THE OIL & GAS INDUSTRY AND LAND USE ISSUES IN BRITISH COLUMBIA

JOHN L. FINGARSON and ROBERT R. SHOULDICE*

This article provides an overview of the impact of environmental, land use and project review procedures on the regulation of the oil and gas industry in British Columbia. This article discusses the uncertainty that has been created in the industry from the implementation of provincial government land use, project review and environmental policy initiatives. The authors are of the view that the energy industry must actively participate in the processes introduced by the government if it wishes to ensure that its future in British Columbia is properly looked after. The article chronicles developments up to mid-July 1993.

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* John L. Fingarson, Vice President, Secretary and General Counsel, Trans Mountain Pipeline Company Ltd. and Robert R. Shouldice, Ladner Downs, Vancouver, B.C. The writers wish to acknowledge the valuable assistance of Sandra Draibye in the preparation of this article.

I. INTRODUCTION

This article deals with the regulation of the oil and gas business in British Columbia, in particular the implementation of rapidly changing environmental and land use review procedures. It is an attempt to catalog the status of the B.C. Regulatory Regime as at the date of writing — July 23, 1993. The various land use initiatives discussed in Part IV of the article evolved from previous political regimes and from some very general principles adopted by the current NDP government. Events are moving rapidly and it is difficult to get an accurate fix on government policy. The result, so far as the oil and gas business is concerned, is unsettled. Many of the new initiatives appear to be driven by a general dissatisfaction with the forest industry. If fully adopted, these initiatives could have a drastic effect on the oil and gas business. It appears that no one in government is taking steps to modify these initiatives for the oil and gas industry, which is materially different from forestry in its effect on land use. Many oil and gas operations are compatible with ecosystem preservation goals.

The oil and gas industry plays an important financial role in the province. In 1992 provincial oil and gas revenue exceeded $212 million while the total value of oil and gas production rose to $902 million.[1] Recent major discoveries in the Peace River area have raised the stakes in the province-wide land use poker game.[2]

Over the past decade the province has repeatedly found itself engaged in bitter disputes over the management of its lands and resources. The forest industry has borne the brunt of environmental activism. Environmental groups have sought to halt the logging of old growth forests in the Walbran, Stein, Carmanah, Robson Bight, Kitlope, Khutzeymateen, and most recently, Clayoquot Sound regions. These groups have employed various techniques to achieve their objectives, including litigation, civil disobedience (road blockades in the face of injunction), and criminal activities (suspected arson and tree spiking).

Perhaps the most dramatic example of land use conflict was the proposed copper mine at Windy Craggy. Geddes Resources invested more than $50 million in Windy Craggy and predicts that the copper mine would generate $8 billion (representing about 1% of the world's supply of copper) in the first 22 years of its existence. Five hundred jobs would be created. The proposed mine is situate within the Tatshenshini/Alsek river watershed. The Tatshenshini River is one of the few remaining wild river systems on the planet.

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1 British Columbia Ministry of Energy Mines and Petroleum Resources, *Energy Market Update*, Volume 5, No. 1. (Victoria: Queen's Printer, February 1993).

2 There is also interest in the Fraser Valley, the Crowsnest Pass area, and on Vancouver Island. Although offshore exploration was once a priority (Chevron still holds some 16 million acres), environmental concerns are likely to preclude any development in the foreseeable future. A moratorium was imposed in the early 1970s by both levels of government.

Some fifty environmental groups (known collectively as "Tatshenshini Wild") asked that the government designate the watershed a protected area.

The Windy Craggy issue achieved an international political profile. In April 1992, a joint resolution was introduced by Congressman Wayne Owens of Utah and then Senator Al Gore calling for the U.S. government to enter into agreements with Canada to protect the Tatshenshini and Alsek rivers. In July 1992, British Columbia appointed Stephen Owen, the former Ombudsman, to examine the project and make non-binding recommendations. He delivered an interim public report on January 20, 1993, advising the government to make its decision in the context of the province's Land Use Strategy (discussed in Part IV of this article). He recommended the government engage in yet another consultation process (of at least six months duration) with the public and other parties before making a final decision. On June 22, 1993, the government announced that the Tatshenshini/Alsek river watershed would be designated a provincial park. Windy Craggy may not be dead yet. Geddes Resources has initiated negotiations with the Champagne-Aishinhik people. The Champagne-Aishinhik have a land claim in the area and appear receptive to the suggestion that a mine be developed on their lands.[3]

The oil and gas industry is also subject to land use conflicts. In 1987, Dynamic Oil Limited became interested in exploration in the Fraser Valley. A joint venture was later formed with Conoco Canada Limited and B.C. Gas Inc. Approval was sought in 1989 to drill three exploratory wells which would also evaluate the storage potential of the formations. The "Friends of the Fraser Valley" opposed any oil and gas activity and received extensive press coverage. The Minister of Energy, Mines and Petroleum Resources ("MEMPR") ordered a public inquiry[4] which took some nine months and concluded that the risks from drilling the proposed wells were small and the benefits were substantial.[5] Even with these findings, the government did not immediately grant the well authorizations. It was only after considerable delay and lobbying by freehold owners of the gas rights[6] that the consortium was granted the right to drill one well.

Storage was a separate issue. The inquiry concluded that the potential risks involved in underground natural gas storage required further study. On February 4, 1991, the government rejected the consortium's application to evaluate the area for storage, even though the exploratory wells will generate much of the information needed to consider storage potential.

Before authorization of the other two wells was granted, the parties were required to participate in more public meetings. On October 25, 1992, more than three years after the

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3 Patricia Losh, "Windy Craggy Hopes Rekindled" *The Globe & Mail* (30 June 1993).

4 The government appointed David Anderson, a former federal politician and environment advocate as the commissioner of the Inquiry.

5 "Fraser Valley Drilling Risk Minimal Report Claims" (1991) 41 (52) *Oilweek* 8.

6 The Fraser Valley is one area of the Province where many owners of the surface rights also hold the oil and gas rights. It was one of the first areas settled in the Province and mineral and oil and gas rights were not reserved to the Crown when it granted the lands.

initial application, the right to drill the remaining two wells was granted. They have yet to be drilled.

The increasing conflict over land and resource use in the province has highlighted the weaknesses in the process by which land use decisions are made. In response to the growing tension and uncertainty the government has undertaken to develop a provincial Land Use Strategy. This article will review the various initiatives adopted to implement the Land Use Strategy and attempt to evaluate how those initiatives will effect the industry. In addition, it will examine the "referral process" used to administer the current statutory regime and consider new legislation bringing changes to the energy project review process.

II. REGULATION OF EXPLORATION AND PRODUCTION

As background to better understanding the referral process in B.C. and how it affects the acquisition of tenure and work authorizations it is helpful to briefly summarize the statutory provisions governing them.

A. ACQUISITION OF RIGHTS

The acquisition of Crown owned oil and gas rights in the province is governed by the *Petroleum and Natural Gas Act*.[7] The *PNG Act* is administered by the Ministry of Energy, Mines and Petroleum Resources ("MEMPR"). Crown reserve rights in the province can only be acquired by public auction (s. 88, *PNG Act*). Virtually all oil and gas in the Peace River area is Crown reserve.

The rights may be acquired in three ways:

1. Permit - Part 5 of the *PNG Act* governs the issuance of permits. The holder of a permit may explore for, but not produce oil and gas;

2. Drilling Licence - B.C. Regulation 10/82 under the *PNG Act* governs drilling licences, which are a form of tenure and have nothing, as such, to do with drilling. The holder of a drilling licence has the right to explore and, when successful, to convert portions of the licence to lease; and

3. Lease - Part 7 of the *PNG Act* deals with leases. The holder of a lease may produce oil and gas. A permittee is entitled, and in some cases may be required, to apply for a lease.

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[7] R.S.B.C. 1979, c.323 [hereinafter *PNG Act*].

B. EXPLORATION AND PRODUCTION

1. Geophysical Work

Part 4 of the *PNG Act* governs geophysical exploration. Tenure is not required to undertake geophysical work, but a licence is. In addition, a licensee requires consent from the "commissioner" before undertaking work. The commissioner is an employee of MEMPR who is authorized under s. 33.1 to attach whatever conditions are appropriate to the work authorization.

2. Drilling and Production Operations

The holder of a permit or drilling licence has the right to do exploratory drilling for oil and gas, and to produce limited amounts for test purposes. The holder of a lease has the right to produce oil and gas. The *Drilling and Production Regulations*[8] govern virtually all technical aspects of drilling and production. The "division head" has considerable authority in supervising operations.

3. Right of Entry

Part 3 of the *PNG Act* deals with right of entry for the purpose of exploration, development and production of oil and gas. The Minister may impose terms with respect to the entry of Crown land (s. 7, *PNG Act*). It is worth noting that the right of entry procedures, including mediation and arbitration, apply to privately owned land as well as Crown land (s. 9, *PNG Act*).

C. REFERRAL SYSTEM

1. Authority

The *PNG Act* does not restrict the circumstances in which conditions may be attached to the approval of an application nor does it indicate the basis on which an application may be rejected. Approval or rejection is entirely within the subjective discretion of the government.[9] In the case of a drilling licence, the Minister is specifically authorized under s. 2(4)(a) of Regulation 10/82 to impose "changes" on an application before approval. There is no similar authority for permits or leases but the discretion to refuse to issue is clear. Accordingly, there is nothing to effectively prevent the imposition of conditions on the grant of the rights. Sections 33.1 and 109 of the *PNG Act* specifically allow conditions to be attached to approval for geophysical work, well authorizations and rig licences.

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8 B.C. Reg. 628/76.

9 Such discretion must be exercised in good faith and reasonably. *Westminster Corporation* v. *L & NW Rwy.*, [1905] A.C. 426 at 430.

2. Conditions on Grant

When an interested party asks that lands be posted for sale, MEMPR gives notice to and seeks input from other divisions of government. The other ministries notified include the Ministry of Municipal Affairs, Recreation and Housing, the Ministry of Tourism and Culture, the Ministry of Forests, and the Ministry of Environment, Lands and Parks. The ministries are asked to identify potential conflicts with other resource and heritage values in the region where the lands are located. They may ask for more time to assess the application, suggest that conditions be placed on the granting of the application or ask that the application be rejected. There is no limitation on the nature of the recommendations which can be made. If significant concerns are identified MEMPR may refuse to post the lands or, as is more frequently the case, put them up for auction with a caveat attached. The rights are sold on the "understanding" that work authorization may not be granted until the concerns identified in the referral process are addressed. The caveats attached to the tenure are specific and set out the concerns raised by the interested ministries and the conditions which must be satisfied before an application for work authorization will be approved.

3. Work Approvals

Where applications are made for work authorizations all Ministries with interests in the region of the proposed development are given notice and asked to advise MEMPR of concerns. Work authorizations are required at each stage, including drilling, completion, testing, production, processing and transportation.

Applications for permission to conduct work are generally directed to the field office (Fort St. John) in the Peace River area for approval. They are then referred to agencies of other ministries in the region for their comments. The ministries are usually the same ones involved in the referral process before the rights were granted but the persons actually involved function at the regional level. Potential land use conflicts are identified and conditions to be attached to the approval are recommended. In some instances the application may be rejected. If serious concerns are raised the applicant will be required to engage in "public consultation" prior to granting its approval. This process includes town hall type meetings with potentially affected parties.

Where no concerns are identified applications for work authorizations are generally turned around in less than five days. This is not required by legislation but has been agreed to by the ministries involved in the referral process. It reflects the operational requirements of the oil and gas industry and in particular, the short operating season in the Peace River area.

At one time it was common to obtain "walk around approval" for a work application in less than one day. "Walk around approval" meant a representative would simply visit each of the government agencies in Fort St. John (at times accompanied by a representative from MEMPR) and obtain approval of the application. Government agencies have objected to this practice. They claim that "walk around approvals" result

in applications being reviewed in a cursory manner and without the baseline data[10] necessary to make informed decisions. One day approvals for work applications are less common today and the short turn around time for work applications is contentious. The Fish & Wildlife Branch of Environment in particular has put pressure on MEMPR to require applicants to provide government agencies with significant amounts of baseline data. While MEMPR has required applicants to provide site specific biological data, as yet it has not required companies to provide substantial quantities of baseline data. MEMPR believes compiling baseline data is the role of government and not of industry. Lack of funds and personnel on the government side may shift the obligation to supply general baseline data to industry.

4. Other Approvals

Separate approvals must be obtained from Regional Operations, Ministry of Environment, Lands and Parks before any proposed construction on Crown lands.[11] In addition, no pipeline can be constructed on Crown land without approval under the *Pipeline Act*.[12] Depending on the nature of the development, approvals may also be required under other statutes such as the *Forest Act*,[13] *Waste Management Act*,[14] *Utilities Commission Act*[15] and others.

5. Potential Problems

The shortcomings of the referral process become apparent when significant land use conflicts come forth in the course of the process. Once issues arise, there is no formal decision making process to resolve them. There are no time limits or restrictions placed on the discretion of the bureaucrats dealing with the issues. Endless public consultation, studies and hearings can be required without reaching a decision.

An example is the Amoco Canada Petroleum Company Ltd. ("Amoco") experience at Beattie Peaks. In October of 1991 Amoco applied for well authorizations for its Beattie Peaks property. Shortly after the application was filed George Desjarlais, the Chief of the West Moberly band indicated that the Treaty Eight Aboriginal Band Association ("Treaty 8"), of which his band is a member, had serious concerns with respect to the proposed development of Beattie Peaks. The Chetwyn Environmental Society also expressed concerns about the proposed drilling.

Treaty 8 is an association of native bands that has negotiated a treaty with the federal government. The terms of the treaty cover lands in parts of Alberta, the Northwest Territories and a substantial portion of Northeastern British Columbia. Treaty 8 alleges

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10 The term "baseline data" includes information on resource inventories and species populations and habitat requirements in the Province.

11 *Land Act*, R.S.B.C. 1979, c. 214.

12 R.S.B.C. 1979, c. 328.

13 R.S.B.C. 1979, c. 140.

14 S.B.C. 1982, c. 41.

15 S.B.C. 1980, c. 60.

that the elders of the bands designated Beattie Peaks as a refuge for their people some time ago.[16] After learning of the concerns MEMPR halted the approval process. It initiated an ethno-historical study of the region to determine the validity of the allegations. The cost of the study was shared equally by Amoco and MEMPR. The study is complete and provides support for the claim that Beattie Peaks is both a refuge and a location with spiritual significance for the native bands. MEMPR also arranged for a "facilitator's report." Not surprisingly, no common ground between the respective positions of Treaty 8 and Amoco could be identified.

Amoco has engaged in extensive public consultation since 1990. It offered to change its proposed drilling sites and to alter its proposed access route to the property. While Amoco is confident that it has addressed the concerns raised by the Chetwyn Environmental Society, its proposals have proven unacceptable to Treaty 8. MEMPR has considered requiring a public inquiry (as it did for the Fraser Valley gas play) or invoking its little used power to require a hearing before the B.C. Utilities Commission.[17] To date it has done neither.

One of the difficulties is that Treaty 8 does not accept the authority of the provincial government to deal with the issue. It wants to deal with the federal government "nation to nation." As a result the federal department of Indian and Northern Affairs, the Provincial Ministry of Aboriginal Affairs and Treaty 8 are currently negotiating a memorandum of understanding to establish a negotiating table at which to resolve issues involving resource management and economic development of treaty lands. Treaty 8 has indicated that it wishes to deal with the proposed development of Beattie Peaks through this process. MEMPR is not expected to play a direct role in these negotiations. Concerns have been raised about Aboriginal Affairs' lack of expertise regarding resource issues. In addition the entire exercise may be redundant since three land and resource management planning tables (discussed later in the article) have already been established in the northeast to deal with these types of issues. Native participation at these tables has been strongly encouraged by the provincial government.

The recent British Columbia Court of Appeal decision *Delgamuukw* v. *Her Majesty The Queen*[18] may further complicate the situation in the northeast. The Court of Appeal affirmed the existence of constitutionally protected aboriginal rights. Concerns have been raised that should oil and gas activities interfere with the exercise of aboriginal rights in an area, the constitutionally protected aboriginal rights might take priority over Crown tenure. In its judgment the Court of Appeal did not address the implications of conflicting rights.

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16 A "refuge" is a region of retreat in the case of an apocalyptic event.

17 Section 6 of the *Utilities Commission Act*, S.B.C. 1980, c. 60 provides that the Minister may, at her discretion, require a hearing before the Commission for a particular development.

18 [1993] 5 W.W.R. 97.

D. SUMMARY

At present British Columbia lacks an effective mechanism for the final resolution of issues raised in the referral process. Unless the underlying land use issues are resolved this will continue to be a source of significant expense and uncertainty for the oil and gas industry. Part IV of this article deals with current initiatives to resolve land use issues.

Consideration should be given to empowering an independent tribunal to deal with such issues, after giving due consideration to all factors with which the public has a right to be concerned. These are important issues for the Commission on Resources and Environment, which is discussed in part IV below.

III. ENERGY PROJECT REVIEW PROCESS AND THE NEW ENVIRONMENTAL IMPACT ASSESSMENT LEGISLATION

A. THE ENERGY PROJECT REVIEW PROCESS

Major projects in the oil and gas business are subject to a formalized review process to determine environmental impact. There are currently three environmental impact assessment mechanisms[19] in British Columbia: the major project review process (unlegislated), the mine development assessment process (*Mine Development Assessment Act*[20]), and the energy project review process (*Utilities Commission Act*[21]). The major project review process and the energy project review process probably both apply to energy related projects. It is generally understood however, that an energy project will only be subject to review under the energy project review process.

The *Utilities Commission Act* (the "*UCA*") defines projects according to the amount of energy used or transmitted (s. 16). Projects which exceed the thresholds are subjected to a review process governed by ss. 16-21 of the *UCA*. MEMPR and the Ministry of Environment, Lands and Parks both deal with applications for certificates to approve the project and to operate it. Practically, it is projects such as the construction of a major gas plant or pipeline which would fall into this category.

B. THE PROPOSED ENVIRONMENTAL ASSESSMENT LEGISLATION

In March of 1992, a discussion paper ("Discussion Paper") on reforming environmental assessment in the province of British Columbia was released. In April and May of 1992, Dale Lovick, Parliamentary Secretary, led a consultation process to obtain public and stakeholder views on the recommendations of the Discussion Paper. His conclusions and recommendations were presented in a report (the "Lovick Report") released in July of

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19 M. Rankin, "Environmental Assessment in British Columbia: The Status Quo and Reform," *Western Canadian Environmental Law and Regulation*, (Vancouver: Canadian Institute, September 1991).

20 R.S.B.C. 1990, c. 55.

21 R.S.B.C. 1980, c. 60.

1992. Bill 32, the proposed *Environmental Assessment Act* was introduced in the B.C. legislature on June 4, 1993.[22]

Bill 32 was the source of a significant amount of controversy. In part this resulted from the manner in which it was introduced. After the release of the Lovick Report the government indicated it would put forth a white paper and obtain additional input from stakeholders before introducing any new legislation. Instead the government introduced Bill 32 without any additional dialogue with affected parties. On June 14, only ten days after its introduction, Bill 32 received second reading. The government tabled several, primarily cosmetic, amendments to the Bill on June 30, 1993. The new legislation was expected to receive third reading and royal assent before the end of July but was suddenly withdrawn on July 23.

Commentators had questioned the need for the rapid passage of an act whose implementation was dependent on regulations which had not yet been drafted. Industry representatives asked that passage of Bill 32 be delayed to allow additional time to consider Bill 32 and consult with government representatives. The Ministry of Environment was not initially receptive to these arguments. The Minister, John Cashore, cited his desire to get a provincial assessment law in place ahead of pending changes to federal environmental regulations as the reason for the rush in getting Bill 32 passed. He wanted to ensure B.C. was "in the driver's seat" when it came to areas of overlapping federal and provincial interests.[23] Since Bill 32 provides that the act and regulations can be varied to accord with any agreement entered into between the B.C. and federal governments it was difficult to see why the prior passage of Bill 32 would put B.C. "in the driver's seat."

This rationale was also suspect in light of the recent experience with Bill 26, the *Waste Management Amendment Act*. Bill 26 passed through the legislature in just under one month. It was introduced on May 19, 1993 and given royal assent on June 18, 1993. Its implementation also depends on regulations not yet drafted.

The rapid passage of legislation with minimal consultation and vague promises that concerns would be addressed in forthcoming regulations had understandably left industry feeling vulnerable and uncertain. On July 23, 1993 the government finally acceded to industry's concerns and announced that Bill 32 would not be pushed through the legislature this session. In his press release John Cashore said that after listening to requests from business, environmental groups and others, he had decided to use the time to consult further on both the regulations and the legislation.[24] Since the government will use Bill 32 as the basis for further consultation with stakeholders, a detailed examination of its provisions will be useful to industry.

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22 From a letter to participants in the reform of the environmental assessment process signed by John Cashore, Minister of Environment, Lands and Parks and Anne Edwards, Minister of Energy, Mines and Petroleum Resources, dated March 3, 1993.

23 R. Williamson, "*Green Act* Irks B.C. Industry" *The Globe & Mail* (29 June 1993).

24 G. Shaw, "Pulling bill could be just government's way to avert another headache" *The Vancouver Sun* (24 July 1993).

1. Scope of New Legislation

Under Bill 32 projects would be designated "reviewable projects" by regulation. Projects formerly reviewable would continue to be reviewable under the legislation.

The backgrounder released with Bill 32 indicated it would also apply to projects not formerly reviewable, including water containment or diversion projects, municipal and regional projects such as waste management facilities and major urban transportation facilities, agricultural projects, and tourism and recreational projects.

2. Application of New Legislation to Oil and Gas Exploration

During the consultation process some participants sought greater regulation of oil and gas activities.[25] Apparently MEMPR strongly opposed any suggestion that conventional oil and gas exploration activities be included within the scope of the legislation. There is no indication that these sorts of activities would be reviewable as such under Bill 32.

However under Bill 32 cabinet could require a newly established Environmental Assessment Board (the "Board") to review the effects of activities proposed under any other act which pertain to the environment or to land use (s. 51). Activities proposed under the *Petroleum and Natural Gas Act*[26] pertain to the environment and land use and could therefore be subject to review. The government's stated purpose is to resolve land issues through development of a land use strategy (see discussion below). Should this strategy fail, project reviews may be required for conventional oil and gas exploration and development. All currently ongoing oil and gas exploration is located in regions of the province facing land use conflict.

Bill 32 also grants the Minister of Environment the discretion to designate a project reviewable if satisfied that the project could have a significant adverse effect and that such designation was in the public interest (s. 4). Under the existing process only cabinet as a whole can subject any significant energy matter to a review.[27]

The language of s. 4 suggests that the Minister's discretion under Bill 32 could only be exercised where a proposed project was significant in terms of size and impact. Most such projects are already reviewable. However, the delegation of discretion to the Minister alone is one more indication of a shift of power in favour of the Ministry of Environment.

C. PROCEDURE FOR PROJECT REVIEW PROCESS

The review procedure under Bill 32 is similar to the existing energy project review process. It is beyond the scope of this article to examine the process in detail. We have

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25 British Columbia, *Reforming Environmental Assessment in British Columbia: A Report on the Consultation Process* by D. Lovick, Parliamentary Secretary to the Minister of Environment, Lands and Parks, (Victoria: Queen's Printer, July 1992) at 3.

26 R.S.B.C. 1979, c. 323.

27 *Supra* note 21, s. 16(2).

included a schematic of the proposed process at Appendix "A." A comprehensive review is set out in a May 1993 paper by Paul Jarman entitled "Environmental Impact Assessment Procedures in British Columbia: Current and Proposed", delivered at a Canadian Institute conference held in July 1993 in Vancouver.

D. TIME FRAME FOR ENVIRONMENTAL ASSESSMENT PROCESS

The lack of specific time frames in the existing project review processes has been identified as a major source of concern and uncertainty for industry. Bill 32 would address these concerns to some extent by establishing specific time limits for various steps of the review process.[28] Ministerial and cabinet decisions would not, however, be subject to deadlines. In addition the Minister would have discretion to extend a time period at any time (s. 88). The usefulness of having time frames would be diminished substantially if such discretion was often exercised.

E. NEW FACTORS TO BE CONSIDERED

B.C. Regulation 388/80 governs the content of an application under the current energy review process. A project report under Bill 32 is the equivalent of an application under the current process. However, Bill 32 does not establish a set content requirement for project reports. Where a project report is required, an applicant is provided with specifications varying with the nature of the project. The specifications could require provision of any information the government considers relevant for an effective assessment of the potential effects of the project (s. 25). Without limiting this very broad discretion, Bill 32 sets out a list of types of information that could be required in a project report (s. 26). Except as discussed below, the differences between this list and the content required for an application under the current process are not significant.

1. Economic, Heritage and Cultural Factors

Currently applicants must identify and provide a preliminary assessment of any potential impact on the physical, biological and social environments. Under Bill 32, an applicant could also be required to provide information about any existing economic, cultural and heritage characteristics potentially affected (s. 26(c)). Cultural impacts and heritage impacts are not defined in Bill 32. They are probably intended to include impacts

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[28] Specific time frames are set out primarily in the administrative provisions of Bill 32. The government is required to file documents in a newly established project registry within seven days of receipt. Time frames during which comments may be provided at various stages of the review process are also established (ss. 13,15,28,30,34,37,70). Several sections of Bill 32 require the executive director to take action within a prescribed period (ss. 10,31,33,38,39). For example the executive director of the environmental assessment office must inform applicants that their application or project report does not comply with the specifications within a prescribed period or the documents are deemed to have been accepted. In addition, the executive director must provide the responsible ministers with his or her final recommendations within a prescribed period. Bill 32 does not, however, indicate the implication of a failure to comply with this latter stipulation.

on the traditional way of life in a region and impacts on heritage sites (*i.e.* native refuge areas) and archaeological resources (*i.e.* middens).

2. Direct, Indirect and Cumulative Impacts

Applicants are now required to identify the direct impacts of proposed projects. The identification of indirect and cumulative impacts has traditionally been the role of government. Cumulative impact assessments involve the assessment of projects in the context of existing development in a region. It is generally conceded that evaluating the total impact of industrial activity is part of the overall management of the province's resources and is an area of government responsibility. There is, however, a significant lack of information in British Columbia about species populations, habitat requirements and resource and archaeological inventories (baseline data). The Ministry of Environment, Lands and Parks, in particular, has repeatedly identified the need for additional baseline data. Since limited governmental resources are available to compile this data, the temptation is great for government to place the burden on industry.

Under Bill 32 the specifications for a project report could require an applicant to give particulars of "data necessary or useful to enable the assessment of the probable cumulative effects of the project" (s. 26(j)). The circumstances in which this information might be required could be limited by regulation (s. 90(2)(d), s. 90(4)(a)). Industry will want to participate during the development of both the act and regulations to attempt to ensure that applicants will only be required to provide cumulative impact data in exceptional circumstances, if at all.

3. Justification Analysis

At the present time an applicant is required to provide a financial feasibility study and a cost benefit analysis as part of its final application for a certificate. The Lovick Report recommended that justification analyses be required only where a proposed project was to be government funded or located on government lands. Government lands presumably would not include Crown reserve oil and gas rights granted to private interests.

Under Bill 32 an applicant could be required to provide an analysis of the rationale of the proposed project (s. 26(a)). "Rationale" is not a defined term but is apparently is intended to include justification analyses. Nothing in Bill 32 would limit the possibility that an applicant could be required to prepare a justification analysis for projects funded by government or located on government lands. This limitation could however, be established in regulation (s. 90(2)(d), s. 90(4)(a)).

Under Bill 32 public utility plants or systems seeking to undertake energy projects would still be required to obtain a certificate of public necessity and convenience from the B.C. Utilities Commission (the "Commission"). Currently an applicant who acquires an energy project certificate or energy operation certificate is deemed to have acquired a certificate of public necessity and convenience. These "deeming" provisions would be repealed by Bill 32 (s. 101). However, where a justification analysis is performed as part

of the environmental assessment process, the Commission has indicated that it would issue a certificate of public necessity and convenience as a matter of course.

F. COST OF PROJECT REVIEW PROCESS

1. Administrative Fees

Bill 32 would allow the government to recover a portion of the costs of the project review process in the form of administration fees (s. 90(2)(b)). The fees would be set by regulation and would vary depending on the size and nature of the proposed project. The magnitude of the fees has not been decided and the potential exposure for industry is great.

2. Intervenor Funding

Intervenor funding is one of the most contentious issues related to project review processes. Originally the Commission had the discretion to award costs to or against any person in a hearing under the energy review process. After the Commission awarded several hundred thousand dollars to public intervenors for hearings on the proposed Site C dam (Peace River) and at B.C. Hydro rate reviews in 1981 and 1982, MEMPR instructed the Commission to cease granting cost awards. In 1984, this instruction was formalized by an amendment to s. 133 of the *UCA*.[29] On June 18, 1993, the *UCA* was again amended to allow the Commission to order a participant to pay all or part of the costs of another participant in the proceedings (s. 133.1).

Bill 32 goes further. It would permit the government to provide funding to enable persons or organizations to participate in all stages of a review under the Act (s. 62). In prescribed circumstances the Minister could order a participant in a public hearing to pay the costs of the Board (s. 55). Both the "prescribed circumstances" and the "costs of the Board" would be defined in regulation (s. 90(2)(f.1)). At first and second readings Bill 32 contained a definition of "costs of the Board" which included costs paid to participants in the review process. Although the government acceded to industry pressure and took the provision out, there is nothing to prevent a similar provision re-emerging in a new bill. In our view it is likely that applicants will be required to fund intervenor participation to some degree.

G. CONFIDENTIALITY

1. Project Registry and Confidentiality

Bill 32 would establish a project registry where all documents relating to project reviews would be filed. Public comments submitted at various stages (ss. 15, 37) and written reasons for decisions reached during the process would also be filed (ss. 22,23,38,39,42).

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[29] *Supra* note 21.

Only information, documents or comments relating to a project assessment available under the *Freedom of Information and Protection of Privacy Act* would be made available at the project registry (s. 61). However, Bill 32 would not actually establish a procedure by which applicants could ensure that information they considered confidential was not made available in the project registry. Industry may wish to have this omission addressed in the new legislation.

2. Public Hearings and Confidentiality

Under Bill 32, the Board could exclude the public from a hearing for the purpose of receiving evidence if it considered that the desirability of avoiding disclosure of the evidence in order to protect the interest of any person, or to protect the public interest, outweighed the desirability of public disclosure (s. 54).

3. Access to Other Applications and Project Reports From Previous Project Reviews

Bill 32 would allow applicants access to any information, analyses or plans from previous project reviews that would assist them in completing their application or project report (ss. 9, 32). At the applicant's request the government could accept that this information could be used to fulfil the requirements of an application or project report. Depending on the procedure established to accomplish this, copyright infringement could occur. Industry may wish to lobby for compensation for those companies whose research is later provided to other applicants. In this way the costs could be borne by all those who utilize the data compiled for a particular type of project.

H. ENVIRONMENTAL ASSESSMENT BOARD

Bill 32 would establish the Board to conduct public hearings of projects referred to it (s. 51). Cabinet would appoint three permanent members of the Board for terms of at least three years and an unspecified number of temporary members (s. 48). Much was made of the fact that Bill 32 would not require balanced representation on the Board. This is not a change from the status quo. Currently public hearings are conducted by the Commission. The Commission is made up of a maximum of seven permanent members and an unspecified number of temporary members all appointed by cabinet (*UCA*). The *UCA*[30] has never required balanced representation on the Commission.

I. OTHER JURISDICTIONS

Bill 32 would give the province the ability to enter into agreements with other Canadian jurisdictions in order to carry out joint reviews of proposed projects (s. 84). It does not, however, set out the means by which this would be accomplished.

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30 *Supra* note 21, s. 2.

J. PROJECT APPROVAL CERTIFICATES

If an applicant successfully completed an environmental assessment under Bill 32, it would receive a project approval certificate. This certificate would include a deadline (which could be extended by application) for the commencement of the construction of the project of between three and five years from the date of the project's approval. Once construction began, the project approval certificate would remain in effect for the life of the project. There would be no requirement to obtain a project operation certificate as is currently the case.

1. Monitoring and Compliance

Under Bill 32, project approval certificates could be issued with conditions attached. Significant powers are granted to the Minister and his agents to ensure compliance. Under Bill 32, a person authorized by the Minister could enter property where a project is being constructed or is in operation and inspect any works or activity connected with the project (s. 65). If a certificate holder contravened a condition the Minister could order that construction of the project or operation of the facility cease (s. 66(1)(b)(i)). Alternatively, the Minister could order the holder to ameliorate the effects of non-compliance (s. 66(1)(b)(ii) or enter into a compliance agreement with the holder (s. 68(1)). In addition, the Minister could cancel a certificate or amend conditions attached where the holder is in contravention of a court order, convicted of an offence under the act, in default of an order to pay costs, or in default of one or more requirements of the certificate (s. 69).

It would be an offence under Bill 32 to construct or operate a reviewable project in the absence of or in contravention of a project approval certificate, in contravention of an order under s. 66, or to make a false or misleading statement in a record filed under the act. First offences would be punishable by maximum fines of $100,000 and imprisonment of not more than six months (s. 75). If a corporation committed an offence, an employee, officer, director or agent of the corporation who authorized, permitted or acquiesced in the offence would commit the same offence (s. 73(4)).

Serious concerns have been raised about the amount of discretion the Minister would be granted under these provisions. A project could be shut down for even a minor infraction of the conditions attached to the certificate. Perhaps more alarming is the fact that the Minister could delegate his authority to any employee of the government or of a government agency (s. 80). These are fairly significant powers to be placed in the hands of any government employee.

K. IMPLICATIONS OF NEW PROJECT REVIEW LEGISLATION

The Ministry of Environment has advised that a new version of Bill 32 will be introduced in the 1994 Spring Session of the legislature after additional consultation with stakeholders. Industry should ensure that it participates in the consultation. In particular it should lobby:

1. against any possibility that conventional oil and gas exploration activities might be designated as reviewable projects;

2. against any requirement that applicants provide cumulative impact data or justification analyses;

3. to ensure that strict limits are placed on the Minister's power to stop the construction or operation of a project. It should also lobby against the possible delegation of this power to government employees;

4. against intervenor funding;

5. for effective integration of the British Columbia environmental assessment with environmental assessments in other jurisdictions; and

6. for an effective "one-window" approach to obtaining other permits and licences necessary to proceed with the project.

IV. GOVERNMENT INITIATIVES RELATING TO THE RESOLUTION OF LAND AND RESOURCE USE ISSUES IN THE PROVINCE

The environment and land use management have been high on the agenda of politicians and governments in the last few years. This new agenda is apparently in response to perceived new demands and priorities of the public.

In the early development of the Canadian economy the issuance of resource rights and other planning decisions were made to promote economic development, social development and job creation. Environmental concerns were either ignored or were clearly a secondary afterthought. As the economy matured social values changed, and a heightened concern for the environment developed. Most recently however, there has been renewed demand for job creation and economic growth and politicians are now faced with the difficult task of reconciling the competing objectives of environmental conservation and economic growth. Governments, trying to be all things to all people, often respond to this kind of development by creating the appearance of doing a great deal when in reality the result is nothing more than additional bureaucracy.

Fuelled by a very active environmental movement in British Columbia (principally concerned with the forest and mining industries) and an election in 1992, these developments have taken hold in a significant way. Politicians wanting to be associated with the new "environmental sensitivity" have introduced "strategies and initiatives" resulting in the creation of new public officials, committees, agencies and bureaucratic processes that are overwhelmingly difficult to understand. A new land use strategy bureaucracy has been unleashed which may be developing at an uncontrollable rate. Where this process will end up is unclear. British Columbia may either create a "world-leading strategy for land use planning and management, as part of a larger commitment

to sustainability,"[31] or a bureaucracy that is so complex and "neutral" in its decision making that economic development in this province is stifled.

The energy industry faces a new bureaucratic world of acronyms describing new strategies, initiatives, guidelines, principles, committees, teams, processes and "tables", all of which may have a direct impact on industry objectives.

If an oil and gas company wants to conduct exploration or production activities today it may be faced with having to deal with a Land and Resource Management Plan ("LRMP"), a Regional Protected Area Team ("RPAT"), a Protected Area Coordinating Team ("PACT"), a System Design Working Group ("SDWG"), a Gap Analysis Working Group ("GAWG") — who apply a "coarse filter analysis" and a "fine filter analysis" to "gap analysis" planning, an Inter-agency Management Committee ("IAMC"), an Integrated Resource Planning Committee ("IRPC") an Associate Deputy Minister Committee ("ADMC"), a Protected Area Strategy Project Office ("PASPO"), a Commission on Resources and Environment ("CORE") and finally, a Cabinet Committee on Sustainable Development ("CCSD"). It is challenge enough to get the decision-makers straight, but industry must also now learn new guidelines, principles, rules, criteria and the process of analysis applied by these players in the decision-making process. Industry must determine where and how its representatives can most effectively participate in this process.

In addition to new government bureaucracy, industry must also recognize the growing demands of native and aboriginal groups. The provincial government is making an effort to involve native groups in the Land Use Strategy process but it is not clear whether the aboriginals in the province will fully participate in the manner government hopes. Many aboriginal groups see themselves as outside the process. For example, Treaty 8 believes it need only deal with the nation with which it negotiated its treaty — the federal government. Industry therefore finds itself forced to consult and negotiate separately with aboriginal groups.

All of this is an evolutionary process with potentially new significant developments occurring daily. The new bureaucracy appears to be developing without clear direction and at a rate that may be beyond the control of the politicians in charge.

The purpose of this section of the article is to try to unravel the complexities of these bureaucratic developments and make some sense of them. There is a definite risk in trying to do this. We may no sooner finish describing the current process and further significant changes may then be announced.

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[31] Commission on Resources and Environment, *Report on a Land Use Strategy for British Columbia*, (Victoria: Queen's Printer, August 1992).

A. PROVINCIAL LAND USE STRATEGY

1. Government Initiatives

The province of British Columbia is committed to enhanced land and resource planning as part of a province-wide land use strategy. At the political and bureaucratic level a number of initiatives have been introduced within the last two to three years. These initiatives include:

1. Commission on Resources and Environment ("CORE") - Stephen Owen's Commission on Resources and Environment was established in January 1992. Its mandate is to coordinate land use initiatives, initiate regional and community planning processes, develop a procedural framework for these and other planning processes and establish a resolution system for environmental disputes;

2. Regional Land Use Planning - this initiative involves the use of "negotiation teams" and consensus-building techniques to develop a general land use plan for a region. Members of the negotiating teams represent a broad spectrum of affected interests and are required to follow the general land use planning guidelines and principles developed by CORE;

3. Land and Resource Management Planning ("LRMP") - also described as the "sub-regional process", this initiative employs "negotiation teams" and consensus building techniques to develop an integrated resource management plan for sub-regions of the province. Members of a LRMP team represent a broad spectrum of affected interests and although this is not a planning process initiated by CORE, the process is overseen by CORE, and must comply with the principles and guidelines established in collaboration with CORE;

4. Protected Area Strategy ("PAS") - the objective of this initiative is to designate a total of 12% of the province as protected by the year 2000. The target 12% will be made up of land, freshwater and marine areas. No activity threatening the conservation, recreation or cultural heritage values for which these lands have been selected will be permitted. The precursors to PAS were the Parks and Wilderness for the 90s plan and the Old Growth Strategy;

5. Environmental Impact Assessment Legislation - The legislation is described in section III of this article; and

6. Round Table on the Environment and the Economy - This committee or working group was established approximately three years ago to consult with the public and come up with a "sustainable development strategy" for the province. The working group is made up of 32 members, with representation from a large number of sectors and interest groups. It was established by the Ministry of Environment and the Ministry of Economic Development.

These initiatives are discussed further below. As well, attached as Appendix "B" to this article is an organizational chart showing how these different initiatives relate to each other.

It is not clear how these initiatives will be coordinated. CORE has been given the statutory responsibility to facilitate coordination but has not yet indicated how it will happen. The overall objective is the development of a broad provincial Land Use Strategy, which the government hopes will effectively produce a "zoning map" for the province. The zoning map is intended to provide differing standards by which to assess proposed developments in different areas of the province.

The impact of these initiatives on economic development in the province is likely to be substantial. As stated in the Lovick Report:

> [o]nce in place, land use plans and provincial policy in areas such as energy, transportation and economic development will narrow the range of issues that will have to be addressed as part of environmental assessment. Addressing the "whether to develop" question through other forums will enable environmental assessment to focus on project-specific environmental and socio-economic impacts.[32]

If the Land Use Strategy achieves its objectives the energy industry should benefit in terms of greater certainty and predictability. This assumes that industry will participate in a meaningful way in the development of the Land Use Strategy. Although industry appeared slow off the mark, it is now apparent that through the Canadian Association of Petroleum Producers ("CAPP") and other industry initiatives, serious activity is taking place at all levels. Representatives of some of the major players in the Peace River area recently met at the cabinet level in Victoria. Industry representatives are now participating in the LRMP and PAS processes in the various regions and communities where industry is active. This participation is critical if industry wishes to avoid having its objectives conflict with the Land Use Strategy.

2. Commission on Resources and Environment

Central to the government's Land Use Strategy was the establishment of the CORE on January 21, 1992.[33] The *Commissioner on Resources and Environment Act*, became law in British Columbia on July 13, 1992. The Commissioner is Stephen Owen, who served as Ombudsman for British Columbia from 1986 to 1992. He is a lawyer by training, served as the Executive Director of the Legal Services Society of B.C., taught with CUSO, and has acted as independent legal advisor to Amnesty International in different cases around the world.

The mandate of CORE is set out in s. 4 of the *Commissioner on Resources and Environment Act*:

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[32] *Supra* note 25 at 3.

[33] Premier's Office, Province of British Columbia, Press Release, 21 January 1992.

(1) The commissioner shall develop for public and government consideration a British Columbia-wide strategy for land use and related resource and environmental management.

(2) The commissioner shall facilitate the development and implementation, and shall monitor the operation of

(a) regional planning processes to define the uses to which areas of British Columbia may be put,

(b) community based participatory processes to consider land use and related resource and environmental management issues, and

(c) a dispute resolution system for land use and related resource and environmental issues in British Columbia.

CORE has been given the broad statutory responsibility of facilitating the coordination of government initiatives to develop a comprehensive Land Use Strategy. As stated at page 35 of CORE's Report:

> The Commission has been given a statutory responsibility to facilitate the coordination of other provincial government initiatives. This includes such processes as the Protected Area Strategy (Parks and Wilderness for the 90's and Old Growth Strategy), the Forest Resources Commission, the Round Table on the Environment and the Economy and other environmental, economic and social initiatives relevant to land use. For example, the provincial strategy *may* incorporate the work of the Round Table on sustainability and the various new environmental management and protection standards which may be legislated; the regional allocation processes will review and incorporate the Protected Area Strategy; and the community-based resource management processes will draw on the Round Table's work on community participation.[34]

This may be an impossible task to achieve. CORE currently has a permanent staff of twenty and occasionally hires mediators to participate in the consultation processes discussed below. These resources are likely to prove inadequate given the magnitude of CORE's task.

In August of 1992, CORE published a Land Use Charter (the "Charter") for British Columbia. The Charter is a compilation of the principles of sustainable development enunciated by previously established bodies such as the British Columbia Roundtable on the Environment and the Economy. CORE will publish a list of provincial land use goals within the next few months which, along with the principles set out in the Charter, will comprise the guidelines for the regional land use planning and community based planning processes discussed below. As one might expect, the Charter is not much more than a compilation of broad motherhood statements setting out principles of "sustainable environment", "sustainable economy" and "social sustainability." It describes the decision-making process as one of "consensus building amongst diverse perspectives and

[34] *Supra* note 31.

stakeholders" and has the stated objective of involving the aboriginal peoples by expressly recognizing aboriginal title and the inherent rights of aboriginal people to self-government. The impact of the Charter on the development of a Land Use Strategy in the province remains to be seen.

3. Regional Land Use Planning Process

As noted above, one of CORE's mandates is to implement regional planning processes. CORE has taken the first step by establishing "negotiating tables" in three regions of the province: Vancouver Island, Cariboo-Chilcotin and Kootenay.

The tables are comprised of representatives from all affected interests in a region. They are to use consensus building techniques to identify and resolve land use issues. The objective of the process is to achieve the most appropriate land use allocation or "large scale zoning" for different regions of the province by having those most directly affected participate in a "shared decision-making process." CORE's role in this process is to facilitate the definition of regional boundaries, provide information support, appoint mediators to the negotiating table, and to prepare the public report that will go to cabinet.

This regional planning process is distinct from the RPAT and the work they are doing within the PAS initiative discussed below. However, there is some overlap. Where regional planning processes are established, recommendations about whether a particular area should become a study area or a protected area under the PAS are to be made by the regional negotiating tables.

According to CORE's Report on "Land Use Strategy for British Columbia" it expects the regional planning teams or tables to develop a consensus and make public recommendations to cabinet regarding:

1. Land use allocations, including the designation of land within regions as protected, special management, integrated or intensive resource management areas;

2. Economic transition and mitigation strategies for communities affected by land use allocations;

3. Priority issues to be addressed through community-based planning processes or through special studies; and

4. Implementation and monitoring details including methods, schedules and other required resources.

The impact of this planning process on industry could be substantial. Areas in this province previously thought to be fully exploitable may now be given a land designation or characterization that substantially limits development. Alternatively, industry may be "stalled" by requirements for special studies, complex referral and consultative processes, voluminous requests for information and unrealistic compromises.

It is a noble thought, but perhaps naive, to think that effective decisions will be made using the "consensus-building" approach to difficult land use conflicts, particularly given the diverse interests that will be represented at the negotiating tables. It remains to be seen whether these diverse multi-stakeholder teams will ever reach a consensus. If the participants in the regional planning process fail, cabinet is expected to make the final decision.[35] Governments have traditionally resisted making difficult land use decisions and have been avoiding them in both Canada and the U.S. for more than a decade. There is no legislation in place giving the power to the negotiating tables or to CORE to set aside land or to establish land use priorities in an area — therefore cabinet *must* make these final decisions.

Where all the interested parties in a region reach a consensus it is likely the government will rubber stamp their recommendations.

The government asked CORE to begin its regional planning procedures in three regions. These are the Cariboo/Chilcotin region, the Kootenay/Boundary region and Vancouver Island. A final report is due by September 1993 for Vancouver Island, and by December 1993 for the Cariboo and Kootenay regions. Only the Vancouver Island process is potentially significant to the oil and gas industry. It is not yet clear whether CORE will make recommendations with respect to the development of coalbed methane gas reserves on Vancouver Island, or whether this issue will be dealt with at the sub-regional planning level or by LRMP (see discussion below). The objective is to eventually establish a regional planning process in all regions of the province.

Another element of the CORE mandate is development of a "community-based, shared decision-making process for planning and management of resources." Not much has happened regarding this aspect of the CORE mandate. CORE is currently investigating existing community-based initiatives (*i.e.* local resource boards and round tables) in B.C. and in other jurisdictions, as well as undertaking a few pilot projects. These include the Anahim Lake Round Table, the Howe Sound Round Table, the Spokane Valley Project and the Lake Cowichan Community Forest Proposal Project. CORE has also expressed the view that the LRMP process (discussed below) partially satisfies the goal of community-based involvement.

It is too early to assess the success of CORE. Its publications to date have been very broad and vague and offer little original insight into the land use issues in British Columbia.[36] The measure of CORE's success will depend on its ability to establish a negotiating process from which emerge concrete decisions with respect to land use in

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35 Cabinet must, in fact, approve any recommendations made by a regional land use planning table. However, government has indicated that where a full consensus is achieved, the recommendations would in all likelihood be acceptable to government.

36 At a recent conference on policies developed by the Commission, one participant likened reading the Land Use Charter to "shovelling fog."

British Columbia, and its ability to provide clear direction in the coordination of the various government initiatives and processes.

4. Protected Areas Strategy

As part of its election platform, the NDP government promised that a total of 12% of the province's land, freshwater and marine areas would be set aside in protected areas by the year 2000. To achieve this objective the government established its PAS.

The PAS is only government policy at this time. There is no specific legislation describing how the process will work. However, there is a definite bureaucracy and process at work which has a significant impact on land use planning in this province. The PAS, as it is commonly known, has its own director, its own office and staff, organizational charts, networks, its own newsletters and other indicia of a government department carrying out a specific mandate. Although the document released by the government on June 10, 1993, entitled "A Protected Area Strategy for British Columbia" (the "PAS Document") proposes several principles "aimed at guiding legislative action" for public discussion, it is not clear when this legislation will come, or what it will look like.

a. Study Areas

Six per cent of the province's lands are already protected to varying degrees. Most of these areas will be incorporated into the PAS. The additional six per cent will be made up of areas representative of the 100 land and ten marine ecosections which have been identified.

When the NDP came to power it "repackaged" and expanded initiatives that had originated with the previous government. The PAS is an amalgamation of the Old Growth Strategy and Parks and Wilderness Plan '90 initiated by the Socred government in the late 1980s. In 1991, as the result of province wide consultation, the Ministry of Environment, Lands and Parks and the Ministry of Forests jointly recommended to cabinet that it consider 184 areas of varying sizes as study areas. Since then 14 Old Growth deferral areas have been designated as further study areas resulting in a total of 198 study areas.

Generally speaking the present study areas were selected on the basis of their suitability as parks and wilderness areas. The province received input from over 15,000 members of the public and interested groups in determining which areas should be designated study areas. An attempt was made to ensure that areas representative of the various ecosystems in the province were chosen, however, various agencies have since indicated that certain land use values were not adequately represented in the initial selection. As a result the list of study areas has yet to be finalized.

Additional study areas are being recommended for designation through a complex system of teams and committees. The players include:

1. Regional Protected Areas Teams, responsible for conducting the technical inventories and analyses required to identify which ecosections of the province are not adequately represented in the present list of study areas and which areas of the province are representative of these "missing" ecosections. Their role is to identify areas of interest, consult with the public and to propose additional study areas based primarily on biological and physical criteria;

2. Inter-Agency Management Committees, responsible for integrating all planning processes and protected areas work in a region and for setting the regional priorities. They assess the study areas proposed by the RPATs in terms of the potential social and economic impact of setting these areas aside, and develop a revised list of proposed study areas for submission to the Assistant Deputy Ministers' Committee. IAMCs are also responsible for proposing and implementing Interim Management Guidelines (discussed later) for study areas. Companies should ensure that the IAMCs in the regions in which they operate are fully apprised of all ongoing and proposed oil and gas developments and of the impact of the Interim Management Guidelines on their operations;

3. Assistant Deputy Ministers' Committee, responsible for developing the PAS and overseeing its implementation. It reports to the Cabinet Committee on Sustainable Development;

4. Cabinet, which decides which of the proposed study areas will be approved. Approved study areas may be recommended for designation as protected areas in the regional and sub-regional planning processes or where the areas involve minor or very specific social and economic issues, recommendations may be made through special studies. Cabinet has the final say as to which areas will be designated protected areas; and

5. Protected Areas Coordinating Team, which provides provincial-level analysis of critical issues, policy interpretation, and coordination between regions, as well as ensuring that provincial standards are maintained.

The Ministry of Environment may be considering as many as 200 more study areas. The land base represented by the present study areas is 12% of the province's total land. The government has set 12% as the maximum percentage of the land base that can be designated as study areas. To add additional study areas to the list, existing study areas must be taken off.[37]

The difficulty for industry is to anticipate which areas are likely to be removed from the list of study areas, which areas are likely to be added and which areas will stay. For example, in the Peace River area, it appears Pettitot will be taken off the list. Pine Pass/Mt. Lemoray has already been rejected once as a candidate as a protected area.[38]

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37 *A Protected Areas Strategy for British Columbia* (Victoria: Queen's Printer, 10 June 1993) at 15.

38 Local residents exerted pressure to get the area back on the study list for reconsideration.

The lists for regions not subject to the regional planning process discussed later in this article are to be finalized by the end of 1994. The list of study areas in regions which are part of the regional planning processes must be completed by the end of this year.

The current list of study areas has been divided into four categories 1, 2, 3 and 4. The first category of study areas will be designated as protected areas as soon as possible. The remaining three categories contemplate varying time frames in which the government is expected to reach a decision as to whether the areas will be designated as protected. Initially, a decision was to be reached for category 2 areas by 1993; for category 3 areas by 1995; and for category 4 areas by 2000. However, in its most recent publication the government indicated that "the current timetable for resolving protected areas will be modified and will reflect the timeframes of the land use planning processes (the Commission's regional plans, sub-regional LRMP, and special studies)."[39]

b. Interim Management Guidelines

There is no blanket moratorium on resource development activities in approved study areas. However, Interim Management Guidelines have been developed for these areas and activities which are perceived to compromise the values of the study area in question will not be permitted. Different guidelines apply to various types of activities. The interim management guidelines which are to apply to petroleum, natural gas and geothermal operations in PAS study areas are as follows:

1. No new tenures will be issued in category 1 and 2 study areas;

2. Applications for approval to drill wells or conduct geophysical exploration will be subject to an enhanced inter-agency referral process. In addition to the usual agencies, applications are referred to the IAMC and the RPAT. Applications may be refused if the area teams decide the proposed work will unduly impact on the "resource values" for which the area was selected as a study area;

3. Geophysical exploration will only be permitted on, or in the vicinity of, existing tenures;

4. New tenure applications in category 3 and 4 study areas will be subject to enhanced referral process; and

5. Applications for authorizations to drill wells or conduct geophysical exploration in category 3 and 4 study areas will also be subject to an enhanced referral. In some areas, work may be approved on the understanding that subsequent tenure may not be granted where it is deemed that the issuance of tenure would compromise the values under study.[40]

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[39] *Supra* note 37.

[40] Ministry of Energy, Mines and Petroleum Resources, B.C. Information Letter, *Protected Areas Strategy Interim Management Guidelines*, E93-05, 4 May 1993.

Apparently the IAMCs and RPATs attempt to turn around referrals within six days in the Pettitot area and thirty days in other regions of the province. Industry representatives have advised us that the enhanced referral process is impeding their ongoing operations.

c. Oil & Gas Development in Protected Areas

The concerns of the energy industry were probably not taken into account when the study areas were selected. It has been estimated that as much as 40% of the potential gas producing lands in the Peace River area lie within study areas. Although the government invited industry to participate in Parks and Wilderness Plan '90, little interest was shown. Recent oil and gas discoveries have heightened industry's concern for the potential impact of these developments. We understand the study areas with which industry is most concerned include Pettitot (category 3), Pine Pass/Mt. Lemoray (category 3), Muskwa River (category 3), Monkman Additions (category 3), Kakwa Addition (category 3), Redfern Lake (category 1) and Foothills (category 3).

Although most of these areas are category 3 and a decision as to their designation will not be made until 1995, any application for tenure in these areas is subject to an enhanced referral process. MEMPR has expressed concern that industry is operating as though it already considers these areas "off limits." The number of applications for tenure in the study areas has declined. Industry is understandably reluctant to acquire tenure in areas which may later be declared "off limits", or which, at the very least, may subject an applicant for tenure or work approvals to considerable "red tape."

Under current legislation there are six different categories of protected lands in this province. These include class A Provincial parks, recreation areas, forest wilderness areas, wildlife management areas, eco-reserves, federal bird sanctuaries and national parks.

These designations are made under various acts of the legislature and parliament. Permitted development on land in the province varies depending on the designations. For example, oil and gas development and production is currently permitted in wildlife management areas. In eco-reserves, which are primarily set aside for research, little, if any, development is permitted and public access may even be restricted. Approximately six per cent of the land base in British Columbia is currently designated as a park, recreation area, wilderness area, wildlife management area, eco-reserve or federal park. Most of these lands will be included in the target 12% of protected areas. However, according to the PAS Document:

> Protected areas are inalienable: the land and resources may not be sold. They are also areas in which no industrial resource extraction or development is permitted. No mining, logging, hydro dams or oil and gas development will occur within protected areas.

According to the PAS Document the government is considering enacting protected areas legislation. Although this legislation is only at a preliminary discussion stage it appears the government is considering five new protected area categories. These include:

1. Strict preservation — normally free of human intervention these areas would provide the highest degree of protection for ecosystems, species and features. This is very similar to the current designation as eco-reserve;

2. Wilderness — large areas without permanent improvements or human habitation. Possible to travel to by mechanized means but travel within is to be non-mechanized;

3. Heritage areas and natural and cultural sites — areas with special cultural heritage or spiritual significance or outstanding archaeological features;

4. Natural environment-based outdoor recreation — areas that protect significant and unique natural ecosystems for the education, appreciation and recreational enjoyment of the public; and

5. Intensive recreation and tourism sites — small areas with recreation facilities that provide a variety of outdoor recreation and nature-oriented learning opportunities in natural surroundings.

d. Implications for Oil and Gas Development

At present no resource extraction activity will be allowed in any of the proposed new categories of protected areas.

In addition, recreation areas, wilderness areas and wildlife management areas do not meet the current definition of a protected area. Areas included within these designations must either be upgraded to fully protected areas or made available for full development. The government plans to upgrade recreation areas and wilderness areas to full protected areas wherever the mineral or energy potential is determined to be low. Where the potential appears to be significant, regional or sub-regional planning processes will be used to evaluate the areas and consider recommendations for final protection designations. Existing inventory data and, where necessary, additional field studies will be relied on to make these assessments. In our view, neither of these sources can adequately identify the potential for oil and gas development in a region.

Wildlife management areas will be studied at the same level of detail as other study areas and the planning processes used to determine if they or part of them will be protected areas.

Land use may also be restricted by municipal zoning designations. This will be relevant to the oil and gas industry in areas such as the Fraser Valley and Vancouver Island. The province is seeking cooperation from municipalities to use their zoning authority to recognize the PAS process and decisions. Many municipalities are understandably frustrated with the process. In particular, the municipalities in the northeast, interested in economic activity, are disturbed by the serious impediment PAS potentially imposes on growth and development in the area. A number of municipalities are organizing to lobby Victoria to alleviate the impact PAS is having on economic development.

The fact is that government may not understand the real nature of the oil business. Industry does not perceive its use of land as incompatible with the wilderness values the government is seeking to preserve through its PAS. Industry must convince both government and the public of its views. Failing that, it risks being subject to serious constraints in certain areas in the province.

We understand that industry representatives have been attempting to educate the government about available techniques and technology which can be employed to minimize the impact of oil and gas development on the environment.

If oil and gas development is not permitted in protected areas, industry must convince the government to reconsider the areas selected as potential protected areas, particularly in the Peace River area. In areas of proven resources, the government is likely to be more receptive to these arguments. Royalties represent a significant source of income to the government.

Industry should be aware that although the government is currently drafting legislation which contemplates compensation for the loss of tenure as the result of an area being designated as a protected area, it is possible no compensation will be available where a company has performed only exploratory work, but has not actually acquired tenure.

5. Land and Resource Management Planning Procedures ("Sub-Regional Process")

Another government initiative which may help eliminate, or alternatively add to, uncertainty is the development of LRMPs. This is often described as the "sub-regional process" and is a separate land use initiative from PAS and CORE. However, it will ultimately be overseen by CORE, in CORE's development of a province-wide Land Use Strategy. Industry may be more effective in participating in this process than with the other initiatives discussed in this article. Industry has a seat at the negotiating tables established under this initiative and will have some ability to influence decisions. These decisions may very well influence decisions for the regional plans and for decisions made within the PAS process.

A sub-regional process is "an integrated, sub-regional, consensus building process that produces a LRMP for review and approval by the government."[41] The plan is to establish direction for land use and should specify broad resource management objectives and strategies. Plans will be prepared for all Crown lands.

According to LRMP's "A Statement of Principles and Process":[42]

1. LRMP is to be guided by provincial policies and regional plans. The LRMP process is used to implement these regional plans and policies at the sub-regional level;

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41 British Columbia, Integrated Resources Planning Committee, *Land and Resource Management Planning: A Statement of Principles and Process*, Final Draft (Victoria: Queen's Printer, 10 March 1993).

42 *Ibid.*

2. LRMPs are to provide direction for more detailed resource planning by government agencies and provide a context for local government planning;

3. All parties with a key interest or stake in the LRMP must be invited and encouraged to participate. The primary objective of an LRMP is to develop consensus among public participants and government agencies;

4. Participant funding for LRMP must be consistent with provincial government policy;

5. Participating groups are to appoint representatives to participate in negotiations and consensus building; and

6. Government will participate through:

   (i) IAMCs, which at the regional level will determine LRMP boundaries, project priorities and funding. These same IAMCs will make decisions on the PAS study areas and protected areas,

   (ii) Middle management of government (*i.e.* Manager of Land Administration, B.C. Lands, district managers, etc.), which will be involved in dispute resolution and in the review and comment on plans that are developed,

   (iii) Inter-Agency Planning teams comprised of locally-based provincial and federal resource managers, local government staff and aboriginal representatives which will initiate each LRMP and provide technical support throughout the process,

   (iv) The Integrated Resource Planning Committee, which in cooperation with CORE, will develop policy and procedures for coordinating inter-agency program implementation at the provincial level and provide advice and support to all of the organizations just mentioned, and

   (v) The Assistant Deputy Minister Committee, which will approve LRMPs and report to cabinet.

Attached as Appendix "C" is a schematic diagram describing the process.

a. The Origin of the Sub-Regional Process

The LRMP processes originated as an integrated resource planning process overseen by the Ministry of Forests. With the increasing emphasis in the 1980s on land values beyond the maximization of timber values, the Ministry recognized it could no longer manage timber supply areas solely for timber production. It initiated a process to incorporate other resource values. Although this planning process predates the establishment of CORE by more than two years, over the past year CORE has monitored

and worked with resource management agencies to develop the "Principles and Process" for the LRMP processes, in order that this level of planning reflect CORE's ideology and methodology.

The LRMP processes are essentially identical to the regional processes except that they focus on smaller areas of the province. In addition, they focus on the development of integrated resource management plans, as opposed to the broad issues of land use that the regional planning processes will address.[43] Accordingly, the processes are expected to identify areas within the sub-region with similar or compatible resource values ("resource units") and produce detailed plans for the future management of these resources.

The Ministry of Forests no longer dominates the LRMP process. The process is overseen by the Integrated Resource Planning Committee, comprised of representatives from the various resource agencies, and a committee of the assistant deputy ministers representing these resource agencies. The Assistant Deputy Minister Committee provides provincial approval of all schedules and priorities for LRMP processes and approves the products of these planning processes. Like the regional planning processes, representatives from all potentially affected government agencies and public groups are invited to participate in the compilation of the sub-regional land use plans. The goal is to compile land and resource management plans for the entire province of British Columbia by 2002.[44] They will be reviewed every ten years thereafter or as required.

b. Sub-Regional Planning Process in the Northeast

There are presently eleven LRMP processes ongoing in the province. No planning process has actually been completed to date. Sub-regional Processes have been initiated in Fort Nelson, Fort St. John and Dawson Creek. These are the areas with the highest concentration of oil and gas exploration in the province.

The LRMP process in Fort Nelson commenced only five months ago. Administrative procedures are being established and actual meetings have not commenced.

The LRMP process in Fort St. John was started just over a year ago but must re-evaluate and redraft its terms of reference to reflect the principles developed by CORE over the past year. Meetings are at a preliminary stage.

The LRMP process in Dawson Creek commenced nine months ago and is the furthest progressed in the northeast. The negotiating team has drafted its terms of reference and last met on April 26, 1993. There are two representatives at the negotiating table from each of the following sectors: forestry, local government, ranching and agriculture, small

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[43] Although it is expected that the Sub-Regional Processes will make recommendations with respect to smaller study areas in the sub-region, it is anticipated that the major recommendations with respect to the Protected Area Strategy will be made at the regional level.

[44] British Columbia, Resource Planning Section, Integrated Resources Branch, Ministry of Forests, *Land and Resource Management Planning: The Fit within the Forest Service Planning Framework*, Information Report #2, (Victoria: Queen's Printer, 8 January 1993).

business, utilities, outdoor recreation, oil and gas, tourism, environmental and conservation, Treaty 8, outfitting and trapping, and provincial government agencies. We understand that the process in the northeast is similar to that used in Alberta, and that there may well be fewer issues to resolve than there were, for example, in the development of an Alberta plan for the Castle River area. There are, however, material differences in this process in British Columbia because of the more varied ecosystems which exist in British Columbia.

There are representatives of the CAPP at each of the negotiating tables in the northeast. According to them the LRMP process is an evolving one. It is not yet clear what impact it will have on the oil and gas industry. In recent months CAPP has become more comfortable with the LRMP process giving the industry the recognition that it has a very significant stake in what happens. LRMP representatives are beginning to understand the impact on government and the economy of revenue generated by the industry and the potential size of compensation claims if industry development is stalled where tenure has already been granted.

c. Relationship between the Regional Planning Process and the Sub-Regional Planning Process

The main distinction between regional and sub-regional land use plans is the extent of the detail contained in the respective plans. Regional plans (described in section IV B. of the article) are expected to provide the broad brush strokes of land use allocation while the LRMP process is expected to establish a detailed multiple use "map" with prescriptives for the future management of the sub-regions.

As a result of fiscal limitations neither the regional planning process nor the LRMP process will take place simultaneously on a province-wide basis. Committees have been established at both the regional and sub-regional levels to decide the order in which areas will be assessed. If a regional plan has been developed in an area, the results of the sub-regional plan must be consistent with the existing regional plan. Conversely, if the sub-regional plan is prepared prior to the regional planning process, it will provide a starting point for the later development of the regional plan.

B. POTENTIAL DIFFICULTIES WITH LAND USE STRATEGY

1. Baseline Data Deficiency

The intention of the government is clearly to generate plans of sufficient detail and scope to enable them to play a fundamental role in the future management of the province's resources. It remains to be seen whether this objective can be achieved. As noted previously, there is a serious shortage of baseline data in British Columbia. A substantial amount of information is required to prepare an integrated resource use plan, and the plan ultimately adopted can only be as useful as the information utilized in the planning process. The government has recognized this deficiency and is beginning to direct significant resources to the accumulation of baseline data. The federal government has also recently begun to contribute financial resources to the programs established by

the province to acquire more baseline data. It remains to be seen if these efforts will be successful.[45] In the interim the various planning processes are continuing and attempting to "make do" with the information that is presently available. If the regional and sub-regional plans are open to continuous challenge on the grounds that they were formulated with inadequate information, the plans will not achieve their objective of foreclosing repeated debates over land use in the province.

2. Shortage of Resources Generally

In addition to the concern that government lacks the resources required to compile adequate baseline data, there is a growing recognition that government may also lack the resources to complete the processes it has established. Not only do the resources provided CORE seem woefully inadequate given the breadth of its mandate, but many of the regions in the province simply lack the manpower to staff the seemingly endless list of committees which make up the Land Use Strategy. Part of the difficulty may stem from the current government's commitment to decentralizing government in the province. The PAS would be much more efficient and effective in our view, if the decision making process was structured on a province wide rather than a regional basis.

3. Representatives at the Negotiating Table

The success of the land use negotiating process will depend, in large measure, on having the right parties at the negotiating table. The recent experience in the Peace River area illustrates the difficulties that may arise.

The treaty negotiated between the federal government and Treaty 8 affects the use of lands in parts of Alberta, the Northwest Territories, and the northeast corner of British Columbia. Treaty 8 claims that industrial activity in the northeast is in violation of the treaty. The province is attempting to have the chiefs of the affected bands take part in the sub-regional planning process. To date, it has only been able to convince a few chiefs to participate. Treaty 8 believes that since its treaty is with the federal government, it need only deal, nation to nation, with the federal government. It has discouraged its member bands from participating in the planning process. As discussed earlier in this article the federal Department of Indian and Northern Affairs, the provincial Ministry of Aboriginal Affairs and Treaty 8 are currently negotiating a memorandum of understanding to establishing a process by which to resolve resource and economic development issues.[46] It is not clear how this process will be co-ordinated with the existing Land Use Strategy if at all.

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[45] The federal government initiated the Fraser Basin Management Program as part of its Green Plan. The federal government, having recognized that the process is being impeded by a lack of inventory data, is seeking ways to acquire this data.

[46] Treaty 8 negotiated a similar memorandum of understanding with the Alberta government in February of 1993.

4. Consensus Building Approach

It remains to be seen if land use issues can be resolved by consensus. Certain uses of land are clearly irreconcilable. Although the process was initiated long before the establishment of the CORE, it is not encouraging that the negotiating roundtable established to resolve logging issues in Clayoquot Sound on Vancouver Island failed to reach a consensus. Alberta's experience with similar processes is more encouraging. If the planning process fails to reach a consensus it will be up to cabinet to make the final decision.[47] Given the history of reluctance of government to take a stand on these types of contentious issues, a failure to resolve the issues at the negotiating tables may simply mean more studies, more initiatives and a continued lack of certainty with respect to land use policy in British Columbia.

5. Integration of Components of Land Use Strategy

One of the most common complaints about the Land Use Strategy is the lack of clear definition of the role that the various initiatives are to play. For example, no one seems to know precisely how the PAS is to be integrated with the LRMP process. In addition there is substantial confusion as to the precise delineation of roles at the regional, sub-regional, and community levels.

More generally, there is growing consternation over the proliferation of land use initiatives in the province. Concerns stem both from the duplication of processes and from the significant amounts of government funds being expended. For example, as part of its Green Plan, the federal government has contributed $100 million to the Fraser Basin Management Program (the "Program"). The objective of the program is to promote sustainable development in the Fraser Basin by balancing economic, social and environmental values. Although CORE's publications suggest that the Program is to be integrated with the provincial Land Use Strategy, there has been little co-ordination to date. In addition, although the objective of the Program and the regional planning processes are similar, it appears the terms of reference developed for the Program are quite different from those developed in the regional planning processes. Accordingly, the results of this joint federal, provincial, and municipal initiative may not be compatible with the results of the regional planning processes.

V. CONCLUSION

The development of environmental and land use policies and regulations in British Columbia is in a state of flux. Developments are occurring daily. The energy industry must continue to monitor developments closely if it wishes to ensure that its objectives do not conflict with the objectives of government planners. Industry must act proactively at this time to ensure its future in the province.

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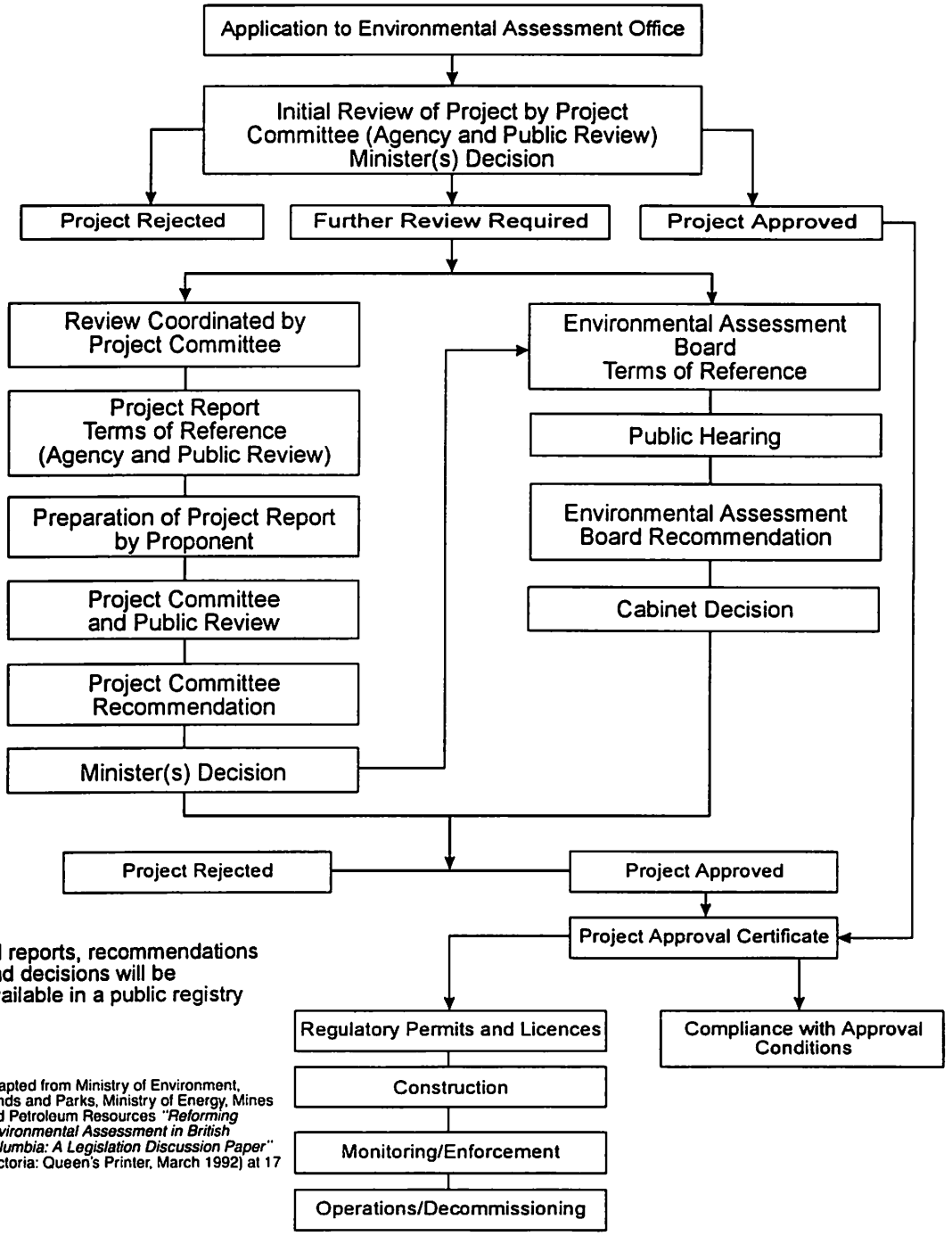
[47] In fact, the conclusions of all planning processes are subject to Cabinet approval, however, where consensus is reached, the expectation is that the decisions will be approved.

Appendix "A"

Proposed Environmental Assessment Process

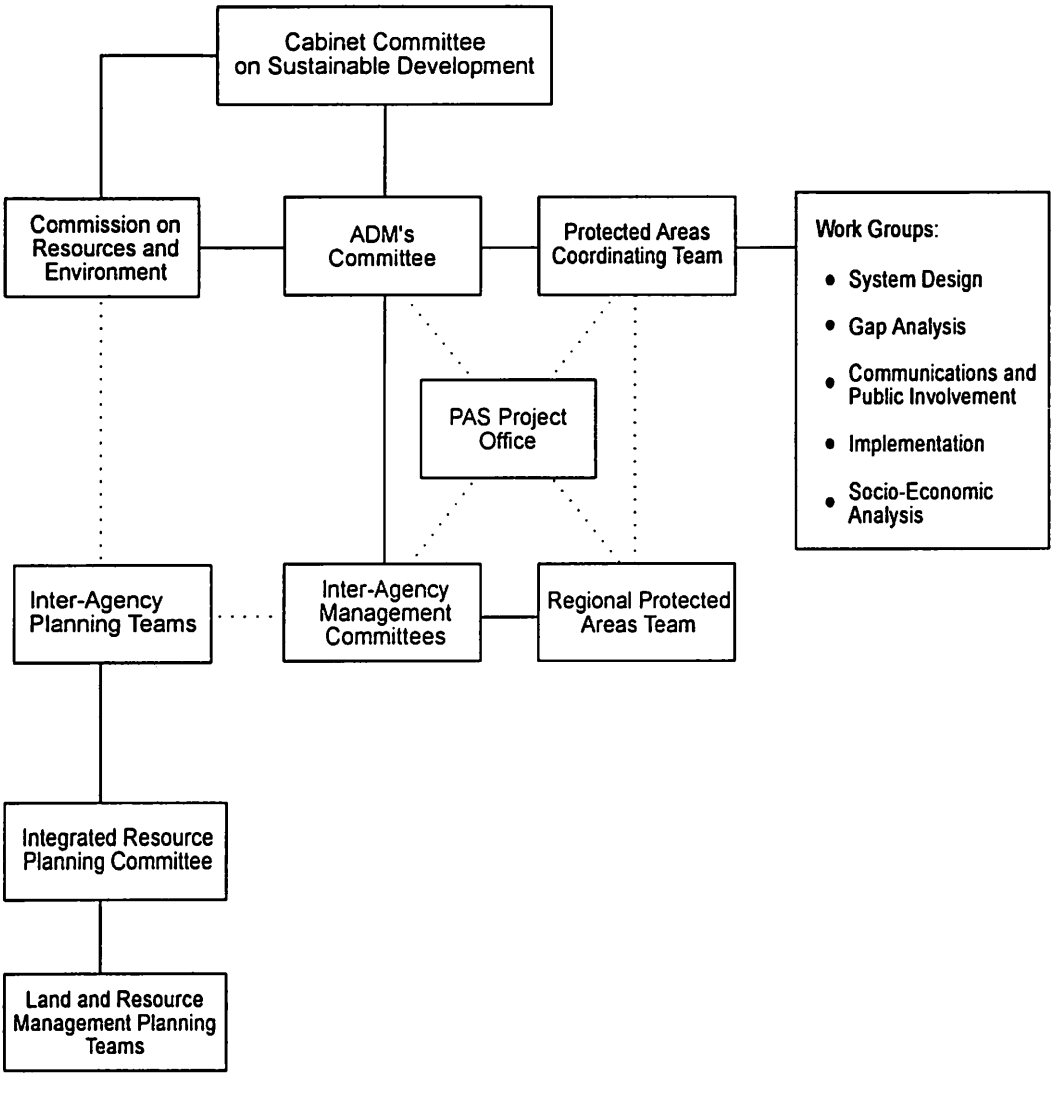


Adapted from Ministry of Environment, Lands and Parks, Ministry of Energy, Mines and Petroleum Resources *"Reforming Environmental Assessment in British Columbia: A Legislation Discussion Paper"* (Victoria: Queen's Printer, March 1992) at 17

VH: 90187-1.CDR

Appendix "B"

Land Use Strategy Organizational Chart

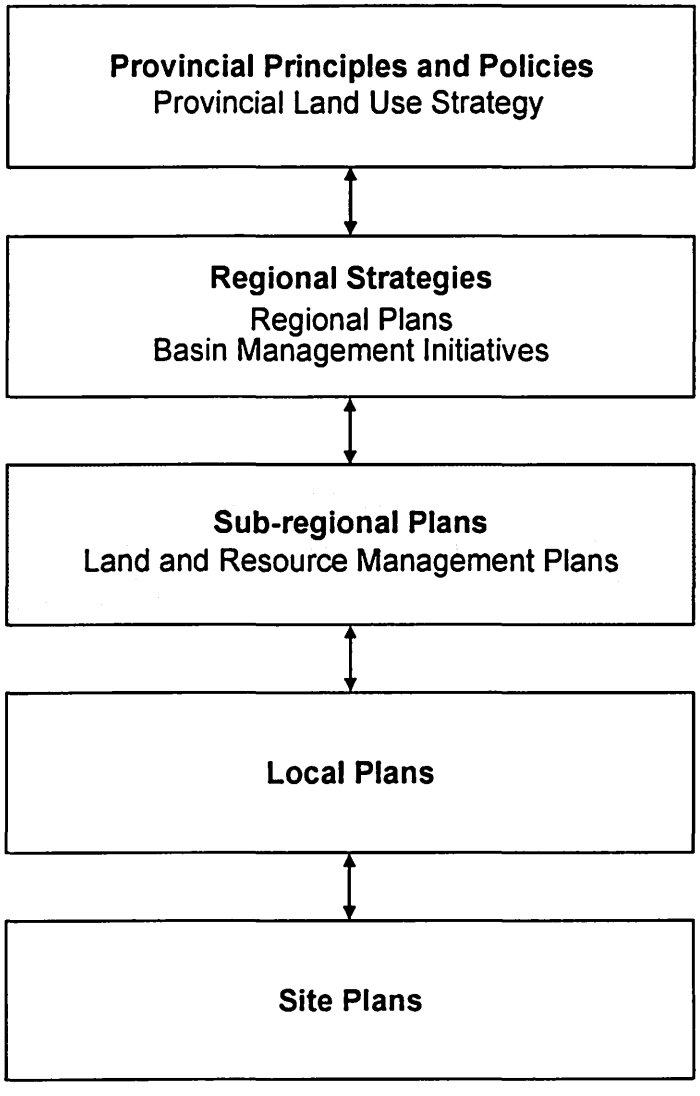


Adapted from PAS Update, Newsletter on the Protected Areas Strategy (Victoria: Queen's Printer, January 1993), Issue #1 at 2

VH 90187-3 CDR

Appendix "C"

Figure 1. LRMP in the provincial land use framework



From *"British Columbia Land and Resource Management Planning: A Statement of Principles and Process"*, Final Draft (Victoria: Queen's Printer, 10 March 1993)

Figure 2. Planning process for LRMP