

# Recommendations For The Improvement Of The Cowichan Estuary Environmental Management Plan



Submitted to the Ministry of Environment and The Cowichan Estuary  
Environmental Assessment Committee

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## PART I

## INTRODUCTION

### WCELA

Since 1974 the West Coast Environmental Law Association ("WCELA") has provided legal services to members of the public who are concerned about threats to the environment. WCELA and the West Coast Environmental Law Research Foundation provide legal representation, promote law reform, conduct education and research, and maintain a library of environmental legal materials. We submit these recommendations in support of the Cowichan Estuary Preservation Society (the "Preservation Society"). [(1) -- 1. . The author greatly appreciates the assistance of Calvin Sandborn, Ann Hillyer, Bill Andrews, Denice Regnier, Morgan Ashbridge, Catherine Ludgate, Lori Crook, Patrick Roy, Bob Holden, Ann Holden, Bill Austin, Christina Chociolko, David Mahony, and Greg Jones.]

### CEEMP

Created in 1987, the Cowichan Estuary Environmental Management Plan (the "CEEMP") was intended to provide "guidance and a focal point for pursuing the opportunities offered by the estuary, and for sustaining its environmental quality for the benefit of future generations." [(2) -- 2. . *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) p. iii.]

The CEEMP promises to "acknowledge the presence of industry", but to "limit the detrimental environmental environment impacts" of industry activities", "avoid further habitat losses", and to support the "rehabilitation of presently degraded habitat in the estuary". [(3) -- 3. . *Ibid.* at p. 1.] Parties to the CEEMP have formalized their commitment to the plan. Cabinet has issued an Order-in-Council requiring compliance with the plan, and each of the major industrial users of the estuary [(4) -- 4. . The industrial users of the estuary in 1987 who signed agreements were Doman Industries Ltd., MacMillan Bloedel Ltd., B.C. Forest Products Ltd., and the Canadian National Railway. MacMillan Bloedel and the C.N.R. are no longer active participants.] have signed implementation agreements. [(5) -- 5. . *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) Appendix 1.]

CEEMP's decision-making authority, the Cowichan Estuary Environmental Assessment Committee (the "CEEAC"), [(6) -- 6. . G. Jones, Regional Manager, Planning and Assessment, MOE, pers. comm. with L. Alexander, December 16, 1991.] feels that the CEEMP has had some success over the last five years, but that it is need of some improvement. [(7) -- 7. . Letter to Calvin Sandborn of WCELA from Greg Jones dated December 4, 1991, p. 1.] The CEEAC is now asking interested members of the public to help identify problems and solutions that will help "integrate environmental protection with the various uses of the Cowichan Estuary". [(8) -- 8. . *Ibid.*] WCELA, on behalf of the Preservation Society, welcomes this opportunity to comment on the CEEMP.

### **Towards a Stronger Management Plan**

The CEEMP represents a significant commitment to the preservation and rehabilitation of an extremely important ecological resource. Many different people and organizations have invested considerable time and energy into the Plan. Nevertheless, the CEEMP appears to offer more symbolic reassurance than environmental protection. The Preservation Society has expressed some very serious concerns about the lack of public participation in the Project Review Process, the Re-designation procedure under the plan, enforcement of the plan, and commitments under the plan to restore and enhance the estuary. [(9) -- 9. . Cowichan Estuary Preservation Society, "Analysis and Recommendations for Improving the Cowichan Estuary Environmental Management Plan, January 23, 1992.]

In Part II we will present a brief summary of these concerns. In Part III we will examine the role that public participation has played in the administration of the CEEMP. This examination will include a discussion about the need for public participation, its advantages from a policy or decision-maker's perspective, and the essential elements found in meaningful public participation processes. We will also examine some public participation models that have been used successfully in other jurisdictions to manage resource-use conflicts. Ultimately, we will argue for a significantly enhanced public role in the decision-making activities of the CEEMP, particularly in the areas of Project Review and Area Re-designation.

In Part IV we will discuss some methods to improve the enforcement of environmental protection under the CEEMP, and which, potentially, can support a much more rigorous restoration and enhancement program.

## Part II

### Summary of Concerns

In its brief, "Analysis and Recommendations for Improving the Cowichan Estuary Environmental Management Plan", the Preservation Society sets out its evaluation of CEEMP's performance over the past five years:

While promising, the Plan has not reached its potential in some cases, particularly where the regulation of certain industrial activities or the enforcement of the Plan was required. [(10) -- 10. . *Ibid.* at p. 1.]

What follows is a brief summary of the Preservation Society's review of the CEEMP.

#### Project Review

The Preservation Society sets out several instances where project review decisions which may not have followed proper procedure, and where decisions -- procedurally sound or not -- appear to have had a negative impact on the estuary. [(11) -- 11. . *Ibid.* at pp. 2-5.]

Project Review procedure under the CEEMP is far from clear. Even Ministry of Environment ("MOE") officials are unsure which projects are covered by the process. [(12) -- 12. . *See* Letter to Mr. Robert Holden from Earl Warnock, Director Vancouver Island Region, Ministry of Environment, dated September 20, 1990, p. 1: "I have read through the Project Review Process, page 10, Section 4.0. I do not believe that it is entirely clear as to which proposals would be covered by the process. The application that was approved was judged by the committee to be "consistent with the area designations of the plan". Although we may not agree entirely on what the wording may mean, I believe that the intent in administering it is more important. I intend to ensure that proposals that may be problematic will be dealt with in an open and consultative fashion."] It appears that although all proposed projects are subject to certain (unspecified) notification requirements, [(13) -- 13. . *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) p. 11: "...advance notification of all proposed activities must be made, without exception".] a thorough project review is to be undertaken only where the proposal is inconsistent with the Plan or where significant environmental impacts are suspected. [(14) -- 14. . P.S. Elder, "Estuary Protection in British Columbia", *International Journal of Estuarine and Coastal Law*, Vol. 4, No. 2, 1989, p. 117 at 126. *See also* *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) p. 11: "Proposed activities which are consistent with the area designations under the CEEMP may not require review unless it may involve significant environmental impact."] That is, no assessment is required if the project conforms with the categories

of appropriate land and water use designated for a particular "zone". [(15) -- 15. . P.S. Elder, "Estuary Protection in British Columbia", *International Journal of Estuarine and Coastal Law*, Vol. 4, No. 2, 1989, p. 117 at 133.] In determining whether the review process applies to a project, MOE may at their discretion consult with interested public groups. [(16) -- 16. . *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) p. 13: "The Ministry of Environment and Park's official administering the process will consult with other regulatory agencies and , as appropriate, with interested public groups, in determining whether a proposed activity should be subject to the project review process."] This discretion, at least in the instances described by the Preservation Society, has not been exercised. [(17) -- 17. . Cowichan Estuary Preservation Society, "Analysis and Recommendations for Improving the Cowichan Estuary Environmental Management Plan, January 23 1992, p. 3: "In each of these examples the public was prevented from actively participating in the review process".]

It is, however, not adequate to simply rely on conformity with a mapping system. The circumstances and potential impact of every project should be examined for environmental impact and not simply "rubber stamped" on the basis of an area designation. This concern has lead the federal government to develop the "initial assessment" process under the Environmental Assessment and Review Process Guidelines Order. [(18) -- 18. . SOR/84-467.]

A formal, clearly defined, publicly accessible [(19) -- 19. . See "Part III: Public Participation".] Project Review Process would go a long way to address both the concerns of the Preservation Society and the concerns of the MOE officials who must administer the process. The confusion surrounding the application of the process could be addressed by applying the process to *all* project proposals, but a "screening" system could be incorporated into the process to allow expedited processing for those proposals which are in conformance with the relevant designated land-use. [(20) -- 20. . See for example the Environmental Assessment and Review Process Guidelines Order, SOR/84-467.]

Recommendation:

1. PROJECT REVIEW PROCESS. We recommend that the Project Review Process procedure be explicitly and clearly defined in the CEEMP, and expanded to apply to all proposed projects. The Process should include the public participation elements discussed in Part III.

### Re-designation

The Preservation Society is concerned that there is no "prescribed procedure" for considering a proposal which may involve a change of area designation under the CEEMP. [(21) -- 21. . Cowichan Estuary Preservation Society, "Analysis and Recommendations for Improving the Cowichan Estuary Environmental Management Plan, January 23, 1992, p. 8.] This absence, they argue, has on at least one occasion

produced pressure to change a designation without a thorough evaluation of the consequences. [(22) -- 22. . *Ibid.* at pp. 8-9.]

As with the Project Review Process discussed above, the CEEMP does not clearly set out a procedure to be followed for re-designation. However, a reading of the hypothetical example used in the Plan Amendment section of the CEEMP suggests that in order to change an area designation, the CEEMP must be amended by Order in Council. [(23) -- 23. . *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) p. 16: "...if there was no demand to continue using the vacated site for log handling, consideration should be given to amending the Plan to accommodate an alternative use..."] The process for amending the plan by Order in Council is considerably clearer. [(24) -- 24. . *Ibid.* at p. 16: "Since a Cabinet Order has been issued for implementing the Plan, amending the Plan will require Cabinet approval. When a situation requiring Plan amendment occurs, the Ministry of Environment and Parks will coordinate an evaluation of all the options and consequences in consultation with the public, affected landowners, and the various government agencies. Following the development of either an acceptable Plan amendment proposal or a number of options for Plan amendment, the proposed amendment would be submitted to Cabinet for approval and issuance of the necessary Cabinet Order."]

A formal, clearly defined, publicly accessible amendment procedure may give the CEEMP both the flexibility and the integrity it needs to meet the changing needs of the estuary.

### **Recommendation:**

2. RE-DESIGNATION. We recommend that the re-designation procedure be explicitly and clearly defined in the CEEMP and include a meaningful public participation process. This process should include the public participation elements discussed in Part III.

### **Enforcement**

The Preservation Society argues that government agencies have failed to enforce CEEMP commitments and other agreements with respect to estuarine use. The Preservation Society sets out instances where an industrial user of the estuary appears to have wilfully disregarded commitments to the CEEMP and the enforcement efforts of government agencies, yet repeated requests by the Preservation Society for protection orders under the *Environment Management Act* [(25) -- 25. . *Environment Management Act*, SBC, c. 14, as amended.] have been refused. [(26) -- 26. . *Cowichan Estuary Preservation Society*, "Analysis and Recommendations for Improving the Cowichan Estuary Environmental Management Plan, January 23, 1992, p. 6.]

It is the Preservation Society's contention there has not been the political will necessary to effectively enforce CEEMP commitments. [(27) -- 27. . *Ibid.*] In Part IV we discuss

pertinent environmental protection enforcement mechanisms that have been used or suggested in other jurisdictions.

### **Restoration and Enhancement**

One other important concern raised by the Preservation Society is the perceived failure of the government agencies to follow up on commitments to the restoration and enhancement of the estuary. [(28) -- 28. . *Ibid.* at pp. 9-10.]

The CEEMP describes these commitments as follows:

It is the aim of the ... Plan to maintain and, where feasible, improve both the quantity and quality of habitat in the Cowichan estuary through similar habitat restoration and enhancement projects, while also accommodating industrial, commercial and other development activities. [(29) -- 29. . *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) p. 14.]

Cowichan Bay has been -- and continues to be -- a dumping ground for a number of different waste materials. Anti-sapstain chemicals, hydrogen sulfide caused by bark wood waste, "end-check" paint, thousands of buried plastic gloves, possible "special waste" sludge, untreated sewage, agricultural use of fertilizers, manure from dairy cattle, septic tanks on the Cowichan Indian reserve using hog fuel in drainage fields, restaurant waste, and hog fuel, are all waste materials identified by the Preservation Society as threatening the estuary. [(30) -- 30. . B. Holden, pers. comm. with L. Alexander, January 9, 1992.] Dioxins in crabs have lead to the closing of the Bay's crab fishery. [(31) -- 31. . Cowichan Estuary Preservation Society, "Analysis and Recommendations for Improving the Cowichan Estuary Environmental Management Plan, January 23, 1992, p. 11.]

Yet it is the contention of the Preservation Society that although they themselves have initiated restoration programs, the restoration efforts of the government agencies who are parties to the CEEMP have been half-hearted and in many cases non-existent. [(32) -- 32. . *Ibid.* at pp. 9-10.]

In Part IV we discuss some restoration and enhancement mechanisms that have been used in other jurisdictions.

## **Part III**

### **Public Participation**

#### **Public Participation and the CEEMP**

Public participation in the administration of CEEMP appears to be limited. The Public was not directly involved in negotiating the implementation agreements incorporated in the plan. [(33) -- 33. . G.K. Lambertsen, "Report on the Cowichan Estuary Plan



Implementation Program, March 1984" in *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) appendix 2, at p. 3: "Much time and effort has been dedicated through the Cowichan Estuary Plan Implementation Program to negotiating agreement between the present industrial users of the estuary and the key government agencies responsible for regulating land and resource use. Efforts to consult and inform the general public and concerned groups and individuals have been made periodically. However, this did not include direct participation in negotiations and the details of the negotiations have been withheld to ensure their continuation." ] The CEEAC may include interested public groups in the determination of whether or not a proposed activity should be subject to the review process, but this practice is discretionary. [(34) -- 34. . See the *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) p. 13: See note 16 supra.] The only non-discretionary provision for public participation in the CEEMP appears to be in the context of plan amendment. [(35) -- 35. . See *Ibid.* at pp. 16-7: "When a situation requiring Plan amendment occurs, the Ministry of Environment and Parks will coordinate an evaluation of all the options and consequences in consultation with the public, affected landowners, and the various government agencies." ] But even this provision fails to clearly set out a well-defined, meaningful process.

This lack of guaranteed public participation runs contrary to Society's growing commitment toward meaningful public participation in environmental decision-making today.

### **The Growing Commitment to Public Participation**

Active public participation in environmental decision-making is supported by the following reasoning: [(36) -- 36. . The first four arguments are taken from C. Sandborn, W. Andrews and B. Wylynko, *Preventing Toxic Pollution: Toward a British Columbia Strategy* (Vancouver: West Coast Environmental Law Research Foundation, 1991) p. 139.]

1. Citizens have a democratic right to participate in decision-making affecting our common environment. They are simply not satisfied that regulators and business have done an adequate job of protecting the environment in the past.
2. Members of the public have many constructive ideas and practical knowledge to contribute toward solving environmental problems.
3. Social justice demands that if certain citizens are asked to bear the risks and costs of measures for the benefit of society as a whole, then they should have a full opportunity to participate in the decision-making.
4. Administrative fairness necessitates that if business is to be consulted on regulatory changes, then others who consider themselves affected should be consulted as well.

5. The accountability of decision makers in a complex democratic system is enhanced by giving the public access to information and by submitting policy decisions to public scrutiny before and after those decisions are made. [(37) -- 37. . A. Thompson and D. Wilson, "Workshop Paper on Options for Regional Involvement in Watershed Management: The Nechako River Management Proposal" (Unpublished, May, 1983) p. 7.]

The World Commission on Environment and Development (the Brundtland Commission) strongly emphasized the importance of public consultation:

[T]he pursuit of sustainable development requires .. a political system that secures effective citizen participation in decision making. [(38) -- 38. . World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) p. 65.]

In the context of wetlands and habitat management, this concept of effective public participation in decision-making has been strongly endorsed. The Fraser River Estuary Study Council, for example, concluded that "[p]ublic involvement should afford people the opportunity to understand and influence *each stage* of the planning process" [(39) -- 39. . C. Harvey, *Fraser River Estuary Study -- Phase II: Results of Public Involvement* (Surrey: Fraser River Estuary Study Council, 1982) p. 48.] [emphasis added].

An international wetlands forum which brought together planners, conservation groups, government agencies and businesses recommended "[t]he public should be involved early and effectively in decisions affecting local wetlands". [(40) -- 40. . Sustaining Wetlands Forum, *Sustaining Wetlands: International Challenge for the 90s* (Ottawa: Sustaining Wetlands Forum, 1990) p. 15. The forum included representatives from the Canadian Institute of Planners, Canadian Wildlife Service, Environment Canada, Ducks Unlimited, International Association of Fish And Wildlife Agencies, National Fish and Wildlife Foundation (U.S.A.), National Round Table on the Environment and the Economy, National Wildlife Federation (U.S.A.), Nissan Canada, Royal Bank of Canada, Sustainable Development Canada, and Wildlife Habitat Canada.]

In the United States, a national wetlands policy forum concluded that:

In undertaking [planning for wetlands protection and management] the responsible agencies should ensure that the planning process is public and includes a balanced representation of different interests concerned about the protection and management of the wetlands covered. [(41) -- 41. . Final Report of the National Wetlands Policy Forum, *Protecting America's Wetlands: An Action Agenda*, (Washington, D.C.: Conservation Foundation, 1988) p. 20.]

A meaningful public process includes participation in the *design* of the process itself. P.S. Elder, a law professor with the Faculty of Environmental Design at the University of Calgary in a paper regarding estuary protection in British Columbia states:



Effective estuary management requires involvement of affected agencies and interest groups in the preparation of both plan and management structure. [(42) -- 42. . P.S. Elder, "Estuary Protection in British Columbia", *International Journal of Estuarine and Coastal Law*, Vol. 4, No. 2, 1989, p. 117 at 140.]

The University of British Columbia and B.C. Hydro recently co-sponsored a symposium on citizen participation or shared decision-making in B.C. Close to 60 people attended representing the interests of business, government, education organizations and non-governmental organizations. The symposium's report puts forward the following proposition:

The public lacks confidence in the ability and willingness of government and business to safeguard public interests and the environment; it is demanding more influence in defining the decision making process, more direct involvement in decision making and more accountability for decisions made. [(43) -- 43. . *Shaping British Columbia's Future: Shared Decision Making and Scarce Resources: A Report on the Symposium* (Unpublished Draft Summary, 1992)]

## **Advantages for Decision-Makers**

Beyond the "moral" and "democratic" imperatives that support full public participation in environmental decision-making, decision-makers are finding that a far more powerful incentive for the inclusion of a public participation component in environmental decision-making is its many *practical* advantages:

### **Feedback and Information Resource**

Feedback for decision-makers is especially important in the context of impact assessment. A study on public participation prepared for the Federal Environmental Assessment Review Office concluded:

[P]lanners ... look to public participation to assess the appropriateness of the strategic facts used to document the proposal, as well as the quality and acceptability of the arguments used to support the proposal and the major choices made. In some cases, they may even obtain new information that had been overlooked in their own studies or dismissed as unimportant by their experts. Overall, the planners will seek to assess the general acceptability of their project through public participation so as to determine the effectiveness of the accompanying measures under consideration or to add mitigating measures citizens want. [(44) -- 44. . R. Parenteau, *Public Participation in Environmental Decision-Making* (Ottawa: Minister of Supply and Services Canada, 1988) p. 5.]

Although they are often overlooked, public interest groups can be an indispensable source of information to a decision-making authority:

[P]ublic participation gives the decision maker not only a greater range of policy choices but also a wider and more representative definition of the values which should be reflected in policy choices; for example, policy formation by narrow interests tends to ignore "soft", "intangible" values, such as aesthetic and ecological considerations, that cannot be quantified, whereas, for the people who live in the region affected by a particular development, it is often these "non-economic" concerns that are of the greatest importance. [(45) -- 45. . A. Thompson and D. Wilson, "Workshop Paper on Options for Regional Involvement in Watershed Management: The Nechako River Management Proposal" (Unpublished, May 1983) p. 7.]

One lesson learned from the failure of an environmental management plan in New Jersey is the crucial contribution public participation makes to applied research:

Scholars, as well as administrators, must stay in touch with the people affected by the policies they are devising. The interaction between the scientist and the public is an important part of applied research that is easily forgotten. [(46) -- 46. . P.A. Gares, "Geographers and Policy-Making: Lessons Learned from the Failure of the New Jersey Dune Management Plan" *Professional Geographer*, 41(1), 1989, pp. 20-29 at p. 28.]

Since many decisions are ultimately made many kilometres away from an area in question, public interest groups can often provide a much needed perspective to the issue:

[I]nvolving concerned citizenry can offset the tendency of government agencies and proponents of water development projects to take narrow views of the public and private interests that are at stake. [(47) -- 47. . A. Thompson and D. Wilson, "Workshop Paper on Options for Regional Involvement in Watershed Management: The Nechako River Management Proposal" (Unpublished, May 1983) p. 7]

### **Effect on Resistance to Implementation**

If opportunities for participation in the decision-making process are not seen as meaningful by those affected by the decision, the decision-making body can expect resistance to the final decision. By promoting consensus, or by "negotiating" with many interests in the creation of rules, "the affected parties will be given ownership in the rules and will be less likely to challenge them": [(48) -- 48. . G.J. Protasel, "Resolving Environmental Conflicts: Neocorporatism, Negotiated Rulemaking, and the Timber/Fish/Wildlife Coalition in the State of Washington", Address to the 49th National Conference of the American Society for Public Administration in Portland, Oregon (Unpublished, 1988) p. 18.]

To choose negotiated rulemaking over traditional administrative rulemaking as a form of environmental regulation implies following a social interaction rather than a technocratic problem-solving strategy. Social interaction invites participation in the public sphere and creates a consensus about mutual expectations. Through the creation of *shared images of the future*, regulatory conflicts are avoided. [(49) -- 49. . *Ibid.* at p. 9.] [emphasis added].

One remarkable example of the benefits of building a consensus is Washington State's Timber/Fish/Wildlife Agreement (the "TFW" agreement) which was created by a process that involved, among others, environmental groups, native groups, timber interest and fishing interests. [(50) -- 50. . For a more detailed discussion of the agreement, see "Some Potential Models" p. \*\*\*.] This process resolved longstanding controversial issues. The state legislature, "stunned by the absence of interest group conflict which historically had surrounded ... policymaking," passed the changes "without a single dissenting vote and without a single word being changed." [(51) -- 51. . G.J. Protasel, "Resolving Environmental Conflicts: Neocorporatism, Negotiated Rulemaking, and the Timber/Fish/Wildlife Coalition in the State of Washington", Address to the 49th National Conference of the American Society for Public Administration in Portland, Oregon (Unpublished, 1988) p. 17.]

Seen in this light, public participation can be characterized as a political strategy:

Participation performs two significantly different functions: it is at once a formal procedure for bringing the public into the decision-making process and a political device for obtaining public support for decisions. [(52) -- 52. . R. Parenteau, *Public Participation in Environmental Decision-Making* (Ottawa: Minister of Supply and Services Canada, 1988) p. 6.]

### **Fiscal Responsibility**

Over the long-term, meaningful public participation can mean substantial cost savings. James Waldo, the person who served as the mediator for Washington State's Timber/Fish/Wildlife Agreement, makes this comment about the TFW:

It also serves another equally important role in our state: it is a living example of how seemingly disparate interests can work together to solve thorny and complex natural resource disputes without hav[ing] to take the bitter, often unpredictable route of litigation and political battles. [(53) -- 53. . J.C. Waldo, "The Challenge of Resource Peace: Lessons from the U.S. Northwest", Address to the University of Victoria Institute for Dispute Resolution (Unpublished, 1990) p. 6.]

## **Essential Components**

Public participation in environmental decision-making can, and does, take a variety of different forms depending on the circumstances of the decision in at issue. However, successful programs appear to have the following elements in common:

### **Variety of Opportunities**

Successful programs appear to offer a wide range of opportunities for concerned members of the public to participate in the decision-making process.

Stakeholder participation should not be restricted to *reacting* to proposals. Instead, stakeholders need an opportunity to participate *throughout* the process [emphasis added]. [(54) -- 54. . T. Gunton and I. Vertinsky, *Reforming the Decision Making Process for Forest Land Planning in British Columbia* (Victoria: British Columbia Round Table on the Environment and the Economy, 1990) p. 4.]

The authors of a recent examination of the Fraser River Estuary Management Program ("FREMP") concluded:

The ultimate success of [a] Management Program will depend on finding new and more productive ways to involve the diversity of stakeholders. [(55) -- 55. . Dorsey, H. & Griggs, J., eds, *Water in Sustainable Development: Exploring Our Common Future in the Fraser River Basin*, vol. II (Vancouver: Westwater Research Centre, 1991) p. 279-80.]

Opportunities can be formal or non-formal, regular or ad hoc, solicited or encouraged. Some examples are public meetings, workshops, or forums; review of draft reports and policies; volunteer monitoring and enforcement; consultation processes; citizen advisory committees; and citizen representation on the decision-making body. [(56) -- 56. . For a more complete discussion, See Part III. "Some Potential Models", p. \*\*.]

### Access to Information

Successful programs depend on equal access to good, full, timely and regular information. A recent Westwater Research Centre study of the Fraser River Basin suggests that reaching agreement on resource conflict in the Fraser River "will depend on the information that is available to stakeholders to use in making decisions." [(57) -- 57. . Dorsey, H. & Griggs, J., eds, *Water in Sustainable Development: Exploring Our Common Future in the Fraser River Basin*, vol. II (Vancouver: Westwater Research Centre, 1991) p. 280. Michael McPhee of the Fraser River Estuary Management ("FREMP") Plan agrees that one of the major criticisms of his program has been the lack of "timely information" [Source: M. McPhee, pers. comm. with L. Alexander, January 8, 1991].]

*Equal* access means all participants in the decision-making process have access to the same information. *Good* information is recent and relevant information. *Full* information means entire documents and not just selected extracts. *Timely* information is information well in advance of the decision, and *Regular* information is information that is distributed as a rule and not just upon request.

Clearly, there may be problems with respect to some information judged by government agencies to be confidential. Hence, the rules must clearly define what sorts of information can be excepted. But it is important that these rules are written as exceptions to a general policy of access, and not as a policy of what information might be included.

Beyond the needs and concerns of participants in the process, access to information in a broader sense requires that the public at large be kept informed of the issues. This would appear to be the responsibility of all participants to the process.

### Accountability

Successful programs have clear understandings between public participants and decision-making bodies with respect to the force and effect of public input. In a report prepared for the B.C. Round Table on the Environment and the Economy, Gunton and Vertinsky argue:

Decision makers should be obligated to provide stakeholders with a written decision summarizing how key decisions were reached and how the various concerns expressed by stakeholders were taken into account. [(58) -- 58. . T. Gunton and I. Vertinsky, *Reforming the Decision Making Process for Forest Land Planning in British Columbia* (Victoria: British Columbia Round Table on the Environment and the Economy, 1990) p. 5.]

In addition, it is important that all parties have a clear understanding of who is ultimately responsible for a decision, and whether that decision is binding. If a decision of a public participation process carries recommendation-weight only, then all participants should know this from the beginning.

### Funding

If the public is going to be included in the decision-making process in a meaningful way, some sort of formal mechanism is necessary to fund their participation. Funding allows participants to send their strongest voice to the table, take the necessary time off work, hire experts, or commission studies and reports. Some sort of compensation for costs is important, especially any costs associated with representatives meeting with their constituents. In addition, some sort of *per diem* for participation may be appropriate.

The public participation component of the FREMP has been criticized recently for, among other things, not funding its participants:

The public consultation policy needs to be revised and *supported by resources* so as to become more progressive and proactive in seeking the involvement of stakeholders in all aspects of FREMP's activities. [(59) -- 59. . A.H.J. Dorsey, "Sustainable Development of the Fraser River Estuary: Success Amidst Failure" Address to the Coastal Resource Management Group Environment Directorate, Organization for Economic Cooperation and Development, Paris 12-14, March, 1990, p. 43.] [emphasis added].

### Part of the Formal Design of the System

It is important that public interest representation is seen as *non-voluntary*. Successful programs formalize participation in the documents of the process.

In order to work, a process involving meaningful public participation in land use decision making will require a well designed, comprehensive infrastructure. The human and financial resources necessary to support such a process include design assistance, technical "know-how", a research capability and funding for unpaid participants. [(60) - 60. . C.R. Darling, *In Search of Consensus: An Evaluation of the Clayoquot Sound Sustainable Development Task Force Process* (Victoria: UVic Institute for Dispute Resolution, 1991) p. 49.]

This is especially true if the process includes an advisory body:

[I]f the only role that can be gained for the regional voice is an advisory one, there are procedures and means for making the advisory role meaningful ... [T]he advisory body must be established by some formal step that entails an equally formal step to disband it ... [T]he body should have a clearly stated mandate, set forth in the legislation or Order-in-Council ... [T]he advisory body should have certain fundamental powers ... to elect its own chairperson, to decide its own agenda, to obtain information from the government, to conduct independent information gathering analysis and evaluation (which implies staff and funding), and to make its views known to the public directly through public meetings and publications. [(61) -- 61. . A. Thompson and D. Wilson, "Workshop Paper on Options for Regional Involvement in Watershed Management: The Nechako River Management Proposal" (Unpublished, May 1983) p. 30.]

### **Tailored Design**

Finally, there is no "all-purpose" model for public participation, nor should there be. Successful processes are "tailored" to meet the needs of particular resource-use conflicts.

If the Province intends to rely on consensus building to negotiate sustainability, the prospect of developing and imposing a generic "Made in Victoria" model should be abandoned. The notion of a pre-conceived, universally appropriate model is contrary to a fundamental precept of consensus building -- which prescribes that the negotiating process must be designed by the parties to accommodate the circumstances of each particular case. [(62) -- 62. . C.R. Darling, *In Search of Consensus: An Evaluation of the Clayoquot Sound Sustainable Development Task Force Process* (Victoria: UVic Institute for Dispute Resolution, 1991) p. 49.]

## **Appropriate Public Involvement**

Some officials have expressed the concern that the inclusion of a public participation component in the decision-making process will cause adverse media attention, take too much staff time, and delay decision-making. [(63) -- 63. . C. Sandborn, W. Andrews and B. Wylynko, *Preventing Toxic Pollution: Toward a British Columbia Strategy* (Vancouver: West Coast Environmental Law Research Foundation, 1991) p. 140-1.]



It is important to understand that public involvement in planning "will not by itself, create harmonious relationships and provide a means to avoid conflict". [(64) -- 64. . C. Harvey, *Fraser River Estuary Study - Phase II: Results of Public Involvement* (Surrey: Fraser River Estuary Study Council, 1982) p. 47.]

However, the key to a successful public participation program is to:

... design a practical system to ensure that people who want to participate in centralized decision-making processes have an opportunity to do so, while at the same time ensuring that the process is quick and efficient. [(65) -- 65. . C. Sandborn, W. Andrews and B. Wylynko, *Preventing Toxic Pollution: Toward a British Columbia Strategy* (Vancouver: West Coast Environmental Law Research Foundation, 1991) p. 141.]

## Some Potential Models

As stated above, successful programs offer a wide range of opportunities for public participation. Clearly, the strength of public influence over the ultimate decision will depend on the forum for participation provided. [(66) -- 66. . See R. Parenteau, *Public Participation in Environmental Decision-Making* (Ottawa: Minister of Supply and Services Canada, 1988) p. 7, where he sets out a spectrum of decision-making power. Mr. Parenteau describes the end-point with the least amount of influence as "information", and then builds through "persuasion", "consultation", and "cooperation", until reaching the other end-point, "control".] What follows is a brief survey, presented in order of increasing public influence, of public participation programs that have been successfully used in other jurisdictions to manage resource-use conflicts.

### Citizen Monitoring

Volunteer citizen monitoring programs have been incorporated into estuarine management plans in Puget Sound and Rhode Island. [(67) -- 67. . See Part IV of this paper, "Enforcement and Enhancement", for a more detailed description of these programs.] Volunteers are organized, and in some cases trained, to conduct enforcement efforts, baseline research and clean-up projects. In the Great Lakes Wetlands Policy Consortium, non-governmental organizations are used to monitor and assist the enforcement activity of government agencies. [(68) -- 68. . *Ibid.*] See Part IV for further discussion of these activities.

### Consultation Processes

**FREMP.** Although FREMP is considered to be "one of the most intensive and progressive efforts to develop decision-making processes", [(69) -- 69. . Dorsey, H. & Griggs, J., eds, *Water in Sustainable Development: Exploring Our Common Future in the Fraser River Basin*, vol. II (Vancouver: Westwater Research Centre, 1991) p. 275.] public participation has been limited to consultation on an ad hoc basis. The authors of a recent study conclude that there must be greater emphasis on consensual decision-



making [(70) -- 70. . *Ibid.*] and that stakeholders must be involved in a more meaningful way. [(71) -- 71. . *Ibid.* at p. 278.]

Official public involvement programs have been uneven and frequently limited to consultation processes that are unproductive and often frustrating for most participants. [(72) -- 72. . *Ibid.* at p. 275.]

While the FREMP has been highly successful in involving key governmental organisations, it has so far been much less successful in finding ways to involve the variety of non-governmental organisations in the working groups. [(73) -- 73. . *Ibid.* at p. 278.]

### Advisory Bodies

**Height-of-the-Rockies Wilderness Area.** In 1987, the Ministry of Forests struck a committee consisting of logging, mining, municipal, outfitting, tourism and recreational representatives in order to resolve resource-use conflicts in the Height-of-the-Rockies Wilderness Area, an 83,000 ha area bordering Banff National Park, B.C.'s Elk Lakes Provincial Park and Alberta's Kananaskis Park. The purpose of the committee was to define ecologically-based units in the area, and to identify the ones in which conflicts over resource use existed "based on such factors as preserving viewsapes from established trails and campsites, protection of lakes, etc." [(74) -- 74. . British Columbia Round Table on the Environment and the Economy, *Reaching Agreement: Volume I Consensus Processes in British Columbia Appendix 1,2,3* (Victoria: The Round Table, 1991) p. 1--5.] The main features of the process were multi-party negotiations within a formal committee and the appointment of a facilitator. [(75) -- 75. . *Ibid.*]

The B.C. Round Table on the Environment and the Economy found the results to be encouraging:

Looking back, it can probably be concluded that the parties knew where they were agreed and where they were in disagreement. Their areas of agreement were embodied in the .. boundaries. In the areas where there was disagreement they at least implicitly recognized that it would be necessary for [the Ministry of Forests] to make the "final call". Given the narrow range of differences that remained, they had a very good sense of what .. recommendations would be and were able to accept the final boundaries, as drawn. [(76) -- 76. . *Ibid.* at pp. 3--23.]

Bob Jamieson of the Palliser Wilderness Society, which was the only non-government, non-industry party to the agreement, concluded:

All participants would probably agree that, despite their differences, everyone was left with a sense of accomplishment and some sense of pride in being able to come to a solution that was less combative and divisive of the local community than has been found in similar conflicts in other parts of B.C. [(77) -- 77. . *Ibid.*]

**Chesapeake Bay.** The States of Maryland, Virginia, Pennsylvania and the District of Columbia have agreed by formal memorandum to participate in a major clean-up of an area known as Chesapeake Bay. [(78) -- 78. . H. Tenner, "Public Participation in the Broader Sense -- The Chesapeake Bay Experience" [abstract only] in *Estuarine and Coastal Management Tools of the Trade*, Proceedings of the Tenth National Conference, Vol. 1 (Maryland: The Coastal Society, 1986) p. 364.] But, according to a recent study, legislative action and program initiatives have come about only as the result of "a very lengthy and extensive public participation process in which the citizens of the region encouraged, pushed and supported their legislators and elected officials into action." [(79) -- 79. . *Ibid.*]

Throughout the entire process public participation has been high with many committees working in partnership with government to assure that the restoration program stays on target and is kept in the public eye. [(80) -- 80. . *Ibid.* at p. 365.]

The program includes a 150 member Coastal Resources Advisory Committee, composed of many citizen representatives and representatives from non-governmental organizations. The Council meets every other month, and in the opinion of those who administer the program, the Council has played an important role in the program's success. [(81) -- 81. . B. Johnston, Participation Officer, Maryland Coastal Zone Management Program, pers. comm. with L. Alexander, January 27, 1992.]

**Grays Harbor Estuary Management Plan.** The Grays Harbor Estuary in Washington State has, as part of its planning process, established a Citizens' Estuary Advisory Council. [(82) -- 82. . *Grays Harbor Estuary Management Plan*, Grays Harbour, Washington 1986.] The purpose of the Council is to advise the program's decision-making authority, the Grays Harbor Estuary Task Force, at Task Force Meetings and sub-committee meetings, to monitor the adoption of the management plan through amendments to local Shoreline Master Programs, and to advise the Task Force on issues identified through that process. The Council is composed of representatives from the local chapter of a state or national environmental organization, the state or national environmental organization itself, local business interests, and "citizens at large" who have knowledge of land and water use issues and permitting procedures. [(83) -- 83. . *Ibid.*]

The Council is formally established under the authority of the Grays Harbor Regional Planning Commission as an advisory group. Representatives of the environmental organizations are appointed by their organizations. All other members are appointed by Commission. The Plan sets out all procedural matters. Staff support is provided to the Council by the Planning Commission. All information that is available to the Task Force is available to the Council. The Plan provides for a general comment period at each Council meeting for concerned citizens who are not Council members.

### **Decision-making Authorities**

**The Pacific Coast Joint Venture.** The Pacific Coast Joint Venture is a plan formally adopted by the governments of Canada and the United States for the conservation of our

internationally shared waterfowl resources. The membership of the steering committee includes representatives from a number of non-government organization "with whom close consultation for advice and cooperation is necessary for the success of the program." [(84) -- 84. . Memorandum of Understanding, Pacific Coast Joint Venture, British Columbia Implementation Committee, June 14, 1991.]

Representatives from non-governmental organizations have votes on decision-making committees that approve the funding of programs at a local level, and can make policy recommendations to government agencies. [(85) -- 85. . The PCJV does not make regulatory decisions with respect to estuary management, but makes *funding* decisions with respect to enhancement and conservation.]

**Timber/Fish/Wildlife Coalition.** As stated above, one remarkable example of the benefits of building a consensus is the TFW agreement. However, James C. Waldo, who served as co-mediator for the agreement, suggests that after decades of confrontation, it was only through "dedication, perseverance and a bit of risk-taking on all sides" that the agreement was reached. [(86) -- 86. . J.C. Waldo, "The Challenge of Resource Peace: Lessons from the U.S. Northwest", Address to the University of Victoria Institute for Dispute Resolution (Unpublished, 1990) p. 5.]

[T]he participants decided to give negotiation a chance, putting aside for the moment the all-too-familiar courses of litigation. By December 1986, the group forged an agreement in principle that ultimately formed the basis for a comprehensive .. compact. [(87) -- 87. . *Ibid.* p. 6.]

Early evaluation of the agreement was positive. One commentator concluded:

[A]long with the general observation that the T/F/W process produced better regulations than those first promulgated by the DNR staff, is the realization that a system of cooperative commitments by the T/F/W participants has been created which goes way beyond formal regulatory requirements. [(88) -- 88. . G.J. Protasel, "Cooperative Natural Resource Management: Negotiated Rulemaking by the T/F/W Coalition in the State of Washington", Address to the Pacific Northwest Political Science Association Convention, Spokane, Washington (Unpublished, 1987) p. 15.]

The Second Annual Review boasted that "[t]here seems no doubt ... the TFW agreement is a success ... there are payoffs to the various interest groups, and ... participants see progress in the second year." [(89) -- 89. . *Timber, Fish and Wildlife Agreement: Second Annual Review*, Vol. I. Overview (Portland: Washington Dept. of Natural Resources, 1989) p. 8.]

More recently, Waldo has offered the following observations:

The ... agreement has been in place now since 1987. Riparian zone management has worked well, and cooperative research is continuing to provide a format for cooperative resource planning. [(90) -- 90. . J.C. Waldo, "The Challenge of Resource Peace: Lessons

from the U.S. Northwest", Address to the University of Victoria Institute for Dispute Resolution (Unpublished, 1990) p. 6.]

In fact, we recently concluded similar negotiations in the State of Idaho, setting up an agreement on non-point source pollution involving tribes, mining, agriculture, environmental groups and state agencies. [(91) -- 91. . *Ibid.* at pp. 6-7.]

**Narragansett Bay.** The Narragansett Bay Project (the "NBP"), in Rhode Island, was designed with a commitment to make it "of the people" and not just with citizen "advice and consent." [(92) -- 92. . J. Lawson, "Narragansett Bay Project: Closing the Gap Between Citizen Advice and Management Decisions" in *Estuarine and Coastal Management Tools of the Trade*, Proceedings of the Tenth National Conference, Vol. 1 (Maryland: The Coastal Society, 1986) p. 367.] The result was a management committee "comprising almost as many citizens as regulators." [(93) -- 93. . *Ibid.*]

Although a Policy Committee holds a "final veto power", Judith Lawson, a member of the Project, believes that "it is difficult to conceive of many situations in which decisions made by the Management Committee would be seriously out of sync with the Policy Committee." [(94) -- 94. . *Ibid.* at p. 368.] This is because, as Ms. Lawson explains:

... the Project's committees interlock and communicate with each other. All decisions made by the supporting committees ... are referred to the Management Committee for approval. Since these committees include citizen representatives and Management Committee members, there is ample opportunity for multiple user-group influence and cross-committee communication during the formation of action plans. Also, course corrections are more easily made before the support committee proposals come before the Management Committee. A consensus is worked out during the decisionmaking within the support committees, so that by the time a plan or proposal reaches the Management Committee, no one is surprised by the suggestions, and many of the "bugs" have already been worked out. [(95) -- 95. . *Ibid.*]

Ms. Lawson speaks of "unforeseen advantages" to this "sort of melting pot Management Committee structure":

[T]he project researchers found it very helpful to call on the expertise of the fishermen while conducting some of their field studies .. Cooperation on the scale the Narragansett Bay Project is experiencing is unusual enough that, by pointing it out to local media that a group of scientists and fishermen were doing a special field survey in an area closed to shellfishing, we were able to attract three television stations, two radio stations, and four newspapers who sent people out to cover the event. [(96) -- 96. . *Ibid.* at p. 369.]

The project, of course, has experienced some problems. The "getting to know you" stages are described as "an exercise in patience." [(97) -- 97. . *Ibid.* at p. 370.] But Ms. Lawson concludes that all participants "seem to be indicating by their persistence that it is best for them to work out their differences and achieve an interest-group balance in-house than to continue to flail away at the problems at the expense of the public." [(98) - - 98. . *Ibid.*]

The parallels between the NBP problem and the Cowichan estuary problem are striking. Both involve historical and inevitable resource-use conflicts. In both locations it took many years of consciousness-raising by environmental groups to produce regulatory action. In both cases decision-makers reached a point where, to use Ms. Lawson's words:

... it [became] obvious that the prerequisite to effecting improvement .. [was] bringing the conflicting interest groups together to work out meaningful, attainable compromises to prevent the Bay's continued deterioration in the interest of preserving short-term economic gain. [(99) -- 99. . *Ibid.*]

Because of these similarities, and because the NBP has been so successful in resolving disputes and ensuring meaningful public involvement, we recommend it be used as a model in the new CEEMP.

3. PUBLIC PARTICIPATION MODEL. We recommend that the public participation process for the CEEMP should be explicitly defined, and should:

- (a) offer a wide range of opportunities for concerned members of the public to participate in the decision-making process, including public meetings, review of draft reports, volunteer monitoring and enforcement, and consultation. Public interest groups should be included on a formal advisory council or decision-making body. The Naragansett Bay Project, Grays Harbour and Timber/Fish/Wildlife processes should be carefully studied for useful precedents;
- (b) ensure that the public is routinely provided with equal access to good, full, and timely information;
- (c) outline clearly the force and effect of all public input received, and provide a mechanism to ensure accountability for such input;
- (d) provide adequate funding to allow public interest groups to participate in a meaningful way.

## PART IV

### Enforcement And Enhancement

MOE has stated that "if regulatory or enforcement methods become the only way of achieving results, [we] will use *whatever means* are available to us." [(100) -- 100. . Letter to Mr. Robert Holden from Earl Warnock, Director Vancouver Island Region, Minister of Environment, dated September 20, 1990, p. 2.] [emphasis added]. Beyond "moral suasion", the *means* presently available to enforce the CEEMP include legal action federally under the *Fisheries Act*, [(101) -- 101. . *Fisheries Act* RSC 1985, c. F-14, as amended..] legal action provincially under the *Waste Management Act*, [(102) -- 102. . *Waste Management Act* SBC, c. 41, as amended.] and if "deliberate actions by any

person or organization contravene [the] Plan," [(103) -- 103. . *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) p. 15-6.] Environmental Protection Orders pursuant to the provincial *Environmental Management Act*. [(104) -- 104. . *Environment Management Act*, SBC., c. 14, as amended.] Furthermore, as stated above, all parties to the CEEMP have made commitments to the restoration and enhancement of the Bay. [(105) -- 105. . *See Part II. "Summary of Concerns".*]

However, it is the Preservation Society's contention that, perhaps due to a lack of political will, [(106) -- 106. . *Ibid.*] the CEEMP has not been effectively enforced, and that restoration/enhancement efforts have been disappointing.

In this final section, we discuss some potential solutions to the CEEMP's enforcement and enhancement/restoration problems. Some of these ideas may possibly be implemented within the present statutory regime in B.C. Others will require some form of law reform.

## Enhancement of Present Statutory Regimes

### Citizen Monitoring

Faced with shrinking funding and increased demand for action, some jurisdictions have effectively incorporated public participation into their enforcement and restoration projects.

**Puget Sound Keeper.** The Puget Sound Keeper is a program of the Puget Sound Alliance designed to assist with the enforcement of pollution control measures in Puget Sound. [(107) -- 107. . Sunday Jacobs, Sound Keeper Assistant, pers. comm. with L. Alexander, January 4, 1992.] The program, modelled on similar programs in Long Island Sound, San Francisco Bay, and on the Hudson River, employs a "Sound Keeper" to patrol the area by boat and to look for pollution sources. When a pollution source is located, the Sound Keeper will first check to see if a permit has been issued, and if it has he will try to work with both the polluter and with the local Department of Ecology to minimize the emission. If the Sound Keeper finds the emission is not permitted or exceeds its permit, he has the option of filing a citizen's suit under the *Clean Water Act*.

The Sound Keeper program, funded through both public and private grants, also works with a team of specially trained volunteers who assist in the enforcement process. Program administrators boast that the program has been a success. [(108) -- 108. . *Ibid.*] Local businesses have been supportive, and have sponsored formal "meet the Sound Keeper" receptions, which are well attended by those in the industrial community.

**Adopt-a-Beach.** Another Puget Sound program, a project called "Adopt a Beach", has been initiated in a effort to restore and enhance Puget Sound. [(109) -- 109. . M. Burke, "The Adopt-a-Beach Program - Successful approach to Direct Public Involvement" [abstract only] in *Estuarine and Coastal Management Tools of the Trade*, Proceedings

of the Tenth National Conference, Vol. 1 (Maryland: The Coastal Society, 1986) p. 351.] The project, funded by the Environmental Protection Agency and directed by the Seattle Aquarium, solicits the help of volunteer citizens to conduct baseline surveys of mitigation efforts, collect shellfish samples, re-establish marsh areas, and clean up plastic nets and other underwater debris. The program has "received the support of other management agencies because they provide a source of manpower for completing projects that could otherwise not be done with limited staff; and the projects are a good source of positive publicity." [(110) -- 110. . *Ibid.*]

**Salt Pond Watchers.** Rhode Island's "Salt Pond Watchers", a team of trained and organized volunteer citizens, serve the same purpose as the Puget Sound Adopt-a-Beach program: to establish long-term monitoring and restoration, in the face of severe limitations in funding. [(111) -- 111. . V. Lee and P. Kullberg, "Salt Pond Watchers: Rhode Island's Experiment in Citizen Monitoring" [abstract only] in *Estuarine and Coastal Management Tools of the Trade*, Proceedings of the Tenth National Conference, Vol. 1 (Maryland: The Coastal Society, 1986) p. 355.] The key to a successful program, in one writer's opinion, is "to instill a sense of self-sufficiency and responsibility among the volunteers: [(112) -- 112. . *Ibid.*]" "Positive feedback must be frequent enough to foster an awareness of the importance of the contribution of the volunteers and to sustain their interest." [(113) -- 113. . *Ibid.*]

**Great Lakes Wetlands Policy Consortium.** Formed in 1989 "in response to the need for a coordinated, proactive approach to wetland policy development in the Great Lakes Basin.", the Great Lakes Wetlands Policy Consortium is composed of 22 conservation and environmental organizations from Canada and the United States. In the Consortium, non-governmental organizations "play a key role in monitoring and reinforcing the actions of government and the private sector." [(114) -- 114. . "Great Lakes Wetlands Policy Consortium Report Released" in *Great Lakes Wetlands*, Volume 1, Number 5, Winter 1990.]

Recommendation:

4. CITIZEN INVOLVEMENT IN ENFORCEMENT, RESTORATION AND ENHANCEMENT. Citizen monitoring, funded through both public and private grants, should be established to assist in the enforcement process, as in the Puget Sound Keeper program. CEEAC should carefully study public participation in restoration and enhancement processes in the Adopt-a-Beach program, Salt Pond Watchers, and the Great Lakes Wetlands Policy Consortium, for useful precedents.

### **Contractual Enforcement Provisions**

Formal implementation agreements have been signed by each of the major industrial users of the estuary which "specify the land and water use changes each company has accepted." [(115) -- 115. . *Cowichan Estuary Environmental Management Plan* (Victoria: Ministry of Environment and Parks, 1987) p. 2.] Hence, the Preservation Society proposes that each implementation agreement contain provisions which prohibit certain activities known to be detrimental to the estuary. [(116) -- 116. .



Cowichan Estuary Preservation Society, "Analysis and Recommendations for Improving the Cowichan Estuary Environmental Management Plan, January 23, 1992, p. 8.] Each prohibition could carry a liquidated damages clause measured in terms of the cost to restore damaged property. Support for this approach can be found in B.J. Barton, R.T. Franson and A.R. Thompson, *A Contract Model for Pollution Control*. [(117)-- 117. . B.J. Barton, R.T. Franson and A.R. Thompson, *A Contract Model for Pollution Control*, (Vancouver: Westwater Research Centre, 1984). The authors discuss potential remedies under the model, including liquidation clauses, at p. 34.] In fact, the authors of that publication contend that a "contract model" is far more suitable for the regulation of pollution than the "criminal model" which is normally used. This is especially true, they argue, for pollution "that is a normal by-product of a desirable human activity." [(118) -- 118. . *Ibid.* at p. 27.]

Recommendation:

5. CONTRACTUAL ENFORCEMENT. We recommend that the "contract model" for pollution prevention be explored to see if it can be used to supplement existing statutory regimes in the Cowichan Estuary.

## Some Law Reform Ideas

Some enforcement ideas will require changes to the statutory regimes themselves.

### The "Polluter Pays" Principle and Emission Charges

Traditionally, Canadian law has not "invoiced" industry for the use they make of our rivers, lakes, oceans and air. As a result, it often appears to be more profitable for a company to pollute than to adopt sound waste management practices. As a result many Western countries have adopted the "polluter pays principle." [(119) -- 119. . See the "Polluter Pays" recommendation approved by the Council of Ministers of the European Economic Community in 1975, discussed in S. Johnson & B. Corcelle, *The Environmental Policy of the European Communities* (London: Graham and Trotman Publishers, 1989) pp. 256-266.] The federal government has committed to this principle in *Canada's Green Plan for a Healthy Environment*: [(120) -- 120. . Government of Canada, *Canada's Green Plan for a Healthy Environment* (Ottawa: Ministry of Supply and Services, 1990) at p. 16: "To encourage efficient use of resources, we must adopt the rule that the polluter or user pays. Whoever causes environmental degradation or resource depletion should bear the full cost."]

The "polluter pays" principle dictates that funding for enforcement and restoration/enhancement should come from those responsible for the point-source pollution -- e.g. the industrial users of the estuary.

The principle can be implemented in a number of ways, but perhaps the most appropriate for the CEEMP is the emission charge. Under an emission charge system, a price is set on each unit of pollutant discharged, and the polluter would pay to

government an amount equal to the quality of pollutant times the unit price. [(121) -- 121. . C. Sandborn, W. Andrews and B. Wylynko, *Preventing Toxic Pollution: Towards a British Columbia Strategy* (Vancouver: West Coast Environmental Law Research Foundation, 1991) p. 98.] The Netherlands, Japan, California, and certain German municipalities are examples of jurisdictions who have successfully used emission charge systems. [(122) -- 122. . *Ibid.* at pp. 98-100.] MOE should establish such an emission charge system for the entire province.

## Civil Damages

The Ontario Law Reform Commission (the "Commission") has recommended to the Ontario Legislature that a new remedy be created for the protection of the environment -- an award of civil damages payable to compensate the public for harm done to the environment which is entirely independent of any damages that may be payable for private injuries suffered by individuals or corporations. [(123) -- 123. . Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto: The Commission, 1990) Executive Summary p. 1.] The new remedy is founded on two basic premises: that "there may exist a public or general harm in the environmental context that is independent of any injury suffered by individuals personally", and that "individuals may have a legitimate stake in taking action responsive to this harm, even though they are not directly affected. [(124) -- 124. . *Ibid.*]

The Commission recommends that a special government body be constituted to administer the civil damage awards. This government body may be required to use the funds for restoration or replacement purposes, or to "rehabilitate the environment generally, in any manner the government body deems appropriate." [(125) -- 125. . *Ibid.* at p. 2.]

The Yukon has recently legislated a right of action for impairment of the environment. Under the Yukon *Environment Act* [(126) -- 126. . Bill 20, *Environment Act*, 2nd Sess., 27th Leg. Yukon, 1991, (assented to 29 May 1991).], any adult or corporate resident of the Yukon can commence an action against anyone who impairs the natural environment.

Recommendation:

6. LAW REFORM. We recommend that the government agencies which are parties to the CEEMP consider reforming their current statutory regimes to fully incorporate the "Polluter Pays" principle, and a public right of action for impairment of the environment.

## Part V

## Conclusion

The revision of the CEEMP represents an opportunity to set a precedent for future estuarine management decisions. We are beginning to realize the importance of conserving what little is left of North America's wetlands:

Across North America, wetlands have been drained or filled, cultivated by farmers, converted by property developers, and used as dumps and landfill sites. More than half of the original wetlands of the United States have now disappeared. California has lost 91% of its original wetlands acreage. In Southern Ontario, only one quarter of the original wetlands remain. In British Columbia, approximately 75% of the Fraser River Delta wetlands have already been lost, as have approximately 70% of the wetlands in the Victoria region. Since 1880 wildlife have lost 99.9% of the seasonal wet meadow habitat and 84.6% of the bog habitat once available to them in the Fraser River Delta. This constitutes loss a rare resource - coastal wetlands made up only 2.3% of B.C.'s 27,000 km of coast line. [(127) -- 127. . C. Sandborn, "Wetlands Protection", in *Law Reform for Sustainable Development in British Columbia* (Vancouver: Canadian Bar Association B.C. Branch, 1990), p. 231.]

Preservation of our remaining wetlands must clearly be a top priority of decision-makers. And in the post-Brundtland world, any real improvement to the CEEMP will require a significantly enhanced role in decision-making for the people who have a stake in what happens to the estuary. Decision-makers must adapt to the changing realities. In the words of Harlan Cleveland, Dean of the Hubert Humphrey Institute of Public Affairs at the University of Minnesota:

In the old days when only a few people were well educated and "in the know", leadership of the uninformed was likely to be organized in vertical structures of command and control. Leadership of the informed is different: it results in the necessary action only if it is exercised mainly through persuasion and by consulting those who are going to have to do something to make the decision a decision.

Very large numbers of people empowered by knowledge -- coming together in parties, unions, factions, lobbies, interest groups, neighborhoods, families, and hundreds of other structures -- assert the right or feel the obligation to make policy.

Decision making proceeds not by "recommendations up, orders down", but by the development of a shared sense of direction among those who must form the parade if there is going to be a parade. Participation and public feedback become conditions precedent to decisions that stick.

In the upside-down pyramid, where the people really do make the policy, leadership is continuous dialogue -- not an act, but an interaction between leaders and followers. [(128) -- 128. . H. Cleveland, Dean of the Hubert Humphrey Institute of Public Affairs, University of Minnesota, quoted in T.J. Scott, "Consultative Decision Making in Managing the Estuarine Environment, The Role of Policy Negotiation", *Estuarine and Coastal Management Tools of the Trade*, Proceedings of the Tenth National Conference, Vol. 1 (Maryland: The Coastal Society, 1986) p. 518.]

The disposition of government agencies changes over time. The industrial users of the estuary may be inactive and forgotten ten years from now. But, when wetlands go, they quite possibly go forever.

## **SUMMARY OF RECOMMENDATIONS**

1. **PROJECT REVIEW PROCESS.** We recommend that the Project Review Process procedure be explicitly and clearly defined in the CEEMP, and expanded to apply to all proposed projects. The Process should include the public participation elements discussed in Part III.
2. **RE-DESIGNATION.** We recommend that the re-designation procedure be explicitly and clearly defined in the CEEMP and include a meaningful public participation process. This process should include the public participation elements discussed in Part III.
3. **PUBLIC PARTICIPATION MODEL.** We recommend that the public participation process for the CEEMP should be explicitly defined, and should:
  - (a) offer a wide range of opportunities for concerned members of the public to participate in the decision-making process, including public meetings, review of draft reports, volunteer monitoring and enforcement, and consultation. Public interest groups should be included on a formal advisory council or decision-making body. The Naragansett Bay Project, Grays Harbour and Timber/Fish/Wildlife processes should be carefully studied for useful precedents;
  - (b) ensure that the public is routinely provided with equal access to good, full, and timely information;
  - (c) outline clearly the force and effect of all public input received, and provide a mechanism to ensure accountability for such input;
  - (d) provide adequate funding to allow public interest groups to participate in a meaningful way.
4. **CITIZEN INVOLVEMENT IN ENFORCEMENT, RESTORATION AND ENHANCEMENT.** Citizen monitoring, funded through both public and private grants, should be established to assist in the enforcement process, as in the Puget Sound Keeper program. CEEAC should carefully study public participation in restoration and enhancement processes in the Adopt-a-Beach program, Salt Pond Watchers, and the Great Lakes Wetlands Policy Consortium, for useful precedents.
5. **CONTRACTUAL ENFORCEMENT.** We recommend that the "contract model" for pollution prevention be explored to see if it can be used to supplement existing statutory regimes in the Cowichan Estuary.
6. **LAW REFORM.** We recommend that the government agencies which are parties to the CEEMP consider reforming their current statutory regimes to fully incorporate the "Polluter Pays" principle, and a public right of action for impairment of the environment.

