

Assessment of Policies and Programs under the *Canadian Environmental Assessment Act* - Recommendations for Reform

by

Christopher J.B. Rolfe

West Coast Environmental Law Association

and

Bob Gibson

University of Waterloo

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Introduction

It has become axiomatic that the ability to choose sustainable development paths requires consideration of the environmental effects of a policy at the same time as economic and other dimensions are being considered. One means of ensuring such consideration would be to require assessment of policies, regulations and programs under environmental assessment legislation.

This paper discusses amendments to the *Canadian Environmental Assessment Act* ("CEAA") which will ensure environmental assessment of policies, regulations and programs in appropriate circumstances. The paper first discusses the need for environmental assessment of policies and programs, and then discusses the inadequacies of the current policy and program assessment regime. It then suggests amendments to the *Canadian Environmental Assessment Act* which will be made to create a fair and efficient method of environmental assessment.

In this memo "program" means a set of related projects or plans, programs and agreements that lead to and provide guidance as to the form of a set of projects.

Policies include statements as to how legislation will be administered, funds spent etc. Such policies may be approved at a ministerial or cabinet level, or may

be developed at the lower levels of the bureaucracy. Regulations are included under the rubric of policies.

I. Need for Environmental Assessment of Programs and Policies

Plans, programs and agreements that generate and guide groups of related activities are not covered by the *CEAA*, even if the resulting activities are likely to have significant adverse cumulative effects. This limits the application of the assessment process and weakens prospects for any serious consideration of the cumulative effects of activities subject to federal control or influence.

The failure of the *CEAA* to deal with environmental assessment of policies and programs conflicts with the *Act's* commitment to use environmental assessment as "an effective means of integrating environmental factors into planning and decision-making processes."¹ The fundamental idea underlying assessment of policies and programs is to broaden environmental assessment from being solely a reactive tool, which attempts to reduce the negative impacts of specific projects, to a more proactive tool. Integrating policy and program assessment into project assessment should realize the following benefits:

- i) encourage review of potential environmental effects associated with all development proposals from policy to project levels;
- ii) permit more systematic consideration of needs and alternatives, for instance, whether or not a particular policy such as increasing fossil fuel supply is necessary or more preferable to conserving energy or hydroelectric expansion; and
- iii) facilitate identification and management of cumulative impacts.

Non-inclusion of policies and programs under *CEAA* also misses an opportunity to increase the efficiency of environmental assessment work by addressing common, overall issues at the initial plan or program stage. For instance, consider a government program of road construction in the north intended to expand access to mineral resources or communities, or a government policy on when to permit road construction to mineral claims in the north. In either case it is possible that little if any consideration is given to the environmental effects of an expanded network of roads. To the extent there is consideration of these cumulative effects, it will likely be repeatedly done as part of assessments of individual projects. Rather than grappling with the overall issues of common design criteria and desirability of an expanded road network in one comprehensive exercise, these issues are dealt with as tangents to a number of

project specific assessments. The result is a duplication of efforts and a feeling by those affected by the policy or program that the big issues have never been dealt with.

Instead fundamental underlying concerns and general road design issues could be best dealt with on a policy or program basis. An appropriate panel could be struck with the expertise to determine these issues and the best technical information brought forward. In the site-specific assessments which follow there would be no need to rehash the basic policy and general design issues.

Similarly it is important to assess policies, regulation and legislation which deal with matters ranging from export of natural gas and taxation of oil, to fisheries regulation. For instance, with regard to fisheries it is theoretically possible to complete an environmental assessment of each fishing activity (i.e., each fish boat's annual activities) that the federal government enables by issuance of a commercial fishing licence. However, practically it makes much more sense to evaluate, in one comprehensive exercise, the regulations which establish openings and closings, gear restrictions etc., and the policies which determine how many licences will be issued. The result will be a much more efficient and meaningful assessment process.

II. *The Status Quo*

Currently under the *Canadian Environmental Assessment Act*, related projects will only be assessed together if the government considers that they are so closely related that they can be considered to form a single project.

The Federal Environmental Assessment Review Office's ("FEARO's") February 1993 document "The Environmental Assessment Process for Policy and Program Proposals" sets out the types of assessment applied to policy and program decisions:

- a) Policy and program initiatives which are submitted to cabinet for consideration are to be assessed if the minister bringing the policy forward considers it to have relevant environmental implications. FEARO estimates that over 75 percent of cabinet business does not require assessment because it is not environmentally relevant. In the remaining 25 percent of cases a statement of environmental implications is to be included in the memorandum to cabinet, and where anticipated environmental effects are considered likely to be significant a more detailed account of the environmental assessment and the rationale for the conclusions and recommendations is to be included in supporting documents. According to the FEARO document "any disclosure of information will be subject to existing legislation, regulations and policies governing the release of information." This is an oblique way of saying that most information will be subject to cabinet confidentiality and unavailable

to the public except as cabinet considers appropriate. The degree and nature of public consultation is left to the discretion of the responsible minister. Concerns for cabinet confidentiality may lead to public consultation being non-existent or not being based on the full details of what goes before cabinet.

b) Policy and program proposals for decision by a minister that are not referred to cabinet are to be assessed where the minister considers an assessment warranted and public statements will be issued "as appropriate". Public statements do not necessarily provide a detailed account of the assessment work undertaken. Instead they are intended to indicate the integration of environmental factors into the decision making process. In other words, there may be no means for the public to "assess the assessment". Also the degree and nature of public consultation is left to the discretion of ministers advocating a program or policy initiative.

c) Regulations considered by cabinet or individual ministers must, according to the federal regulatory policy,² be subject to regulatory impact analysis statements ("RIAs") which are to summarize the environmental impact of the proposed regulations based on an environmental assessment report.³ This process normally involves public and other stakeholder consultations on a range of issues including environmental concerns; however, the effectiveness of such consultations is often limited by the fact that the exact form of regulations may not be known (again due to cabinet confidentiality). While the RIA's process ensures some environmental assessment, the environmental assessment reports relied on are often not subject to public scrutiny.

d) Proposals for projects (projects as defined in the *Canadian Environmental Assessment Act*) are to be covered by the *CEAA* process not the processes described above. It is not clear whether this means cabinet proposals for programs of "*CEAA* projects" would be assessed separately from the individual projects.

Environmental assessment will not be required where cabinet is of the opinion that assessment is inappropriate for reasons of national security, urgency, or emergency.

The problems inherent in the present policy are relatively obvious. Although Environment Canada is available to assist in the assessment process neither they nor FEARO have any oversight in ensuring assessment of policy or program initiatives. Assessment will be avoided if Ministers -- often ministers receiving advice from departments opposed to environmental assessment or ignorant of environmental impacts -- determine that the initiative is not "environmentally relevant" or that assessment is unwarranted. There is no list of factors to be considered in environmental assessment programs, policies or regulations.

Public involvement is extremely limited largely because of fear of open government. Even public oversight of the assessments after a decision is made is extremely limited by the fact that full assessments are not released. There is a lack of independence in the completion of environmental assessment, and the highest profile policy assessments to date have been heavily biased. For instance, the Canadian environmental review of NAFTA is little more than a "greenwash" that justifies NAFTA with minimal consideration of conflicting points of view.

A study on the integration of environmental assessment into government policy found

the following, mutually reinforcing barriers now constrain the integrated assessment of policy: a lack of clear objectives, insufficient political will, the narrow definition of issues, the existing organizational structure, absence of accountability, bureaucratic politics, lack of information and absence of incentives.

The integration of environmental issues at the policy level will require a comprehensive effort. Piecemeal initiatives, such as the requirement that environmental factors be considered as part of memorandum to Cabinet, are likely to prove ineffective, unless they are reinforced by complementary measures.⁴

Inclusion of policy and program assessment in the *Canadian Environmental Assessment Act* may provide the most effective means by which integration of environmental issues into formation of government policies could be accomplished.

III. Issues Related to the Assessment of Programs, Regulations and Policies

The environmental assessment of policies and programs raises a number of issues that are unique to policies and programs. In Part IV the explanations which follow suggested amendments attempt to explain the rationale for the amendments and the concerns which makes the amendments necessary.

One issue in relation to assessment of policies is particularly problematic: how to involve the public in assessment of policies that are approved by cabinet and maintain cabinet secrecy where appropriate. Judith Hanebury states:

Two alternatives are available to allow more meaningful participation. The first is to lift the veil from cabinet decision making and allow public participation at an early stage of policy formation and assessment. As

recommended in the [Report of the Saskatchewan Environmental Assessment Review Commission⁵], at the completion of the assessment the proposed policy could then go to cabinet for a decision. In unusual situations, secrecy for the entire process could be allowed but would have to be justified by cabinet before an independent party.

Alternatively, policies could be formulated and assessed and then released in draft for public review and comment before finalization. This alternative runs the risk that "approval in principle" will be a *de facto* final approval and that the public participation process will be seen as a charade. Without the opportunity to receive alternatives, comments, concerns and analysis from stakeholders prior to the implementation of a policy, it could prove difficult to announce or enforce policies that may have a short term economic cost and a long term environmental benefit. For that reason alone, public participation at an early stage of the policy formation process, would appear to be essential.⁶

The opening of cabinet decision making is obviously the preferred approach. This approach, with criteria for cabinet confidentiality in some circumstances, is followed below.

We also note that one of the authors has previously suggested that assessment of policies could be accomplished by passing a regulation making provision and eventually passing regulations. However, in light of the slow progress the Regulatory Advisory Committee and government have made in developing regulations, and given the number of regulations which must be developed by the Regulatory Advisory Committee over the next few years, tabling this issue for resolution by regulation may lead to a significant delay in assessment of major policies. Moreover, because of the unique issues involved in assessment of policies a general enabling provision may not give the Governor in Council sufficient power to create an effective policy assessment regime through regulation.

IV. Statutory Amendments for Environmental Assessment of Programs

This part suggests amendments which would provide a reasonable efficient means of assessing programs and policies.

Section 2

The following definitions will need to be included in section 2 of the Act:

"a confidence of the Queen's Privy Council for Canada" means information described in section 39(2) of the *Canada Evidence Act*.

"council" means the Queen's Privy Council for Canada or committees of the Queen's Privy Council for Canada, cabinet or a committee of cabinet. **[definition taken from section 39(3) of the *Canada Evidence Act*]**

"policy" includes a regulation and any statement, agreement, guidelines, objective or criteria or plan which guides the administration of legislation or regulations or the expenditure of government funds.

"President" means President of the *Canadian Environmental Assessment Act* appointed under section 65.

[In many of the proposed amendments which follow it is suggested that the President be used to exercise a function which must be independent of government. Using the President of the Canadian Environmental Assessment Agency to fulfill this function is dependent on section 65 being amended so that the President's appointment is not during the Governor in Council's pleasure. If the Agency is amended in a way analogous to the CRTC model this need for independence is presumably met. If the Agency is not independent from cabinet some other official could be used, for instance the environmental auditor general (who will presumably answer to Parliament not cabinet or a Minister). The Information Commissioner appointed under the Access to Information Act could also be used for the purposes of arbitrating public availability of information on environmental assessment of policies.]

"Program" means

a) an agreement, proposal, plan or program to develop, fund, guide or encourage a set of projects designated as a program under section 15; or

b) >an agreement, proposal, plan or program for developing, funding, guiding, or encouraging a particular class of similar projects or a set of projects in a particular geographic locale, whether or not the specific individual projects are identifiable.

[Paragraph (a) involves only a minor change from the existing provisions in the *CEAA* whereby two or more projects can be lumped together as a single project. Paragraph (b) is intended to programs where the actual individual projects are not necessarily identifiable. In practice there may be some overlap between paragraph (b) and provisions for policies which

include statements or plans guiding expenditure of government funds. For instance, a "program" for funding agricultural drainage projects has aspects of both policy and program. Under the process outlined in this part, the assessment of the agricultural drainage initiative would assess both policy and program aspects in the same process.]

Section 5

Several new subsections will need to be added after section 5(2):

(2.1) An environmental assessment of a policy or program is required

(a) with regard to regulations, if the responsible authority has reason to believe that the regulation may potentially have positive or negative environmental impacts or that there may be public concern with regard to the potential environmental impacts of the regulation, before council or a federal authority approves the regulation for gazetting in the Canada Gazette Part I;

(b) with regard to written policies, if the responsible authority has reason to believe that the policy may potentially have positive or negative environmental impacts or that there may be public concern with regard to the potential environmental impacts of the policy, before council or a federal authority approves or adopts the policy; and

(c) within the time directed by the President, if the President finds, after having consulted with appropriate federal authorities, that a policy exists which may have significant environmental impacts and which has not been previously assessed;

(d) with regard to programs, before a federal authority,

(i) enters into an agreement or other program calling for the federal government to exercise a duty or function listed in subsection (1) in relation to projects which are part of a program; or

(ii) announces or commits itself to a program.

[Explanation: A different trigger is necessary for programs and policies as the current project specific triggers are poorly adapted to triggering environmental assessment of a program early in the genesis of the program. For instance, an agreement committing the federal government to funding of a series of

future projects may not trigger an assessment under paragraph 5(1)(b).

Proposed paragraphs 5(2.1)(a) and (b) provide a very low threshold initial pre-screening (i.e. reason to believe that there may potentially be environmental impacts or public concern) which determines if a formal screening is necessary. This is intended to avoid the need for screening of policies which clearly have no environmental impact, for instance office coffee policies etc.

The reference to positive or negative impacts in paragraphs (a) and (b) is necessary to ensure that policies are not merely assessed in order to mitigate adverse effects but also in order to further the goal of sustainability.

The provision applies to policies and programs adopted at a cabinet level. This is essential. For instance, environmental assessment of policies effecting the North Atlantic Cod stock would only be meaningful if applied to the cabinet approved regulations which detail when matters such as fisheries openings and closings and allowable technology.

Because of the difficulty in identifying policies which have developed in an *ad hoc* manner, this provision generally only requires assessments for formal written policies and for regulations. However, under paragraph (c) environmental assessment of policies which develop in an *ad hoc* manner could be triggered by complaints to the head of the Agency who could be given the power to order an assessment if appropriate under subsection (3).]

(2.2) Where an environmental assessment of a policy is required before council approves or adopts a policy, the federal authority that, directly or through a Minister of Crown in right of Canada, recommends that council adopts or approves the policy

(i) shall ensure that an environmental assessment of the policy is conducted as early as is practicable in the planning stages of the policy and before irrevocable decisions are made,

(ii) is, for the purposes of this Act and the regulations, except subsection 11(2) and sections 20 and 37, the responsible authority in relation to the policy,

(iii) shall consider the applicable reports and comments referred to in sections 20 and 37, and

(iv) where applicable, shall perform the duties of the responsible authority in relation to the policy under section 38 as if it were the responsible authority in relation to the project for the purposes of paragraphs 20(1)(a) and 37(1)(a).

[Explanation: Proposed subsection 5(2.2) mirrors current paragraph 5(2)(b). It clarifies the roles of federal departments who recommend adoption of a policy by cabinet. It parallels current provisions for assessment of cabinet initiated projects.]

Section 6

Section 6 should be amended as follows:

6. Subject to subsection 55(4), no confidence of the Queen's Privy Council for Canada shall be disclosed or made available to any person.

[Explanation: as is discussed further below it is necessary to have some limited exception to the cabinet confidentiality if environmental assessment of policies is to be meaningful and open.]

Section 15

Section 15 would need to be amended as follows:

(2) For the purposes of conducting an environmental assessment in respect of two or more projects or policies,

(a) the responsible authority, or

(b) where at least one of the projects is referred to a mediator or a review panel, the Minister, after consulting with the responsible authority, may determine that the projects or policies are sufficiently related that they can be considered to form a single project, program or policy.

(2.1) The responsible authority or Minister shall designate the projects as related if:

(a) the responsible authority or the Minister has reason to believe that the projects may have significant cumulative environmental impacts;

(b) one project is necessary for the other project or projects to proceed or makes the proceeding with the later project or projects likely; or

(c) the projects are similar in nature, location or in their contribution to adverse environmental effects and the responsible authority or the Minister believes that environmental assessment of the projects may be conducted more efficiently and effectively by assessing the projects as a single project or program.

In addition to the amendments to section 15 suggested in Part IV, the following subsection would be necessary:

(2.2) The responsible authority or Minister shall designate policies as related if

(a) the policies are so linked that the responsible authority or the Minister believes that environmental assessment of the policies may be conducted more efficiently and effectively by assessing the policies as a single policy;

(b) the responsible authority or Minister believes that the policies are so linked that consideration of one policy cannot be properly conducted without consideration of the other policy;

(b) the responsible authority or Minister believes that one policy is part of the other policy and that environmental assessment of the policies may be conducted more efficiently and effectively by assessing the policies as a single policy.

(2.3) Any person may request that the President consider if two or more projects or policies are related on the basis of criteria set out in subsection (2.2), and if the President considers the projects or policies to be sufficiently related, the projects or policies shall be assessed together.

[Explanation: The revisions to section 15 keep the current process whereby the responsible authority can deem two projects to be a single project and extends it to deeming two or more projects to be a program. It also sets out criteria for what constitutes a program and, recognizing that the criteria may be hard to apply in some cases, allows a person to ask the Agency President to review whether or not something is a program.

Proposed subsection 15(2.2) recognizes that often it is essential for effective assessment to consider a number of related policies, e.g. assessment of natural gas export policy is better done in conjunction with a number of related policies as it is

only one link in the larger chain of energy production and consumption. Assessment of related policies together could be accomplished through this sort of policy scoping process which is based on pre-established criteria and overseen by an independent agency.]

Section 16

The following subsections should be added following subsection 16(2):

16(2.1) Every screening or comprehensive study of a program shall consider the factors included in subsection 16(1) and 16(2) to the extent possible given the degree to which specifics of the projects which form part of the program have been finalized.

[Explanation: Often program screenings will not be able to deal with site specific issues such as mitigation measures or impacts of individual projects.]

16(2.2) A screening or comprehensive study of a program may include a description of how any projects promoted, funded, guided or encouraged by the program are to be assessed in a manner which ensures proper attention to environmental concerns not addressed, or addressed only generally, in the program assessment, and which ensures appropriate public participation in assessment of individual projects.

16(2.3) A screening or comprehensive study of a policy may include a description of how any related policies are to be assessed in a manner which ensures proper attention to environmental concerns not addressed, or addressed only generally, in the initial policy assessment, and which ensures appropriate public participation in assessment of related policies.

16(2.4) Where a description of the requirements and procedures for assessing related projects or policies is completed under subsections (2.2) or (2.3) the description shall specify

i) requirements and procedures necessary for assessment of related projects or policies which are not on the Comprehensive Study List, and

ii) requirements and procedures necessary for assessment of related projects and policies which are on the Comprehensive Study List.

[Explanation: The purpose of subsections 2.2 to 2.4 is to enable policy and program assessments to lay the ground rules as to

how they can be used in assessment of related projects or policies. See also suggested section 19.1.]

Section 16.1

A new section needs to be added after section 16:

16.1(1) Every screening or comprehensive study of a policy and every mediation or an assessment by a review panel of a policy shall include a consideration of the following factors:

(a) where these can be determined with sufficient certainty to assist

i) designing the policy,

ii) avoiding or reducing potential negative environmental effects of the policy,

iii) increasing the positive environmental effects of the policy,

iv) making the decision whether or not to adopt or approve the policy,

the environmental effects or potential environmental effects of the policy including any cumulative environmental effects that are likely to result from the policy in combination with other policies;

(b) the significance of the effects referred to in paragraph (a);

(c) comments from the public that are received in accordance with this Act;

(d) measures that are technically and economically feasible that would mitigate any significant adverse environmental effects of the policy identified in paragraphs (a) and (b);

(e) the purpose of the policy;

(f) alternate means of carrying out the purpose of the policy that are technically, constitutionally and economically feasible;

(g) where these can be determined with sufficient certainty to assist in deciding whether or not to adopt or approve the policy, the environmental effects or potential environmental effects of alternate policies;

(h) the capacity of renewable resources that are likely to be significantly affected by the policy to meet the needs of the present and the future;

(i) the need for, and the requirements of, any follow up program in respect of the policy.

[Explanation: The matters to be considered in the screening of a policy are broader than those in assessment of a program. This is because the heart of environmental assessment of policies is the assessment of broader "policy" questions -- for example, the capacity of renewable resources.]

Often it may be impossible to determine whether or not a policy will have any environmental effects or what those effects might be. The wording of paragraphs (a),(b),(d) and (g) is intended to facilitate screenings of policies for which it is impossible to determine effects with sufficient clarity to assist in decision making.]

Section 18

A new subsection needs to be added after section 18(3):

(3.1) Where the responsible authority has reason to believe that there may potentially be significant environmental impacts of a policy or that a policy may be of concern because of potential environmental effects or where required by regulation, the responsible authority shall give the public notice of an opportunity to examine and comment on the screening report and on any record that has been filed on the public registries in respect of the policy pursuant to section 55 before taking a course of action under section 20.

[Explanation: It is essential that the test for public participation and the screening of policies be somewhat more rigid than with regard to the screening of projects. In particular, given the reluctance of federal officials to derogate from principles of cabinet confidentiality, the phrase in subsection 18(3), "where the responsible authority is of the opinion that public participation in the screening of the project is appropriate under the circumstances" could essentially eliminate effective public participation.]

Section 19.1

A new section after section 19 will be necessary:

19.1(1) Subject to subsection (3), the Agency, on the request of the responsible authority and where the Agency determines that the environment assessment of a program could be used in conducting environmental assessment of projects undertaken under that program, declare that the program assessment is an approved program assessment.

(2) Subject to subsection (3), the Agency, on the request of the responsible authority and where the Agency determines that the environment assessment of a policy could be used in conducting environmental assessment of related policies, declare that the policy assessment is an approved policy assessment.

[In the context of subsections (2) and (3) it is important that the Agency be relatively independent of government. As the party responsible for approving policy or program assessments for use in assessment of related policies or projects, the Agency must, without risk of political interference, be able to ensure that approved assessments are adequate. This is more important in the context of approved assessments of policies and programs than in the context of approved assessments of class screenings because the amendments suggested below provide a means by which approved assessments could be used in partial fulfillment of the assessment of projects or policies on the Comprehensive Study List. If the Agency is not independent it is questionable whether or not there should be any mechanism for using approved policy or program assessments in the completion of comprehensive studies.]

(3) The Agency shall, before making a declaration pursuant to subsections (1) or (2),

(a) publish in the *Canada Gazette* a notice setting out the following information, namely,

(i) the date on which the approved policy or program assessment will be available to the public,

(ii) the place at which copies of the approved policy or program assessment may be obtained, and

(iii) the deadline and address for filing comments on the appropriateness of the use of the approved policy or program assessment as a model in conducting screenings of related projects; and

(b) take into consideration any comments filed in respect of the approved policy or program assessment.

(4) Any declaration made pursuant to subsections (1) or (2) shall be published in the Canada Gazette and the approved policy or program assessment to which it relates shall be made available to the public at the registry maintained by the Agency.

(5) Where a project is part of a program in respect of which an approved program assessment report has been declared the responsible authority may use the approved assessment report for the purposes of complying with section 18

(a) provided the use of the assessment report is in accordance with the description made pursuant to section 16(2.2);

(b) provided any significant new information, issues or evidence not considered during the program assessment can be considered during the project assessment.

(6) Where a policy is related to a policy in respect of which an approved policy assessment report has been declared the responsible authority may use the approved assessment report for the purposes of complying with section 18

(a) provided the use of the assessment report is in accordance with the description made pursuant to section 16(2.2);

(b) provided any significant new information, issues or evidence not considered during the policy assessment can be considered during the project assessment.

(7) Where a responsible authority uses an approved program or policy assessment report in the completion of an assessment of a related project or policy it shall, in addition to use of the approved assessment report, ensure that the assessment of the related project or policy takes fully into account all local circumstances, including specifics of the related project or policy and cumulative environmental effects that may result from the policy or project in combination with other programs, projects or activities that have been or will be carried out.

(8) Subject to subsection 9, an approved policy or program assessment may not be used as a model in conducting assessments of related projects or policies more than five years after publication of the declaration pursuant to subsection (3).

[Explanation: The purpose of this subsection is to ensure that outdated policy or program assessments do not form the basis of project assessments.]

(9) Notwithstanding subsection 8, where a project or policy assessment has been commenced within the five year period, an approved policy or program assessment may be used for an additional 12 months for purposes of completing the project assessment.

[Explanation: The proposed section 19.1 mirrors section 19. It allows use of an approved policy or program assessment in much the same way as a class screening report (except there are more guidelines as to when use of the program assessment is appropriate). Since a program screening could involve hearings etc. it may also be possible to use the program environmental assessments in the context of comprehensive studies, hearings or mediations of projects; this is dealt with in the new section 24.1]

Section 24.1

A new section 24.1 is necessary to detail how approved policy or program assessments could be used in the assessment of policies or programs listed on the Comprehensive Study List.

24.1(1) Where a project listed on the Comprehensive Study List is part of a program in respect of which an approved program assessment report has been declared the responsible authority may use the approved assessment report to assist in compliance with section 21

(a) provided the use of the assessment report is in accordance with the description made pursuant to section 16(2.2);

(b) provided any significant new information, issues or evidence not considered during the program assessment is considered during the project assessment.

(2) Where a policy is related to a policy in respect of which an approved policy assessment report has been declared the responsible authority may use the approved assessment report for the purposes of complying with section 21

(a) provided the use of the assessment report is in accordance with the description made pursuant to section 16(2.2);

(b) provided any significant new information, issues or evidence not considered during the policy assessment can be considered during the project assessment.

(3) Where a responsible authority uses an approved program or policy assessment report in the completion of an assessment of a related project or policy it shall, in addition to use of the approved assessment report, ensure that the assessment of the related project or policy takes fully into account all local circumstances, including specifics of the related project or policy and cumulative environmental effects that may result from the policy or project in combination with other programs, projects or activities that have been or will be carried out.

(4) Subject to subsection 5, an approved policy or program assessment may not be used in conducting assessments of related projects or policies more than five years after publication of the declaration pursuant to subsection 19.1(3).

[Explanation: The purpose of this subsection is to ensure that outdated policy or program assessments do not form the basis of project assessments.]

(5) Notwithstanding subsection 4, where a project or policy assessment has been commenced within the five year period, an approved policy or program assessment may be used for an additional 12 months for purposes of completing the project assessment.

Section 54

Section 54 will need to be amended by adding the phrase ", in addition to completion of an environmental assessment as required under paragraph 5(1)(e)," after "the Government of Canada or federal authority shall" in subsections 54(1) and 54(2).

[Explanation: This is merely intended to clarify the need for a program assessment where a federal provincial funding agreement requires completion of project specific assessments once the essential details of projects are finalized.]

Section 55

The following subparagraph needs to be added to subsection 55(3):

(g) Portions of any record describing a policy or program or draft policy or program for which an assessment is being conducted.

The following subparagraph needs to be added to subsection 55(4):

(d) Subject to subsections 4.1 and 4.3, any portion of a confidence of the Queen's Privy Council for Canada which describes a proposed or draft policy or program or alternatives to a proposed or draft policy or program and the environmental assessment of such a policy or program.

[Explanation: This partially removes cabinet confidentiality. Cabinet confidentiality would remain for all parts of cabinet documents which go beyond description of possible policies and their environmental effects. For instance, discussion of the political pros and cons of a policy would remain subject to confidentiality provisions. Cabinet confidentiality would remain for records excluded under subsection 55(4.1) and there would be a limited period of confidentiality for records excluded under 55(4.2).]

The following subparagraph needs to be added after subsection 55(4):

(4.1) Any federal authority may apply to the President of the Agency **[this assumes that the Agency will be an independent body as proposed in the Liberal Red Book; alternatively, another independent official such as the Information Commissioner appointed under the *Access to Information Act* or Environmental Auditor General could be used]** to waive the need for disclosure of the confidence of the Queen's Privy Council for Canada on the basis that the information would have been exempted from disclosure under section 13, 14, 15, 16, 17, 18, 19, 20, 22, 23 or 24 of the *Access to Information Act*.

[Explanation: This provision protects information otherwise protected from disclosure in the *Access to Information Act*, but, in combination with subsection (4) does not exempt from disclosure cabinet confidences which describe a proposed policy or its environmental assessment.]

(4.2) Subsection 4.1 does not apply to portions of records which describe a policy or environmental assessment of a policy that is publicly announced.

[Explanation: Publicly announced policies which may need to be kept secret prior to their announcement, for instance details of the federal budget, are dealt with under subsection 4.3]

(4.3) A federal authority may apply to the President of the Agency to temporarily waive the need for disclosure of a confidence of the Queen's Privy Council for Canada which describes a policy or program or its assessment on the basis that disclosure of the record prior to

announcement of the policy or program could reasonably be expected to be materially injurious to the financial interests of the Government of Canada or the ability of the Government of Canada to manage the economy of Canada or could reasonably be expected to result in an undue benefit to any person or could reasonably be expected to be materially injurious to the ability of the Government of Canada to pursue the objective of good government.

[Explanation: The purpose of this section is to allow delaying the disclosure of draft policies which could have negative effects if made public prior to final approval. For instance, there may be legitimate reasons for maintaining secrecy over major policy initiatives such as the budget. As noted in Part III public involvement in policy and program initiatives is sufficiently important that this temporary waiving of public access to environmental assessment records must be limited to situations where it is truly necessary.]

Once again, this assumes that the Agency will be an independent body as proposed in the Liberal Red Book; alternatively, another independent official such as the Information Commissioner appointed under the *Access to Information Act* or Environmental Auditor General could be used.]

(4.4) Where disclosure of a record is waived under subsection 4.4 the record shall be disclosed at the same time as the policy or program is announced.

[Explanation: This requires making environmental assessments of policies or programs such as budgets public at the same time as the policy or program is announced.]

A number of additional changes would have to be made throughout the *Canadian Environmental Assessment Act* adding references to policies and programs wherever the *Act* currently refers to projects alone.

Conclusion

The authors hope that the above suggested amendments provide a catalyst to discussions on how programs and policy assessments can be incorporated into the *CEAA*. We believe the suggested amendments provide a reasonable, workable and cost-effective means of ensuring the integration of environmental concerns into the decision making process of the Canadian government.

Footnotes

1. Preamble, *CEAA* clause 2.

2. "The Federal Government's Regulatory Policy" (effective February 28, 1992), Appendix 13, *Minutes of Proceedings and Evidence of the Sub-Committee on Regulations and Competitiveness*, November 17, 1992 to December 10, 1992.

3. *Minutes of Proceedings and Evidence of the Sub-Committee on Regulations and Competitiveness*, November 17, 1992 to December 10, 1992.

4. Francois Bregha et al., *The Integration of Environmental Considerations into Government Policy*, (Ottawa: Canadian Environmental Assessment Research Council, 1990).

5. *Environmental Challenges* (1991).

6. Judith Hanebury in "Environmental Impact Assessment as Applied to Policies, Plans and Programs" [unpublished].