by the federal government be made available in both English and French. Federal institutions have the duty to ensure that any member of the public can communicate with, and obtain available services in either official language from its head or central offices, offices located in the National Capital Region, or elsewhere in Canada where there is significant demand for such communication or those services.

21. R.S.C. 1985, c. P-10.
22. R.S.C. 1985, c. 31 (4th Supp.), as amended.

1.3.3 Access to Information Concerning Judicial Proceedings

Federal laws governing the Federal Court of Canada and the Supreme Court of Canada provide that courts are to be open to the public and that court documents are available to the public. For example, in the Federal Court, any person may, subject to appropriate supervision and when the facilities of the Court permit, inspect any Court file and obtain a copy on payment of a fee at the rate of C $0.40 per page. Rules relating to pre-trial production of documents and discovery of witnesses, as well as cross-examination of witnesses at trial enable litigants to obtain environmental information from other parties to the case. Finally, the Criminal Code of Canada provides that criminal proceedings are to be in open court unless the court directs otherwise in the interests of public morals, the maintenance of public order or the proper administration of justice.

1.4 Overview of Provincial Access Legislation, Policies and Practice

With the proclamation of the *Alberta Freedom of Information and Protection of Privacy Act* on 1 December 1994, all Canadian provinces except Prince Edward Island, now have freedom of information statutes in force similar to the federal *Access to Information Act*. Members of the public have access rights to government-held information subject to a number of exemptions and exceptions that are broadly similar to those under the federal legislation.

Legislation in Alberta, British Columbia, Ontario and Saskatchewan designates an Information Commissioner, with an independent watchdog function similar to the federal Information Commissioner, while the Quebec law establishes a three-member Access to Information Commission (*Commission de l'accès à l'information*). The Manitoba and New Brunswick statutes expand the mandate of the provincial ombudsman to include access to information complaints. In Newfoundland, the reviewing officer is a judge of the Supreme Court of Newfoundland, while in Nova Scotia, the reviewing officer is either appointed by Cabinet or is a judge of the Supreme Court of Nova Scotia.

Ontario and Saskatchewan have separate statutes setting out public access rights to information held by municipal governments, while other provinces, such as British Columbia, address rights to information held by municipal governments in the statute that applies to the provincial government as a whole.

Most provincial access to information laws provide that "any person" has the right to the governmental information. Local residency or other connections or associations with the province do not appear to be required to exercise this right. The Newfoundland law is similar to the federal law, but dissimilar to those of other provinces in limiting access rights to Canadian citizens and landed immigrants. Neither the federal nor the Newfoundland statute appear to preclude the use of agents who are Canadian citizens or landed immigrants to request the desired information from the government in question. The *British Columbia Freedom of Information and Protection of Privacy Act* (FOIPPA) is discussed in detail as it represents one of the more sophisticated provincial regimes.

1.4.1 Freedom of Information and Protection of Privacy Act (British Columbia)

Legal Right of Access to Information

Enacted in 1992, the *British Columbia Freedom of Information and Protection of Privacy Act*[23] (FOIPPA) is broadly similar to the federal *Access to Information Act* in that it entrenches the right of access of any person to information held by the provincial government subject to limited exceptions. An independent Information and Privacy Commissioner is established as an officer of the provincial legislature with responsibility for monitoring the administration of the FOIPPA and conducting investigations and audits to ensure compliance.

As with the AIA, FOIPPA requires an applicant to make a written request to the public body that the applicant believes has custody or control of the record. The BC legislation surpasses the AIA in placing a positive duty on provincial officials to respond to information requests. The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Cabinet confidences are subject to an exception under FOIPPA but are not excluded as under AIA. A public body cannot refuse to disclose:

- records that have been in existence for 15 years;
- information in the record of a Cabinet decision on an appeal under an Act; or
- background documents if the decision has been public or implemented, or if five years have passed since the decision was made.

23. *Supra*, note 2.

FOIPPA sets out other discretionary exceptions, such as those for policy and legal advice, personal information, information relating to intergovernmental relations or negotiations, the financial or economic interests of public bodies, and business interests of third parties. An additional exception permits public bodies to refuse to disclose information which could reasonably be expected to result in damage to or interfere with the conservation of natural or heritage sites, or of endangered or rare species of animals and plants.

Unlike AIA however, FOIPPA provides for a public interest override for all exceptions. Disclosure is required where there is a risk of significant harm to the environment, to the health or safety of the public or a group, or where disclosure of the information would be clearly in the public interest.

Access Policies

In October 1993, the Government of British Columbia produced a *Policy and Procedures Manual*. This manual is the authoritative guide to the FOIPPA and is updated periodically. The document is detailed and addresses many public access issues. One interesting policy statement in the *Policy and Procedures Manual* is that a Freedom of Information request should only be made as a last resort, when requests through informal channels have not succeeded. This statement appears to recognize that unless informal systems are recognized and valued, the entrenchment of access rights in law may lead to diminished access as informal systems of providing access are discontinued. A second policy initiative is the *Freedom of Information Directory*, which is a listing of records held by British Columbia public bodies.

Ease of Access

As with the AIA, FOIPPA requires public bodies to create a record for an applicant as long as: the record can be created from a machine readable record in its custody or under its control; using its normal computer hardware, software and technical expertise; and creating the record would not unreasonably interfere with its operations.

Timeliness

The time-frames for responding to information requests are tighter for FOIPPA than AIA. Public bodies must supply requested information

without delay and not later than 30 days after the request is received. Extensions of this deadline are limited to specific situations and to an additional 30-day period, unless a longer period is approved by the Information and Privacy Commissioner.

Affordability

The fee regulations under FOIPPA provide for maximum search and copying fees that may be charged by public bodies. Public bodies may charge less than the maximum fees, or charge no fee at all. The maximum fee for copies of printed material is C $0.25/page; for microfiche, C $10.00/fiche; and for computer diskettes, C $10.00/diskette. Maximum searching fees are C $7.50 per quarter-hour after the first three hours.

A controversy has arisen recently with respect to fees charged for information that is available for purchase. The British Columbia government proposes to charge C $600 per file for geographic information system (GIS) data that an environmental group needs to make environmental maps. The government argues that access may be refused because the data is available for purchase, but the environmental group argues that C $600 per file is an unreasonable barrier to access for a non-profit organization. The environmental group has requested a review by the Information Commissioner, but the government is disputing the Information Commissioner's jurisdiction to conduct the review.

1.4.2 Access to Information Concerning Judicial Proceedings

Provincial laws governing the procedures of superior and provincial courts typically state that all court hearings shall be open to the public except where a court orders the public to be excluded due to the possibility of serious harm or injustice to any person. In most provinces, however, there is a prohibition on photography, video and audio recordings, as well as live coverage, except in limited circumstances as ordered by the court.

On payment of prescribed fees, a person is entitled to see and obtain a copy of any document filed in a court proceeding unless an Act or an order of the court provides otherwise. The court has the authority to treat a document as confidential so that it does not form part of the public record. For example, an Ontario court ordered that documents relating to a secret manufacturing process be sealed and not form part of the public record.

2. ENVIRONMENTAL ASSESSMENTS OF PROPOSED PROJECTS

2.1 Introduction

This section describes laws, policies and practices relating to public access to information associated with environmental assessments of development projects. The federal regime under the *Canadian Environmental Assessment Act* is discussed, as well as the Alberta regime under the *Environmental Protection and Enhancement Act*.[24]

2.2 Federal

Legal Right of Access to Information

The *Canadian Environmental Assessment Act*[25] (CEAA), which came into force in January 1995, is the primary federal legislation setting out the public's legal rights of access to information associated with environmental assessments of proposed development projects. The Act is based in large part on the principle of public participation. The Preamble states that:

> And whereas the Government of Canada is committed to facilitating public participation in the environmental assessment of projects [...] and providing access to the information on which those environmental assessments are based [...][26]

One of the stated purposes of CEAA is to ensure that there be an opportunity for public participation in the environmental assessment process. To facilitate public access to records relating to environmental assessments, the Act requires that a public registry "be established and operated in a manner to ensure convenient public access to the registry [...] in respect of every project for which an environmental assessment is conducted."

The federal authority charged with the responsibility of ensuring that an environmental assessment is carried out (the responsible authority) bears the legal obligation of establishing and maintaining the public registry throughout the entire period of the environmental assessment. Further, a public registry must be maintained for every project which undergoes an environmental assessment, whether it be a simple screening or a lengthy panel review.

24. S.A. 1992, c. E13.3.
25. *Supra*, note 20.
26. *Supra*, note 20, Preamble.

The requirement that public access to the registry must be *convenient* represents a significant broadening of public access rights beyond those set out in the *Access to Information Act*. Mere compliance with the requirements of the *Access to Information Act* may not meet the test of convenience under CEAA.

A public registry must include records that:

- have otherwise been made available to the public;
- would have been disclosed under the *Access to Information Act* had a request been made;
- would be in the public interest to disclose because they are necessary for effective public participation in the assessment, except records containing third party information.

The third point, which is based on a "public interest" test, represents a significant broadening of the public access rights under AIA for environmental assessment information.

In most cases, however, records proposed for inclusion in a public registry must be "cleared" through the *Access to Information Act* to ensure compliance with that legislation. This clearing process is intended to ensure that no exempted or excluded information, such as records relating to trade secrets, Cabinet documents, national security or criminal investigations is included in the public registry.

In addition to public access rights associated with the public registry, the *Canadian Environmental Assessment Act* includes various provisions that set out rights to environmental assessment information. The Minister is required to report to Parliament annually on the activities of the Agency and the implementation of the CEAA. This annual report must include a statistical summary of all environmental assessments conducted or completed during that year.

With respect to screenings, responsible authorities have the discretion to notify the public and give the public an opportunity to examine and comment on screening reports and supporting documents prepared pursuant to CEAA. With respect to comprehensive studies, the Agency is required to notify the public of such studies and provide an opportunity to examine and comment on comprehensive study reports and supporting documents. With respect to panel reviews, the panel is required to ensure that the information required for an assessment by a review

panel is obtained and made available to the public, and to hold its hearings in public. The Minister of Environment must make reports from panel reviews or mediators available to the public and must advise the public that the report is available.

Finally, the Minister is required to provide reasonable public notice of, and a reasonable opportunity for anyone to comment on, draft guidelines, codes of practice, criteria or orders respecting the application of CEAA, or draft federal-provincial or international agreements or arrangements respecting environmental assessments.

Access Policies

As a matter of policy, the Canadian Environmental Assessment Agency has established a public registry framework to ensure convenient access to information about environmental assessments carried out under the Act, as well as to ensure a consistent approach throughout the federal government. The framework consists of three components:

- the Federal Environmental Assessment Index, an electronic database listing all environmental assessments conducted under the Act;
- document listings of all publicly available documents relating to the environmental assessments; and
- the environmental assessment documents themselves.

The Federal Environmental Assessment Index contains information on the "who, what, when, where, and why" of federal environmental assessments, and provides contacts for further information on these and related documents. This Index is accessible on the Internet electronic network, and is updated monthly by the Canadian Environmental Assessment Agency based on information provided by the responsible authorities. The index represents an important advance in making environmental assessment information publicly accessible in a convenient manner because it:

- provides "one-window" access on the key information of any environmental assessment conducted under the Act;
- directs the public to contacts and documents related to a specific environmental assessment;
- is electronic and therefore convenient, quick, and inexpensive; and

- eliminates the need to request information through the *Access to Information Act*.

The second component of the public registry framework is the listing of all available documents relating to each environmental assessment. This listing is maintained by the responsible authority in either electronic or hardcopy form. The third component of the public registry framework consists of the documents produced by, collected by, or submitted to the responsible authority with respect to an environmental assessment.

Ease of Access

Several barriers to convenient public access to environmental assessment information under CEAA deserve mention. The electronic format of the Federal Environmental Assessment Index has led to some implementation difficulties in several departments that are lagging behind in connecting to the information highway. This barrier to public access is likely to be temporary. A second barrier is that fiscal restraint resulting from the March 1995 federal budget has led to layoffs of personnel and budget cutbacks in offices of some departments responsible for providing access to environmental information.

Timeliness

The Canadian Environmental Assessment Agency has developed guidelines for responsible authorities[27] concerning reasonable time frames in responding to public requests for documents that are in the public registry. The guidelines are based on the following principles:

- the time period between ordering a document and its delivery should, in most cases, be less than 30 calendar days;

- time periods should be flexible to account for the circumstances of each request; and

- transmitting documents electronically should be encouraged.[28]

27. Canadian Environmental Assessment Agency. *Responsible authority's guide.* Canadian Environmental Assessment Agency, November 1994, pp. 176-177.
28. *Ibid.* pp. 175-176.

The guidelines provide that:

- access should be provided within 10 working days of the date of request unless an extension is warranted;

- priority should be given to requests from persons wanting to participate in a formal public participation process being conducted under the Act;

- access may, if necessary, be provided within a period greater than 10 working days but less than 30 calendar days, in the following circumstances:

    1. the request is for a large number of documents or for particularly lengthy documents;

    2. the request requires documents to be translated or put into an alternative format; and

    3. access may exceed 30 calendar days only if the requester agrees to the extension.

Given that the CEAA and the public registry system have only been in operation since January 1995, there is insufficient information to determine if federal departments are meeting the requirements of the Act and these guidelines.

Affordability

The fee structure for providing copies of documents from the public registry is based on that used for the AIA and according to the following eight principles developed by the Agency:

- Simplicity – The process to determine costs recovered or waived should be as simple and precise as possible;

- Consistency – The practice of recovering costs should be uniform throughout the federal government;

- Usefulness – Cost recovery guidelines should not inhibit convenient public access to documents. However, the guidelines should serve as a deterrent to frivolous, overly broad or poorly framed requests;

- Pre-payment – Payment for the reproduction costs (if any) must be received before the documents are to be transmitted;

- Scope – Charges should be limited to reasonable standard costs and should cover only the direct costs of reproducing documents in hardcopy or electronic form;

- Level – There should be no minimum or maximum charge for reproducing documents;

- Exemptions – No costs should be charged for documents prepared for the purpose of consulting with the public during the period of consultation; and

- Format – For convenience and cost savings, the reproduction of documents in electronic form should be encouraged.[29]

The fee schedule for the three formats (hardcopy, microfiche, electronic) are: C $0.20 a page for hardcopy; C $0.40 per fiche; and C $10.00 per diskette. Where the total fee is C $25.00 or less, the fee is waived.

2.3 Provincial (Alberta)

Legal Right of Access to Information

The *Alberta Environmental Protection and Enhancement Act*[30] (EPEA) sets out the statutory framework for the environmental assessment process for projects in the province of Alberta. The EPEA requires that the Director, an official designated by the Minister of Environmental Protection, establish and maintain a register containing such documents and other prescribed information that are provided to the Director or created or issued by the Director.

Under the Environmental Assessment Regulation of the EPEA,[31] a person may, during usual business hours, examine any information or document contained in the register, and may obtain one copy of any document contained in the register free of charge. These rights are subject to the Alberta's *Freedom of Information and Protection of Privacy Act*.

29. *Ibid.* p. 173.
30. S.A. 1992, c. E-13.3.
31. Alberta Regulation 112/93.

The Environmental Assessment Regulation prescribes the documents and information that must be included in the registry for environmental assessments. Other information requirements prescribed by the Regulation are as follows:

- Where further environmental assessment is required, the proponent's notice must include certain information and be published in a newspaper that has general circulation in the area where the proposed activity is to be located;

- Notice of the Director's decision with respect to an environmental impact assessment report must be given to each person who submitted a statement of concern with respect to the proposed activity;

- Notice of the final terms of reference for an environmental impact assessment report must be published in a newspaper that has general circulation in the area where the proposed activity is to be located;

- Notice must be published in a newspaper that has general circulation in the area where the proposed activity is to be located that the environmental impact assessment report has been published and submitted to the Director.

Access Policies

The governments of Alberta and Canada have signed an agreement that seeks to harmonize the conduct of environmental assessments that are subject to the processes of both governments. The establishment of a federal office in Edmonton and other measures under the agreement should ensure more convenient public access to information from environmental assessments. The Ministry of Environmental Protection has published a guide to the EPEA[32] and a brochure on the Alberta environmental assessment process.

Ease of Access

The Environmental Assessment Regulation prescribes the categories of information that must be included in the register of environmental assessment information but does not prescribe the format of the register (electronic, paper files or a combination thereof). The standard practice, however, is to enter environmental assessment information

32. Alberta Environmental Protection. 1993. *A guide to the Environmental Protection and Enhancement Act*. Alberta Environmental Protection.

into an electronic database. The information in the database of the register is available through the Ministry of Environmental Protection's Edmonton office, but is not accessible on-line by the public. The proponent must make the terms of reference for environmental impact assessment reports available for inspection during business hours, and must also provide a copy to any person who requests it.

Timeliness

The EPEA has several provisions that set time-frames for the conduct of the process. People who are directly affected by a proposed activity for which a decision relating to further environmental assessment has been made may, within 30 days (or longer if allowed by the Director), submit a written statement of concern to the Director, setting out their concerns with the proposed activity. Within ten days of publishing and submitting an environmental impact assessment report, a proponent must publish a notice in an appropriate general circulation newspaper that the report or a summary thereof is available and that a copy can be obtained free of charge.

Neither the EPEA nor the Environmental Assessment Regulation set out time frames or standards (such as the "convenient public access" standard in the CEAA) guaranteeing timely provision of information. However, the Environmental Assessment Division of the Ministry reports that delays for entry of information into the register, at least with respect to information generated by government, are minimal in that such information is automatically entered into the register.

Affordability

As noted above, a person may, during usual business hours, examine any information or document contained in the register, and may obtain one copy of any document contained in the register free of charge. Environmental impact assessment reports are available from proponents free of charge.

3. LICENSES OR PERMITS FOR PROPOSED PROJECTS

3.1 Introduction

Each year dozens of federal and provincial departments and agencies issue many hundreds of different types of approvals (i.e., licenses, permits, authorizations) for projects that may have environmental effects or that relate to the environment in some way. In this section,

public access to environmental information relating to the more common approvals are discussed as examples of the approaches taken by the federal government. The Ontario Environmental Bill of Rights[33] (EBR) is discussed as an interesting provincial approach to providing generic public access to environmental information relating to issuing licenses and permits [see discussion in Section 3.3 below].[34]

3.2 Federal

The primary federal laws providing public access to environmental information relating to proposed licenses and permits for projects are the *Access to Information Act*[35] and the *Canadian Environmental Assessment Act*.[36] The AIA applies generally to all such approvals, while the CEAA applies only to those licenses, permits or authorizations issued pursuant to statutes or regulations listed in the Law List Regulations[37] of the CEAA. Where such a statutory or regulatory provision is included on the Law List Regulations, an environmental assessment must be conducted before an approval can be issued pursuant to that provision for any proposed project. The information from the project's environmental assessment is then accessible through the public registry system under the CEAA.

The Law List Regulations include 190 provisions relating to approvals in such areas of federal authority as fisheries, navigable waters, the Yukon and Northwest Territories, Indian reserves, nuclear facilities, oil and gas pipelines, national parks, migratory birds and railways.

Three examples of federal approvals are discussed in this section, as follows:

- Subsection 35(2), *Fisheries Act*;[38]
- Subsection 14(1), *Northwest Territories Waters Act*;[39] and
- Section 117, *National Energy Board Act*.[40]

33. S.O. 1993, c. 28.
34. See Part 4.3, *infra*.
35. See note 1, *supra*.
36. See note 20, *supra*.
37. S.O.R./94-636.
38. R.S.C. 1985, c. F-14, as amended.
39. S.C. 1992, c. 39.
40. R.S.C. 1985, c. N-7.

The first two of these are Law-Listed provisions, while the third is not.

Subsection 35(2) of the *Fisheries Act* provides for issuing authorizations by the Minister of Fisheries and Oceans to harmfully alter, disrupt or destroy fish habitat in the course of a work or undertaking. In the absence of such an authorization, harmfully altering, disrupting or destroying fish habitat may be an offense under the Act.

Subsection 14(1) of the *Northwest Territories Waters Act* authorizes the Northwest Territories Water Board to issue licenses to use waters or deposit waste in waters in connection with operating an undertaking. The unauthorized use or deposit of waste is an offense under the Act. Note that the *Yukon Waters Act* is virtually identical to the *Northwest Territories Waters Act*.

Section 117 of the *National Energy Board Act* authorizes the National Energy Board to issue licenses for exporting and importing natural gas to and from Canada. Exporting or importing gas is not permitted except under and in accordance with a license.

Legal Right of Access to Information

The *Fisheries Act* does not provide specifically for public access rights to environmental information relating to applications for, documents relating to, or authorizations issued pursuant to Subsection 35(2) of the Act. It does, however, require the Minister to submit an annual report to Parliament, part of which deals with protecting fish habitat. With this one exception, then, public access rights to information are limited to the AIA and CEAA.

The *Northwest Territories Waters Act* does provide additional rights as follows. Under this Act, the Northwest Territories Water Board is required to hold public hearings with respect to certain types of licenses and has discretion to hold hearings for others. The Board must give notice of applications for licenses and public hearings through such means as publishing the application in a newspaper of general circulation and the *Canada Gazette*. The Board is also required to maintain a public register which contains prescribed information relating to each license. The Act requires that the public register be open for inspection by any person upon payment of a fee during the Board's normal business hours.

The *National Energy Board Act* requires public hearings before the National Energy Board with respect to issuing licenses for the export of gas. These hearings provide opportunities for public access to environmental information about the project. Regulations under this Act describe in detail the information requirements an applicant must meet before a license to export gas can be issued. Although applications to export gas do not trigger an environmental assessment under the *Canadian Environmental Assessment Act*, the Board has determined that it has authority to examine environmental effects associated with such applications.

The *Rules of Practice and Procedure of the Board*[41] set out several provisions designed to ensure that the public is notified and has an opportunity to participate in hearings. Notices of pending hearings are published in various newspapers with wide distribution. Members of the public are entitled to intervene as parties to the hearing, subject to the Board's authority to control its proceedings. Interveners have the right to participate fully in hearings, present evidence and argument, and cross-examine witnesses. Any party may request additional information from any other party. Where information is not forthcoming, a party may bring a motion before the Board requesting that the information be provided. The Board generally requires that applicants provide all documents to interveners as they are produced. A final legal requirement is that the Board must submit an annual report on its activities to Parliament.

Access Policies

The Department of Fisheries and Oceans has no formal policies relating to providing access to environmental information associated with authorizations to destroy fish habitat. The Northwest Territories Water Board has developed several policies and practices to facilitate access to information related to license applications. Applications and associated documents and transcripts of Board hearings are available at the Board's Yellowknife head office. Notice of applications for certain types of licenses for projects outside the Yellowknife area is provided in local newspapers while local aboriginal or public interest organizations are notified by letter. Further, key documents are translated into local aboriginal languages.

41. The rules of practice and procedure of the board. Part II. *Canada Gazette*. 129/10. 17 May 1995.

The National Energy Board has published a *Memorandum of Guidance Concerning Early Public Notification of Proposed Applications*, which applies to applications to export natural gas, among others. It was developed on the assumption that timely public input improves the Board's regulatory process.

The policy set forth in this memorandum is that applicants must implement a public information program to explain the proposed project and its potential environmental and social effects, and must also allow an opportunity for public comment. This public information program must be described in the application to the Board. It must also provide interested parties with adequate time to both comment on the proposed project and to respond to any relevant questions that may be raised by an interested party.

Finally, the Board has also published a bulletin entitled *How to Participate in a Public Hearing*[42] which explains how members of the public can participate in the hearing process.

Ease of Access

Each of the regions of the Department of Fisheries and Oceans (DFO) has the responsibility for issuing Subsection 35(2) authorizations for that region. Historically, regions have differed markedly in their approach to issuing these authorizations: several regions issue many; others, very few. The DFO has initiated several measures designed to achieve a national approach that would be implemented by all regions. One of these has been to issue a regulation that sets out standard forms for both applications and the authorizations themselves.

Public access is complicated by the fact that in most provinces, proponents contact provincial regulatory agencies first about proposed projects. The provincial agencies in turn refer projects to the DFO where a Subsection 35(2) authorization may be required. DFO regional officials determine whether or not an authorization is required. If so, an environmental assessment is carried out and the authorization issued, together with any terms and conditions required to protect fish habitat.

Much project-specific information is available through provincial regulatory agencies, although this varies from province to province depending on the nature of the provincial system. Environmental

42. Minister of Public Works and Government Services. *How to participate in a public hearing*. Information Bulletin IV. Ottawa: National Energy Board. 1994.

assessment information is accessible through the public registry under the CEAA. The DFO often relies on the AIA system for large-scale information requests concerning project authorizations but provides information informally for smaller-scale requests.

A key barrier to access to information held by the Northwest Territories Water Board is the fact that it serves a small population (50,000 inhabitants) scattered over an expanse of land larger than Mexico. As noted above, the Board has undertaken several measures to address this issue, at least in part.

The quasi-judicial nature of the National Energy Board can be a barrier to convenient access to environmental information associated with gas export applications. The Board goes so far as to encourage interveners to consider legal representation; in practice, most interveners are represented by lawyers. Obviously, such representation usually means substantial costs for the intervener. A second barrier is that the amount of information routinely sent to interveners by applicants can be very large, requiring much time and effort to review.

Timeliness

Little information is available on the timeliness of responses by the DFO to requests for information concerning Subsection 35(2) authorizations. However, the Information Commissioner has not reported any unresolved complaints against the DFO under the AIA in its last two annual reports.

Time delays associated with providing public access to information about applications for water licenses by the Northwest Territories Water Board are minimal, and publication of a notice of application in a newspaper occurs within one to two weeks of receipt by the Board. In National Energy Board hearings, providing timely information to interveners in accordance with the public information program is in the interests of project applicants, and so is not usually an issue.

Affordability

The informal practice of the Department of Fisheries and Oceans with respect to information about Subsection 35(2) authorizations is to charge no fees for copies of documents, subject to the comments noted above. When the scale of an information request is such that a formal information request under the *Access to Information Act* is required, the AIA fee structure is applied.

The Northwest Territories Water Board charges no fees for providing access to water licenses, applications or related environmental information, with the exception that members of the public pay charges for photocopying documents.

The National Energy Board lacks the authority to award costs against an applicant, so that interveners participate in hearings at their own expense. However, interveners receive information, including environmental information, related to applications to export gas from the applicant and the Board at no charge.

3.3 Provincial (Ontario)

Legal Right of Access to Information

Proclaimed into force on 15 February 1994, the Environmental Bill of Rights of 1993[43] (EBR) represents an expansion of public access rights to information relating to proposed environmental decisions by the Government of Ontario. Under s. 2(1), the purposes of the EBR are:

- to protect, conserve and, where reasonable, restore the integrity of the environment;
- to provide sustainability of the environment;
- to protect the right to a healthy environment.[44]

To fulfill these purposes, the EBR purports to provide:

- means by which residents of Ontario may participate in environmentally significant decisions by the Government of Ontario;
- increased accountability of the Government of Ontario for its environmental decision-making.[45]

The EBR sets out minimum levels of public participation that must be met before fourteen prescribed ministries of the Government of Ontario make decisions on certain kinds of environmentally significant proposals for instruments (as defined), policies (including programs

43. S.O. 1993, c. 28. The EBR homepage is at <gov.on.ca/envision/ebr/index.htm>.
44. Ontario *Environmental Bill of Rights, 1993*, Subsection 2(1).
45. *Id.*, Subsection 2(3).

and plans), Acts, and regulations. Instrument is defined as a permit, license, approval, authorization, direction or order issued under an Act, and includes, under the regulations, proposals for orders relating to waste disposal sites and approvals relating to the discharge of contaminants into the environment. Instruments are to be classified under regulations, and this classification determines the level of public participation and notice for any given instrument.

A Minister is required to do everything in his or her power to give public notice of a proposal for an instrument under consideration in his or her ministry at least thirty days before a decision is made on whether or not to implement the proposal. Notice is given through the electronic registry established under the EBR, and other appropriate means. A Minister need not give notice of the proposed instrument where the delay involved in giving notice would result in danger to the health and safety of any person, harm or serious risk of harm to the environment, or injury or damage or the serious risk of injury or damage to any property. However, the Minister must give notice of a decision on whether or not to implement a proposal for an instrument as soon as is reasonably possible after the decision is made.

Any Ontario resident has the right to appeal a decision to implement a proposal for certain categories of instruments issued by the several primary regulatory ministries. Any two Ontario residents may apply to the Environmental Commissioner for a review of the instrument by the appropriate Minister.

The position of an independent Environmental Commissioner was established under the EBR as an officer of the Legislative Assembly. The Environmental Commissioner's role is to oversee the implementation of, and compliance with the EBR. With respect to public participation in government decision-making, the Environmental Commissioner reports on Ministerial compliance in placing notices on the Environmental Registry, reviews the registry's use and processes under the EBR, and reviews the exercise of Ministers' discretion under the EBR. The Environmental Commissioner is required to report annually to the Speaker of the Legislative Assembly, may provide special reports to the Speaker, and may be required to perform such special assignments as directed by the Assembly.

Access Policies

Several initiatives have been undertaken to improve public access to the EBR Environmental Registry. The Ministry of Environment and

Energy, which administers the Environmental Registry, has established a technical advisory committee to identify problems and recommend improvements. The Ministry also provides funding to the Ontario Environmental Network, a nongovernmental network of Ontario environmental organizations, to engage a resource person to promote the use of the Registry by environmental and other citizen groups, and to recommend ways to improve it. Finally, the Ministry has published a guide to assist the public in accessing and using the Environmental Registry.

The Office of the Environmental Commissioner has established an educational advisory committee to advise the Commissioner on educational and outreach strategies with respect to the EBR. The Environmental Commissioner has also published several guides to the EBR and the Environmental Registry.

Ease of Access

The Government of Ontario has adopted the position that the Environmental Registry should be developed using existing infrastructure. Various access modes have been selected for the Environmental Registry:

- dial-up by computer and modem using either a local number or a toll-free long distance number;
- access through the Internet,[46] Freenet, Web, and GONet (Government of Ontario) electronic networks; and
- dial-up by computer and modem made available by local public and First Nations libraries.

Several administrative barriers to access associated with the Environmental Registry have been suggested. The first is that insufficient information is provided by Ministries with respect to proposed instruments, and that the language used is overly technical. A style guide for use by all of the participating provincial Ministries designed to improve public access and enhance participation is being considered by the Ontario government.

A second barrier is that the lead Ministry responsible for administering the Environmental Registry should be clarified. At present, the Ministry of Environment and Energy administers the Registry, although

46. Queries to the Registry should be directed to <gov.on.ca/samples/search/Ebrquery_reg.htm>.

it includes information from many other Ministries. It may be appropriate for a central agency, such as the Management Board Secretariat, to administer the Registry. Notwithstanding these barriers, it is noteworthy that more than 14,000 individuals had logged on to the Environmental Registry as of June 1995.

Timeliness

No statistical information is yet available as to the extent to which the Environmental Commissioner and provincial ministries are in compliance with the various legislated time frames for responses to requests from the public. The 30-day period for public comment on proposed instruments (as well as proposed regulations and policies) is the minimum period prescribed under the EBR. This 30-day period has been criticized as being too short for informed comment to occur, in at least some circumstances.

A related criticism is that prior to the EBR, longer periods of time were afforded to the public on an informal basis. For example, 90 days was a standard period of time for public consultations by the Ministry of Environment and Energy. Environmental groups are concerned that the 30-day period will become the standard period for public comment, rather than a minimum period.

Affordability

The Government of Ontario has adopted the position that access to the Environmental Registry should be free for residents of Ontario. The toll-free long distance dialing service to the Environmental Registry is provided at no charge, as is access to the Freenet and GONet. Internet users pay a flat fee for a connection to Internet, but there are no actual usage charges for access to the Environmental Registry. Web users pay membership and usage fees.

4. PROPOSED REGULATIONS, POLICIES, PROGRAMS AND PLANS

4.1 Introduction

This section addresses the extent to which the public has access to the environmental information upon which governments make decisions about proposed regulations, policies, programs and plans. The *Ontario Environmental Bill of Rights Act* is discussed as an innovative approach at the provincial level to afford public access to environmental information used in support of policy and law reform.

4.2 Federal

Legal Right of Access to Information

The extent of public access rights to information relating to proposed regulations, policies, programs and plans depends on a number of factors such as whether or not the proposals are excluded or exempted from access pursuant to the *Access to Information Act* and the stage of development of the proposal within government. As noted above, a wide variety of documentation relating to the Queen's Privy Council for Canada (Cabinet) is excluded from the application of the AIA. These documents include memoranda to Cabinet, discussion papers, communications between Ministers on Cabinet business, briefing material, and draft legislation and orders in council. The exclusion for Cabinet confidences is most important because all draft regulations, all important policies and programs, and many plans are approved by Cabinet.

A number of exemptions set out in the AIA allow governmental institutions to refuse to disclose environmental information associated with proposed regulations, policies, programs and plans. Exemptions are provided for information obtained in confidence from other governments; information relating to federal-provincial affairs, international affairs, national defense or the economic interests of Canada; or information subject to solicitor-client privilege.

A recent initiative is the amendment of the *Auditor General Act*[47] to create a Commissioner of the Environment and Sustainable Development. The Commissioner will report directly to the Auditor General on the success of subject departments in implementing their sustainable development strategies. In turn the Auditor General's role is expanded to include giving due regard to the environmental effects of expenditures in the context of sustainable development.

The new provisions also require federal departments to "reply" to a "petition," made by a resident of Canada, provided that:

- the petition concerns an environmental matter;
- is in the context of sustainable development; and
- the matter is the responsibility of a Department subject to the Act.

47. R.S.C., c. A-17, as amended.

There is no further provision setting out the possible content of either the petition or the reply, but the amendments have the potential to provide indirectly for public access to information concerning departmental programs. The Auditor General's traditional function is to report to Parliament and to the public on government expenditures. The new amendments might also raise the profile of federal sustainable development strategies through the Auditor General.

Access Policies

In its December 1995 response to the recommendations of a Parliamentary standing committee dealing with reform of the *Canadian Environmental Protection Act*[48], the Government of Canada recognizes the public's right to information and proposes to establish an electronic public registry that would include inventories of environmental data, monitoring data, information submitted to reporting requirements under the CEPA, and information gathered to determine whether or not substances are toxic.

A key source of information about proposed federal regulations related to the environment is the *Federal Regulatory Plan*,[49] which is published annually. Each federal department is required to provide information on the objectives and status of all regulatory initiatives falling within its jurisdiction. In addition, government departments often undertake public information and consultation exercises concerning proposed regulations prior to drafting the regulations or other documents that will be submitted to Cabinet. For example, the *Environmental Consultations Calendar*[50] published by Environment Canada itemizes at least a dozen consultations with stakeholders outside government for which changes to a regulation or statute were envisaged.

The Government of Canada's Regulatory Policy provides that once Cabinet approval has been secured, draft regulations should be published in Part I of the *Canada Gazette* for several months to allow for public comment prior to the regulations being finalized. Departments are required to demonstrate, by means of a regulatory impact analysis statement that is published with the draft regulation, that Canadians have been consulted. This consultation requirement often affords

48. Government of Canada. 1995. *Environmental protection legislation designed for the future – A renewed CEPA: A proposal (CEPA Review: The Government Response).* Ottawa: Minister of Supply and Services, pp. 24-25.
49. Treasury Board of Canada (published annually).
50. Government of Canada. 1993. *Environmental consultations calendar.* Ottawa: Environment Canada.

enhanced public access to environmental information relating to the proposed regulation. In most cases, the finalized regulations are not changed substantially as a result of this formal consultation process. In the case of the first four regulations promulgated under the *Canadian Environmental Assessment Act*, however, changes between the draft and final regulations were considerable. The Agency is also continuing to work with a regulatory advisory committee composed of representatives from the federal and provincial governments, industry, environmental groups and aboriginal groups in order to develop additional regulations.

Proposals for policies and programs other than regulations to be considered by Cabinet are subject to the Cabinet directive, *The Environmental Assessment Process for Policy and Program Proposals*.[51] The stated objective of this directive is to systematically integrate environmental considerations into the planning and decision-making processes. The environmental information derived from an examination of proposed policy or program initiatives is intended to support decision-making in the same way that economic and other factors are considered.

The Cabinet directive provides that a statement on environmental implications should be included in memoranda to Cabinet, and where appropriate, other documents submitted to Ministers. Where anticipated environmental effects are likely to be significant, a more detailed account of the environmental assessment and the rationale for its conclusions and recommendations should be included in the documents supporting the proposal.

The Cabinet directive allows broad discretion to ministers as to whether or not a public statement relating to the environmental effects of a policy or program should be released. For key initiatives likely to have significant effects, the Cabinet directive suggests that public announcements contain a summary of the anticipated environmental effects, their significance, information on mitigation measures and follow-up programs, if any.

Ease of Access

Part I of the *Canada Gazette* is widely available at libraries across Canada. Subscriptions are available in hard-copy format, and through various legal on-line services. Virtually all draft regulations are published in Part I of the *Canada Gazette,* together with the regulatory impact

51. Federal Environmental Assessment Review Office, February 1993.

analysis statements that often provide some information relating to likely environmental effects of the regulation.

Compliance with the Cabinet directive by federal departments has been low, but appears to be increasing. Certainly, information about such assessments, where they are conducted, is rarely made available to the public even in summary form as suggested in the Cabinet directive. A notable exception is the environmental review of the North American Free Trade Agreement.

The key barrier to public access to such environmental information is the doctrine of Cabinet confidentiality, which is well-entrenched in Canadian governments. Another barrier is that neither the Canadian Environmental Assessment Agency nor one of the central agencies has a clear mandate to promote, monitor and publicly report on compliance by departments with the Cabinet directive.

Timeliness

Time frames for public comment on draft regulations published in Part I of the *Canada Gazette* are typically 60 or 90 days. The importance of the timeliness of information issue under the Cabinet directive is diminished given that few environmental assessments of proposed policies and programs are carried out, and information about such assessments is rarely provided to the public.

Affordability

Free access to Part I of the *Canada Gazette* is widely available at public or university libraries, while annual subscriptions cost hundreds of dollars. The limited information that has been released relating to the environmental assessments of proposed policies and programs has apparently been made available at no charge to members of the public.

4.3 Provincial (Ontario)

Legal Right of Access to Information

As outlined in Section 3.3, the EBR (Environmental Bill of Rights) expands public access-to-information rights relating to proposed environmental decisions by the Government of Ontario, including decisions relating to proposed regulations, policies, programs and plans. The EBR sets out minimum levels of public participation which must be met before the Government of Ontario makes decisions on a proposed policy

(a policy is defined as a program, plan or objective and includes guidelines or criteria to be used in making decisions about issuing, amending or revoking instruments).

Where a Minister considers that a proposal for a regulation could, if implemented, have a significant effect on the environment, the Minister is legally obliged to do everything in his or her power to give notice of the proposal to the public. In the case of proposed policies or Acts, the Minister is subject to this legal obligation only if, in addition to the significant environmental effects determination, he or she considers that the public should have an opportunity to comment on the proposal before it is implemented. As with proposals for instruments, Ministers provide notice of proposals through the Environmental Registry.

Public notice is not required where such notice would endanger the health or safety of any person; harm or pose a serious risk of harm to the environment; or injure, damage or pose a serious risk of damage to any property. Similarly, notice is not required where, in the Minister's opinion, the proposal is subject to a public participation process under other legislation that is substantially equivalent to the process required under the Environmental Bill of Rights, or the decision is primarily administrative or financial in nature. Finally, no notice is required for a proposal that forms part of a budget or economic statement presented to the Legislative Assembly.

After giving notice of a proposal, Ministers are legally obliged to take every reasonable step to ensure that all comments relevant to the proposal that are received as part of the public participation process are considered when decisions about the proposal are made. Finally, Ministers are required to give notice that a proposal for a policy or regulation has been implemented as soon as reasonably possible after the implementation of that proposal.

Fourteen Ontario provincial ministries, including the Ministry of Environment and Energy, are required to develop so-called Statements of Environmental Values. The Ministry Statement of Environmental Values is intended to explain how the purposes of the EBR are to be applied when decisions that might significantly affect the environment are made in the Ministry and how consideration of the Act's purpose should be integrated into the Ministry's decision-making process.

Draft Statements of Environmental Values and any revisions thereof are required to be placed on the Environmental Registry for public comment. A Minister is required to take every reasonable step to

ensure that the Ministry's Statement of Environmental Values is considered whenever decisions that might significantly affect the environment are made in the Ministry.

As for instruments, any two Ontario residents who believe that an existing policy or regulation should be amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy or regulation. In addition they can propose that a new policy, Act or regulation be developed.

Assuming that certain conditions are met, a Minister who has received an application for review from the Environmental Commissioner, is legally required to consider each one in a preliminary manner in order to determine whether the public interest warrants such a review. In making this determination, the Minister may consider the Ministry's Statement of Environmental Values and other criteria outlined in Section 67 (of the EBR). Where a Minister determines that the public interest does warrant a review, it shall be conducted within a reasonable time. Finally, a Minister is required to give notice of the decision whether or not to conduct a review, together with a brief statement outlining the reasons for the decision, to the applicants and the Environmental Commissioner.

In November 1995, the newly elected Government of Ontario issued a regulation that has the effect of narrowing the scope of the EBR's application. Under its terms, the Ministry of Finance is exempted from the provisions of the EBR and second, public notice requirements for environmentally significant proposals that would result in the elimination, reduction or realignment of a provincial government expenditure are suspended for ten months.

Access Policies

Many of the final Statements of Environmental Values placed on the Environmental Registry by the 14 Ontario government ministries in November 1994 reinforce EBR commitments to public participation in decision-making by committing themselves to open and consultative processes for proposed policies, Acts, regulations and instruments that are environmentally significant. Each Ministry has agreed to participate in a one-year review process of the Statements of Environmental Values ending in November 1995. This review process, requested by the Environmental Commissioner in late 1994, is a response to criticism by public interest groups who argue that some of the Statements of Environmental Values do not meet the requirements of the EBR.

As part of the review process, the Environmental Commissioner intends to explore ways to refine each Statement of Environmental Values by developing strategies to ensure and enhance ongoing public participation, among others.

Ease of Access

The Environmental Commissioner has developed instruction kits and application forms for individuals wishing to apply for an investigation into whether an environmental law has been contravened and for a review to determine whether an existing policy, Act, regulation or instrument should be amended, repealed or revoked. The Environmental Commissioner's Office includes a team of educators and public information officers to assist applicants in the processing of forms.

Timeliness

See Section 3.2.

Affordability

See Section 3.2.

5. ENFORCEMENT AND COMPLIANCE ACTIONS

5.1 Introduction

Federal and provincial governments in Canada are both engaged in enforcing and otherwise seeking compliance with their respective environmental laws. Industrial facilities are inspected, possible illegal activities are investigated, determinations with respect to compliance (or lack of compliance) are made, prosecutions are commenced, and the courts enter convictions or acquittals. The issue to be addressed is the extent to which there is convenient public access to information about enforcement and compliance actions undertaken by governments under environmental laws and guidelines. The following section examines public access to information relating to enforcement of and compliance with the federal *Canadian Environmental Protection Act*, the *Canadian Environmental Assessment Act*, and the pollution provisions of the federal *Fisheries Act*, as well as key environmental laws in the province of British Columbia.

5.2 Federal

Legal Right of Access to Information

The right of public access to enforcement and compliance information relating to the CEPA, the CEAA, and the pollution provisions of the *Fisheries Act* is subject to the *Access to Information Act*. The AIA allows governmental institutions to refuse to disclose information obtained or prepared by any governmental institution pertaining to the enforcement of any federal or provincial law, or which could reasonably be expected to be injurious to the enforcement of any such law or the conduct of lawful investigations. The AIA also allows governmental institutions to refuse to disclose information that is subject to solicitor-client privilege.

Several provisions of the CEPA do, however, provide legal authority to enable the public to obtain information relating to the enforcement of the CEPA. First, the federal Minister of Environment is required to report annually on the administration and enforcement of the CEPA. These reports contain valuable publicly accessible information about compliance and enforcement.

Second, the CEPA provides that any two adult Canadian residents who believe that an offense has been committed under the CEPA may apply to the Minister for an investigation of the alleged offense. On receipt of the application, the Minister must investigate all matters he or she considers necessary to determine the facts relating to the alleged offense. Where the alleged offense does not require further investigation, the investigation may be discontinued. However, a report describing the information obtained and stating the reasons for its discontinuation must be provided to the applicants. Thus the applicant gains access to government-held information, but also has the ability to require the government to gather additional information and make it available. The Minister is required to report to the applicants within ninety days on the progress of the investigation and the action, if any, that the Minister proposes to take. There appears to be no obligation on the part of the government to make the investigation reports publicly available.

Given the very limited enforcement powers under the CEAA, and the absence of offenses and penalties, compliance is secured primarily through education and information mechanisms such as the CEAA annual report and its public registry, discussed in Section 3.2 above.

Access Policies

Environment Canada's CEPA Enforcement and Compliance Policy[52] identifies education and information as one of six categories of measures to promote compliance with the legislation. Under this Policy, Environment Canada undertakes to announce the availability of the following materials, which it will distribute upon request:

- copies of the *Canadian Environmental Protection Act* and its regulations;
- environmental quality guidelines and objectives, release guidelines, and environmental codes of practice, developed under the Act;
- the Act's Enforcement and Compliance Policy;
- a list of court actions arising from the enforcement of the *Canadian Environmental Protection Act*;
- a list of orders issued by the Minister under the Act;
- information on precedent-setting cases under the Act;
- fact sheets, handbooks, pamphlets and reports on subjects relevant to the Act.

Under a second category of measures entitled Consultation on Regulation Development and Review, Environment Canada promises to consult affected parties during regulation development, believing that such consultation and the ensuing amendments result in better and more effective regulations. Compliance policies for the pollution provisions of the *Fisheries Act* and the *Canadian Environmental Assessment Act* are being developed; these may provide for making compliance information accessible to the public.

Ease of Access

On the premise that compliance and enforcement help to achieve environmental protection, and help to increase knowledge and public awareness, Environment Canada has undertaken several initiatives to make enforcement and compliance information publicly available. The 1993-94 *CEPA Annual Report*[53] summarizes the enforcement and compli-

52. Government of Canada. 1992. *Canadian Environmental Protection Act enforcement and compliance policy*. Ottawa: Environment Canada.
53. Government of Canada. 1994. *Canadian Environmental Protection Act report for the period April 1993 to March 1994.* Ottawa: Environment Canada.

ance efforts of each of Environment Canada's five regions. The number of inspections, warnings, directions, prosecutions, and convictions relating to the different CEPA regulations are provided, together with other enforcement and compliance initiatives.

The Pacific and Yukon Region of Environment Canada produces an annual *Compliance Status Summary Report,*[54] which provides a more detailed overview of the compliance status of the industrial and commercial sectors with the *Canadian Environmental Protection Act* and pollution provisions of the *Fisheries Act.* The following types of information are included:

- compliance verification mechanisms used;
- compliance status;
- degree of implementation for the particular law or guideline;
- descriptions of enforcement actions that have been employed; and
- compliance promotion activities performed.

The report provides information on enforcement and compliance priorities for that year, and presents selected inspection data for given facilities, such as pulp and paper mills and mines.

Finally, Environment Canada publishes a national status report on compliance with selected regulations under the CEPA and the *Fisheries Act*.[55] This national status report presents statistics and graphically displayed summary information, but does not identify individual facilities or companies.

Timeliness

The publications described above are published annually. While they present information that is useful in identifying trends in compliance and enforcement, there is less information that is of interest to a member of the public interested in a specific facility. More timely information would need to be sought through a request under the *Access to Information Act.*

54. Government of Canada. 1994. *Compliance status summary report, British Columbia: Fiscal Year 1993-1994.* Ottawa: Environment Canada (Environmental Protection Branch).
55. Government of Canada. 1995. *Compliance and enforcement report, Vol I: Six regulations under CEPA and the Fisheries Act.* Ottawa: Environment Canada.

Affordability

The publications described above are provided at no charge. Other information relating to enforcement and compliance, if accessible, would be subject to the fees associated with requests under the *Access to Information Act*.[56]

5.3 Provincial (British Columbia)

Legal Right of Access to Information

Legal rights of access to information concerning the enforcement and compliance of British Columbia environmental laws reside primarily in the *Freedom of Information and Protection of Privacy Act* (FOIPPA).[57]

Access Policies

The Government of British Columbia is a leading jurisdiction in Canada in terms of making enforcement and compliance information available to the public. The initiatives taken by the British Columbia Ministry of Environment, Lands and Parks respond to a publicly stated decision by the Minister to provide better information to the public with respect to enforcement and compliance activities.

Ease of Access

Two initiatives of the Ministry of Environment, Lands and Parks that facilitate public access to environmental information relating to compliance and information deserve mention. The first is the biannual *Environment Noncompliance Report,* which identifies industrial and municipal operations not in compliance with the *British Columbia Waste Management Act*[58] or regulations. The tenth of these reports, published in March 1995, listed 85 operations not in compliance over the period from 1 April to 30 September 1994.[59] Noncompliance with waste management permits, pollution prevention orders, and waste management regulations, as well as the Act itself are published in the report. Information provided for each entry in the report includes the name of the company or municipality, the location, the type of operation, and the status of the operation.

56. *Supra*, note 9.
57. *Supra*, note 10.
58. S.B.C. 1982, c. 41.
59. News Release: *B.C.'s Tenth environment noncompliance list release.* British Columbia Ministry of Environment, Lands and Parks. 2 March 1995.

A second initiative of the Ministry of Environment, Lands, and Parks is the *Charges and Significant Penalties Summary*, also published twice per year. This document lists charges laid, convictions entered and penalties imposed for offenses committed under provincial environmental protection statutes, and under the environmental protection provisions of the federal *Fisheries Act*.[60] During the period from 1 April to 30 September 1994 for example, 269 charges were laid and 134 convictions were recorded. Information provided includes the name and location of the operation, the offense under which the charge was laid, the disposition by the court, and the penalty imposed or remedy ordered.[61] Both of these reports are available through regional offices of the Ministry as well as on the Internet. Additional information related to the noncompliance of industrial and municipal operations or to charges laid, convictions entered and penalties imposed against such operations is available in accordance with the provisions of FOIPPA.

Timeliness

Internet access to the reports provided by the British Columbia Ministry of Environment, Lands, and Parks ensures timely access to information to members of the public who are on-line. The five-month period needed to prepare each of the reports is not ideal but is not unreasonable given the sensitive nature of the information and the need for accuracy in reporting.

Affordability

The reports prepared by the British Columbia Ministry of Environment, Lands, and Parks are provided at no charge to members of the public.

6. NATIONAL POLLUTANT RELEASE INVENTORY

The National Pollutant Release Inventory (NPRI) is a national database of pollutants released into the Canadian environment from industrial and transportation sources, as well as pollutants transferred off-site as wastes. The first summary report on NPRI was published in April 1995.

60. *Supra*, note 38.
61. News Release: *Latest environmental charges and significant penalties summary released.* British Columbia Ministry of Environment, Lands and Parks. 27 February 1995.

Legal Right of Access to Information

NPRI was established under the authority of the *Canadian Environmental Protection Act*. This Act empowers the Minister of Environment to order information to be submitted for the purpose of determining whether or not a substance is toxic, for the purpose of assessing whether or not to control a substance, or the manner in which to control a substance. On 27 March 1993, in accordance with Section 16 of the CEPA, the Minister published a notice in Part I of the *Canada Gazette* requiring anyone in Canada who owns or operates a facility with 10 or more full-time employees in the reporting year, and which manufactures, processes or otherwise uses any of the 178 NPRI-listed substances, in concentrations greater than 1 percent, and in quantities equal to or greater than 10 tonnes, to file a report with Environment Canada and identify any releases or waste transfers of those substances into the air, water or land. A number of facilities are exempt from the reporting requirement including mines, oil and gas wells, fuel distribution facilities, and facilities selling products which contain NPRI substances where there are no releases to the environment from the facility.

Public access rights to information in NPRI are limited by provisions in the CEPA and the *Access to Information Act* relating to confidential business information. Companies providing information to the NPRI can claim that the information is confidential; the submission of such a claim prevents Environment Canada from releasing the information except in limited circumstances. The CEPA incorporates, by way of reference, the provisions of the AIA dealing with third-party confidential information. When a request for confidentiality is made, the requesting party is not normally required to provide information to justify the request unless specifically prescribed. For example, the NPRI Guidance Document recommends that persons requesting confidential treatment include documentation justifying their claim with their request. When disclosure is intended, the third party claiming confidentiality is notified and given the opportunity to provide evidence that the information in question meets the criteria set out in the AIA. Where such evidence is not provided or is insufficient, the third party is notified that the information will be released.

In a June 1995 report *It's About our Health!: Towards Pollution Prevention*,[62] the House of Commons Standing Committee on Environment and Sustainable Development recommended that the NPRI be given an

62. Government of Canada. 1995. *Report of the House of Commons Standing Committee on Environment and Sustainable Development*.

explicit statutory basis and that it be harmonized with the United States Toxics Release Inventory (TRI). In its response,[63] the Government of Canada accepted the recommendation and is proposing to amend the CEPA to provide a statutory basis for the NPRI.

Access Policies

Current NPRI reporting requirements are based on consensus recommendations from a multistakeholder advisory committee (MSAC), which included representatives of industry, labor, environmental groups, and provincial and federal governments. The list of 178 substances for the 1993 reporting year was selected following a review of the lists of substances used by the US Toxics Release Inventory (TRI) and the National Emissions Reduction Masterplan of the Canadian Chemical Producers' Association.[64] The first annual report on NPRI[65] included data from 1466 facilities in 5266 substance reports. The report is published as a matter of policy, and not pursuant to any legal requirement.

The report states that approximately 130 companies requested confidential treatment of all or part of the information they provided to NPRI. According to the report many of these claims were withdrawn and at the time of printing, the Access to Information Secretariat had accepted four claims for confidentiality, while a fifth remained unresolved.

Ease of Access

The report states that NPRI is intended to be publicly accessible, and that information on NPRI and the database can be obtained from Environment Canada's national and regional offices. Non-confidential NPRI data is available on the Internet.

Timeliness

Information will continue to be collected and published on an annual basis, providing opportunities for year-to-year comparison and for assessing trends in the release and disposal of pollutants in Canada.

63. Government of Canada. 1995. *Environmental protection legislation designed for the future – A renewed CEPA*. Ottawa: Environment Canada.
64. Chris Rolfe. 1994. *Community right to know: Issues for the five-year review of the Canadian Environmental Protection Act.* West Coast Environmental Law Research Foundation, p. 7.
65. Government of Canada. 1995. *Summary report of the 1993 National Pollutant Release Inventory.* Ottawa: Environment Canada.

Affordability

The NPRI report has been provided to members of the public at no charge; similarly, there is no charge for accessing NPRI data through the Internet.

MEXICO

1. CONSTITUTIONAL AND LEGAL FRAMEWORK FOR PUBLIC ACCESS TO INFORMATION IN MEXICO

This section provides an overview of the constitutional and legal provisions governing public access to information, both generally and in regard to environmental issues.

1.1 Federal Constitutional Framework

In terms of public access to environmental information, the Political Constitution of the United States of Mexico is not specific in acknowledging such a right, although two provisions related to this subject are contemplated under Articles 6 and 8, respectively. The wording of Article 6 specifically states that: "The expression of ideas shall not be subjected to any judicial or administrative inquiry, provided that they do not attack ethical principles, infringe on the rights of third parties, entail any violation or disturb the peace; the right to information shall be guaranteed by the State."

This precept, introduced in the Constitution of 1977[1] together with individual guarantees regarding freedom of speech, enshrines the right to information. There has been some debate around the legality of this right, as the constitutional wording "does not precisely define the phrase 'right to information,' nor does it assert who the recipients of this right are, or the legal means the State will exert in order to ensure that it is respected."[2] The necessary rules for making the constitutional reform effective were left to be the subject of a specific regulatory law. In interpreting the legal contents of the right to information, the federal courts have issued very restrictive criteria:[3]

1. The Constitutional amendments were published in the Official Gazette of the Federation (*Diario Oficial de la Federación)* on 6 December 1977.
2. Opinion of the United Committees for Legislative Studies and First Committee for Constitutional Issues, who reviewed the Reform Initiative forwarded by the President of the Republic in October of 1977. Federal Electoral Commission, *Political Reform*, Mexico, vol. I, 1978, p. 46.
3. *Amparo* recourse 390/83, Fifth District Court for the Federal District Administrative Issues, 1983. This criterion was upheld in 1985 by the Administrative Division of the Nation's Supreme Court of Justice.

- The right to information is a social guarantee, correlative to that of freedom of speech, which was instituted on the occasion of the so-called "Political Reform," and consists of the State permitting a variety of opinions from political parties to be voiced through communications media, on a regular basis;

- The specific definition of the right to information is to be provided by secondary legislation; and

- It was not intended to establish individual guarantees entitling citizens, whenever they deem it appropriate, to request and obtain given information from State bodies.

This is not to say that authorities free themselves from their constitutional and legal obligation to provide information in the manner and under the terms established by the Constitution and the law, but on the other hand, it is not to be assumed that citizens have a right before the State to obtain information in cases and through systems not contemplated under applicable rules.

Such was the restricted legal framework in force until 1994, when the exercise of the right to public information was defined by ordinary legislation, specifically under the *Federal Act on Administrative Procedure (Ley Federal de Procedimiento Administrativo);* later, in 1996, the right to information in connection with environmental issues was defined more clearly when amendments to the General Law of Ecological Equilibrium and Environmental Protection *(Ley General del Equilibrio Ecológico y la Protección del Ambiente – LGEEPA)* were passed by the Congress of the Union. In these amendments reference is made to public access to records, documents and data held by administrative authorities. It will be necessary to wait and see how the courts systematically interpret these legal provisions in order to assess the scope of the access to information right as an individual guarantee granted to private citizens. Both laws will be reviewed later on in this document.

Article 8 of the Constitution establishes the so-called *right to petition*, asserting that:

> Civil servants and public employees shall respect the right to petition, provided that it is exercised in writing, in a peaceful and respectful manner; however, only citizens of the Republic may avail themselves of this right where political issues are concerned.

> The authority to whom the petition is addressed shall have the obligation to issue a written response and make it known to the applicant within a brief period of time.

The right to petition empowers individuals to go before state authorities and present a written submission or petition of any kind in order to obtain a response to their request. The right to petition is a comprehensive individual guarantee consisting of the right granted to private citizens and a corresponding obligation on the part of authorities. Pursuant to this obligation, the authorities must respond in writing to the submission received. This does not necessarily imply, however, that the response to a given request must be affirmative.

A most important aspect of this constitutional guarantee relates to the fact that it is not subject to the fulfillment of any requirements in order for it to be exercised; that is, it is a broad guarantee granted to all individuals.[4] The Supreme Court has unequivocally asserted that "Article 8 of the Constitution does not make the dispute itself, or any other aspect of the petition right, contingent upon applicants having complied with specific regulatory requirements."[5]

1.2 Constitutional Framework at the State Level

Within the legal framework of the States of the Republic, these two guarantees (the right to information and the right to petition) are in force pursuant to the principle of supremacy of the Federal Constitution.[6] The individual state constitutions do not have the legal power to contravene or restrict the prescriptions entrenched in the Federal Constitution.

State constitutions are empowered to either implement individual guarantees and itemize or provide details thereto in order to ensure that

4. See "Petition, Right of." Judicial Gazette of the Federation *(Semanario Judicial de la Federación)*, Sexta Época, Vol. LXXVII, third part, p. 25, *Amparo* under review 6176/63, José Guadalupe Arontes Blancas, 28 November 1963, 5 votes. The argument to the effect that the right to petition granted under Article 8 of the Constitution is conditional upon the applicant substantiating his legal standing in connection with the subject matter of his submission is inaccurate, since the guarantee embodied in the mentioned precept is only conditional upon the right being exercised in writing, in a peaceful and respectful manner.
5. See "Petition, Right of." Judicial Gazette of the Federation, *Sexta Época*, Vol. XIX, third part, p. 63, *Amparo* under review 4916/58, Juan N. Canales, 19 January 1959, voted unanimously (4 votes).
6. Article 133 of the Political Constitution of the United Mexican States enshrines the principle of the supremacy of the Federal Constitution itself and that of federal laws and international treaties over the constitutions and the laws of the Federate states.

they are better applied or observed. The provisions of the Political Constitution of the State of Yucatán specifically address the right of access to information under Article 86, which states:

> The State, in its capacity as the organizer of human community life, shall exercise those actions under its responsibility to the extent necessary for securing the solidarity of community members, and guaranteeing them an equitable participation in the well-being that results from community life. The State, through its public authority, shall guarantee the respect of each individual's right to enjoy an ecologically balanced environment and benefit from the protection of the ecosystems that make up the natural heritage of Yucatán, based on the following principles:
>
> I.- State inhabitants have the right to live in a healthy environment that allows them to live in dignity and make rational use of the natural resources with which the State is endowed in order to reach sustainable development, in the terms outlined in the governing Law;
>
> II.- No person may be compelled to perform activities that cause, or are likely to cause environmental damage, in the terms outlined in the governing Law;
>
> III.- State inhabitants are entitled to knowledge of and access to up-to-date information regarding the condition of the environment and the State's natural resources, as well as to participate in those activities directed towards their preservation and betterment.[7]

These constitutional provisions are regulated under the Law of Ecological Equilibrium and Environmental Protection *(Ley del Equilibrio Ecológico y Protección al Ambiente)* of the State of Yucatán, in its chapter devoted to social participation,[8] which states:

> Article 89. State and municipal governments shall encourage the participation and responsibility of society in devising ecological policy, the use of any instruments thereof for information and enforcement actions and, in general, in those ecological actions that may be undertaken.
>
> Article 90. To this effect, the state and municipal governments shall [...] invite the general public to express their opinions and make proposals...

7. This chapter is contained in part eight of the Constitution of the State of Yucatán, which relates to the "purpose of the State as a means of living in a civilized manner and the overall development of the community."
8. Published in the Official Gazette of the State Government on 21 December 1988.

1.3 Federal Administrative Procedure Act

The *Federal Administrative Procedure Act (Ley Federal de Procedimiento Administrativo – LFPA)* was published in the Official Gazette of the Federation on 4 August 1994 and came into force on 1 June 1995. The provisions of this law apply to actions, procedures and resolutions adopted by the centralized federal public administration, without prejudice to the provisions contained in the international treaties to which Mexico is a party. The LFPA supplements the various administrative laws under its umbrella, such as the General Law of Ecological Equilibrium and Environmental Protection.[9]

The LFPA deals essentially with the right to access administrative documents. In accordance with this law:

a) The federal public administration must provide access to its registries and records as provided by this or other laws.[10] The object of the right to access is the information held in public offices in a clear and comprehensible format, while the records, registries and documents are the media through which such rights can be exercised.

b) The parties interested in a given administrative procedure are entitled to know its status at all times and to obtain the appropriate information from the relevant authorities, provided such information does not relate to national defense and security, issues protected by trade or industrial secrets – where the interested parties are neither owners nor assignees – or matters governed by specific legal provisions that prohibit disclosure.[11]

1.4 General Law of Ecological Equilibrium and Environmental Protection

The General Law of Ecological Equilibrium and Environmental Protection *(Ley General del Equilibrio Ecológico y Protección al Ambiente – LGEEPA)* was amended in 1996[12] in order to include, among other

9. The LFPA does not apply in issues of a fiscal or financial nature, nor does it govern the responsibilities of public servants, electoral issues, economic matters, agrarian and labor justice, or the office of the Solicitor General. Article 1, second paragraph.
10. Article 16, Sections VII and VIII.
11. Articles 33 and 34.
12. The Reform was published in the Official Gazette of the Federation on 13 December 1996.

issues, the right to environmental information, as a mechanism intended to widen the scope of public participation in environmental management.

In accordance with the draft LGEEPA amendments forwarded to Congress by the Federal Executive, "the guiding criterion has been that communities which are objectively informed may make decisions that best protect their interests and rights, and at the same time are likely to pay attention to what is happening in their areas. Given the environmental conditions that prevail in some regions and areas of the country, communities in particular and society in general, must be aware of any environmental changes that do or do not occur. This is why it must be guaranteed that responsible authorities make such information available to the public." Thus, the LGEEPA deals with the access to information issue in two ways: the disclosure of environmental information and the individual right of access to information held by administrative authorities.

1.4.1 Disclosure of Environmental Information

In regard to the disclosure of environmental information, the Law requires that environmental authorities periodically publish available official information. To this aim, the LGEEPA contemplates the creation of a National System of Environmental and Natural Resources Information *(Sistema Nacional de Información Ambiental y de Recursos Naturales – SINIA),* whose object will be to register, organize, update and publicly disclose national environmental information. SINIA will be coordinated and merged with the National Accounts System under the responsibility of the National Institute of Statistics, Geography and Informatics *(Instituto Nacional de Estadística, Geografía e Informática – INEGI).*[13]

13. The development of institutional databases is a general policy of the Mexican Government, contemplated in the 1995-2000 Information Systems Development Program *(Programa de Desarrollo Informático)*. This program outlines a serious problem with regard to this issue: the development of institutional, publicly accessible data bases is only just beginning. In 1995, of a total of 215 databases managed by 31 institutions, only 11 were publicly accessible. This is why there are plans to set up an informational infrastructure for the benefit of public institutions, the private sector and society at large, through the development of databases on specific subjects that include information at national, regional, sectorial and institutional levels. Likewise, this program proposes that criteria be established to allow the promotion and coordination of governmental efforts aimed at granting citizens access to public information contained in national and international data networks.

The design of SINIA is based on the pressure-state-response model proposed by the OECD and adjusted to Mexico's specific needs and possibilities. In 1997, the second phase of SINIA, allowing it to be accessed via the Internet, will be implemented. In the third phase, the information contained in the biennial report, discussed later on in this document, will be incorporated.

SINIA will also include information pertaining to the inventories of existing natural resources in the national territory; the mechanisms used and the results obtained from monitoring air, water and soil quality; and data on ecological zoning, registers, programs and actions that may be undertaken in order to preserve the ecological equilibrium and protect the environment. The law also provides that SINIA will contain relevant reports and documents resulting from scientific and academic activities, as well as technical or other studies that deal with environmental issues and the preservation of natural resources, which are conducted in the country by individuals or corporations, both domestic and foreign.

In accordance with the 1995-2000 Environmental Program *(Programa de Medio Ambiente)*, SINIA will encompass the following components:

- Environmental Indicators System;
- Environmental Accounts Complementing the National Accounts System;
- Geographical Information System for Ecological Zoning;
- Information System for the Knowledge and Use of Biodiversity;
- Information System on Protected Natural Areas;
- Information System on Toxic Substances and Hazardous Waste;
- Pollutants Release and Transfer Registry;
- Information System on International Environmental Cooperation;
- Information System on Environmental Regulations;
- Information System on Compliance with Environmental and Natural Resources Laws, Regulations and Standards;
- Laboratories and Environmental Monitoring.

Likewise, the LGEEPA states that SINIA must produce the following environmental information publications:

- A Report on the General Condition of Ecological Equilibrium and Environmental Protection *(Informe sobre la Situación General en Materia de Equilibrio Ecológico y Protección al Ambiente)*, that must be drafted and published every two years. Publication of the 1995-96 Biennial Report *(Informe Bienal de la Situación General en Materia de Equilibrio Ecológico y Protección al Ambiente)* was expected during the second semester of 1997.[14] INEGI is participating in the information gathering process so that environmental statistics and basic information handled by both institutions are validated and rendered compatible. The trends and policies developing in the country will then be analyzed so that they may be discussed by national experts and finally, the report will be discussed in the Advisory Councils for Sustainable Development;

- The Ecological Gazette *(Gaceta Ecológica)*, which will contain legal provisions, Mexican Official Standards, decrees, regulations, agreements and other administrative acts. It will also contain general information regarding environmental issues published by the federal or local governments and international documents dealing with environmental issues of interest to Mexico, notwithstanding their publication in the Official Gazette of the Federation *(Diario Oficial de la Federación)* or in other media;[15]

- The calculation of the Ecological Net Domestic Product *(Producto Interno Neto Ecológico)*. The Ecological Net Domestic Product will be computed for the purpose of quantifying the costs of environmental pollution and the depletion of natural resources caused by economic activities in a specific year. The INEGI will integrate the Ecological Net Domestic Product into the National Accounts System.[16]

14. Until now, two Biennial Reports, covering the periods 1991-92 and 1993-94, have been published.
15. Article 159 bis 2. The Ecological Gazette (*Gaceta Ecológica)* has the legal status of a governmental gazette, in accordance with the Act on the Official Gazette of the Federation and Governmental Gazettes *(Ley del Diario Oficial de la Federación y Gacetas Gubernamentales)* published on 24 December 1986. However, the purpose, contents and scope of the Ecological Gazette are more extensive than those of the other governmental gazettes, which are only concerned with the "publication of agreements, orders, decisions, directives, notifications, notices and in general all communications issued by Federal Executive Agencies, which are not required to be published in the Official Gazette of the Federation." (Article 13).
16. Article 159 bis, third paragraph.

1.4.2 Individual Right of Access to Environmental Information

The LGEEPA reform was intended to grant everyone, independently of whether or not they are directly affected by a given issue, the right to obtain, from the appropriate environmental authority, the environmental information in the hands of such authority.[17] In accordance with article 159 bis 3, any individual or juridical person has the right to ask Semarnap, state, Federal District and municipal authorities to grant them access to the requested information. Only one exception to the general access to information is contemplated. This exception covers the information related to environmental audits: only those who are, or are likely to be directly affected may gain access to the basic diagnosis and the preventive and corrective actions to be undertaken as a result of environmental audits. Moreover, confidentiality must be respected, as provided under the Federal Law on Industrial Property *(Ley Federal de Propiedad Industrial)*.[18]

The LGEEPA determines the kind of information that may be requested, the steps to be followed and the instances when authorities may deny such information. Under the law "any information (whether in written, visual or electronic format) in the hands of environmental authorities pertaining to water, soil, flora, fauna and natural resources in general, as well as information regarding activities and measures which affect, or might affect them," is construed as environmental information.

Under the LGEEPA, procedures are minimized and encompass filing a written request, which must clearly specify the information being requested, and the reasons underlying such request.[19] The applicants, whether individuals or juridical persons, must identify themselves by stating their personal or corporate names and their addresses. This legal

17. This legal provision is in accordance with the position stated by the Judiciary in the sense that exercising the petition right does not require that legal standing be proven. This is how it has been asserted in the following case: "Petition, Right of." Judicial Weekly Review of the Federation, Vol. LXXVII, third part, p. 25, *Amparo* under review 6176/63, José Guadalupe Arontes Blancas, 28 November 1963, 5 votes. The argument to the effect that the petition right granted under Article 8 of the Constitution is subject to the petitioner substantiating his legal standing in regard to the petition is inaccurate, since the guarantee embodied under the mentioned legal precept only requires that the right be exercised in writing and in a peaceful and respectful manner.
18. Article 82.
19. "Petition, Right of." Article 8 of the Constitution does not subordinate the challenge or any other aspect of the right of petition to the compliance by the petitioners with specific regulatory requirements. Judicial Weekly Review of the Federation Vol. XIX, third part, p. 63, *Amparo* under review 4916/58, Juan N. Canales, 19 January 1959, voted unanimously (4 votes).

provision regulates petition rights granted under Article 8 of the Constitution in regard to environmental issues.

One of the innovative aspects contemplated under the LGEEPA has to do with the establishment of an obligation for environmental authorities to respond to the petition within 20 days. This is most relevant, as it expedites the issuance of a response to the applicant. In the Mexican legal system, authorities may normally take up to four months to respond. Article 17 of the *Federal Administrative Procedure Act* states that "unless specific laws prescribe otherwise or set different deadlines, the period of time available for authorities to issue a decision shall not exceed four months; after this period of time has elapsed, the applicant's request shall be deemed refused." Before this legal definition, the jurisprudence from the Nation's Supreme Court of Justice had only considered that the "brief period of time" referred to under the Constitution must be "that which reasonably allows a petition to be considered and decided upon."[20]

Even though this legal provision – whose purpose it is to expedite the response from environmental authorities – is adequate, it may be ineffective in practice. In fact, Article 159 bis 5 of the LGEEPA asserts that environmental authorities must respond within 20 days after having received a given petition. In addition, it states that, where authorities provide a negative answer, it shall mention the reasons underlying the denial. However, immediately thereafter, the concept of deemed refusal is incorporated, by providing that where no written response is issued by environmental authorities within the specified time limits "the petition shall be deemed to have been refused." This could result in authorities simply letting deadlines go by, in order not to provide legal reasons for denying access to the requested information, due to the administrative burden faced by public offices, or as a result of sheer indolence.[21] In

20. *Amparo* under review 3609/1957, – Genaro Sandi Cervantes. Judicial Information Bulletin *(Boletín de Información Judicial),* 1958, No. 61-62 and 1966 Report *(Informe de 1966),* Second Division *(Segunda Sala),* p. 135. In jurisprudence, the Court has ruled that Article 8 of the Constitution is violated if, after 4 months from the date a written petition from a private party is received by the authority, no response is issued (Appendix to Vol. CXVIII, rulings 767, 188 and 470); in other decisions the Court has established the variability of the "brief term" concept, since in some instances it has estimated that this may be 5 days, while in other instances it may be up to 10 days. (*Amparo* under review 6023/1954. – María Servín de Peralta. – Judicial Information Bulletin, 1955, No. 2953; and *Amparo* under review 1799/1955. – Luis Valencia Rojas. – Judicial Information Bulletin, 1955, No. 3286.

21. The lack of legal grounds and arguments underlying the *deemed refusal* may not be challenged before the Courts, since it is not an act of power *per se* and therefore the formality requirements to be fulfilled by legal acts do not apply. Only the essence of the refusal may be challenged, not its lack of formality. See decision rendered by the Second Collegiate Administrative Tribunal of the First Circuit: "Deemed

any event, when applicants receive a negative response to their information request, they may directly file an action for annulment before an administrative tribunal or challenge the grounds for the deemed refusal before a Federal Court.[22]

In addition, the LGEEPA grants private parties the right to file a revision recourse whenever they consider that their interests are affected by the authorities' denial to provide the requested information. It is worth mentioning that, besides administrative recourses, private parties may avail themselves of another legal instrument to demand that information be provided: the *amparo* recourse – whose purpose is to have constitutional petition rights respected by authorities, and to have criminal recourses contemplated in the Criminal Code for the Federal District in *fuero común* matters, and for the entire Republic in *fuero federal* matters – which provides that unduly preventing the filing or the processing of a request by public employees is construed as a misuse of power.[23]

The right of access to environmental information is not limitless. Indeed, the LGEEPA establishes the limits of such a right by setting exceptions in order to prevent the right from being meaningless. Environmental authorities may only deny providing the information

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Refusal [...] may not be challenged for lack of grounds and arguments." The deemed refusal resolution, since it is a legal fiction that originates in the silence of administrative authorities, is intended to provide the grounds for action, which, when implemented, allows the plaintiff to initiate an action for annulment in substitution of the express act; thus, even though the negative silence constitutes the challenged act, the truth is that it is not a real administrative resolution since it lacks the will of the issuing authority; this is why interpretation processes may not be made, and challenges may not be allowed on the grounds that the constitutional requirements of foundation and motivation are lacking, since it is merely a fiction that comes into legal existence at peoples' will and, hence, only the essence of the refusal may be examined. Direct *Amparo* 122/91, Fivisa, S.A. de C.V. 25 April 1991. Voted unanimously. Justice: Carlos Yánez. Secretary: Mario de Jesús Sosa Escudero.

22. In this case, it is not proper to make an application for the revision recourse contemplated under the LGEEPA before the authority that "issued" the deemed refusal. According to the decision made by the Second Collegiate Tribunal of the Sixth Circuit: "Deemed Refusal, may not be challenged before the very authority responsible for it." Direct *Amparo* 394/91. Gloria Violeta Contreras, 9 May 1991. Voted unanimously. Judicial Weekly Review of the Federation, *Octava Época*. Vol. XIV, July, second part, p. 671.

23. Article 215, Section III provides that private parties may be liable for the misuse of information provided by environmental authorities. Article 159 bis 6 of the LGEEPA states that: "those who receive environmental information from competent environmental authorities, in accordance with the provisions of this Chapter, shall be responsible for using it in an adequate manner and shall be liable for any damages arising from any misuse thereof."

requested whenever one of the following circumstances occurs and is evidenced:[24]

- It is considered under legal provisions that the information is confidential or that its disclosure affects national security, given its very nature;
- The information pertains to matters which are the subject of pending legal proceedings or inspection and enforcement actions;
- The information has been provided by third parties even though they are not obliged to do so by law; or
- The information relates to inventories, inputs, and processing technologies, including their descriptions.

1.5 Federal District Environmental Act (Ley Ambiental del Distrito Federal)

Article 23 of the *Federal District Environmental Act*[25] states that the Federal District Department of the Environment *(Secretaría del Medio Ambiente del Distrito Federal)* shall establish a publicly accessible, permanent system of environmental information and enforcement. This system shall include information pertaining to natural resources, environmental policy instruments, as well as releases and levels of pollutants. In addition, Article 23 provides that the Department of the Environment must issue an annual public report on the environmental conditions in the Federal District.

The following information mechanisms are currently made available to the public by the Government of Mexico City:[26]

- Requests to visit the Atmospheric Monitoring Automated Network *(Red Automática de Monitoreo Atmosférico – RAMA)*. Visits to RAMA facilities, such as the control center, the calibration and maintenance laboratory or the weather forecast division, are permitted. This allows citizens to be aware of the actions carried out for the purpose of adequately registering the levels of atmospheric pollution in the Metropolitan Zone of Mexico City *(ZMCM)* and the repercussions these measurements may have on some aspects of city life, such as the triggering of the Environmental Contingencies Program. Access to RAMA facilities is free of charge;

24. Article 159 bis 4.
25. Published on 9 July 1996 in the Official Gazette of the Federation.
26. Federal District Department. Handbook of Procedures and Public Services of the Federal District Public Administration *(Manual de Trámites y Servicios al Público de la Administración Pública del Distrito Federal).* Oficialía Mayor, 1996.

- Consulting the Documentation Center of the Pollution Prevention and Control Division *(Centro Documental de la Dirección General de Prevención y Control de la Contaminación)*, which allows citizens to consult bibliographic information and environmental impact and risk assessment studies. The consultation is free of charge;
- Information regarding the inventory of pollutants released into the atmosphere and periodical publications about air quality and special analyses. These give the public up-to-date information on the pollutant release inventory by area and include reports, statistical yearbooks, and monthly, annual and special studies on air quality undertaken by the ZMCM. In order to gain access to the information, the applicant must provide an appropriate explanation supporting the need for the requested information, which is supplied free of charge;
- Information regarding the historical database of the Atmospheric Monitoring Automated Network *(RAMA)*. This database contains comprehensive historical data stored in electronic format which may be accessed by applicants in a manner that suits their needs – for example by contaminant or for a given period of time – so that they may perform relevant data analyses. Applicants must justify the need for the information requested, which is supplied free of charge;
- Consultation of the Metropolitan Air Quality Index *(Índice Metropolitano de Calidad del Aire – IMECA)*. This hourly report issued by the Metropolitan Environmental Commission *(Comisión Ambiental Metropolitana)* may be consulted through the Internet at: <http://www.cem.itesm.mx/sima/ddf/> and by telephone through Locatel;
- Access to the Restricted Traffic Program "No Driving Today" *(Programa de Restricción Vehicular "Hoy No Circula")*. This service is supplied through the Telephone Information Service *(Servicio Público de Localización Telefónica – Locatel)* and provides information regarding the days when a vehicle, depending on its registration and sticker color, may not be driven in the metropolitan area. It also provides information about emergency measures triggered by the implementation of atmospheric contingency programs.

2. ENVIRONMENTAL IMPACT ASSESSMENTS

This section describes the legislation, regulations and policies concerning public access to information gathered through environmental impact assessment procedures. The federal General Law of Ecological

Equilibrium and Environmental Protection[27] and the environmental legislation of some of the states will be reviewed.

In Mexico, jurisdiction over environmental issues is shared by the three levels of government: federal, state and municipal. The LGEEPA itself grants jurisdiction by stating that the Federation shall be responsible for the environmental impact assessment of any work or activity expressly contemplated under Article 28 of this Law (which is discussed later on in this document); the states shall be in charge of assessing the environmental impact of those works or activities not expressly under the jurisdiction of the Federation, while municipalities shall participate in the environmental impact assessment of works or activities under the responsibility of the states, whenever they are undertaken within the limits of their territory.[28]

2.1 Federal Legislation

Right of Access to Information

Under the LGEEPA, an environmental impact assessment is defined as an administrative procedure under the responsibility of Semarnap, which "sets forth the conditions that shall govern the undertaking of works and activities that are likely to cause ecological imbalances or exceed the limits and conditions established in the applicable provisions aimed at protecting the environment and preserving and restoring ecosystems, in order to prevent or minimize their negative effects on the environment."[29]

27. The Environmental Impact Regulation adopted under the LGEEPA (published in the Official Gazette of the Federation dated 7 June 1988) will not be reviewed since, in accordance with the LGEEPA amendments enacted on 13 December 1996, the right of access to information was substantially modified in order to widen its scope and add some precision. This Regulation is to be amended in order to reflect the changes introduced in the Law.
28. Article 35 bis 2 adds some precision to the distribution of jurisdiction grants among the federal, state and municipal governments: "Article 35 bis 2: Those environmental impacts that might be brought about by works or activities not contemplated under Article 28 shall be assessed by the Federal District or state authorities, with the participation of the respective municipalities, whenever, due to their location, magnitude, or characteristics, the probable environmental impacts are significant and are expressly contemplated in state environmental legislation. In such occurrences, the environmental impact assessment may be performed within the framework established for authorization procedures relating to land use, constructions, subdivisions, or other procedures contemplated by state laws and the applicable provisions. Such laws shall contain the provisions necessary for the purpose of achieving compatibility between environmental policy and urban development and avoiding needless duplication of administrative procedures."
29. Article 28.

Under the LGEEPA, those works and activities that cause, or are likely to cause significant effects on the environment or natural resources, are subject to the granting of an authorization prior to their being undertaken whenever they may not be adequately regulated through other instruments such as standards, permits, ecological zoning and others. To this end, Article 28 of the Law specifically describes the works and activities whose environmental impact assessment shall be the responsibility of the federal government:

> I. Hydraulic works, roads, oil, gas, hydrocarbons and multi-purpose pipelines;
>
> II.- Oil, petrochemical, chemical, iron and steel, pulp and paper, sugar, cement and electrical power generation industries;
>
> III.- The process of exploring, extracting and processing minerals and substances reserved for the Federation in accordance with the *Mining Act (Ley Minera)* and the Act Regulating Article 27 of the Constitution in regard to Nuclear Matters *(Ley Reglamentaria del Artículo 27 Constitucional en Materia Nuclear)*;
>
> IV.- Hazardous and radioactive waste treatment, containment and disposal facilities;
>
> V.- Exploiting tropical forests and that of species which do not regenerate easily;
>
> VI.- Tree plantations;
>
> VII.- Changes in the use of woodlands, jungles and arid zones;
>
> VIII.- Industrial parks high-risk activities are contemplated;
>
> IX.- Real estate developments that affect coastal ecosystems;
>
> X.- Works and activities in everglades, swamplands, lagoons, rivers, lakes, banks and shores connected to the sea, as well as in their littorals or federal zones;
>
> XI.- Works in natural protected areas under federal jurisdiction;
>
> XII.- Fishing, aquaculture and agricultural activities that may threaten the preservation of one or more species, or damage their ecosystems, and
>
> XIII.- Works and activities under the federal government's jurisdiction that are likely to cause serious and irreparable ecological imbalances,

> damage to public health and the ecosystems, or exceed the limits and conditions set forth in the legal provisions pertaining to the preservation of ecological equilibrium and the protection of the environment.

The aim of such a listing is to ensure that the Federal Government does not leave any works and activities that involve significant impacts unregulated, and to provide private parties with increased legal certainty, so that they know exactly which activities require an authorization.[30]

Further to the reform of the LGEEPA in 1996, public participation in environmental impact assessment procedures has been expanding. Besides having the right to know the contents of the statements submitted to authorities, citizens may now participate in environmental impact assessment procedures through two newly created public access means. Public discussion of projects submitted to environmental authorities is permitted whenever their undertaking might bring about serious ecological imbalances or damages to public health or ecosystems. In addition, the procedures to be followed by environmental authorities for the purpose of guaranteeing the right of individuals to make remarks and proposals regarding submitted environmental impact statements are established. The following access to information mechanisms derive from the contents of Article 36.

- Right of access to the contents of environmental impact statements *(manifestaciones de impacto ambiental – MIA)*. Article 34 of the Law provides that, once an environmental impact statement is submitted and duly filed, the authority shall make it accessible to the public so that it may be consulted by any person who so requests.

  > I.- The Department shall publish the environmental impact authorization request in the Ecological Gazette.[31] In addition, within five days of filing the environmental impact statement with the Department, the applicant

30. The LGEEPA also provides that Semarnap may request an environmental impact assessment of works and activities that, while not expressly listed in the Law, may cause ecological imbalances, damages to public health or the ecosystems, or exceed the limits and conditions set forth by law. However, so that the benefit resulting from having an accurate listing is not nugatory, this provision contemplates the procedure by which authorities determine whether filing an environmental impact statement is in order. The presumption of *deemed acceptance* is contemplated where the authority fails to respond within the prescribed time limits.
31. This requirement for publication in the Ecological Gazette is also mentioned in the last paragraph of Article 31: "The Department shall publish in the Ecological Gazette a listing of the preventive reports that are brought to its attention in accordance with the provisions of this article, and shall make such reports available to the public."

> shall publish, at his own expense, a summary of the projected work or activity in a newspaper of wide circulation in the federate state involved;
>
> II.- Within ten days of the project summary's publication according to the above-mentioned terms, any citizen may request that the Department make the environmental impact statement available to the public in the federate state involved.

The Division of Ecological Zoning and Environmental Impact of the National Ecology Institute *(Dirección General de Ordenamiento Ecológico e Impacto Ambiental del Instituto Nacional de Ecología)* within Semarnap is the administrative unit in charge of organizing the consultation process regarding preventive reports, environmental impact statements, and publishing the relevant information pertaining to projected works or activities in the Ecological Gazette.[32]

It should be noted, however, that some restrictions apply in terms of gaining access to the information provided by the promoters of the work or activity. When submitting an environmental impact statement, the applicant may request that information included in the file be kept confidential whenever industrial property rights and the confidentiality of commercial information submitted might be jeopardized by public disclosure.

- Holding public consultations regarding projected works or activities. The law provides that Semarnap may hold public hearings at the request of any member of the community involved. This stage is of high significance in the environmental impact assessment procedure, for its purpose is to gather the opinions and viewpoints of all those affected by the projects being considered. The relevant wording of the mentioned Article 34 provides that:

> III.- Whenever, according to the provisions set forth in the Regulation adopted under the Law, works or activities that are likely to cause serious ecological imbalances or damages to public health or ecosystems are considered, the Department, in coordination with the local authorities,

32. Article 60, Section VII of the Bylaws of the Department of the Environment, Natural Resources and Fisheries *(Reglamento Interior de la Secretaría de Medio Ambiente, Recursos Naturales y Pesca)*. In addition to the activities carried out by the Division of Ecological Zoning and Environmental Impact, the federal agencies of Semarnap have authority in connection with environmental impact assessments (Article 32, Section X, paragraph f). The Department is promoting a delegation and decentralization process of environmental impact assessments. Currently, 19 of Semarnap's federal agencies are empowered to examine statements, make diagnoses and provide follow up, and all agencies now have offices where environmental impact studies may be filed.

> may organize a public information meeting at which the promoter of the project shall explain the technical environmental aspects of the planned work or activity.
>
> In order for this duty to be effective, the Division of Ecological Zoning and Environmental Impact is responsible for convening and conducting, whenever it is deemed necessary, technical and public hearings in regard to projects that have entered the environmental impact assessment stage.[33]

It is worth noting that the decision to hold such public hearings is left entirely to the discretion of authorities; that is, not all requests from interested parties will give rise to public consultations, but rather that environmental authorities shall take the particular circumstances surrounding each case into consideration and decide accordingly.

- Submission of proposals by affected parties. The above-mentioned Article 34 establishes the mechanism aimed at ensuring that public opinions and proposals are taken into consideration during the assessment procedure:

> IV.- All interested parties may, within twenty days of the Department making the environmental impact statement available to the public in accordance with the provisions of section I, propose the implementation of additional preventative and mitigatory measures, and make those remarks that they may deem appropriate; and
>
> V.- The Department shall include the remarks made by interested parties in the respective file, and record the public consultation process as well as the remarks and proposals submitted in writing in the decision issued.

The relevant aspect in the LGEEPA is to make public information an integral part of the authority's decision-making process. From these legal provisions ensues the fact that environmental impact assessments and statements, and public information are essential elements in the environmental impact assessment process. Public participation in the process is more than merely red tape; it is a decisive component of the assessment system itself which requires that technical considerations take public perceptions into account.

One other important fact is worth emphasizing. This access to information mechanism is not restricted to environmental impact statements, but also covers *preventive reports.* Preventive reports are submitted in connection with projected works or activities which do not require

33. *Id.*, Section VI.

an environmental impact statement to be filed under the law.[34] Indeed, the last paragraph of Article 31 of the LGEEPA states that "the Department shall publish in its Ecological Gazette the listing of all preventive reports that may be submitted in accordance with the provisions of this Article, and shall make them available to the public." The interpretation of this legal provision may mean that the right of access to information is in fact limited to consulting the reports and submissions filed. Since the law itself establishes that the damages that might be caused by specific works or activities do not justify undertaking an environmental impact assessment procedure, it would perhaps be excessive to subject preventive reports to as strict a scrutiny as that undergone by environmental impact statements.

Access to Information Policy

The 1995-2000 Environmental Program states that environmental impact assessment is an instrument for gathering environmental information and a process for analyzing the social costs and benefits involved in each development project; it provides an opportunity for making the right decisions in order to maximize the use of economic and ecological resources for the benefit of society. Thus, in order to fully take advantage of an environmental impact assessment's overall potential, a series of measures, which include "devising appropriate mechanisms for public participation and consultation," are considered necessary under this Program.

Ease of access

The executive summaries pertaining to environmental impact assessment projects may be also consulted through the Internet at the following address: <http://www.ine.gob.mx/INE/documentos/dgoeia/mias.html/>.

34. "Article 31. The undertaking of works and activities referred to under Article 28, Sections I through XII, shall require the filing of a preventive report in lieu of an environmental impact statement whenever: I. There exist official Mexican standards or other provisions that regulate the releases, discharges, natural resources exploitation and, in general, all the relevant environmental impacts that may be brought about by the projected works or activities; II. The intended works or activities are specifically contemplated in a partial urban development plan or ecological zoning that has been assessed by the Department in accordance with the provisions of the next article; or III. The facilities involved are located in industrial parks authorized under the provisions of the present section. In the above cases, upon analyzing the preventive report, the Department shall determine, within a period of time not exceeding twenty days, whether filing an environmental impact statement in any of the forms prescribed by the Regulation adopted under this Law is required, or if any of the above conditions apply."

Access Time

Environmental impact assessment records may be consulted at any time after they have been submitted to Semarnap and the respective file has been opened. Moreover, the promoter of the work or activity must publish a project summary in a newspaper of wide circulation within the federate state where the project is to be undertaken within five days after filing the statement.

Citizens may request, within ten days of the project summary's publication, that Semarnap make the environmental impact statement available to the public of the federate state involved. In addition, any interested party may, within twenty days of the environmental impact assessment's being made publicly available by the Department, propose the establishment of additional preventive and mitigatory measures and make any remarks they deem relevant.

2.2 State Legislation

Right of Access to Information

Each of Mexico's 31 states and the Federal District has its own legislation pertaining to environmental protection, which contemplates and regulates the environmental impact assessment procedure. All of these laws establish the right of access to information in connection with this process, excepting those enacted by five states.[35]

In dealing with the environmental impact assessment procedure, the *Federal District Environmental Act (Ley Ambiental del Distrito Federal)* contemplates a mechanism that provides access to documents filed with the Federal District Department of the Environment *(Secretaría de Medio Ambiente del Gobierno del Distrito Federal)*:

> Article 37. Upon receipt of an environmental impact or risk report, statement or study, the Department shall, within two working days, open a file for public consultation containing the summary of the projected work or activity (in the form prescribed under Article 35, Section I, Subsection h), as well as the decision rendered in regard to the corresponding environmental impact, when issued.

To this end, the Federal District Department of the Environment shall maintain, on its premises, a publicly available list of all reports,

35. Colima, Nayarit, Oaxaca, San Luis Potosí and Tlaxcala.

statements and studies submitted in regard to environmental impact. This list is to be updated every two working days.

Besides granting citizens the right to access documents, the *Federal District Environmental Act* contemplates the possibility of public participation in the environmental impact assessment procedure through the following mechanism:

- Promoters of works or activities that require the issuance of an environmental impact authorization prior to their being undertaken must publish a summary of the projected works or activities – at their own expense, in a newspaper with nationwide circulation – which states the name of the owner or promoter and that of the person responsible for the environmental impact statement or study; the name and the main characteristics of the project, including its location; and the most significant environmental impacts expected together with any preventative, mitigatory, remedial, compensatory or enhancement measures considered;
- Any person may submit written remarks to the District's Department of the Environment within five working days of this summary's publication, provided that documentary evidence is presented to support these remarks;
- The Department of the Environment shall carefully assess the remarks submitted when rendering its decision regarding the environmental impact; and
- Those persons who are of the opinion that their remarks have not been appropriately analyzed and taken into account, may avail themselves of the *dissension* administrative recourse, in accordance with the provisions of the *Federal District Administrative Procedure Act (Ley de Procedimiento Administrativo del Distrito Federal).*

The laws of the States of Baja California Sur, Campeche, Coahuila, Chiapas, Guanajuato, Chihuahua, Guerrero, Hidalgo, Morelos, Nuevo León, Puebla, Querétaro, Sinaloa, Tabasco, Veracruz, Yucatán and Zacatecas include provisions that regulate access to information in connection with the environmental impact assessment procedure. For example, in this regard the *Ecological Act* for the State of Guanajuato *(Ley Ecológica para el Estado de Guanajuato)* provides the following:

> Article 28. Upon filing an environmental impact statement, and once the requirements established by the competent authority have being fulfilled, any person may consult the corresponding file.

> Interested parties shall be entitled to request that any information contained in the file be kept confidential whenever its disclosure might affect industrial property rights or licit interests of a commercial nature.

Similar provisions are contemplated in the environmental legislation of the States of Sonora and Tamaulipas. The Law of Ecological Equilibrium and Environmental Protection of the State of Sonora[36] provides that:

> Article 31. Upon the filing of an environmental impact statement and once the requirements established by the competent authority have being fulfilled, the statement shall be published under the terms and conditions prescribed by Regulation. Interested parties shall be entitled to request that any information contained in the file be kept confidential whenever its disclosure might affect industrial property rights or licit interests of a commercial nature.
>
> Any person may consult the corresponding file made up of the documents contained in the environmental impact statement.

For its part, the Law of Ecological Equilibrium and Environmental Protection of the State of Tamaulipas[37] provides that:

> Article 39. Upon the filing of an environmental impact statement and once the requirements established by the Department or the competent municipal authority have being fulfilled, any person shall be entitled to consult the corresponding file at the Environmental Programs Registration Office *(Oficina de Registro de Programas Ecológicos)*.
>
> Any interested person shall be entitled to request that any information contained in the file be kept confidential, whenever its disclosure might affect industrial property rights or licit interests of a commercial nature.

In the State of Baja California, the possibilities for accessing the information are broader, since the files are both made publicly available in government offices and are published in the State's Official Gazette *(Periódico Oficial del Estado)*. Indeed, the Law of Ecological Equilibrium and Environmental Protection of the State of Baja California *(Ley del Equilibrio Ecológico y Protección al Ambiente del Estado de Baja California)*[38] provides that:

> Article 63. Upon filing an environmental impact statement, and once the requirements established by the branch have being fulfilled, any person

36. Published in the Official Gazette of the State Government *(Periódico Oficial del Gobierno del Estado)*, dated 3 January 1991.
37. Published in the Official Gazette of the State Government, dated 12 December 1991.
38. Published in the Official Gazette of the State Government, dated 29 February 1992.

> shall be entitled to consult the corresponding file, which shall be published in the Official Gazette of the State *(Periódico Oficial del Estado)*.[39]
>
> Any party interested in keeping any part of the information confidential shall clearly indicate to the Branch, in a separate section of the filed document, any information that constitutes a technological secret and which, if it were made public, could affect industrial property rights or licit interests of a commercial nature. In this case, the information shall be presented in such a way that any information of significance to the environment or public health may be examined without the interested party being affected.

Also aimed at widening access to information possibilities, the Law of Ecological Equilibrium and Environmental Protection of the State of Quintana Roo *(Ley del Equilibrio Ecológico y la Protección del Ambiente del Estado de Quintana Roo)*[40] provides that promoters of works or activities must submit their environmental impact statements accompanied by a sufficient number of copies for distribution to state municipalities:

> Article 35. Upon filing an environmental impact statement, and once the requirements established by the competent authority have been fulfilled, any person shall be entitled to consult the corresponding file.
>
> For the purposes of the preceding paragraph, the interested party shall provide the copies that are necessary for public consultation at the official libraries of each municipal seat. Environmental groups that operate in the state shall be entitled to request copies of the file containing the environmental impact statement from the libraries in which documents are kept, or from the Department of Public Works and Urban Development *(Secretaría de Obras Públicas y Desarrollo Urbano)*, which shall be provided within five days of the request.
>
> No subsequent application for a work or activity shall be considered for two years following the date the authorization of the work was made public, if the essential elements of the new application are identical to the ones contained in the previous one, so that intellectual property rights or licit interests of a commercial nature are protected.

39. On the contrary, Article 54 of the Environmental Impact Regulation adopted under the Law of the State of Baja California *(Reglamento en Materia de Impacto Ambiental de la Ley del Estado de Baja California)* restricts access to information possibilities, as it requests that interested parties prove their legal standing and the need to obtain the information contained in the files in order for them to be allowed to consult the documents on the premises of the State environmental authority.
40. Published in the Official Gazette of the State *(Periódico Oficial del Estado),* dated 14 April 1989.

Access Policies

In the states of the Republic, the policy is to allow public access to the information submitted in the environmental impact assessment procedure without any legal limitation whatsoever, except for the five states which do not regulate this issue. It is worth mentioning, however, that the environmental legislation of the State of Michoacán limits the access to information pertaining to the environmental impact assessment procedure since it requires that the applicant be proficient in environmental issues.[41] This is considered to be exception to the general tendency prevailing in the country, which allows access to any interested persons, without any need for them to prove their legal standing or show any kind of proficiency. The *Environmental Protection Act* of the State of Michoacán *(Ley de Protección al Ambiente del Estado de Michoacán)*[42] states:

> Article 28. Once the environmental impact statement has been filed, and the requirements established by the competent authority have been fulfilled, only individuals who are proficient in environmental issues may consult such a report.

Ease of Access

All states throughout the country have set up branches charged with the administration and application of environmental laws and regulations in force in their territory. However, ease of access is still limited, since the information is concentrated in the offices of state governmental seats. Visiting these offices is necessary to gain access to this information, implying that individuals not residing in the capital city must travel there in order to consult any files. Efforts must be made to forward this information to all municipalities belonging to a specific state. Moreover, information systems allowing on-line access must be set up. Early implementation of these mechanisms is hindered by financial considerations.

41. There is also some doubt on the interpretation of Article 70 of the Law of Ecological Equilibrium and Environmental Protection of the State of Aguascalientes *(Ley del Equilibrio Ecológico y Protección al Ambiente del Estado de Aguascalientes)*. It specifically states that: "Upon an environmental impact statement being filed, and once the requirements established by the competent authority have been fulfilled, *any person who shows an interest* may consult the corresponding file." A strict interpretation might indicate that the Law requires a direct interest to be proven for access to information to be granted; however, a systematic interpretation of the Law indicates that the intention of the legislator was to leave the way open for any person who is interested to know the files' contents without them having to prove that they are affected in a direct, actual or potential manner in order to gain access to information.
42. Published in the Official Gazette of the Constitutional Government of the State of Michoacán de Ocampo *(Periódico Oficial del Gobierno Constitucional del Estado de Michoacán de Ocampo)* dated 7 May 1992.

Access Time

Consulting environmental impact information may occur at any time after it has been submitted by the promoter of the work or activity and duly filed with authorities. Specific provisions in the Federal District legislation contemplate not only access to information but also the possibility to submit comments regarding the environmental impact statement within five working days of its publication.

Cost

The publication of environmental impact statements is at the expense of the promoter of the work or activity. This is why consulting the document itself is free of charge, although a small charge applies if copies of filed documents are requested.

3. PERMITS AND AUTHORIZATIONS

The issuance of permits, licenses or authorizations is the action through which administrative authorities grant private parties the ability or the right to perform an act or undertake an activity. This section deals with the mechanisms of public access to information related to the issuance of the various permits and authorizations contemplated in environmental laws, such as:

- Operating licenses – Fixed sources under federal jurisdiction that release or are likely to release odors, gases, or solid or liquid particulates into the atmosphere, require that an operating license be granted by Semarnap before operations are allowed to start;

- [Pollutant] release inventory – Its purpose is to register fixed sources of air pollution. Businesses must provide information regarding the substances they release into the atmosphere, specifically their quantity and composition;

- Authorization to handle hazardous wastes – This is the authorization granted to businesses involved in the installation and operation of systems for the collection, storage, transport, containment, reuse, treatment, recycling, incineration and final disposal of hazardous waste;

- Authorizations dealing with the import or export of hazardous waste;

- A register of companies involved in the handling of hazardous waste – The regulation adopted under the LGEEPA in connection with hazardous waste provides that facilities generating hazardous waste must be listed in a registry established by Semarnap for this purpose;

- Discharge permits – The *National Waters Act (Ley de Aguas Nacionales)* provides that a permit from the National Water Commission *(Comisión Nacional del Agua)* is required for permanent, periodic or accidental discharges of wastewater into bodies of water under federal jurisdiction, and where such wastewater permeates federal or other lands whenever such discharges are likely to contaminate underground strata or aquifers;[43]

- Authorizations setting specific permitted noise levels.

Right of Access to Information

Environmental legislation does not contemplate public participation in granting permits and authorizations. Generally, the procedure only involves filing the application and fulfilling the requirements set forth by law. The administrative act granting or denying a permit or an authorization is personally communicated to the interested party and is not published in any medium such as the Official Gazette of the Federation.

Notwithstanding the above, it is possible to gain access to official documents issued by the administration and those submitted by interested parties. As indicated earlier in this document, under Article 159 bis 3 of the LGEEPA, all persons are granted the right to ask authorities to make the requested environmental information available to them, as prescribed by Law. Environmental information is defined in this Article as any "information in written, visual or electronic format, in the hands of environmental authorities, relating to water, air, soil, flora, fauna and natural resources in general, as well as that pertaining to activities or measures which affect, or are likely to affect them." The subject of the access right is, then, the information kept in public offices, while the files, records and documents in the hands of the administration are the instrumental means enabling the exercise of this right.

43. Article 88. The Article itself provides that the National Water Commission may substitute the required wastewater discharge permit with a simple notice, depending on the characteristics of the aquifers, areas and sites involved, or those of water uses.

Access Policies

SINIA, the National System of Environmental Information and Natural Resources (see Section 1.4.1 above), contemplates the creation of a subsystem known as the Environmental Regulation Information System *(Sistema de Información sobre Regulación Ambiental)*. Its purpose is to combine data pertaining to the legal framework in force and its implementation. It will include databases containing information regarding the decisions, authorizations and licenses issued by Semarnap, as well as information pertaining to laws, regulations and Mexican Official Standards. In accordance with the 1995-2000 Environmental Program, this information system must be promoted so that individuals, companies and other government agencies may make use of its contents in their decision-making processes.

For the purpose of consolidating all the information generated in the process of issuing environmental permits, licenses and authorizations, Semarnap determined that there was a need to devise a centralized management and documentation instrument which would also, among other things, serve as an input for an information system. Thus, on 11 April 1997, Semarnap published in the Official Gazette of the Federation, "The Agreement Establishing the Mechanisms and Procedures for Obtaining a Comprehensive Environmental License through a Single Request, and Updating Pollutants Release Information through an Operating License." This Agreement considers that the "Comprehensive Environmental License" is the appropriate instrument for coordinating procedures, gathering and updating information, and monitoring pollutants released by industrial facilities. It states:

> FIRST. The purpose of the present agreement is to establish the mechanisms and procedures so that – in those instances where the management and operation of facilities that carry on activities under federal jurisdiction must be granted several permits, licenses or authorizations by the Department of the Environment, Natural Resources and Fisheries *(Secretaría de Medio Ambiente, Recursos Naturales y Pesca* – Semarnap) – a single application may be filed in connection with environmental protection issues, and to update the information needed to set up a pollutants release and transfer inventory by facility.

Ease of Access

The Environmental Regulation Information System is in the development stage, however, several registers containing information regarding the permits and authorizations granted by the different branches of Semarnap may currently be consulted:

- Pollutants Release Inventory. Sources of atmospheric pollution are registered in this inventory;

- Public Register of Water Rights *(REPDA)*. This is where concession and assignment titles, and the permits for the use and exploitation of water are registered, together with any extensions, suspensions or terminations thereof, as well as the acts or contracts pertaining to the total or partial transmission of titles.

Besides these registers, the various reports submitted by Semarnap include global figures in connection with the permits, licenses and authorizations issued. Such is the case with the Report on the General Condition of the Ecological Equilibrium and the Protection of the Environment *(Informe sobre la Situación General en Materia de Equilibrio Ecológico y la Protección al Ambiente)* which is submitted biannually, and the Activity Reports *(Informes de Actividades)* which are presented by the Department on a yearly basis.

Cost

Access to these registers is free of charge. A small charge applies whenever copies of data contained in the registers are requested, which is at the applicant's expense. Once the Environmental Regulation Information System is fully implemented, it will be possible to access it through the Internet at no cost.

4. PROPOSALS FOR PLANS AND PROGRAMS

This section describes the mechanisms for public access to projected plans and programs being considered by environmental authorities.

Right of Access to Information

Article 26 of the Constitution explicitly sets forth the power of the State to undertake planning activities. It also lays the ground for ensuring that the various sectors – public, private and social – are involved in the National System of Democratic Participation. This Article states: "Planning shall be democratic. Through the involvement of the different social sectors, it shall gather the expectations and demands of society in order to include them in the development of the plan and programs. There shall exist a development master plan to which all programs of the federal public administration shall be subjected to." Thus, the planning

system is not merely conceived as a decision-making process but, essentially, as a social participation process where conciliating interests and joining efforts allow the achievement of goals that are supported by the entire society.

The *Planning Act (Ley de Planeación)*[44] regulates Article 26 of the Constitution and is intended, among other things, to establish the basic standards and principles according to which the planning of national development will be carried out, to direct the activities undertaken by the federal public administration accordingly, as well as to lay the ground for promoting and guaranteeing the democratic participation of the various social groups – through their representative organizations – in the design of the government's plans and programs.

The *Planning Act* contemplates a National Development Plan which sets forth the national goals, the strategy and the priorities for the country's overall development; it provides an estimate of the resources that will be allocated to that end; it determines the instruments for carrying out this plan and those responsible for so doing; it establishes the policy guidelines of global, sectorial and regional natures; and its programs encompass all economic and social activities and rule the contents of sectorial, institutional, regional and special programs.

Article 20 of the *Planning Act* asserts that:

> Within the framework of the National System of Democratic Planning there shall be room for the participation and consultation of various social groups, so that the population may voice opinions concerning the drafting, updating and carrying out of the Plan and the programs referred to in this Act.
>
> The organizations representing blue-collar labor, peasants and popular groups, academic, professional and research institutions, business organizations and other social groups, will be involved as permanent advisory bodies in those aspects of democratic planning which are related to their activities, through public consultations organized to that aim. Moreover, representatives and senators of the Congress of the Union shall participate in these meetings.
>
> To this end, and in accordance with the applicable legislation, the System shall contemplate the organization and operation, the formalities, the frequency and the terms which shall govern the participatory and consultative processes for the national planning of development.

44. Published on 5 January 1983 in the Official Gazette of the Federation.

The LGEEPA's role establishes that the federal government shall promote the responsible participation of society in planning, carrying out, assessing and controlling environmental and natural resources policy. To this end, Article 158, section I provides that Semarnap "shall convene, within the framework of the National System for Democratic Planning, organizations representing blue-collar workers, businesses, peasants, farmers, agroforestry and fisheries, agrarian communities, indigenous people, educational institutions, private and not-for-profit entities, and other interested parties, so that they may voice their opinions and make proposals."

Even though the public has the right to participate in the planning process through public consultations, they are not entitled to have access to projected plans and programs until such time as they are finalized and published. The plans and programs relating to environmental management are not included under the LGEEPA's definition of environmental information accessible to the public. It is important that plans and programs be included in the information that may be furnished to the public, for it is easier to make adjustments or amendments when a project is still in its development stage – when the documents in the hands of the government body are known – than to challenge the action taken by the administration on the grounds of disagreement with the final draft submitted to the public.

Access Policies

The environmental policy making process and its evaluation need public participation in order for them to be legitimated and to bring about propitious conditions for their implementation. This is why one of Semarnap's strategic lines of action aims at promoting shared social responsibility and participation in environmental and natural resources policy making. As a result, a policy aimed at permanently informing the various levels of social stakeholders and securing their cooperation has been implemented. One of Semarnap's responsibilities is to coordinate the Advisory Committees for Sustainable Development, one at the national level and four at the regional level, which were set up in April of 1995.

The duties of the advisory committees are: a) to advise on designing, carrying out and evaluating sectorial strategies and policies; b) to promote or undertake public consultations and coordinate the various institutions and social organizations; c) to promote, organize or undertake public consultations and coordinate citizens; d) to assess the results of the general and specific programs of Semarnap and its decentralized

agencies; e) to analyze issues and specific cases of regional and national significance; and f) to ensure proper coordination with similar national and international entities.

The advisory councils are made up of permanent, specialized technical commissions and working groups set up for specific purposes. Each commission or working group appoints a coordinator; all councils have an operating committee, a president and a technical department who follow up on the agreements reached and the recommendations adopted by the corresponding council. The duties of the various bodies are described in the corresponding operating bylaws discussed and approved by the counselors themselves.

Between April 1995 and March 1997 the national and regional councils held seven meetings. The following are among the key issues discussed:

- Semarnap's sectorial programs (Environment, Land and Forests, Hydraulic, Fisheries and Aquaculture);
- The Amendments to the General Law of Ecological Equilibrium and Environmental Protection;
- The Strategy for Environmental Management Decentralization;
- Semarnap's strategic proposal concerning the transition towards sustainable development;
- Semarnap's report before the UN Commission for Sustainable Development;
- Holding national workshops for the analysis of the LGEEPA in April of 1996; and
- The official document presented by Mexico at the Rio+5 Forum held in March 1997 in Rio de Janeiro, Brazil.

Additionally, the following issues have been discussed at regional council meetings:

- The Hazardous Waste Program;
- The Border XXI Program;
- The Intracoastal Channel Project for the State of Tamaulipas;
- The expansion project for *Exportadora de Sal, S.A. de C.V. "Salitrales de San Ignacio"* in Baja California Sur;

- The construction of a dock for cruise ships in Cozumel, Quintana Roo;
- The issue concerning oil exploitation activities in the Natural Area of Laguna de Términos and the Península de Atasta, Campeche;
- The project regarding the construction of the La Venta – Colegio Militar highway; and
- The "Save the Apatlaco River" Project.

Ease of access

The National Development Plan and Semarnap's Environmental, Hydraulic, Land and Forestry, Fishing and Aquaculture Programs were published in the Official Gazette of the Federation. In addition, all of them are commercially published so they may be purchased at public documentation centers. They may also be accessed and obtained through the Internet at Semarnap's website <http://www.semarnap.gob.mx/> and the Presidency of the Republic's homepage <http://www.presidencia.gob.mx/>.

Cost

The publications may be consulted free of charge at information centers. The cost of publications is affordable so that interested persons can acquire the environmental plan and programs. Copies of these documents may be obtained free of charge through the Internet.

5. LAWS, REGULATIONS AND STANDARDS

This section provides an overview of existing legal mechanisms enabling the public to participate in the process of making environmental law, regulations and standards. Furthermore, mechanisms for public access to the contents of such legal provisions are outlined.

5.1 Laws

Under the Mexican Constitution, the right to introduce new bills or amendments to existing laws before the Congress of the Union is reserved for the President of the Republic, representatives and senators of the Congress of the Union and state legislatures.[45]

45. Article 71 of the Political Constitution of the United Mexican States.

Even though the power to present bills is limited to the federal executive and legislative branches and the state congresses, Mexican legislation allows citizens to directly present submissions *(peticiones)* before the Congress of the Union. The bylaws governing the Internal Administration of the General Congress of the United States of Mexico[46] provide the following:

> Article 61. Any submissions made by individuals, corporations or authorities that do not possess the right to initiate legislation shall be directly forwarded by the President of the House of Representatives to the corresponding House Committee, according to the subject of the submission. The Committee shall decide whether or not the submission deserves consideration.
>
> Citizens and groups interested in bills discussed by the Congress of the Union may voice their opinions at public hearings held throughout the legislative process. Such hearings provide important information to legislators.

This mechanism was used when amendments and additions to the General Law of Ecological Equilibrium and Environmental Protection were introduced in 1996.

In 1995, the Ecological and Environmental House and Senate Committees (in close cooperation with the federal executive branch and the Congresses of the federate states) called for national consultations on environmental legislation, for the purpose of hearing the considerations, recommendations and concerns of the various sectors of society.

Through this consultation process, numerous submissions expressing diverse concerns and proposals in regard to national legislation on environmental issues were received from nongovernmental organizations, research centers, universities, manufacturing associations, boards of trade, federal, state and municipal agencies and bodies, state Congresses and representatives from international civic organizations. The submissions constituted the grounds for the drafting of the LGEEPA reform.

5.2 Regulations

Only the President of the Republic has the power to issue administrative regulations. This power is contemplated under Article 89 I of the Constitution: "The powers and obligations of the President are as

46. Published on 20 March 1934 in the Official Gazette of the Federation.

follows: 1. To promulgate and carry out the laws passed by the Congress of the Union, ensuring that the administration strictly enforces compliance thereto." The regulatory power of the federal executive is thus contemplated here: it empowers this branch of the public authority to issue general or abstract provisions aimed at carrying out the law by developing and complementing in great detail, the legal principles contained in the laws enacted by the Congress of the Union. There is no legal mechanism allowing the public to take part in drafting these regulations.

5.3 Standards

Article 36 of the LGEEPA states that Semarnap is responsible for issuing Mexican Official Standards pertaining to the environment and the sustainable exploitation of natural resources, for the purpose of:

> I.- Establishing the requirements, specifications, conditions, procedures, goals, parameters and permitted ranges which shall be observed in regions, zones, river springs or ecosystems; in the exploitation of natural resources; in carrying out economic activities; in the use and destination of goods and services as well as in production processes;
>
> II.- Considering the conditions necessary for the well being of the population, the preservation or restoration of natural resources, and the protection of the environment;
>
> III.- Stimulating or encouraging economic agents to redirect their processes and technologies with the aim of protecting the environment and achieving sustainable development;
>
> IV.- Providing conditions of long-term stability for investment and inducing economic agents to absorb the costs arising from any environmental damages they may cause; and
>
> V.- Fostering productive activities for reasons of efficiency and sustainability.

The issuance of environmental Mexican Official Standards and amendments thereto shall be subjected to the procedure established under the Federal Law on Metrology and Standardization *(Ley Federal sobre Metrología y Normalización)*.[47] The purpose of this law is to promote transparency and efficiency in drafting and enforcing Mexican Official Standards (NOM) and Mexican Standards (NMX). Under Article 47 of the Law, the procedure established is as follows:

47. Published on 1 July 1992 in the Official Gazette of the Federation.

- Draft NOMs shall be published in full in the Official Gazette of the Federation so that interested parties may submit their comments to the National Advisory Committee on Standardization for Environmental Protection *(Comité Consultivo Nacional de Normalización para la Protección del Ambiente)* within 90 days of such publication.[48] During this time, the background analyses that preceded the drafting of a NOM shall be available for public consultation at the premises of the committee;

- Once the period of time referred to in the above paragraph has elapsed, the National Advisory Committee on Standardization for Environmental Protection shall review the comments received and amend the draft NOM as deemed appropriate within the following 45 days; and

- The authority shall ensure that the responses to comments received are published prior to the publication of a NOM.

This procedure shall be observed at all times in order for the issued standard to have full legal validity. However, the law contemplates the possibility that the procedure not be followed in cases of emergency. In such cases, the competent authority can issue the Mexican Official Standard directly, without a project or draft having been tabled, but must have it published in the Official Gazette of the Federation. The NOM shall then be in force for a period of time not exceeding six months. Under no circumstances may the same standard be issued twice consecutively invoking emergency reasons. However, if the authority that issued the emergency standard wanted to extend its validity or even make it permanent, it would have to table a draft project and follow the regular approval procedure.[49]

Although making NOMs is primarily entrusted to the public authority, the Federal Law on Metrology and Standardization contemplates the possibility for the public to present its own proposed NOMs. The last paragraph of Article 44 of this Law provides that: "Interested persons may submit proposals for Mexican Official Standards before government bureaus who shall assess them and, where deemed appropriate, submit a draft project to the appropriate committee."

48. Several interested parties and representatives from economic sectors participate in the Committee, which is made up of 7 subcommittees in charge of: ecological exploitation of natural resources, hazardous materials and waste, air, fuels quality, water, environmental risk and polluting energy. Each subcommittee has one or more working groups.
49. Article 48.

Right of Access to Laws, Regulations and Standards

In order for federal legal provisions including statutes, decrees, regulations, agreements, circulars, orders and other administrative acts issued by federal public authorities to be fully in force, they must be published in the Official Gazette of the Federation.[50]

Additionally, Article 120 of the Constitution provides that: "the State Governors must publish and enforce federal laws." Such publication is meant to make it easier for the country's inhabitants to be aware of federal laws. Specifically in connection with environmental issues, the LGEEPA contemplates the publication of the Ecological Gazette as an official means of information about applicable legal provisions:

> Article 159 bis 2. The Department shall publish a Gazette compiling all legal provisions, Official Mexican Standards, decrees, regulations, agreements and other administrative acts. It shall also contain other information of interest on environmental issues published by the Federal and local governments, and international documents dealing with environmental issues of interest to Mexico, whether or not such information is included in the Official Gazette of the Federation or other dissemination media. Likewise, official information pertaining to natural protected areas and the preservation and sustainable exploitation of natural resources shall be published in this gazette.

Access Policy

The policy in regard to legal information is based on the criterion that informed communities may objectively adopt those decisions that better safeguard their interests and rights, while keeping abreast of what happens in their milieus. Given the environmental conditions that prevail in certain regions and areas of the country, communities in particular and society in general must be aware of whatever occurs or fails to occur in connection with their environment; therefore, the responsible authority must guarantee that such information is made available to the public on a continuous basis.

Ease of Access

The public is guaranteed access to the Official Gazette of the Federation, which is published by the Department of the Interior *(Secretaría de*

50. Article 2 of the Law regarding the Official Gazette of the Federation and Government Gazettes *(Ley del Diario Oficial de la Federación y Gacetas Gubernamentales).*

Gobernación) and is available to the public both at the Department's own offices and through distributors of newspapers and magazines. In addition, there are electronic on-line services which provide access to the Official Gazette via the Internet.[51] The Department of the Interior, through the National General Archives *(Archivo General de la Nación)*, published a collection of CD – ROMs which contain an unabridged compilation of the Official Gazette from 1973 up until now, as well as the index of all documents published from 1917 to 1972.

On the other hand, the Congress of the Union has a comprehensive database containing all the federal statutes in force, which may be consulted at its library or through its Internet website at: <http://info.cddhcu.gob.mx:80/leyinfo/>.

The Ecological Gazette is published by the National Institute of Ecology and may be consulted at existing documentation centers in Semarnap's various offices.[52] Currently it is published on a quarterly basis. Searches may also be performed through its Internet website.

All federal environmental laws and regulations, as well as Mexican Official Standards in force have been compiled by Semarnap and may be accessed through its Internet website at: <http://www.semarnap.gob.mx/>.

In 1996 Semarnap itself published a CD – ROM, entitled "Mexican Environmental Compendium: An Update on Environmental Management," which contains a compilation of federal statutes and regulations related to the Department's activities, as well as of the NOMs issued on environmental protection issues. In addition, it includes the environmental laws enacted by state Congresses. In 1992, Profepa concluded a compilation of state and municipal legislation dealing with environmental protection, which is available in electronic format.

51. Infosel Legal website at: <http://www.infosel.com.mx>.
52. According to its 1997 Planning Subdepartment Working Program, Semarnap intends to promote and support the creation of information centers in its regional offices for the purpose of facilitating their interaction with the main office but which are, above all, aimed at increasing regional awareness of environmental issues and expanding the opportunities available for the exploitation of resources by local agents, whether they are government or academic entities, economic agents or citizens' organizations. In connection with this project, options are being analyzed in order to allocate significant resources of the Program for Environmental Management and Decentralization currently at the approval stage by the World Bank.

At the state level, searches concerning environmental legislation may be made in the official gazette of each federate entity, as well as in the libraries of each one of the state Congresses. In addition, several legal libraries, such as those belonging to the Nation's Supreme Court of Justice, the National General Archives and the Legal Research Institute of the *Universidad Nacional Autónoma de México*, are currently compiling state legislation.

Cost

The cost of official publications, such as the Official Gazette of the Federation and the Ecological Gazette is quite moderate as the selling price is merely intended to recover publication costs. Public services provided through the Internet, as well as those offered by documentation centers and legal libraries, are free of charge. Private services bear a higher cost, thus limiting access to persons and organizations that can afford them.

6. ENFORCEMENT AND COMPLIANCE ACTIONS

This section provides an overview of the legal provisions governing public access to information collected by competent authorities in connection with environmental law enforcement and compliance actions.

Right of Access to Information

In respect to right of access, it is worth highlighting voluntary compliance measures such as environmental audits, through which those responsible for managing a business may voluntarily perform a methodological examination of operations carried out in connection with the contamination and risk they generate, as well as their degree of compliance with environmental legislation, international parameters and sound standards of operation and engineering practices, for the purpose of determining the preventive and corrective measures needed to protect the environment.

Persons who demonstrate that they are, or are likely to be directly aggrieved by the activities of the audited business, may have access to information generated during the environmental audit. In accordance with Article 38 bis 1 of the LGEEPA, Semarnap "shall make available to those persons who are, or are likely to be directly aggrieved, the preventive and corrective programs brought about by environmental audits, as well as the information concerning the basic diagnosis which triggered

such programs. In any event, legal provisions governing the confidentiality of industrial and commercial information shall be abided by."

However, the public does not have access to the information generated in connection with the actions (such as inspection visits, sanctions and legal proceedings) undertaken by the authorities for the purpose of enforcing compliance with environmental laws and regulations, whenever such actions are in process. As a matter of fact, the LGEEPA provides that the authority shall deny the requested information whenever it pertains to issues that are the subject of pending legal proceedings or unresolved inspection and surveillance actions.[53] This limitation is intended to, on the one hand, facilitate the discovery process and, on the other hand, safeguard the honor and reputation of citizens or companies involved in those proceedings until such time as a final decision is reached by the competent authority.

Access Policies

In order to promote awareness of compliance and enforcement actions, the 1995-2000 Environmental Program contemplates the need for designing and implementing an information system that will allow authorities to closely follow up on the inspection visits carried out in each facility. This system will monitor the significance of detected irregularities, the technical corrective measures adopted, the sanctions imposed, the compliance deadlines and reports, the implementation of measures, the installation of control equipment and the quantity of pollutants that are no longer discharged into the environment.

In addition, this program will set up a national system of environmental compliance indicators consisting of a database containing all the information pertaining to irregularities detected during inspection visits. With such an index, it will be possible to make more accurate diagnoses, to program inspection visits according to clearly defined environmental performance goals and to inform the public on the compliance levels reached.

Ease of Access

Profepa is developing an information system on compliance with environmental and natural resources legislation *(Sistema de Información sobre el Cumplimiento de la Normatividad Ambiental y de Recursos Naturales).* This system is intended to design and operate the various

53. Article 159 bis 4, Section II.

subsystems which aim to increase public awareness regarding environmental compliance, and facilitate setting goals and programming inspection and enforcement actions. This system will be composed of the following subsystems:

- strategic information for decision making;
- monitoring natural resources for the achievement of environmental compliance;
- environmental audits;
- environmental compliance indicators for industry; and
- citizen enforcement suits.

In 1997, a pilot project for the control of priorities and the follow-up of overall goals will be implemented, and later a system accessible through the Internet will be devised.

Currently, Profepa submits reports regarding activities undertaken, including data on the number of inspection visits and environmental audits performed, sanctions imposed on private parties, and complaints filed by the population. This information may be consulted in the Biennial Report on the General State of Ecological Equilibrium and Environmental Protection, Semarnap's Annual Activity Reports, the Monthly Activity Reports of Profepa's State Bureaus, and on Profepa's Internet website at: <http://www.semarnap.gob.mx/profepa/index.htm/>.

Cost

Currently access to Profepa's reports is not hampered by cost considerations. Access through the Internet is free of charge.

7. RELEASE INVENTORIES OF TOXIC SUBSTANCES

This section outlines the rights and mechanisms for accessing information regarding the management and final disposal of hazardous waste. Hazardous waste management requires knowing those businesses or activities that are responsible for generating them, and the volumes and types of waste produced, transported, stored, treated or eliminated on a yearly basis. It also entails detecting the sites within the national territory where these activities take place, and having information on both the companies involved in the transport, storage, or final

disposal of hazardous waste, and on spillage occurrences (and the way such spills are taken care of), in order to minimize or control risks. To this end, a notification system based on seven different hazardous waste management statements and reports has been devised:

- statements from hazardous waste generating companies;
- statements concerning the delivery, transport and receipt of hazardous wastes;
- statements regarding accidental hazardous waste spills;
- statements from companies that may generate waste containing polychlorinated biphenyl (PCB) compounds from electrical equipment;
- monthly reports on hazardous waste stored in final disposal sites;
- semi-annual reports on hazardous wastes sent for recycling, treatment, incineration or confinement; and
- semi-annual reports on hazardous wastes received for recycling or treatment.

Right of Access to Information

These statements and reports constitute the basis for setting up the inventory contemplated by Article 4, Section XI of the Regulation adopted under the LGEEPA in regard to hazardous waste,[54] which entrusts Semarnap with the responsibility for establishing and updating an information system in connection with the generation of hazardous waste.

The information contained in this system is construed as environmental information in accordance with the provisions of Article 159 bis 3 of the LGEEPA, for it is indeed information in written or electronic format held by the authority pertaining to the activities or measures that affect, or are likely to affect the water, air, soil, flora, fauna and the natural resources in general. Hence, any person is entitled to request Semarnap to provide them with any information contained in the system.

Besides the information contained in the statements and the reports, the public has access to additional information regarding the

54. Published on 25 November 1988 in the Official Gazette of the Federation.

companies involved in the management and final disposal of hazardous waste, specifically, the risk assessments and accident prevention programs related to the performance of such activities.

Risk assessments must be submitted to Semarnap together with environmental impact statements; thus, they are available for public consultation and comments within the terms and time limits described above in the section devoted to the environmental impact assessment procedure. In addition, accident prevention programs must be submitted for approval by several public authorities: Semarnap, the Department of the Interior, and the Departments of Energy, Trade and Industrial Development, Health, and Labor and Social Welfare. These programs also fall under the definition of environmental information in the hands of the authority and are therefore accessible to the public.

Access Policy

According to the 1996-2000 Program for the Minimization and Comprehensive Management of Hazardous Waste in Mexico *(Programa para la Minimización y el Manejo Integral de los Residuos Peligrosos en México)*, environmental information is an essential instrument in the process of establishing long-term policies, goals and priorities, so that their achievement may be permanently assessed. In addition, information contributes to facilitating collective actions and widening the authority's maneuvering leeway in establishing well-supported social consensus. Reliable, complete and timely information is required for sound decision-making and keeping the public informed. Hence, more public involvement in obtaining information regarding the management and final disposal of hazardous wastes is promoted.

Ease of Access

Having a toxic release inventory is essential, however, as acknowledged by the Program for the Minimization and Comprehensive Management of Hazardous Waste, the majority of the efforts displayed in this regard "face important limitations inasmuch as they are based on waste generation indices estimated in other countries, which are mostly obtained on the basis of the overall number of employees in a business. There has been little field testing, and therefore a wide ranging exercise of regional and sectorial coverage is required in order to set generation indices that are more realistic and in line with the specific technological conditions of Mexican industry." A preliminary inventory, subject to review, has already been established with the information available

from the impact statements filed, the environmental audits performed and the data gathered in the industrial census.

In addition, hazardous waste information and tracking systems are being developed. These will allow the information needed for the evaluation of hazardous waste generation, movements and disposal to be collected, stored and processed. These systems are:

- The Pollutants Release and Transfer Register *(Registro de Emisiones y Transferencia de Contaminantes – RETC).* The RETC will allow the government and the general public to be aware of the discharges and transfer of hazardous substances originating from industrial facilities and other relevant sources. Other countries' experience indicates that the RETC actually promotes the detection of inefficient processes by businesses while providing the public and the authorities with useful data for setting up pollution prevention and control priorities;

- The Inventory of Generating Facilities and Hazardous Waste Tracking Systems *(Inventario de Establecimientos Generadores y Sistemas de Rastreo de Residuos Peligrosos)*. Setting up a database relating to the impact statements filed by hazardous waste generating businesses will allow the systematic registration of general information about the facilities themselves and the characteristics of the waste generated; and

- The National Tracking System *(Sistema Nacional de Rastreo)*. The purpose of such a system is to monitor hazardous wastes from their originating source to their final disposal based on the reports and statements submitted to Semarnap by waste generating industries and waste management companies.

8. GENERAL CONSIDERATIONS

Inasmuch as many of the aspects related to the accessibility of environmental information have just recently been incorporated into Mexican legislation, it is still too early to evaluate how the law has actually been carried out, or to identify the barriers or obstacles that may hinder information access. It is worth mentioning, however, that prior to the new legislation being introduced, access to information was obstructed by a series of factors which encompassed inadequate administrative discretion, severe resource limitations, inconsistent policies in regard to information collection and dissemination, as well as an excessive centralization of information depositories in the nation's capital.

THE UNITED STATES

1. CONSTITUTIONAL AND LEGAL FRAMEWORK FOR PUBLIC ACCESS TO INFORMATION

1.1 Introduction

This chapter documents public access to environmental information at the federal level in the United States and gives examples of similar regulations at the state level. The five categories chosen for analysis are: access to information regarding environmental impact assessment (Section 2), proposed permits (Section 3), proposed regulations (Section 4), toxic release inventories (Section 5), and compliance and enforcement actions (Section 6). The context for this discussion is provided by the following material, which provides an overview of the US constitutional and legal framework for public access to information, specifically those constitutional provisions, and federal and state laws that are relevant to public access to environmental information in the United States.

Given their prime importance for public access to governmentally held environmental information, freedom of information laws at the federal and state level merit pride of place in any consideration of the topic. Thus they are discussed in some detail in this section, as are some general policies relating to access to information.

1.2 Overview of Constitutional Provisions

The United States Constitution establishes the framework for the functioning of the United States government. The Constitution divides the government into three branches – executive, legislative, and judicial – and enumerates the powers of each. The executive branch functions through a system of agencies, whose operations are regulated by administrative law. The rules, regulations and general orders promulgated by an administrative agency, pursuant to its delegated powers, have the force and effect of law.

The First Amendment to the US Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This amendment has been interpreted as imposing limits on the Government's ability to withhold certain types of information from the public. This includes information which is produced or released in a forum that, by its nature or by express constitutional command, is open to the public and not wholly internal to government. The First Amendment itself does not create a system for providing information to the public nor does it create a threshold level of appropriate disclosure of information to the public.[1]

In Article I, under the speech or debate clause, the Constitution prohibits the courts or the executive branch from punishing a legislator for making information public in the course of the legislative process. In addition, Article I provides that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such drafts as may in their judgment require secrecy..."

1.3 Overview of Federal Access Legislation, Policies, and Practices

US law provides a number of legal tools that allow public access to information related to the environment that is held by both governmental and private sources. The most basic and important mechanisms in the United States for accessing environmental information are freedom of information laws, right-to-know laws, permitting laws, and environmental impact assessment laws. Freedom of information laws and several supplementary tools for the public to obtain information will be outlined in some detail in this section, while the right-to-know laws, environmental impact assessment laws, permitting laws, and other information access mechanisms will be dealt with in the following sections.

1.3.1 Freedom of Information Act

In the United States, the public can gain access to federal executive agency records through the *Freedom of Information Act* (FOIA),[2] a general purpose law that applies to many kinds of governmental information. Under this law, any person can request an agency to provide copies of all documents it holds relevant to a particular subject. This system puts the burden on the public to identify the desired information and demand its disclosure, and applies only to information in the possession and control of the government.

1. Tribe, L.H. 1988. *American constitutional law*, 2nd ed. New York: The Foundation Press Inc., 814.
2. 5 U.S.C. §552.

Legal Right of Access

The FOIA works by establishing a presumption that any person may have access to any record held by a government agency unless the record is covered by a specific exception to the Act. The Act does not define "record," and there has been substantial litigation over whether particular pieces of information requested from an agency are records under the Act. In general, agency records do not have to be written documents. They can include items such as photographs, maps, tape recordings, and computer disks, but not personal notes of agency employees. The FOIA also requires agencies to make adjudicatory opinions, policy statements, and administrative staff manuals available for public inspection and copying.

Certain documents – including those dealing with national security, private personnel records, ongoing criminal investigations, or confidential business information – are exempt from disclosure under the FOIA. If the agency decides that a document contains information that falls within one of these exceptions, it can withhold from disclosure only those parts of the document that are subject to the exception. The rest of the document must be given to the person requesting the information. If the government refuses to disclose the requested documents, the person requesting the information can challenge this decision in court.

To gain access to an agency record, a person must make a request that "reasonably describes" the record desired. Most agencies require that FOIA requests be made in writing. If an agency does not possess the record asked for in the letter, it may simply deny the FOIA request – it does not have to collect or develop new information. When an agency denies all or part of a FOIA request, it must specify the reasons for the denial in writing. Agencies must respond to the FOIA within certain time limits.

Judicial review has been essential in enforcing the requirements of the FOIA. Individuals, firms, or the press whose FOIA requests have been denied have the right to challenge the denial in court. In such a lawsuit, the agency has the burden of showing either that an exception to disclosure applies to the request or that the information does not exist. This gives an advantage to the person making the request, and promotes the presumption in favor of disclosure. Because many of the statutory exceptions to disclosure are broadly worded, some agencies have tried to expand the coverage of the exceptions. Having to prove in court that they are entitled to assert an exception helps prevent agencies from unjustifiably withholding information. Judicial review also has helped

clarify the scope of the exceptions to the FOIA and made their application more uniform from agency to agency.

Access Policies

In October 1993, President Clinton issued a directive calling upon all federal agencies "to renew their commitment to the *Freedom of Information Act*, to its underlying principles of government openness, and to its sound administration."[3] In a companion directive, the Attorney General announced that "it shall be the policy of the Department of Justice to defend the assertion of a FOIA exemption only in those cases where the Agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption. Where an item of information might technically or arguably fall within an exemption, it ought not to be withheld from a FOIA requester unless it need be."[4]

Recent amendments to the *Paperwork Reduction Act*, with sections concerning federal access policy, were passed on 22 May 1995.[5] The *Paperwork Reduction Act* has the overall goal of having federal agencies become more responsible and publicly accountable for reducing the burden of federal paperwork on the public. Section 2, on the coordination of federal information policy, states that each agency shall "ensure that the public has timely and equitable access to the agency's public information...." This includes encouraging a diversity of public and private sources for information based on public governmental information; providing access to data maintained in electronic format; soliciting and considering public input on the agency's information dissemination activities; and providing notice when changing or terminating significant information dissemination products. The law explicitly holds that user fees charged by agencies for disseminating information may not exceed the actual cost of dissemination.

The *Electronic Freedom of Information Act* Amendments of 1996 introduced changes involving the maintenance of agency reading rooms under Subsection (a)(2) of the Act. Agencies are required to make categories of records – final opinions rendered in the adjudication of administrative cases, specific agency policy statements, and administrative staff manuals that affect the public – routinely available for public inspection and copying. This means that, as of mid-1997, agencies will begin to

3. President's memorandum to department and agency heads regarding the *Freedom of Information Act*, 29 *Weekly Comp. Pres. Doc.* 1999 (11 Oct. 1993).
4. Attorney General's memorandum to department and agency heads regarding the *Freedom of Information Act*, *Daily Report for Executives* (BNA) No. 191, at 145 (5 Oct. 1993).
5. *Public Law* 104-13.

maintain both conventional reading rooms and "electronic reading rooms" in order to meet their FOIA Subsection (a)(2) responsibilities. The amendments apply a general "reasonable efforts" standard to the matter of an agency's search obligation.

Ease of Access

General access to information laws have been used very effectively by environmental groups and journalists. However, because these freedom of information laws put the burden of identifying the information to be disclosed on the public, their value is somewhat limited.

Even if the government does possess relevant information, the FOIA can be an awkward and expensive means for disseminating government-held environmental information. The FOIA relies on case-by-case responses to specific requests rather than an automatic system for disclosing information to the public. Often, the public is not aware of information that the government possesses and is not able to identify specific records for disclosure. FOIA requests must be specific. General requests are rejected when the government employee processing the request is not able to identify the government documents that would meet the request. Even if the public is aware that the information exists, it can be time consuming for citizens or public interest groups to determine precisely what information they need, write a request that will identify this information specifically enough so that an agency employee can provide the information in a reasonable amount of time, and, if necessary, follow up on the request within the agency or in court, as was discussed above.

Most information access laws in the United States exempt confidential business information or trade secrets from public disclosure. The lack of any clear definition of what constitutes a trade secret has enabled industry and government to invoke this exception frequently to withhold environmental information, and has generated costly and time-consuming litigation over whether such information is properly withheld. In addition, government employees can be held criminally liable if they improperly disclose confidential business information, which gives an added incentive to err on the side of withholding information from the public.

Timeliness

The FOIA requires agencies to respond to an information request within ten days. If an agency does not do so (which may mean as little as

acknowledging receipt and stating an expected time when the requested information will be provided), or if the agency denies the request, the person who made the request may file suit within specified time limits (for most agencies, a six-year statute of limitations). The statute authorizes the agency to seek a ten-day extension if responding within the stipulated period is not possible.

Public interest environmental groups, who often use FOIA requests to gain specific environmental information, find that the government's actual response time varies greatly, depending on the department and the type of information requested. The public usually turns to FOIA requests when informal requests have resulted in delays or when the material is needed without delay.

Affordability

When a government agency receives a request for documents based on the FOIA, the agency must provide copies of those documents at no or nominal cost, or explain why it cannot. The FOIA allows agencies to charge a fee for processing FOIA requests. Fees can be imposed to recover copying expenses, the costs of searching for documents and, in some instances, the cost of reviewing the request to determine whether any exemptions apply. The fee is not designed to recover the full cost of developing the information.

In reality, different fees apply according to whom it is that requests the information. For example, a member of the news media or an educational institution may be charged only for reasonable copying charges, but a person requesting information for commercial use may also be charged for reviewing the request and searching for the applicable records. The fee is often waived if disclosure of the information is in the public interest rather than the commercial interest of the requester. Small requests are also often processed without a fee.

1.3.2 Congressional Collection and Dissemination of Information

Legislative committees in the US Congress have the authority to require federal agencies, including the EPA, to provide documents and testimony on the implementation of environmental laws. Although this power is not limited, Congress exercises discretion to prevent disclosure of national security information and other sensitive matters.

In addition to making individual requests for information from executive agencies, Congress has created a special office of its own, the

General Accounting Office (GAO), to provide systematic oversight of executive agency activities. The GAO reviews agency actions, evaluates how well the agencies have carried out the law, and reports to Congress on those subjects. The GAO pursues its investigations at the request of congressional committees or individual legislators, by statutory directive, or on its own initiative. This systematic oversight often brings to light problems or opportunities for improvement in environmental regulatory programs and activities.

Of special relevance for environmental matters is the public nature of the GAO's reports. Even though the information requested by the GAO from the executive agencies may not be public, the final GAO report on any topic usually is a public document. Unless they include protected national security information, GAO reports become publicly available thirty days after they are presented to Congress. These reports not only provide the public with information, they also often save the public much time and expense because they present the information in a concise and organized fashion. The GAO will mail an index of their reports at no cost to any requester and will mail a copy of any report at no cost on request.

Finally, the information that Congress itself generates – its legislative bills, hearings, and debates – are generally available to the public. Much of the printed material is also or will soon be available in electronic form through computer networks. Debates in the two chambers are televised live (on cable television), as are selected committee proceedings. Limited public seating is available to view official committee meetings not involving national security secrets. Legislative committees must give advance public notice of their meetings.

1.3.3 "Voluntary" Agency Collection and Dissemination of Information

The FOIA is both a "fishing expedition" for the citizen and a records management burden for the agency. To reduce FOIA requests, as well as to comply with various specific legal directives for access to documents, some federal agencies provide public reading rooms where people may review (and for a nominal fee copy) agency reports, studies, policies, and other selected documents. For example, the Department of Energy maintains reading rooms with declassified environmental and safety documents at some of its nuclear weapons production sites. These give citizens a better sense of what records the agency has and faster access to them, and they reduce the clerical demands that FOIA requests would otherwise impose.

Most agencies create rulemaking dockets, with complete copies of public comments on proposed rules, available via some sort of reading room arrangement. Some agencies will open their offices to accommodate reasonable, informal citizen requests to view agency working files and documents. For example, the US Forest Service has the reputation of allowing broad access to agency data for citizens interested in forest plan development. Other agencies, such as law enforcement or defense agencies, have the opposite reputation.

1.3.4 Judicial Branch

Almost all judicial action takes place in open proceedings that may be fully reported in the press. Many jurisdictions allow court proceedings to be televised. In addition, private citizens involved in civil court actions with the government or other private parties have the power to require opposing parties to produce information relevant to the case through the process of "discovery." Litigants may demand the production of documents, written responses to questions, the opportunity to question potential witnesses under oath, and other means of garnering information. Parties faced with discovery requests may ask the court to block such requests if they are not relevant to the trial or if they are otherwise not allowed under the Rules of Civil Procedure. This paper discusses discovery powers further in its explanation of citizen enforcement suits in Section 6.1.1 below.

1.3.5 "Government in the Sunshine" – Open Meeting Laws

The federal government and most state governments require almost any group of people exercising official decision-making authority to open their meetings to the public.[6] Thus, regulatory boards, commissions conducting specialized inquiries, or licensing boards must give public notice of their meetings in the *Federal Register* and allow the press and public to attend. [The *Ohio Public Records Act* and *Open Meetings Act* (Sections 1.4.1 and 1.4.2) are good examples of "government in the sunshine" laws at the state level.]

Under the *Federal Advisory Committee Act* (FACA), even *ad hoc* committees of experts assembled to advise a federal agency on specific problems must announce their meetings and open them to the public.[7] In

6. A number of laws require this at the federal and state level and are known as "government-in-the-sunshine laws." See, e.g., 5 U.S.C. §552b prescribing when federal agencies must conduct open meetings.
7. *Federal Advisory Committee Act*, 5 U.S.C. Ap. 2, §1 *et seq.*

some cases, the open government principle goes so far as to prohibit decision makers from discussing business informally with one another outside of public meetings. Also under the FACA, minutes and transcripts of the committee meeting must be made available for public inspection and copying at a single location in the offices of the advisory committee. Federal agencies sometimes avoid the requirements of the FACA by signing individual consulting contracts with each expert and by requiring each expert to submit an individual report.

1.4 Overview of State Access Legislation, Policies, and Practices

Records kept by state agencies are available to the public under state freedom of information laws. Most states have some combination of a freedom of information act, a community right-to-know act, an open meetings act, provisions in an administrative procedure act regulating permitting and rulemaking, and provisions in individual environmental laws which provide for access to information during permitting, enforcement, and other stages of the implementation process. Many states also have environmental impact assessment provisions, either in a state EIA act or provisions within an environmental law.

1.4.1 The Ohio Public Records Act

Legal Right of Access

An example of a state general freedom of information act can be found in Ohio's *Public Records Act* which provides access to publicly held information.[8] The law requires that all public offices maintain records properly and make them accessible to the public, with only certain exceptions. Exceptions to the Act include trial preparation records, confidential law enforcement investigatory records and medical records.

Access Policies

The state legislature has specified that the *Public Records Act* is to be interpreted liberally to facilitate broader access to public records.[9]

Ease of Access

Under the Act, public officials must promptly prepare and make available for inspection all public records at reasonable times, during

8. R.C. 149.43 and related sections of R.C. Chapter 149.
9. R.C. 149.43(B).

regular business hours. Where the public office keeps information in databases that use microfilm or computer access, the equipment necessary to reproduce the information must be also made accessible to the public. Upon request, a person responsible for public records shall make copies of public records available at cost and within a reasonable amount of time.

Timeliness

As mentioned above, copies must be made available within a "reasonable amount of time" and records must be "promptly prepared" and made available for inspection at "all reasonable times during regular business hours."

Affordability

A public office may adopt a reasonable policy setting a fee for copies. The fee should reflect the actual costs involved in making a copy. Public offices will usually not charge for copies where the requester is indigent or represents a non-profit group.

1.4.2 The Ohio Open Meetings Act

Legal Right of Access

The *Ohio Open Meetings Act* requires all state and local officials to take official actions and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.[10]

Public bodies must promptly prepare minutes of all public meetings. The minutes do not have to detail discussion during executive sessions, but need reflect only their general subject matter. In terms of openness, all public bodies must take all official actions and hold all deliberations in meetings that are open to the public. Public bodies may only go into executive session during open meetings.

Access Policies

The state legislature has specified that the *Open Meetings Act* is to be liberally construed within the goals of promoting public access to information.

10. R.C. 121.22, *et seq*.

Ease of Access

Under the Act, public bodies must give notice that a meeting will be held and, in certain instances, must identify the purpose of the meeting. Public bodies must establish by rule, a reasonable method by which the public can determine the time and place of regularly scheduled meetings. A "regular meeting" is one that is held at scheduled intervals. For special meetings, the purpose of the meeting must also be communicated to the public.

Timeliness

In Ohio, the appropriate state body must provide at least 24 hours advance notification of a particular meeting to all news media that have requested such notification. In addition, the public body's meeting rules must provide for reasonable advance notice of all meetings at which a specific type of business is to be discussed to all persons requesting such notice.

Affordability

A reasonable fee may be requested by the agency to provide advance notice of meetings where a specific type of business is to be discussed.

2. ENVIRONMENTAL IMPACT ASSESSMENTS

Public access to information is an intrinsic part of the laws, policies, and practices associated with environmental impact assessments (EIAs). The federal regime under the *National Environmental Policy Act* (NEPA) provides a legal guarantee of the public's right to know, as do related state regimes.[11]

2.1 Federal Regulations and Policies

Legal Right of Access

One of the key mechanisms in the United States for accessing information on anticipated environmental effects is found in the EIA policy established under NEPA. The federal agency responsible for the project must prepare an environmental impact statement (EIS) for each major federal action significantly affecting the quality of the human environ-

11. 42 U.S.C. §4321 *et seq.*

ment, and this includes legislation as well as proposed construction projects. The US Environmental Protection Agency (EPA) has the responsibility to review and evaluate all EISs. These typically include a detailed discussion of three essential subjects: (1) the proposed project and its alternatives; (2) the environmental impacts of each alternative; and (3) mitigation measures that can be taken to avoid or minimize unwanted impacts.

Under NEPA the public is accorded a legal right to have access to information concerning every step of the EIA preparation and decision-making process. The government is given an explicit duty to make information readily accessible to the public at specific points in the process.

An EIS is rarely prepared outside the context of a specific project. One reason for this may be that the EIS process is too cumbersome and slow to be applied to rapidly evolving policies and proposals for legislation. Under NEPA, federal agencies are required to prepare an EIS as part of recommendations or reports on proposals for legislation. These "legislative EISs" have been performed only rarely. In the few instances where they have, legislative EISs often follow an abbreviated process for environmental impact analysis that dispenses with many of the opportunities for public review common in project-specific EISs. For example, an agency recommending or reporting on legislative proposals often does not need to engage in public scoping or, except in specified circumstances, prepare a draft EIS for public comment.[12] Still, in some cases, for example with Forest Service wilderness designation recommendations, the proposal is both legislative and administrative and the full process of preparing an EIS is followed.

In general, NEPA regulations require that the EIS, the comments received, and any underlying documents be made available to the public pursuant to FOIA. In the case of an action with effects of national concern, notice of the preparation and availability of draft environmental impact statements must be published in the *Federal Register* and mailed directly to interested parties. For federal actions with effects of local concern, such as the permitting of an individual plant, publication of notice in local periodicals is also required.

As part of the NEPA process, federal agencies must hold or sponsor public hearings whenever appropriate and solicit appropriate comments from the public. Agencies must also explain in their procedures

12. For regulations regarding implementation of NEPA, see 40 C.F.R. §1506.

where interested parties can get information or status reports on environmental impacts and other aspects of the NEPA process. The US system puts great weight on this public disclosure and involvement, requiring that scoping meetings be preceded by a public notice of intent (NOI) to initiate the EIS process. The agency must publicize the availability of the draft EIS; provide a copy to any person, organization or agency that requests one; and actively solicit comments on it from appropriate state and local environmental agencies, Indian tribes potentially affected, and the general public. The agency must also hold public meetings or hearings when there is substantial interest or controversy about the proposal, or when requested by another agency with jurisdiction over the action.

Access Policies

Executive Order 11514 on the Protection and Enhancement of Environmental Quality was issued in 1970 and updated in 1978 to further the purposes of NEPA.[13] The Executive Order makes federal agencies responsible for developing procedures to ensure the fullest practicable provision of timely public information, understanding of federal plans and programs with environmental impact, and to obtain the views of interested parties. Agency procedures must include public hearings and provide the public with relevant information, including information on alternative courses of action. Federal agencies are asked to encourage state and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment.

Ease of Access

In general, NEPA requires very broad disclosure but provides for certain exemptions, such as those found under the FOIA or if, for instance, information is unavailable or too costly to find. Controversy frequently arises over agency interpretations of terms such as "significant impact" and questions about what levels of hazard and risk an agency must disclose. Agencies are not required to inform citizens about a project until after screening to determine the extent of potential environmental impacts. If after screening the agency decides not to prepare an EIS, it must prepare a Finding of No Significant Impact (FONSI) and notify the affected public of its decision.[14] The scoping process under NEPA is also open to the public. This means that the public has access to

13. 3 C.F.R. §902 (1966-70); as amended by Executive Order 11991, 3 C.F.R. §123 (1978).
14. See generally, 40 C.F.R. §1501.

background information that will be considered during scoping. The public also has access to all information that is developed during the entire EIS process and incorporated into the draft and final EIS, as well as all comments and underlying documents.

Agencies are required to circulate the entire draft and final EIS to any person or organization that requests it. As a practical matter, it is very easy for the public to get these documents; a letter, a phone call, or a visit is enough. Agencies will often keep mailing lists of people who have shown past interest in agency projects and automatically send them a notice of availability of draft and final EISs. Agencies may automatically send copies of draft and final EISs to groups and individuals with a well-known interest in a project, such as local politicians, journalists, and NGOs.

Timeliness

If a governmental agency intends to prepare an EIS, it must publish a notice of intent as soon as practicable and, in any case, before beginning scoping. Prior to preparing any detailed EIS, the responsible federal official must consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with regard to the environmental impact involved. Copies of such statements and the comments and views of the appropriate federal, state, and local agencies which are authorized to develop and enforce environmental standards are to be made available to the public.

Affordability

Under NEPA regulations, material requested by the public is to be made available by the agency at no charge, if possible, or at actual cost.

2.2 Selected State Regulations and Policies

Approximately two-thirds of the states in the United States have environmental impact assessment requirements under state environmental law. Specifically, California, Connecticut, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, South Dakota, Virginia, Washington, Wisconsin, and Puerto Rico all have comprehensive EIA requirements. Virtually all states have procedures for notifying the public of forthcoming meetings, among which are public hearings on proposed environmental impact assessments, even if not already specified by the EIA provisions of the law.

The *California Environmental Quality Act*, one of the most comprehensive state EIA laws, provides a good example of access to information concerning the EIA process at the state level.[15]

2.2.1 California's Environmental Quality Act

Legal Right of Access

The *California Environmental Quality Act* (CEQA) was among the models used by the US EPA in developing the provisions implementing the *National Environmental Policy Act*. The Act requires that an environmental impact report (EIR) be prepared balancing the pros and cons of any major project. In the case where a report is not required (i.e. where the potential environmental effects are not significant), the agency must prepare a negative declaration except when the project is specifically exempted by law.

Ease of Access

The California EIA process gives the public two chances to receive information concerning a proposed environmental impact report: first, when the goals are being set and second, during the process which determines the scope of the environmental review process. Once goals are drafted, several public hearings are usually held to present information and to provide opportunities for public comment. At the different stages of the process, the public has access to information on the proposed goals, alternatives, the draft EIR, the final EIR, and the final proposed action.

Timeliness

Notice of draft and final EIR and planning meetings must be made at least 10 days prior to the meeting, be posted in or near the affected area, and be published in a locally available newspaper at least 10 days before the meeting. The notice must contain full information about the location, time and agenda of the meeting and contain any rules to be followed at the meeting. Decisions may not be made at the meeting on matters for which notice was not provided.

3. LICENSES OR PERMITS FOR PROPOSED PROJECTS

Permits are issued to facilities under most of the major environmental statutes through federal programs and through state programs,

15. Cal. Pub. Res. Code §§21000-21177 (West 1986 & Supp. 1994).

including those which were delegated under the federal environmental statutes. In this section, public access to environmental information relating to the permitting process is discussed through examples of approaches taken under federal and state law.

3.1 Federal Regulations and Policies

An environmental permit is a legal document that specifies the conditions under which a regulated firm may operate, the types and amounts of pollutants it may discharge, and requirements as to reporting, record keeping, operation, maintenance, and all aspects of monitoring, including frequency, methodology, and sampling locations. In addition to providing specific limits on the pollution that a firm may discharge, a permit may specify a range of other requirements concerning the firm's operation, including the disclosure of important technical (and even financial) information about the firm and its operations and emissions.

In light of the many advantages of permits, environmental agencies in the United States use them to regulate a number of environmental problems, including air emissions, the discharge of water pollution, the operation of mines, and the treatment, storage, and disposal of hazardous wastes.[16] Rules for issuing, modifying, and revoking permits under these programs include procedures for public participation and access to information.[17]

The public can play a significant role in the environmental permitting process. In some ways, the public's involvement in permitting bears many similarities to its involvement in notice and comment rulemaking discussed in the next section.

3.1.1 Legal Right of Access

Generally, public interest will be greatest when a new facility seeks a permit. If, however, a community has experienced problems with a permitted facility, or new pollution control standards have become applicable, the facility's application for renewal also tends to generate

16. For air emissions, see *Clean Air Act Amendments of 1990,* Title V, §§501-507. For the discharge of water pollution, see *Federal Water Pollution Control Act,* Subchapter IV, 33 U.S.C. §§1341-1345. For the operation of mines, see *Surface Mining Control and Reclamation Act,* Subchapter V, 30 U.S.C. §§1251-1279. For the treatment, storage, and disposal of hazardous wastes, see *Resource Recovery and Conservation Act,* 42 U.S.C. §§6925.
17. See, e.g., 40 C.F.R. part 124.

public attention. In either case, there are opportunities for the public to submit comments or participate in public hearings prior to the decision to grant or deny a company's application.

When a government agency receives an application for a permit, it first confirms that all necessary information has been provided. Once a federal agency has received a complete application for a permit, it may decide either to deny the application or to begin preparing a draft permit.[18] Usually, the government provides notice and the opportunity for comment before the agency actually begins to draft the permit. This ensures that the permit writers review public comments before drafting the permit language. On the other hand, notice may be delayed until after a draft permit has been prepared. This allows the public to focus their comments on actual provisions of the proposed permit.

Notice of permitting must indicate all relevant details concerning each specific permit, such as the name and address of the facility, as well as the business and industrial processes that will be carried out there. It must also describe the nature, quantity, and frequency of the discharges from the facility, and any anticipated environmental effects from these discharges. Depending on the facility and pollutants involved, the notice may provide additional information to assist the public in evaluating the likely impact of the proposed activity. For example, if a plant is planning to release pollutants into surface waters, the notice identifies the location of all discharge points at the plant, the name of the receiving waters, any water quality standards applicable to the waters, and whether the waters currently meet those standards. The notice must also state whether an environmental impact assessment has been prepared.

3.1.2 Access Policies

EPA's *Policy Statement on Public Participation*[19] covers rulemaking (when regulations are classified as significant), the administration of permit programs, and program activities supported by EPA financial assistance to state and local governments. The purpose of the policy is to strengthen the EPA's commitment to public participation and establish uniform procedures for public participation in the EPA's decision-making process. The policy affirms the view that only through exchange of information between the EPA and the public can good environmental decisions be reached. Agency officials are expected to provide for, encourage, and assist public participation. The policy

18. 40 C.F.R. §124.6.
19. 46 F.R. 5740 (Jan. 19, 1981).

encourages officials to strive to communicate with, and listen to, all sectors of the public. The policy assumes that agency employees will strive to do more than the minimum required, and is not intended to create barriers to more substantial or more significant participation. Because the policy recognizes the agency's need to set priorities for its use of resources, it emphasizes public participation in decisions where options are available and alternatives must be weighed, or where substantial agreement is needed from the public if a program is to be carried out.

On the whole, the policy clearly sets out that public participation should begin early in the decision-making process and continue throughout as necessary. The agency is required to set forth options and alternatives beforehand, and seek the public's opinion on them. Merely conferring with the public after a decision is made does not achieve this purpose, according to the policy. The role of agency officials under the policy is to plan and conduct public participation activities that provide equal opportunities for all individuals and groups to be heard.

Ease of Access

Federal permitting regulations in the United States require federal agencies to maintain lists of all interested persons and organizations in a region, and to mail notices of the proposed permit to these people.[20] These interested parties might include local civic associations, local chapters of environmental organizations, trade union representatives, recreational associations, and other groups likely to be affected by the proposed activity. Mailings of this nature, combined with official government bulletins, notices in local newspapers and radio broadcasts, are used to alert interested members of the public of a pending permit application. The agency is required to notify all communities and political jurisdictions whose environment might be affected by a facility's operation, not just those situated in the immediate vicinity of the plant.

Because permit applications and draft permits are technical in nature, they may be difficult for non-experts to understand. Under US permitting laws, non-technical documents called "fact sheets" are often required.[21] The fact sheets give a brief description of the discharges from the facility, the proposed limitations on those discharges, and requirements for compliance and monitoring. They also include an explanation of the rationale used in developing the proposed discharge limitations. Fact sheets are required to be made available to the public, and are

20. 40 C.F.R. §124.10(c)(1)(ix).
21. 40 C.F.R. §124.8.

mailed to anyone who requests a copy. They provide, in less technical form, much of the information upon which interested citizens base their comments.

Notice of a proposed permit typically instructs members of the public about how they can participate in subsequent phases of the permitting process. The notice includes a description of the procedures for submitting comments on the permit, and the procedures for requesting a public hearing. The names and addresses of the agency personnel responsible for the permit are also provided, along with directions about how interested parties may obtain copies of the permit application, the fact sheet, and other relevant documents.

The use of other types of notice beyond official government notice is important in the context of permitting because of the greater impact a permitting decision is likely to have on the communities affected by the plant's operation. And the use of supplemental forms of notice is even more feasible in the permitting context since the geographic scope of a permit is typically fairly small. Local newspapers and radio stations in the United States are likely to be a community's major source of information. Notice of a proposed permit will reach the greatest number of people in a community if it is published or broadcast through those media, and permitting laws require or encourage their use.[22]

Timeliness

The agency usually must notify the public of its action as soon as possible, and preferably before a final decision is made.[23]

Affordability

The methods discussed above, such as advertising the permit application and mailing fact sheets or copies of the application are done at no or minimal cost to the public.

3.2 Selected State Regulations and Policies

Permitting is carried out at the state level both under state programs which have been delegated authority to implement the federal environmental statutes, and under state environmental statutes and state administrative procedure regulations. Permits issued under state

22. 40 C.F.R. §124.10(c)(2)-(4).
23. 40 C.F.R. §124.10.

programs which implement the federal environmental statutes come under the federal permitting requirements for public participation and access to information described above. For permits which do not fall under federal law, most states have some sort of notice requirement which vary in the detail and nature of the information provided, and which concern to whom notice must be provided and in what fashion. Permitting rules and practices in Tennessee and New Jersey are fairly typical examples of access to information during the permitting process at the state level.

3.2.1 Tennessee

Legal Right of Access

Environmental permits in Tennessee are generally issued under the federally delegated state environmental programs for air, water and waste. Each division creates its own specific rules for involving the public in the permitting process. The public notice provides the name of the company applying for the permit, the type of operation, and the contact information for the governmental engineer assigned to prepare the permit. In the past few years, some citizens have complained that this was not enough information and the air division, for one, changed its process to provide more explanation. If the division receives a substantial amount of comments, a public hearing will be scheduled.

Ease of Access

The notice is published in the local newspapers, while both the notice and the draft permit are available for review at public depositories, which are usually local libraries around the state. There is no hotline or toll-free number provided for interested persons; to discuss the proposed permit with the engineer or to receive more information, any interested member of the public located outside the capital will have to make a long-distance call. If detailed information on the process is requested, this will only be available in Nashville. Any individual can call the engineer for more information and will usually be able to get limited information over the telephone. Private citizens are usually given more assistance than commercial consultants.

Timeliness

The comment period will be anywhere from 30 to 45 days, depending on the division.

Affordability

The cost of the requested material depends on how much information is requested and who asks for it. If an entire file is requested, the individual will most likely be asked to come to the office in the Capitol or to their local library/depository to review it in person and make copies themselves, with a price per page.

3.2.2 New Jersey

Legal Right of Access

The *New Jersey Water Pollution Control Act* is an example of a state environmental law with access to information requirements regarding the permitting process.[24] In general, any information obtained by the government pursuant to this Act must be available to the public, with the standard exemption for trade secrets. The Act explicitly provides for notice and opportunity for public hearings in the case of every proposed new permit, as well as for every proposed permit suspension, revocation or renewal, or any substantial modification of a permit. Notice of all modifications to a discharge permit must be published in the New Jersey Department of Environmental Protection *Bulletin*.

4. PROPOSED REGULATIONS, POLICIES, PROGRAMS, OR PLANS

4.1 Introduction

This section addresses the extent to which the public has access to the environmental information about proposed regulations, policies, programs, or plans. The section focuses on notice and comment rulemaking procedures under the *Administrative Procedure Act* (APA). Like the FOIA, these procedures apply beyond environmental rulemaking, but they have been useful to citizens who wish to have access to the governmental decision-making process.

In the United States, the APA prohibits formal decisions by governmental agencies that are "arbitrary and capricious."[25] Under this provision, the courts have required that agencies be able to justify their actions by producing a written "administrative record" of the documents that support the action. The administrative record must be avail-

24. *N.J. Statutes Annotated,* Title 58, Chapter 10A (amended 1993).
25. 5 U.S.C. §706.

able for public scrutiny and for submission of relevant information by the public. In addition, it is open to FOIA requests and must be made available if the agency decision is challenged in court.

Sometimes a program for environmental regulation is so complex that industry and citizens require help understanding it. The government may establish information offices to respond to questions from the public about regulations. The US EPA has set up several telephone "hotlines" that industry and the public can call without charge to ask questions about regulatory requirements, as well as to request information about governmental activities. In addition, the EPA has a Small Business Ombudsman to answer questions from small businesses and to advocate the point of view of the small business community in agency proceedings.

4.2 Federal Regulations and Policies

Legal Right of Access

Notice and comment or legislative rulemaking is a particular method of developing legally binding administrative rules. Notice and comment rulemaking has become the most common method of enacting rules in the United States. The APA, enacted in 1946, represents the first comprehensive codification of administrative procedure in the United States and governs, among other things, the process of notice and comment rulemaking applicable to federal agencies.[26] Notice and comment rulemaking requires the agency to notify the public of a proposed rule by publishing it in the *Federal Register* and to consider written comments submitted by the public before adopting a final rule.

Many of the notice and comment rulemaking requirements derive from judicial interpretations of the APA, and are not found in the words of the statute itself. In general, the law allows affected members of the public to challenge regulations in court and allows courts to overturn regulations if, among other issues, the agency fails to provide the public with proper notice and opportunity to comment on regulations or fails to consider significant public comments.

Access Policies

In 1993, President Clinton issued Executive Order 12866 regarding regulatory planning and review. The Executive Order describes, in part,

26. See, 5 U.S.C. §706.

a regulatory review process designed to be more open and accessible to public scrutiny. The President ordered his administration to make its regulatory review process more accountable and open to public examination. The Office of Information and Regulatory Affairs is in charge of implementation of the Executive Order. The goals of this office are to increase public involvement in the rulemaking process by using informal means in addition to the more traditional formal means represented by the notice and comment process.

The Clinton Administration also encouraged "negotiated rulemaking" which involves interested parties directly in the rule drafting process, even before the notice period. By involving interested parties directly in drafting a rule, and by having them negotiate out some areas of disagreement, the Administration expects the rule will be more intelligently drafted and less contentious when proposed. Section 6 of the Executive Order directs agencies to explore and use regulatory negotiation in order to develop rules more by consensus.

For other policies relevant to rulemaking, see the discussion of the EPA's Policy Statement on Public Participation in section 3.1.2 on access to information with regard to licenses or permits for proposed projects.

Ease of Access

Publication of the proposed rule in the *Federal Register* is meant to reach a wide public audience. Unless potentially interested parties are made aware of a proposed rule, they will be unable to express their views on it, and public participation in the rulemaking process will be effectively defeated.

In the United States, proposed rules of federal agencies are published daily in the *Federal Register*, the official government publication for this purpose. The *Federal Register* is reliable, timely, and accessible. It is available in many public libraries and government offices, and it collects in a single place the government's entire rulemaking agenda. But the very breadth of the publication can make it large and unwieldy. In fact, few ordinary citizens actually read the *Federal Register*, and the publication is used primarily by lawyers and regulated firms having a special interest in particular cases.

Individuals not only have a right to know what the government is saying, they have a right to know what others are saying to the government. The APA bans one-sided discussions and provides for open dock-

ets where any individual can examine the administrative record to see what other people have said about the proposed rule. Agencies keep copies of comments received on proposed regulations in the open docket, available for inspection at agency offices or through the use of the FOIA. Agencies will often designate a contact person, whose name and phone number are then printed with the draft and final rule in the *Federal Register*, to field inquiries about the regulation. Comments on a proposed rule, however, must be in writing and must be submitted during the declared comment period.

However, even with publication requirements in the *Federal Register* and in local newspapers, large segments of the local population will not have access to information concerning proposed regulations. For example, if a rule is going to affect a largely Central American population in New York, notice in the New York Times (the main daily newspaper) of the proposed rule will not be effective in informing the target population. The information would need to be in Spanish and disseminated through other means than the printed news media. When dealing with a largely Hispanic community, for example, the most effective way to give notice is through Spanish-language radio stations.

Timeliness

The APA does not give a specific time limit within which notice of a proposed rule must be published. However, because an agency cannot proceed to issue a final rule until an opportunity has been given for the public to comment, there is pressure for the agency to make the proposed rule available to the public as soon as possible. The agency is required to allow sufficient time to receive and consider public responses before it adopts the final version of a rule. In the United States, comment periods usually last at least 30 days.

Affordability

Under most agency rulemaking procedures, documents are made available to the public at minimum cost and the agency may waive or reduce the costs in the public interest.[27] Moreover, under the *Comprehensive Environmental Response, Compensation and Liability Act* (CERCLA), for example, EPA can award "technical assistance" grants to local community groups to allow them to receive expert advice that will help them understand, and comment on, proposed government decisions.[28]

27. See, for example, *Clean Air Act*, 42 U.S.C. §7607 (d)(4)(A).
28. Technical Assistance Grants to Groups at National Priorities List Sites, 54 *Fed. Reg*. 49848 (1 Dec. 1989). Provided for in 42 U.S.C. §9617(e), CERCLA §117(e).

In the context of the open meetings principle of the *Federal Advisory Committee Act* and other similar laws, funds can be made available by the government for travel expenses and reasonable per diem expenses of citizen organizations in order to facilitate their participation.

4.3 Selected State Regulations and Policies

Most states have some version of notice and comment or legislative rulemaking provisions, either in their administrative procedure acts or directly in their environmental statutes. In general, these provisions do not differ greatly from the federal procedures outlined above. The *California Administrative Procedure Act* provides an example of access to information concerning proposed regulations at the state level.[29]

4.3.1 California's Administrative Procedure Act

Legal Right of Access

In California every agency drafting a regulation must make the proposal, and an initial statement of reasons for proposing the regulation, available to the public upon request. Notice of the proposed regulation must be mailed to every person who has filed a request for notice of regulatory actions and may be mailed to any person whom the agency believes to be interested in the proposed action. Notice of the proposed regulation must also be published in the California *Regulatory Notice Register*. Individual statutes can prescribe more stringent notice rules. In addition to the full text of the proposed regulation, notice must include the time, place, and nature of proceedings for adopting the proposed regulation, the date by which comments are due, the name and telephone number of the agency officer to whom inquiries concerning the proposed administrative action may be directed, as well as information concerning related laws and regulations. The agency officer in charge of the proposed regulation must also make available to the public upon request the location of public records, including reports, documentation, and other materials related to the proposed action. The agency must notify the public of changes to the proposed action at least 15 days before the agency adopts the resulting regulation. Also, state agencies may not add material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless adequate provision is made for public comment on that matter.

29. *California Administrative Procedure Act*, Government Code §11340 *et seq.*

Access Policies

The general policy for the access to information concerning proposed regulations in California is to encourage the widest possible notice distribution to interested persons.

Ease of Access

The California APA has a requirement that proposed regulations be written in "plain English" which means language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English. If it is not possible to use plain English due to the technical nature of the regulation, the agency is required to prepare a non-controlling plain English summary of the regulation.

Every agency must maintain a file of each rulemaking, including copies of petitions received from interested persons, all published notices, the determination, all studies and supporting documentation, and the minutes of any public hearing. The file must also contain an index or table of contents that identifies each item contained in the rulemaking file and must be available to the public.

Timeliness

The agency must give notice of the proposed regulation at least 45 days prior to the close of the public comment period on the proposed regulation. At the time of the close of the public comment period, a public hearing will typically be scheduled.

Affordability

The California Office of Administrative Law must make the *Regulatory Notice Register* available to the public at a nominal cost only.

5. TOXICS RELEASE INVENTORY

5.1 Federal Regulations and Policies

Legal Right of Access

The *Emergency Planning and Community Right-to-Know Act* (EPCRA) is aimed at informing local governments, emergency responders and the general public about environmental emergencies. The

EPCRA calls for the creation of state and local emergency preparedness bodies to plan for and receive notice of accidental releases of hazardous substances.[30] Although Congress designated an initial list of substances covered by this provision, the EPA can add substances to or subtract them from the list, and can set the threshold amounts for all listed substances.

Any facility that possesses listed substances in excess of the threshold amounts must notify the local emergency planning body of their existence and give immediate notice of any accidental releases. On request of the state or local emergency planning bodies, facilities may be required to submit more detailed information on the storage and use of each individual chemical present.

Section 313 of the EPCRA requires the EPA to conduct an annual Toxic Release Inventory (TRI) of 654 listed toxic chemicals released into the environment by manufacturing operations of a certain size. Many of the listed chemicals are not regulated by the EPA under any other program but nonetheless must be reported.

In addition to release amounts, the TRI requires detailed substance-specific information on amounts emitted into the air from fugitive, non-point, and point sources; discharged to a stream or to a public wastewater sewage system; and released as hazardous waste to underground injection, off-site treatment facilities (e.g., recycling or incineration), and disposal (i.e., landfills or surface impoundments).

The EPCRA, Section 313, adds significant procedural strengths to US public disclosure laws, especially in regard to restrictions on claims of confidential business information or trade secrets. It requires strict substantiation, including proof at the time a claim is submitted, that the information really is secret, that there is provable competitive harm which would result from disclosure, and that the substance in question is one which a competitor could readily reverse-engineer. If a manufacturer is exempted from disclosing the identity of a substance, he or she must nonetheless report his or her own identity, the general physical and chemical character of the substance, and the amount released. The EPCRA also provides heavy penalties for, and citizen suit opportunities against, facilities that do not comply with TRI requirements.

30. EPCRA §§301-304, 42 U.S.C. §11001-11004.

Access Policies

The government policies governing the public's access to information required by the EPCRA are further developed in the EPA's *Pollution Prevention Strategy*, published in 1991. Under this strategy, the EPA has set a series of pollution prevention goals for its work with the regulated community. In order to implement these principles in its programs, the EPA will use and expand upon EPCRA reporting requirements. In the pollution prevention strategy, the EPA acknowledges the need for "more and better" information on the environmental performance of both consumer products and industrial facilities.

Ease of Access

The public can obtain copies of the information made available under the EPCRA from the local emergency planning committee, which must publish annual notices of availability. State and local governments also can impose information disclosure requirements stronger than those in federal law. However, the EPCRA establishes protection to prevent disclosure of trade secrets, such as information kept confidential by a business that would be of commercial use to its competitors. One exception to this trade secret protection guarantees health care professionals access to chemical information if needed for treatment or prevention of injuries. In non-emergency cases, however, the health care professional must agree to protect trade secrets before gaining access to the information. Companies required to report under the TRI must submit an annual report to the EPA indicating which listed chemicals they use, how much they use, how their waste streams are treated, and how much of each chemical is released into the environment, by medium (e.g., air, water, soil). Each year, the EPA releases a summary of the TRI information reported by the covered companies, including detailed analyses and breakdowns of the TRI data. This report is also made publicly available.

The EPCRA directs the EPA to maintain TRI data on a computer accessible database. The EPA's TRI Reporting System is accessible to anyone with a computer and a telephone modem, who has applied for and received a user identification code through the National Library of Medicine. With this code, any individual can access the database through the Internet. By accessing the database, a citizen can quickly obtain a report on which companies are discharging what chemicals in what quantities to what media in any part of the country. Citizens without telephone access can purchase computer-readable copies of the inventory, and those without computers can ask the EPA to search the

inventory for particular information. In addition, the TRI database is available on microfiche or compact computer disc (CD-ROM) format at over 4,000 locations around the country – many of them public libraries – where people can go to use the database free of charge. A toll-free hotline also exists to answer questions from the public about the TRI system, conduct searches, and explain other aspects of the EPCRA.

The EPCRA also presents several challenges worth noting. First, because it imposes an affirmative obligation on a large and constantly changing group of companies to come forward with information, the law can be difficult to enforce. How does the government or citizen enforcer identify the small company that mis-reports or should be reporting but is not? How do they find the company that under-reports its discharges? Finally, the important improvements in accessibility achieved by the EPCRA, Section 313, are significantly offset by the scope of the inventory, which exempts or excludes important emissions information, especially from non-manufacturing facilities and for small quantities of extremely hazardous substances.

A further challenge is presented by the general lack of public awareness of TRI data availability, even in areas with high levels of chemical emissions. The EPCRA does not require the EPA to implement a public outreach program, but the lack of an EPA strategy for assessing the informational needs of different sectors of the public hampers the goal of ensuring public access to TRI data.

Timeliness

The requirement to make information publicly available through telecommunications directly from the EPA-maintained computer database gives the public access to new data as soon as EPA has updated the computer collection.

Affordability

As mentioned above, the availability of information from the TRI through computer modem, on CD-ROM, in public libraries, through hotlines and information requests makes it possible for almost any citizen to access the database at little or no charge. The statute specifies that the information is available on a cost-reimbursable basis.

5.2 Selected State Regulations and Policies

Approximately half of the states in the United States have right-to-know laws.[31] Disclosure of information is often based on environmental surveys of the facilities conducted by the government. These surveys generally identify the conditions at the facility and chemicals that may be dangerous to community residents if released into the environment; the information from these surveys is made available to the public. These surveys may be conducted as a result of the statute or a public request for information. Generally, trade secrets, privileged, or confidential information is not available to the public. Most of these statutes, however, provide for an exception to this rule in the case of a medical emergency, requiring disclosure of chemical information if it is needed for a physician to treat or diagnose an individual exposed to the substance. The *New Jersey Worker and Community Right-to-Know Act* provides a good example of a state right-to-know law.[32]

5.2.1 New Jersey's Worker and Community Right-to-Know Act

Legal Right of Access

The *New Jersey Worker and Community Right-to-Know Act* enables state and local officials and individuals to find the answers to many questions about complex pollution problems. Industries using hazardous chemicals must submit annual inventory reports about the presence and movements of toxic substances to the US EPA, the New Jersey Department of Environmental Protection or the state's Local Emergency Planning Committee. All inventory information is available to the public. Each year, every facility covered by the law must conduct an environmental survey of all the chemicals and conditions at the facility that may be dangerous to community residents if released into the environment. These surveys are detailed reports about the amounts, hazards, and locations of specific substances at the facility. The New Jersey Department of Environmental Protection has developed a list of hazardous substances covered by the law.

31. The following states have right-to-know laws: California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Missouri, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia and Wisconsin.
32. *N.J. Stat. Ann.* §§34:5A-1 to 34:5A-31 (West 1988 & Supp. 1990).

Ease of Access

Facilities must submit these surveys to the local police department, local fire department, local emergency planning committee, a designated county agency and the New Jersey Bureau of Hazardous Substances Information. The law requires the New Jersey Department of Environmental Protection to establish a central file for all the surveys they receive.

If a citizen challenges information which is deemed to fall within the exceptions for disclosure, the New Jersey Department of the Environment will ask the facility to show them why the information should be shielded from public disclosure. If the facility does not give them sufficient or proper reason, the New Jersey Department of the Environment may disclose the information to the person who requested it. In very limited circumstances, such as a medical emergency, the New Jersey Department of the Environment will disclose this information to health professionals who need access to the information to deal with the emergency. In almost all cases, the law requires that these health professionals enter into an agreement not to disclose the confidential information.

The public may obtain right-to-know information from several sources in New Jersey. One source is the New Jersey Department of the Environment. Information is obtained simply by sending a written request to their Bureau of Hazardous Substance Information. By clearly specifying the type of information requested, requests will be sped up. At the very least, requesters should identify the name and location of the facility about which they are requesting information. Another source of this information is the county-lead agency. The *Worker and Community Right-to-Know Act* provides funding to a designated agency in each county, usually the county health department. Each county-lead agency has a Right-to-Know Coordinator who responds to requests for information and assists facilities in complying with the law.

Timeliness

The New Jersey Department of the Environment will respond to a citizen's request for information within 30 days.

Affordability

The New Jersey Department of the Environment will not charge if the information requested is less than 50 pages of material. If the request is larger than 50 pages, there is a charge of ten cents per page.

6. ENFORCEMENT AND COMPLIANCE ACTIONS

Access to information is the only way that the federal government allows citizens to participate in governmental decisions to enforce environmental laws. The US common law doctrine of prosecutorial discretion denies citizens a voice in agency decisions on whether and when to use governmental enforcement power.[33] To preserve citizens' participatory rights and supplement agencies' enforcement capabilities, Congress established separate citizen enforcement rights, which now exist in most of the major environmental statutes in the form of citizen suit provisions. For citizen suits to be practical, members of the public must have access to accurate information about the compliance status of regulated entities. Accurate information requires that the data be collected and provided to the government by regulated facilities and that the government provide the data to members of the public on request.

Because the regulated community is so large, the most effective way for the government to gather environmental data is to have the regulated parties monitor their own discharges and inspect their own facilities. Regulated parties must then submit regular, detailed reports of monitoring results to federal and state agencies and must keep records of their monitoring results. Because the monitoring reports of regulated entities generally are sworn statements, reports that show violations are usually enough to prove liability in enforcement suits, either by the government or by private individuals. Most US environmental statutes have these monitoring, inspection, *record keeping* and reporting requirements. The EPA collects this information and maintains a computer database which also includes enforcement information. Aside from certain exceptions, the enforcement information is also accessible for private individuals and allows them to monitor the compliance status of regulated facilities and enforcement actions of the government. Under the *Freedom of Information Act* and various state open records laws, members of the public also have a right to examine reports of regulated parties and government inspectors; and the *Emergency Planning and Community Right-to-Know Act* requires regulated entities to collect and issue reports about their discharges, which can then be used to document violations.

6.1 Federal Regulations and Policies

6.1.1 Citizen Enforcement Suits

In the United States, most environmental statutes contain citizen suit provisions enabling citizens to prosecute violators of statutory

33. See *Heckler* v. *Chaney*, 470 U.S. 821, 830-31 (1985). (An agency's decision not to prosecute or enforce is generally committed to an agency's absolute discretion).

requirements. Citizen suit provisions have been used to enforce federal regulations in diverse areas ranging from antitrust to consumer protection. Citizen suit provisions are said to create private attorneys general, for they confer upon individuals the right to enforce public laws against other entities, either public or private.

The US *Clean Air Act* (CAA), enacted in 1970, was the first federal environmental statute of the modern era with a citizen suit provision.[34] The CAA citizen suit provision is the basis for similar clauses in almost every other major piece of federal environmental legislation. Today, any person can bring a lawsuit against private parties or the government for violations of certain sections of statutes regulating air, water, toxic waste, endangered species, mining, noise, the outer continental shelf and more. Under many statutes, the remedies available to the citizen are equivalent to those granted to the federal agency charged with administering the statute, including the recovery of attorney fees.

The typical citizen suit provision permits "any person" (including an individual, organization or corporation) to sue any other person (including the United States) who is violating the requirements of a statute. The citizen can use information gained through discovery, or through FOIA requests, such as discharge monitoring reports. Discharge monitoring reports are often accepted by courts as definitive proof of a violation, because they are written and filed by the alleged violator. The right-to-know statutes and the Toxics Release Inventory have also helped citizens identify and prove environmental violations.

Before filing a suit, a citizen must notify state and federal agencies as well as the alleged violator that a lawsuit is pending. As long as the violation continues past the time of the notice and the state or federal government is not pursuing a "diligent enforcement" action against the alleged violator in court, a lawsuit may be filed by the citizen after 60 days. Once the suit is filed, the government has no power to dismiss it and may affect the outcome only by intervening in the case. If the citizen wins, the court may order the defendant to stop the violating activities. In certain circumstances, the court may award the plaintiff the court costs and attorney fees associated with bringing the action. Some statutes allow the plaintiff to ask the court to impose civil penalties on the violator, payable to the US Treasury.

Many citizen suits are resolved by negotiated settlements rather than by trials. Courts have the authority to approve settlements which

34. 42 U.S.C. §7604(a), CAA §304(a) (citizen suit judicial enforcement).

they find to be reasonable, adequate and in the public interest. To ensure that settlements are effective in causing defendants to comply with the law, most *citizen suit* plaintiffs insist that settlements be as easy to enforce as possible. Many settlements are "consent decrees" which, on approval of the court, become enforceable as court orders. When the government is party to a lawsuit, environmental laws sometimes require notice to the public of proposed settlements and opportunities for public comment.[35] The public notice requirements do not apply to *citizen suit* settlements.

6.1.2 Information from the Regulated Community: Monitoring and Reporting Requirements

Legal Right of Access

Successful enforcement of pollution standards requires, among other things, available evidence of whether a source is complying with the set standards. Experience in the United States suggests that self-monitoring and disclosure requirements are powerful enforcement tools.

Almost every US pollution control law requires regulated industries to monitor their pollution discharges regularly and to keep records of their monitoring data and other information relating to their polluting activities.[36] These laws require that the records either be provided periodically to the government or be available for inspection by the government on demand. In most cases, the laws provide for public access to any such records in the government's possession, so long as the records do not reveal trade secrets or other confidential business information. Even if the law lacks explicit public access language, government-held records, including those generated by private individuals, still may be available to the public through the FOIA, as discussed above. Usually, the government or the industry bears the burden of proving that the data should not be available to the public.

35. See, RCRA, 42 U.S.C. §6973(d) (when the United States seeks to settle certain claims it must provide "notice and an opportunity for a public meeting in the affected area, and a reasonable opportunity for comment..."). See, also 40 C.F.R. §271.16(d)(2)(iii)(1994) (states generally must provide at least 30 days for public comment on all proposed settlements of RCRA civil enforcement actions).
36. Examples of US environmental laws with monitoring and *record keeping* requirements include the *Clean Air Act*, the *Federal Insecticide, Fungicide, and Rodenticide Act*, the *Surface Mining Control and Reclamation Act*, *Toxic Substances Control Act*, the *Comprehensive Environmental Response, Compensation, and Liability Act* (Superfund), and the *Federal Water Pollution Control Act*.

In the United States, self-monitoring and record keeping laws are indispensable to governmental enforcement programs because the government does not have the resources to monitor all regulated industries itself. In addition, these laws can serve an important function in citizen enforcement. Public access to such compliance records allows citizens to identify regulated industries that are violating the law. With this information, citizens can notify the governmental enforcement officials and encourage them to take enforcement action. Citizens can also publicize the violations, using public pressure to force the industry to correct its violations.

In the United States, the *Clean Water Act* is generally considered to be the model for the use of self-monitoring.[37] This Act outlaws all discharges of pollutants into surface waters without a permit from the federal or state government. The permits contain clearly stated discharge limits and other conditions, and either the government or citizen plaintiffs can go to court to enforce the permits. Under the *Clean Water Act*, the public is guaranteed access to the information collected by the government.

Ease of Access

Again using the *Clean Water Act* as a model, the government can specify what sort of monitoring, sampling, and record keeping a permit holder must undertake.[38] The *Clean Water Act* guarantees public access to any permit and to any records, reports, or information that the government obtains from a permit holder, except for trade secrets. Coupled with the Act's citizen suit provisions, these information access provisions allow citizens to seek relatively quick relief against violators. A citizen need only obtain copies of the polluter's permit and the discharge monitoring reports (DMRs) to see if the discharges have exceeded the amounts allowed by the permit. If violations have occurred, the DMRs can be used as evidence against the polluter in court.

To ensure that the monitoring reports are accurate, the government not only has access to a permit holder's records, but also has broad inspection powers. These powers include the right to enter a permit holder's private property without advance notice, to inspect monitoring equipment and facility operations, and to take samples of effluents. This

37. *The Federal Water Pollution Control Act*, 42 U.S.C. §1318, states that any records, reports, or information obtained under this section shall be available to the public, with an exception for trade secrets.
38. 42 U.S.C. §1342(i), CWA §402(i).

authority, combined with stiff criminal, civil, and administrative penalties for violation of monitoring and reporting requirements, encourages thorough and accurate record keeping by all permit holders.

Timeliness

By EPA regulation, *Clean Water Act* permit holders must file monthly DMRs with the government, as well as notices of noncompliance if the monitoring indicates a violation.

Noncompliance serious enough to threaten health or the environment must be reported to the government within twenty four hours.

6.1.3 Accessing Information from the Government

Most environmental statutes contain requirements for public access to information concerning enforcement and compliance. For example, under the *Clean Water Act*, before issuing an order assessing a civil penalty, the EPA shall provide public notice of, and reasonable opportunity to comment on the proposed issuance of the order.[39] Any person who comments on a proposed penalty assessment shall be given notice of any hearing held and of the final order assessing the penalty.

Enforcement-related environmental information is kept by the EPA in a series of databases. These databases are divided into enforcement sensitive and non-sensitive sections. Enforcement sensitive data are those records which the agency is currently using in order to maintain an enforcement action against a specific facility. At the moment, the easiest way for an individual to access these databases is through the nongovernmental organization OMB-Watch (Office of Management and Budget-Watch), which has access to all of these databases and uses this access to assist citizens who are in need of information. OMB-Watch is a non-profit organization which monitors federal agencies in the United States. It maintains a computer access system to information held by the EPA. The public must register with OMB-Watch to receive a user identification number and a manual, which are sent within one week. The access is free if the public calls OMB-Watch directly or can be gained through Internet.

In addition to the Toxics Release Inventory discussed above, other examples of the EPA's various databases relevant to finding environ-

39. 42 U.S.C. §1319(4) on rights of interested persons.

mental compliance and enforcement information are the following: The Facility Index System (FINDS) provides information on the location of facilities regulated by the EPA. This information is updated by the various EPA program offices and is available to the public through the governmental agency National Technical Information Service (NTIS). The NTIS can provide a member of the public with an EPA mainframe user identification number. The FINDS system is located on the mainframe and there is no charge to obtain this access number. The NTIS can also provide the data contained in FINDS on magnetic tapes for which is charged an at-cost fee. Other than the NTIS, the public can obtain access to FINDS by writing a FOIA request specifying the subject matter of interest in FINDS.

The Aerometric Information Retrieval System (AIRS) contains enforcement information on all facilities which are permitted under the *Clean Air Act*. The data on air quality and pollution emissions is collected from state and local agencies. The information on AIRS includes a facility's name, address, a quarterly report on the facility's current compliance status, and a listing of enforcement actions taken at the facility both by the state and by the EPA. The report for each facility also tallies the number of violation notices issued and administrative actions taken at the facility for the past two years. In order to obtain access to AIRS, one must apply for a user identification number through the National Technical Information Service (NTIS). Once a user number is obtained, an account is set up and on-line access to the database is available through the EPA mainframe. There is a US $15 fixed monthly fee in addition to a charge for actual computer time. FOIA requests can also be used to access the information in the AIRS database.

The Resource Conservation and Recovery Information System (RCRIS) is a national program management and inventory system of RCRA hazardous waste handlers. Handlers are characterized as fitting one or more of the following categories: treatment, storage and disposal facilities (TSDFs); large quantity generators (LQGs); small quantity generators (SQGs); and transporters. The RCRIS captures identification and location data for all handlers and a wide range of information on TSDFs regarding permit or closure status, compliance with federal and state regulations, and cleanup activities. Although there are no means for direct access to this database by the general public, various forms of the RCRIS are available in its non-sensitive format. These can be obtained through FOIA requests which generate RCRIS reports in print. The first US $25 of copies are free, after which there is a charge of 15 cents per page. The RCRIS can also be accessed through the NTIS, which provides data type in the form of magnetic tapes with non-sensitive information

through an annual subscription of US $1,700. Certain limited versions of the RCRIS are also accessible through the Internet by using GOFER, FTP, or the World Wide Web. The charge for this access is the subscription fee charged by whichever channel is used.

The Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS) contains information on abandoned or uncontrolled hazardous waste sites. In addition, the database contains information on pre-remedial actions such as the discovery date and the completion date of a preliminary assessment, site inspection, and the date of final hazardous ranking determination. Of the sites, over 1,200 are listed on the National Priority List (NPL). CERCLIS also contains information such as a description of the NPL site, owner/generator information, regulatory and response history, waste description, environmental impact information, water use information, and the remedial events occurring at the NPL sites. Data is collected concerning the inventories, assessments, and cleanup of uncontrolled hazardous waste sites. EPA headquarters and regional offices maintain the data in CERCLIS databases. This information is only available in a non-sensitive format by informal request or through a FOIA request.

6.2 Selected State Regulations and Policies

In the United States, the EPA has a primary responsibility for implementing programs under most of the US environmental statutes and must report on its successes and failures to Congress. Most environmental statutes allow the EPA to delegate primary regulatory responsibility to the states, although the EPA remains ultimately accountable to Congress. States, therefore, take the lead in most direct compliance and enforcement activities and also take on specific responsibilities for providing the EPA with the information necessary to oversee and evaluate state activities and national program implementation. The information provided by the states to the EPA under the oversight requirements is available to the public on request under the federal FOIA and under a state's open records laws and policies. States typically provide reports on general enforcement and compliance records which include information on inspections, permit reviews, violations, and judicial cases filed. Reports are required anywhere from quarterly to yearly. In addition, many state environmental statutes contain specific provisions concerning public access to information during enforcement proceedings. The New Jersey Water Pollution Law provides a good example of a state law containing provisions for access to information concerning environmental enforcement.

6.2.1 The New Jersey Water Pollution Law

Legal Right of Access

Under the New Jersey Water Pollution Law, the government must provide an opportunity to the public to comment on a proposed administrative consent order prior to its final adoption if it would establish interim enforcement limits that relax effluent limitations established in a permit or a prior administrative order.

Ease of Access

The notice must include a summary statement describing the nature of the violation necessitating the administrative consent order and its terms or conditions. It must also specify how more information on the administrative consent order may be obtained and to whom written comments may be submitted. Before any final action is taken, the agency must notify everyone who submitted written comments and include a response to those comments.

Timeliness

The comment period may not be less than 30 days after the date of publication of the notice.