

# Testing the Waters

## A Review of Environmental Regulation of Run of River Power Projects in British Columbia

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## **INTRODUCTION**

The promotion of run-of-river (“ROR”) projects<sup>1</sup> has been a key feature of the British Columbia government’s plan to increase reliance on renewable sources of energy. Yet a great deal of controversy has arisen concerning the environmental footprint of these projects and whether sufficient regulatory oversight is currently in place. Government representatives and ROR proponents have defended existing regulatory processes by pointing to the large number of approvals required. In a recent letter to the California State Assembly, BC Minister of Environment, Barry Penner, asserted that a typical ROR project requires more than 50 permits, licences, reviews and approvals from 14 regulatory bodies.<sup>2</sup> The following report canvasses the provincial and federal environmental regulations that apply to ROR projects in BC. It focuses on those statutes and regulations that are most relevant to environmental issues, including each piece of provincial legislation and most of the federal legislation cited in Minister Penner’s letter.<sup>3</sup> This review suggests that many of the laws and approvals referred to by ROR advocates have little if any application to the environmental impacts of a given project.<sup>4</sup> Further, this report identifies significant shortcomings in the key legislative provisions and review processes that do address environmental concerns. These include inadequate access to public information, a lack of clear and balanced legislative mandates to guide decision-makers, reduced regulatory thresholds for environmental assessments, as well as ineffective monitoring and compliance measures. Despite the numerous laws and agencies involved, the current regulatory regime does not afford adequate environmental protection in the context of ROR development in BC.

## **PROVINCIAL LEGISLATION**

### ***Land Act and Water Act***

The Land Act<sup>5</sup> and Water Act<sup>6</sup> are the key legislative instruments governing the disposition of public resources in BC. These laws provide minimal guidance on how the environmental impacts of such decisions should be considered. What little environmental protection may be contemplated is generally left to the wide discretion of officials, and is not subject to objective, mandatory standards.

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<sup>1</sup> Run-of-River projects are just one type of Independent Power Project (“IPP”) in British Columbia. IPPs such as wind power, solar power, and geothermal energy projects, for example, are subject to a similar but not identical regulatory regime. This report examines the regulatory framework for ROR projects, although the term IPP is used in some cases where it is more appropriate.

<sup>2</sup> Scott Simpson, “British Columbia Green Power Faces Battle in California,” Vancouver Sun, April 1, 2009, online: <http://communities.canada.com/vancouver/print.aspx?postid=326740>. See also the Independent Power Producers Association of British Columbia, Run of River Fact Sheet, online: <http://www.ippbc.com/media/Run%20of%20River%20Fact%20Sheet.pdf>.

<sup>3</sup> As reported by Simpson, *ibid*.

<sup>4</sup> The figure above concerning the number of regulatory approvals required for a typical project incorporates various approvals, such as warning sign placements, which have little bearing on environmental protection. In addition, a number of the statutes cited by Minister Penner do not address environmental impacts. See, for example, discussions on the *Transportation Act*, S.B.C. 2004, c. 44, and *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22., below

<sup>5</sup> *Land Act*, R.S.B.C. 1996, c. 245.

<sup>6</sup> *Water Act*, R.S.B.C. 1996, c. 483.

The *Land Act* governs the disposition of provincial Crown land, which includes the foreshore and the beds of rivers and streams. Decisions on Crown land tenure are made by the Integrated Land Management Bureau (“ILMB”). Virtually all ROR projects in BC are located on Crown land. Land tenure is therefore one of the key approvals that a ROR project must obtain before any work can begin.<sup>7</sup>

The *Water Act* covers a range of water rights and uses, and vests ownership of and rights to surface water in the Crown. Any ROR project that involves diverting water from a stream, river or lake must acquire a “conditional water licence” issued by the Water Stewardship Division of the Ministry of Environment (“WSD”).

Applications for Crown land tenure and water licences are submitted jointly. This application package contains a preliminary description of the project called a Project Scope.<sup>8</sup> Based on the information provided, regulatory agencies provide a checklist of objectives and information requirements that the proponent can use to prepare its final application, called a Project Development Plan. Proponents must prepare an Environmental Impact Assessment, which is a report that describes how anticipated environmental impacts will be addressed.<sup>9</sup> Once the Project Development Plan is submitted, the regulatory decision to approve, reject or place conditions on the tenure or licence is made (by ILMB for land tenure and by WSD for water licences).

Concerns about environmental regulation under the *Land Act* and *Water Act*:

## 1. Inadequate Public Notice and Information Disclosure

- **Public notification is ineffective and delayed.** There is no legal requirement to notify the public of new ROR applications.<sup>10</sup> Public notification is often not provided until late in the land tenure adjudication process. After the application package is complete, project information is posted on government websites, but no public notification of the posting is given (e.g. in local newspapers or the *Gazette*).<sup>11</sup> Furthermore, land tenure applications

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<sup>7</sup> There are various forms of Crown land tenure, including investigative use permits, temporary permits, works permits, licences of occupation, leases, rights of way, and easements. This report focuses primarily on Crown land leases, which provide a right of occupation, typically for 30 to 45 years.

<sup>8</sup> *Independent Power Production in B.C.: An Inter-agency Guidebook for Proponents*, Ministry of Agriculture and Lands (September 2008), online: [http://www.al.gov.bc.ca/clad/IPP\\_guidebook.pdf](http://www.al.gov.bc.ca/clad/IPP_guidebook.pdf) (“IPP Guidebook”). The Project Scope includes: an executive summary; the proponent identification; the project concept; the capacity of project; linkage with other projects; the market for electricity; a schedule for completion of project; and, a section addressing any impacts (*IPP Guidebook*). The Project Scope was formerly known as the Preliminary Project Description.

<sup>9</sup> Environmental Impact Assessments (“EIAs”) should not be confused with provincial or federal environmental assessments, which are different regulatory processes discussed below. EIAs are reports prepared by the proponent (or its consultants) which describe how the proponent plans to address environmental issues such as instream flows, wildlife habitat, water quality, roads, bridges, flood control, and hazards to the environment. (*IPP Guidebook, ibid.* at 98).

<sup>10</sup> Note that the public notice contemplated by s. 33 of the *Land Act* is subject to the Minister’s discretion. As is the notice provision in s. 3(1) of the *Water Regulation*, B.C. Reg. 19/2010.

<sup>11</sup> *ILMB Decision Database*, <http://www.arfd.gov.bc.ca/ApplicationPosting/index.jsp>, and *Water Licences Query Database*, [http://a100.gov.bc.ca/pub/wtrwhse/water\\_licences.input](http://a100.gov.bc.ca/pub/wtrwhse/water_licences.input). Concerned citizens and organizations must search government databases on a regular basis if they wish to keep abreast of project proposals (*Improving the opportunities for public involvement in the Crown land tenure and water licence approval process for run-of-river*

are only posted for about 6 months after a final decision is made, effectively barring the review of past land tenure decisions made by ILMB.<sup>12</sup>

- **Key information is withheld from public scrutiny.** Initial applications are never posted. Nor are the government's preliminary reports on this information. Completed applications are often redacted, disclosing only maps without the accompanying preliminary project description.<sup>13</sup> For projects with less than 50 megawatts nameplate capacity,<sup>14</sup> the Project Development Plan is similarly withheld from the public. The only opportunity for public access to this information is through Freedom of Information ("FOI") requests. But FOI requests are time consuming, often face long delays, and may prove futile if government agencies deem disclosure a potential risk to the financial interests of the proponent or other third-parties.<sup>15</sup>

## 2. Crown Land Tenure Decisions Lack Clear Mandate to Consider Environment

- The *Land Act* does not provide environmental factors that must be considered in tenure applications. It gives no detailed guidance on whether or how to assess issues such as environmental impacts, land use suitability, or cumulative effects.<sup>16</sup>
- The government has drafted a Strategic Policy on Crown Land Allocation Principles,<sup>17</sup> but the extreme breadth of these principles renders them of no useful guidance to decision makers.<sup>18</sup> Further, as a policy document, it is not legally binding on decision makers.
- ILMB has provided, upon request, a list of other factors which it considers relevant to

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*electrical generation projects in British Columbia*, West Coast Environmental Law (December 2009), online: <http://www.wcel.org/sites/default/files/publications/IPP%20water%20license%20and%20land%20leases.pdf> ("Improving Opportunities").

<sup>12</sup> Improving Opportunities, *ibid.* at 7.

<sup>13</sup> *Ibid.* at 6.

<sup>14</sup> That is, waterpower projects not subject to the BC *Environmental Assessment Act*.

<sup>15</sup> In BC, FOI requests can take an excessive amount of time. Projects involving third parties, such as IPPs, have taken up to five years to process. See for example the IBM case "Liberals must divulge contents of lucrative contract awarded to IBM", *Vancouver Sun*, online:

<http://www.vancouversun.com/Liberals+must+divulge+contents+lucrative+contract+awarded/2328989/story.html>.

If a request will cause significant harm to the financial interests of the third party, then the government is prohibited from releasing the requested information (see s. 21 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ["FOIPPA"]). The third party can also object to the release of information, in which case, any information sought will be further delayed (FOIPPA, s.23). Perhaps most importantly, reduced funding to many ministries and to the Office of the Information and Privacy Commissioner ("OIPC") has caused increased delays and reduced oversight (see for example Keith Reynolds, "How Does BC Rank on Openness and Accountability? The Government's Approach to the Auditor General and Access to Information", Canadian Centre for Policy Alternatives (September 2006), online: <http://www.policyalternatives.ca/newsroom/news-releases/bc-lags-rest-canada-funding-public-watchdogs>). For a review of the illegally lengthy delays, extraordinarily high fees and redaction of information that are commonplace with the current provincial FOI system, see the Environmental Law Clinic submission to the Legislative Committee concerned with FOI issues at <http://www.elc.uvic.ca/press/FOI-submissions.html>.

<sup>16</sup> *Land Act*, *supra* note 6, s. 11(3).

<sup>17</sup> "Crown Land Allocation Principles", online:

[http://www.al.gov.bc.ca/clad/leg\\_policies/policies/allocation\\_principles.pdf](http://www.al.gov.bc.ca/clad/leg_policies/policies/allocation_principles.pdf) ["Crown Land Allocation Principles"].

<sup>18</sup> As an example, under the heading "Considerations for the Decision Maker: Crown Land Values are Managed to the Benefit of the Public", the document states: "Decisions should consider social, economic and environmental outcomes that may ensue as a result of an allocation of Crown land. Benefits may be short or long term, direct or indirect." *Ibid.*

Crown land tenure decisions, but these factors are not listed in any publicly available policy document and it is unclear what obligation, if any, decision makers are under to consider them.<sup>19</sup>

### 3. Water Licence Decisions Lack of Clear Mandate to Consider Environment

- The *Water Act* was first enacted in 1909. As a creature of this bygone era, its focus is on the disposition of quantities of water in exchange for government fees. It provides little to no direction on environmental issues such as stream health or water conservation.
- Water licences are issued on a “first in line, first in right” basis.<sup>20</sup> This policy encourages proponents to apply for more licences than they can reasonably expect to use.<sup>21</sup>
- Licence decisions must account for the interests of the application, licencees, land and riparian owners, and other applicants. There is no clear legal obligation to consider regional or local land use plans, stream health, cumulative effects, or other environmental factors.<sup>22</sup>

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<sup>19</sup> In response to an email by West Coast Environmental Law, an ILMB representative suggested that the following factors were considered by decision makers in Crown land tenure applications:

- the provisions of the *Land Act*,
- the Crown Land Allocation Principles, (*supra* note 18)
- “Strategic Support for Land Use Planning” documents, ([http://www.agf.gov.bc.ca/clad/strategic\\_land/lup\\_support.html](http://www.agf.gov.bc.ca/clad/strategic_land/lup_support.html))
- approved local and regional plans,
- the rules for ‘establishment and use’ found in any applicable Crown land designations, such as parks, protected areas, special use zones, reserves and old growth management areas,
- other government agency perspectives including local, provincial and federal,
- comments and concerns of the local First Nation(s),
- comments from other tenure holders who may be affected, and
- public input.

“Improving Opportunities”, *supra* note 12 at 13.

<sup>20</sup> *Water Act*, *supra* note 7 at 15.

<sup>21</sup> Only when multiple water licences are issued on the same day do the respective rights take precedence according to their purposes. In times of water shortage, the licensee with an earlier water licence is allowed to take as much water as is stipulated in its licence before a late-comer licensee is allowed to take any (“Improving Opportunities”, *supra* note 12). When there are two licences issued on the same date and to the same stream, the allocation is prioritized according to the purposes of the licences, with the following rank: “domestic, waterworks, mineral trading, irrigation, mining, industrial, power, hydraulicking, storage, conservation, conveying and land improvement purposes.” Conservation, it should be noted, ranks second to last of the 12 contemplated uses. *Water Act, ibid.*, s. 15(2).

<sup>22</sup> The only provision in the Act to even remotely contemplate environmental impacts is section 12, which says that the decision maker “may” refuse or amend a licence that is inconsistent with an approved resource management plan. When questioned by West Coast Environmental Law on the factors relevant to licence decisions, WSD stated that water licence decisions are based on Technical Assessments which are prepared by WSD staff and summarize the specifications, comments, and potential impacts in relation to the project. One Technical Assessment reviewed by West Coast Environmental Law contained information about the following issues: “water reserves, lands affected by the proposed works, existing water licences on the watercourse, riparian rights, other affected landowners, fishery flow and environmental impact on water resources, wildlife habitat, flood control, recreation, other potential uses of the water, transportation, hazard to the public, impact on Crown land-owned resources, aesthetic values, First Nations consultation, public consultation and interest, and socio-economic effects.” However, as stated below, the lack of publicly available documents setting out the relevant considerations, and WSD’s refusal to provide written reasons for licence decisions, effectively prevent the public from understanding the factors which led to the decision in a given instance.

- The Environmental Appeal Board (“EAB”) has recognized that some environmental issues such as impacts to fish instream flows are *relevant* to water licence decisions, but the WSD is not *required* to consider these factors.<sup>23</sup> In addition, the EAB has held that the project’s land-based cumulative impacts and community opposition are *not* relevant considerations in deciding whether a water licence should be issued.<sup>24</sup>
- Licences cannot be amended for water conservation. As long as the licensee abides by the Act and the terms of the licence, the Act does not provide authority to amend licences to reduce the quantities of water provided.<sup>25</sup>

#### 4. Reasons for Tenure and Licence Decisions are Inadequate or Non-Existent.

- The ILMB posts written reasons on its website for decisions on Crown land tenure applications. However, these reasons tend to be short and shed little light on *why* the decision was made or the factors considered.<sup>26</sup>
- The WSD does not issue *any* reasons at all for its decisions on water licences.
- Without full explanation of tenure and licence decisions, especially in light of the lack of detailed legislative or policy guidance, the regulatory process appears secretive. This lack of transparency has fed growing concerns about whether land tenure and water licence decisions are, in fact, based on a thorough and consistent consideration of the relevant environmental impacts.<sup>27</sup>

#### 5. Insufficient Grounds and Procedures for Appeal

- The internal appeal provisions under the *Land Act* are procedurally unclear, impractical, and subject to the broad discretion of the Minister.<sup>28</sup>

<sup>23</sup> *Planedin v. Deputy Comptroller of Water Rights*, EAB Decision No. 2006-WAT-012(a) at 19-20, online: [www.eab.gov.bc.ca/water/2006wat012a.pdf](http://www.eab.gov.bc.ca/water/2006wat012a.pdf).

<sup>24</sup> *Ibid.* Also see “Improving Opportunities”, *supra* note 12.

<sup>25</sup> Section 18(1) sets out the purposes for which a licence may be amended, which are to:

- (a) extend the time set for beginning construction of the works;
- (b) extend the time set for completion of the works;
- (c) extend the time set for making beneficial use of the water;
- (d) authorize additional or other works than those previously authorized;
- (e) correct an error in the licence;
- (f) remove a provision of the licence that is inconsistent with this Act;
- (g) authorize the use of water for some purpose other than that specified in the licence;
- (h) extend the term of the licence;
- (i) increase or reduce the quantity of water authorized to be diverted or stored if it appears to have been erroneously estimated.

Note that s. 18(1)(i) only allows a reduction in quantity where there has been an “error” in the quantity of water estimated. It is not immediately clear what might constitute such an error. Arguably, this provision would presumably not apply when the cumulative effects of previously issued water licences were not considered, or in circumstances where such measures were considered but were not determinative.

<sup>26</sup> This is based on the review of ILMB decisions conducted by West Coast Environmental Law in “Improving Opportunities”, *supra* note 12 at 15.

<sup>27</sup> Some critics have alleged that impacts to fish, wildlife and the overall ecosystem are only considered by the WSD in a “best-case scenario”. See Tanis Douglas, “Green” Hydro Power – *Understanding Impacts, Approvals, and Sustainability of Run-of-River Independent Power Projects in British Columbia*, Watershed Watch Salmon Society (August 2007), online: [http://www.rivershed.com/documents/green\\_hydro\\_power.pdf](http://www.rivershed.com/documents/green_hydro_power.pdf) (“Green” Hydro Power”).

<sup>28</sup> Section 63 of the *Land Act*, *supra* note 6, sets out the procedure for registering an objection to the disposition of a

- WSD water licence decisions may be appealed to the BC EAB, but only by the applicant, directly affected land owners, riparian owners<sup>29</sup>, or other licensees or applicants.<sup>30</sup> There is no general right of appeal to the public or organizations representing the public interest.

## 6. Monitoring and Enforcement of Conservation Measures is Rare

- Government officials are authorized to inspect project sites and issue penalties for contraventions of the Act, regulations, or terms of a licence. However, funding for monitoring and enforcement of environmental protection has declined rapidly since the 1990s. This has been seen through downsized budgets for environmental ministries and by reductions in the number of conservation officers.<sup>31</sup>
- Fines are rare. If issued at all, they have been for amounts as little as \$230.<sup>32</sup>

### *Utilities Commission Act*

The *Utilities Commission Act*<sup>33</sup> sets out the powers of the Utilities Commission (the “Commission”) to regulate public utilities in BC. To meet the goals set out in the Government’s Energy Plan,<sup>34</sup> BC Hydro plans to purchase large quantities of power from ROR projects. BC Hydro manages a competitive bidding process among IPPs for awards of Electricity Purchase Agreements (“EPAs”). EPAs are subject to regulatory review by the Commission under s. 71 of

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Crown land tenure. Any person may submit a written notice of objection to such a disposition. However, the notice must be submitted *before* the disposition is made. Given the inadequate notice and information disclosure, this is highly impractical. Second, the Minister has *absolute discretion* on whether to hold a hearing to consider the objection. There are no factors to guide how discretion should be exercised in such decisions. Third, if a hearing is held and a report issued, the only obligation on the statutory decision maker is to “review” the report and “take account” of its recommendations. He or she *may* (or may not) then make an order setting out what is deemed “just” in the circumstances. Section 64 of the *Land Act* provides that only an “affected person” (i.e. likely only the applicant, a land owner, riparian owner, licensee or other applicant) may appeal such an order, and even then only on a point of law. Once Crown land tenure has been issued (i.e. the time for s. 63 objections has passed), the only other alternative would be to judicially review the tenure decision. However, in addition to the considerable time expense involved in such proceedings, members of the general public or public interest organizations may be considered not to have a direct interest and therefore be denied standing.

<sup>29</sup> That is, owners of land adjoining the water body in question.

<sup>30</sup> *Water Act*, *supra* note 7, s. 92(1).

<sup>31</sup> According to a report by West Coast Environmental Law, enforcement actions declined by over 50% between 1995 and 2005, and written warnings (as opposed to fines or other legal actions) were increasingly relied upon. Major funding cutbacks also occurred during the same time period, and may be a factor in the decline. For example, the Compliance Policy and Planning Branch, of the Ministry of Environment, responsible for “ministry-wide leadership and service in support of a strategic approach to compliance management”, has only four full time staff positions. See “No Response: A survey of environmental law enforcement and compliance in BC”, West Coast Environmental Law (2007), pages 24-26, online: <http://wcel.org/sites/default/files/publications/No%20Response%20-%20A%20survey%20of%20environmental%20law%20enforcement%20and%20compliance%20in%20BC.pdf>.

<sup>32</sup> In a review of the quarterly reports for 2007, 2008, and the first two quarters of 2009, only three tickets were issued for breaching the terms or conditions of a licence/authorization/permit under the *Water Act*. Furthermore, the fines issued were for paltry amounts. Husky Oil, for example, was fined \$230 for its contravention.

<sup>33</sup> *Utilities Commission Act*, R.S.B.C. 1996, c. 473.

<sup>34</sup> The BC Energy Plan is available on the government of BC website: <http://www.energyplan.gov.bc.ca/>.

the Act.<sup>35</sup> In addition, construction or expansion of utility plants or systems (e.g. to supply power acquired from IPPs) may require Commission approval through a Certificate of Public Convenience and Necessity (“CPCN”) under s. 45 of the Act.

### Concerns with the *Utilities Commission Act*

- **Key approvals must adhere to pro-ROR government policy.** In 2008, the government introduced legislative amendments to streamline regulatory approvals of IPP projects.<sup>36</sup> The Act now requires the Commission to ensure that CPCNs and EPAs are consistent with the government’s energy objectives.<sup>37</sup> These objectives include important environmental considerations like the reduction of greenhouse gas, investment in innovative technology, and the promotion of “clean or renewable energy”, but do not refer to potential environmental impacts of additional “clean energy” generation such as compromised wildlife habitat or reduced water quality.<sup>38</sup> Coupled with the anticipated increase in electricity demand,<sup>39</sup> these measures create an unbalanced regulatory foundation in favour of ROR expansion, leaving key environmental impacts outside of the scope of the Commission’s review.
- **The Act allows exemptions from key regulatory approvals.** The Minister may provide exemptions from CPCNs or EPA approvals.<sup>40</sup>
- **Local government authority has been effectively abolished.** After concerns with impacts to grizzly populations and planning gaps prompted a BC regional district to oppose a ROR project in 2006, the government amended section 121 of the Act to effectively abolish local authority over ROR projects.<sup>41</sup> The BC government still has a

<sup>35</sup> On March 11, 2010, BC Hydro chose 19 IPP projects for an award of energy purchase contracts, pursuant to its Clean Power Call issued on June 11, 2008. See BC Hydro website: [http://www.bchydro.com/planning\\_regulatory/acquiring\\_power/clean\\_power\\_call.html](http://www.bchydro.com/planning_regulatory/acquiring_power/clean_power_call.html).

<sup>36</sup> See Bill 15 – 2008, *Utilities Commission Amendment Act*, 2008. Online: [http://www.leg.bc.ca/38th4th/1st\\_read/gov15-1.htm](http://www.leg.bc.ca/38th4th/1st_read/gov15-1.htm)

<sup>37</sup> Section 1 of the *Utilities Commission Act*, *supra* note 34, defines these objectives as follows:

- (a) to encourage public utilities to reduce greenhouse gas emissions;
- (b) to encourage public utilities to take demand-side measures;
- (c) to encourage public utilities to produce, generate and acquire electricity from clean or renewable sources;
- (d) to encourage public utilities to develop adequate energy transmission infrastructure and capacity in the time required to serve persons who receive or may receive service from the public utility;
- (e) to encourage public utilities to use innovative energy technologies
- (i) that facilitate electricity self-sufficiency or the fulfillment of their long-term transmission requirements, or
- (ii) that support energy conservation or efficiency or the use of clean or renewable sources of energy;
- (f) to encourage public utilities to take prescribed actions in support of any other goals prescribed by regulation;

<sup>38</sup> Furthermore, the Act requires CPCNs and EPAs to be consistent with the government’s goal of deriving 90% of BC power from sources of clean energy (*Ibid.*, ss. 64.01, 64.02).

<sup>39</sup> BC Hydro projects an approximate 1.4% annual increase in electricity demand in BC over the next 20 years. See BC Hydro website: [http://www.bchydro.com/planning\\_regulatory/meeting\\_demand\\_growth/forecasting\\_growth.html](http://www.bchydro.com/planning_regulatory/meeting_demand_growth/forecasting_growth.html)

<sup>40</sup> *Utilities Commission Act*, *supra* note 34, ss. 22, 88.

<sup>41</sup> In 2006, the Squamish-Lillooet Regional District denied zoning approval for the Ashlu River IPP project proposed by Ledcor Inc. (J. Calvert, *Liquid Gold: Energy Privatization in British Columbia* (Fernwood Publishing:

policy of consulting local governments on ROR projects, but the Province retains sole jurisdiction over Crown land tenure, water licences, and utilities approvals.<sup>42</sup>

### ***Forest Act and Forest and Range Practices Act***

The *Forest Act*<sup>43</sup> and the *Forest and Range Practices Act*<sup>44</sup> (“FRPA”) are the two main pieces of legislation governing forestry activities in British Columbia. They determine the licencing, permitting, and planning requirements for logging, incidental forest practices (such as clearing, road building, and reforestation), and other development on forest and range lands.

The use or construction of roads on forest land may obligate ROR project proponents to obtain approvals from the Ministry of Forests and Range (“MOFR”).<sup>45</sup> Before issuing such approvals, MOFR officials are typically required to consider a broad scope of potential environmental impacts such as landslides, fan destabilization, soil disturbance, or deposits of sediment or harmful substances into streams, lakes, or wetlands.<sup>46</sup>

Concerns about the application of forestry legislation to ROR projects:

- **Minor tenures exempt from environmental protections.** Some licences that ROR proponents must obtain are exempt from key legislative protections. Occupants Licence to Cut (“OLTC”) are defined as minor tenures.<sup>47</sup> Holders are not required to prepare Forest Stewardship Plans, and can be exempted by MOFR regional or district managers from practice requirements regarding soil protection, riparian areas, forest health, watersheds, biodiversity, and wildlife protection.<sup>48</sup>

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2007), at pg 175). Bill 30 subsequently amended s. 121 of the *Utilities Commission Act* such that no decision of a local government “... supersedes or impairs a power conferred on the commission or an authorization granted to a public utility”. Because CPCNs may be required for public utilities such as BC Hydro to use ROR power, the amendment of s. 121 of the Act allows the Commission to ignore or override local government land use decisions regarding ROR projects.

<sup>42</sup> Minister Richard Neufeld’s speech to the IPPBC AGM (June 7, 2006); Minister Neufeld, Debates of the Legislative Assembly (May 15, 2006 Afternoon Sitting), online: <http://www.leg.bc.ca/hansard/38th2nd/H60515p.htm#bill30-3R>. Moreover, nearly all ROR projects are located on Crown land and thereby fall outside the geographical jurisdiction of local governments.

<sup>43</sup> *Forest Act*, R.S.B.C. 1996, c. 157.

<sup>44</sup> *Forest and Range Practices Act*, S.B.C. 2002, c. 69.

<sup>45</sup> An Occupant Licence to Cut authorizes the holder to cut Crown timber. A Road Use Permit authorizes the holder to use a Forest Service Road for industrial purposes or to construct/modify the road. A Works Permit allows the holder to carry out works within a Forest Service Road right-of-way. Finally, a Third Party Road Use Agreement allows the holder to use the road in situations where an industrial user already has a Road Permit for Non-Forest Service Roads (IPP Guidebook, *supra* note 9).

<sup>46</sup> MOFR Design Criteria for Works that May Impact Forest Roads or Timber Tenure, Online: Ministry of Forests and Range, July 2005  
[http://www.for.gov.bc.ca/hth/engineering/documents/publications\\_guidebooks/publications\\_reports/MOF-IPP-Design-Criteria\\_July7-05\\_.pdf](http://www.for.gov.bc.ca/hth/engineering/documents/publications_guidebooks/publications_reports/MOF-IPP-Design-Criteria_July7-05_.pdf).

<sup>47</sup> *Forest Practices and Planning Regulation*, B.C. Reg. 4/2010, s. 1 “minor tenure”.

<sup>48</sup> FRPA General Bulletin, “Application of FRPA to Independent Power Producers, Mineral Interests and Other Occupiers of the Land, No.16 (September 9, 2008), online  
[http://www.for.gov.bc.ca/dck/Tenures/FRPA\\_gen\\_bulletin\\_16.pdf](http://www.for.gov.bc.ca/dck/Tenures/FRPA_gen_bulletin_16.pdf), at 2.

- **Key wildlife protections have been effectively repealed.** Many ROR projects occur in areas of critical wildlife habitat where activities such as forest clearing or road building are prohibited under the FRPA by designations called General Wildlife Measures (“GWMs”). To proceed, project proponents therefore require an exemption from applicable GWMs. In February 2008, the Ministry of Environment issued a Decision Note stating that if an Environmental Assessment certificate has been granted, FRPA officials *must grant proponents an exemption to otherwise applicable GWMs*.<sup>49</sup> This policy fetters the discretion of MOFR officials and, in effect, repeals one of the few existing legal protections in BC for at-risk species.
- **Excessive logging occurs.** Government inspection reports indicate that right-of-way logging by ROR proponents has occurred in excessively wide swaths in old-growth forests—up to four times what was agreed to in management plans.<sup>50</sup>
- **Wildlife protection under the FRPA has been poor in the past.** The most endangered bird in Canada is the Spotted Owl. They live only in BC, where there are less than 20 left in the wild. Nonetheless, the BC government continues to authorize logging in their habitat, despite recommendations in 2003 and 2007 by the Spotted Owl Recovery team to ban further habitat destruction.<sup>51</sup>

### ***Environmental Assessment Act*<sup>52</sup> (BC)**

Certain major projects within British Columbia must undergo an environmental assessment (“EA”), a process overseen by the Environmental Assessment Office in accordance with the BC *Environmental Assessment Act* (“EAA”). A provincial EA is triggered by certain thresholds set out by regulation,<sup>53</sup> whereas federal environmental assessments (discussed below) are triggered if a project requires federal money, land, or approvals.

Concerns about the BC EAA:

- **Legal protection has been weakened.** The Act, which came into force in 1996, was rewritten in 2002 in what has been described as “a dramatic step backward for environmental assessment in British Columbia.”<sup>54</sup>
- **Project thresholds are too high.** The 2002 amendments increased thresholds for the review of hydroelectric power plants (and associated water diversion projects) from 20

<sup>49</sup> Ministry of Environment Decision Note, February 25, 2008, File: 280-20. The Note was approved on March 18, 2009 by the Deputy Minister of Environment.

<sup>50</sup> See Cloudworks Energy Inc.’s response to the Ministry of Environment’s IPP Inspection Team Findings, April 9, 2009, online: [http://www.cloudworksenergy.com/PDF/CEI\\_Responses\\_to\\_MOE\\_Audit\\_9April2009.pdf](http://www.cloudworksenergy.com/PDF/CEI_Responses_to_MOE_Audit_9April2009.pdf).

<sup>51</sup> See Faisal Moola et al., “Rich Wildlife Poor Protection: The Urgent Need for Strong Legal Protection of British Columbia’s Biodiversity”, David Suzuki Foundation and Sierra Legal (2007), online: [http://www.davidsuzuki.org/Publications/Rich\\_wildlife\\_poor\\_protection.asp](http://www.davidsuzuki.org/Publications/Rich_wildlife_poor_protection.asp), at 10. See also the ELC and Sierra Legal Letter to the Minister of Environment et al., “Re: *Wildlife Act* Review” (July 18, 2007), online: <http://www.elc.uvic.ca/documents/letter%20-%20Wildlife%20Act%20Review.pdf>, at 3.

<sup>52</sup> *Environmental Assessment Act*, S.B.C. 2002, c. 43.

<sup>53</sup> *Reviewable Projects Regulation*, B.C. Reg. 4/2010.

<sup>54</sup> “Deregulation Background: Bill 38 – The New Environmental Assessment Act”, West Coast Environmental Law, (May 15, 2002; updated November 2, 2004), online: <http://wcel.org/resources/publication/deregulation-backgrounder-bill-38-new-environmental-assessment-act> (“Deregulation Background”).

megawatts to 50 megawatts. As a result, a large proportion of ROR projects do not undergo EAs.<sup>55</sup> Thresholds are also very high for electrical transmission lines. The current threshold is 500 kV. As a result most IPP transmission lines will not trigger a provincial EA, even where the transmission lines are located in an old growth management area or critical wildlife habitat.<sup>56</sup>

- **Provincial EAs are subject to political discretion.** The EA process is now directed by government policy and subject to broad political discretion.<sup>57</sup> The Executive Director of the Environmental Assessment Office can ‘waive’ the EA requirement if he or she considers that the project will not have significant adverse effects.<sup>58</sup> The meaningful participation of First Nations, local governments, and other stakeholders is no longer guaranteed, but is instead subject to the discretionary application of government consultation policies.<sup>59</sup> Public access to EA documents is guided by the same policy regulation and subject to the Executive Director’s sole discretion.<sup>60</sup> And, the discretion for ministers to approve an EA certificate application is unstructured and unbounded by substantive criteria.<sup>61</sup>
- **The EAA process is not objective.** Where the former Act contained a purposes section to guide the EA process, the current Act is silent.<sup>62</sup> Moreover, section 11(3) of the EAA

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<sup>55</sup> This determination was made based on data obtained from the Independent Power Producers of BC website suggesting that 50 out of 58 small hydro projects proposed since 2003 were less than 50MW. In some cases, where two or more ROR projects are located in close proximity to each other, these projects may be “clumped” together and undergo an EA collectively if their cumulative output is greater than 50MW. See [http://www.ippbc.com/EN/bc\\_ipp\\_map/](http://www.ippbc.com/EN/bc_ipp_map/).

<sup>56</sup> *Reviewable Projects Regulation*, *supra* note 54, s. 9.

<sup>57</sup> For example, ss. 11 and 14 of the EAA give the Executive Director or Minister the discretion to determine the scope of the assessment.

<sup>58</sup> *EAA*, *supra* note 53, s. 10(1)(b)(ii).

<sup>59</sup> *Public Consultation Policy Regulation*, B.C. Reg. 373/2002. Under the former Act, a project committee consisting of federal, provincial, First Nation, and local representatives would guide the process, identifying information requirements and determining the scope of review.

<sup>60</sup> *EAA*, *supra* note 53, ss. 11, 25.

<sup>61</sup> The BC Court of Appeal has described the broad discretion of the minister to grant an EAC under the current Act as follows: “I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential “adverse effects” from going forward. The Act does not specify effects on whom or what.” (*Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, at para. 57). In *Do Rav Right Coalition v. Richmond/Airport/Vancouver Rapid Transit Line Project and RAV Project Management Ltd.* 2005 BCSC 991, Bauman J. (at para. 34) characterized the minister’s discretion thus: “...at the end of the process, a political, policy-driven decision is made by elected Ministers of the Crown; they are given a very broad discretion to consider the issue: they may consider “any other matters that they consider relevant to the public interest in making their decision on the application.” The breadth of this discretion fails to guarantee that environmental factors will be given due weight.

<sup>62</sup> The former *Environmental Assessment Act*, R.S.B.C. 1996, c. 119, included a purposes section that stated: “The purposes of this Act are

- (a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,
- (b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
- (c) to prevent or mitigate adverse effects of reviewable projects,
- (d) to provide an open, accountable and neutrally administered process [...]
- (e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its

requires the assessment itself to reflect government policies. This could make what should be a scientific review of the potential environmental impacts of a project subject to the current policy goals of the provincial cabinet, such as expanding hydroelectric power into remote communities.<sup>63</sup>

- **No regional or cumulative assessment.** There is no requirement under the Act for regional assessments of cumulative impacts from ROR projects and other resource-based industries in the area. This is surprising given that the ostensible purpose of an EA is to ensure that the potential environmental and socio-economic impacts of major projects within the province are understood and accounted for. As a result, cumulative effects of ROR projects will go un-checked unless the federal Canadian Environmental Assessment Act is also triggered, as discussed below.
- **No mandatory review of alternative sites and methods.** The 2002 Act repealed the previous statutory provisions that required evaluation of alternative sites and methods to the proposed project. Now the 2007 EAO Guide to Preparing Terms of Reference states that a number of issues only need to be addressed if a project triggers a federal environmental assessment: these issues include the assessment of alternative means of carrying out the project, cumulative environmental effects, the potential for accidents and malfunctions and natural hazards to the project.<sup>64</sup>
- **Inadequate monitoring and compliance with EA commitments.** Proponents may make commitments to mitigate environmental impacts under the EA process, but monitoring of such commitments can be inadequate, as can actual compliance.<sup>65</sup>

### ***Fish Protection Act***

The BC government introduced the *Fish Protection Act*<sup>66</sup> in 1997. Among other measures, the Act contemplates the protection of threatened fish populations through the designation of “sensitive streams” and the development and imposition of associated recovery plans.

#### Concerns about the *Fish Protection Act*:

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agencies and British Columbia's neighbouring jurisdictions.

These provisions were removed when the Act was rewritten in 2002.

<sup>63</sup>BC's Energy Plan affirms the government's support for BC Hydro's remote community electrification program, as well as a commitment for 3000 gigawatt hours of electricity on top of the firm energy requirements, to be obtained from net-zero greenhouse gas emissions projects. See [http://www.energyplan.gov.bc.ca/PDF/BC\\_Energy\\_Plan\\_Electricity.pdf](http://www.energyplan.gov.bc.ca/PDF/BC_Energy_Plan_Electricity.pdf).

<sup>64</sup> Environmental Assessment Office. A Guide to Preparing Terms of Reference for an Application for an Environmental Assessment Certificate. (Victoria: Environmental Assessment Office, 2007), online: <http://www.eao.gov.bc.ca/guide/tor/Guide%20to%20Preparing%20Terms%20of%20Reference%20Sept07.pdf>. By contrast, several jurisdictions require the consideration of alternative project locations or alternatives to the project itself as a mandatory feature of environmental assessment. For example, see International Institute for Environment and Development. A Directory of Impact Assessment Guidelines, second edition. (Nottingham: International Institute for Environment and Development, 1998) and the US National Environmental Policy Act, Sec. 102 [42 USC § 4332].

<sup>65</sup> “Independent Power Producer (IPP) Projects in British Columbia: Backgrounder”, West Coast Environmental Law (May 2009), online: <http://wcel.org/resources/publication/independent-power-producer-ipp-projects-british-columbia-legal-backgrounder>, at 14. Also see note 32, above, which discussed the general decline in environmental enforcement actions in BC.

<sup>66</sup> *Fish Protection Act*, S.B.C. 1997, c. 21.

- **Many key provisions of the Act are not in force**, and require a provincial cabinet order to become law. For example, section 5 would grant the Minister authority to consider fish when issuing *Water Act* licences and approvals.<sup>67</sup> Section 8 would allow water licences to be issued to community groups for the purpose of protecting instream flows.<sup>68</sup> These provisions would provide tangible solutions to conservation concerns, and enhance regulatory integration. But the government has not announced any intention to bring these (or other) provisions into force.
- **Provisions in force have not been given full effect.** To date, only two streams have been designated and remediated under the Act’s recovery planning process. Despite widespread concern regarding provincial fish populations and stream health, there are no current plans for further action under this provision.<sup>69</sup>
- **Regulations under the Act also contain weaknesses.** The *Riparian Areas Regulation* includes streamside protection directives, but the regulation itself only applies to projects within regional districts. Because most ROR projects occur on Crown land, the Regulation cannot be applied. In addition, the amendment of s. 121 of the *Utilities Commission Act* (discussed above) effectively repeals local government regulation.<sup>70</sup>

### *Wildlife Act*

British Columbia is one of only two provinces in Canada with no law to specifically protect endangered species.<sup>71</sup> The *Wildlife Act*<sup>72</sup> is predominantly concerned with the regulation of hunting in BC. The Act does, however, contain some provisions respecting endangered species. It allows the Minister, with permission of Cabinet, to designate Wildlife Management Areas (“WMAs”). The Act also allows Cabinet to designate, by regulation, endangered or threatened species.

Concerns about the *Wildlife Act*:

- **Species-protection provisions are rarely used.** Only one threatened and three endangered species have been designated under the Act, although dozens are recognized by the BC Ministry of Environment and under the federal *Species at Risk Act*.<sup>73</sup> The

<sup>67</sup> *Ibid.*, s. 5 (not yet in force).

<sup>68</sup> *Ibid.*, s. 8 (not yet in force).

<sup>69</sup> Personal communication with Jeff Hoyt, BC Ministry of Environment, February 18, 2010.

<sup>70</sup> For another example, the *Sensitive Streams Designation and Licensing Regulation*, B.C. Reg. 89/2000, prohibits the construction of new dams on 15 streams but arguably has had little real effect. When the Act was passed there were no proposals to build dams on any of these streams, and no new streams have been designated since 2000.

<sup>71</sup> The other is Alberta.

<sup>72</sup> *Wildlife Act*, R.S.B.C. 1996, c. 488.

<sup>73</sup> Two mammals and two birds are listed under Schedules D and E of the *Designation and Exemption Regulation*, B.C. Reg. 168/90. By contrast, the Ministry of Environment lists 28 mammals and 40 birds on its “red list”, a list of extirpated, endangered, and threatened species and subspecies (based on information accessed on February 16, 2010; see <http://www.env.gov.bc.ca/atrisk/red-blue.htm>). The federal *Species At Risk Act* lists approximately 11 mammals and 16 birds in BC as endangered or threatened, and one mammal as extinct (based on information accessed on February 16, 2010, online: [http://www.sararegistry.gc.ca/sar/index/default\\_e.cfm](http://www.sararegistry.gc.ca/sar/index/default_e.cfm)). The *Wildlife Act*’s *Designation and Exemption Regulation* does however list dozens of species as ‘game’, ‘small game’, ‘big game’ and ‘fur-

species-protection under the Act will, therefore, have at best only an occasional influence on the regulation of ROR projects within the Province.

- **No mandatory designation.** Instead of requiring certain species to be designated as endangered or threatened if populations fall below scientifically determined thresholds, species designation is only optional under the Act, and subject to the political will of Cabinet.<sup>74</sup>
- **No mandatory protection.** Once a species is designated, the Act does not prescribe a timeframe within which protective measures, such as a recovery plan, must be in place. This means that if government priorities shift elsewhere, endangered species may be protected on paper, but remain under siege in the wild.
- **Wildlife management areas provide minimal protection.** The Act does not prescribe any prohibited or restricted uses or industrial activities within WMAs. The Act provides no mandatory protections within WMAs; the only requirement is that land users acquire the written consent of the regional manager of MoE.<sup>75</sup> Unlike protected areas, industrial activity such as forestry, mining, or waterpower projects are typically permitted within WMAs.<sup>76</sup> Only one WMA has been designated since 2001.<sup>77</sup>

### ***Park Act***

The *Park Act*<sup>78</sup> prohibits a variety of commercial and industrial activities within park boundaries that are incompatible with the recreational or other values of provincial parks. However, ROR projects have been exempted from key protections otherwise applicable under the Act.

Concerns about the *Park Act*:

- **ROR projects are allowed in some parks.** Park-use permits may be issued to allow “local run-of-the river projects” within Conservancies (a type of park) for communities that “do not otherwise have access to hydro electric power.”<sup>79</sup>
- **Park waterways are not protected.** The Act does not prohibit or require mitigation of the environmental impacts of ROR projects built outside of park boundaries on waterways that later run through parks.
- **Park borders can be changed.** The government has unlimited authority to change the

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bearing’.

<sup>74</sup> Under section 6, the designation of endangered species is optional, even if it is clear that “a species of wildlife is threatened with imminent extinction throughout all or a significant portion of its range in British Columbia because of the action of humans”.

<sup>75</sup> *Wildlife Act*, *supra* note 73, s. 4(4). The regional manager may decide on a case by case basis what the permitted, restricted, or prohibited uses are in a WMA by order. See Ministry of Environment website, “Wildlife Management Areas” <http://env.gov.bc.ca/bcparks/explore/wma/>.

<sup>76</sup> Furthermore, the designation of a WMA does not affect the pre-existing rights of land users within that area. *Wildlife Act*, *ibid.*, s. 4(3).

<sup>77</sup> Ministry of Environment website, “Wildlife Management Areas, Alphabetically Listed” [http://env.gov.bc.ca/bcparks/explore/wma/alpha\\_listing.html#u](http://env.gov.bc.ca/bcparks/explore/wma/alpha_listing.html#u).

<sup>78</sup> *Park Act*, R.S.B.C. 1996, c. 344.

<sup>79</sup> *Ibid.*, s. 9(10) and (11)

boundaries of parks, other than “Class A” parks.<sup>80</sup> For example, when a ROR project was proposed requiring transmission lines through Pinecone Burke Provincial Park, the government simply invited the proponent to apply for a “park boundary adjustment” (which was later denied after huge public protest).<sup>81</sup>

- **Roads and transmission lines can go through parks.** Private construction in parks is prohibited without a permit,<sup>82</sup> but in Class B parks, a permit can be issued as long as, in the Minister’s opinion, to do so is “not detrimental to the recreational values of the park concerned.”<sup>83</sup> Construction permits can be issued in Class C parks (conservancies) with no restrictions.<sup>84</sup>

### ***Heritage Conservation Act***

The *Heritage Conservation Act*<sup>85</sup> seeks to encourage and facilitate the protection and conservation of heritage property in British Columbia.

Concerns about the *Heritage Conservation Act*:

- **Any environmental protection offered by the Act is incidental.** The Act’s protective provisions are only triggered if the proposed project would damage a designated provincial heritage site or an object of archaeological value. There are only 51 designated heritage sites, with a combined area of less than four kms<sup>2</sup>, so the Act seldom applies to ROR projects.<sup>86</sup> Moreover, the Act allows the Minister to issue permits authorizing damage, destruction, or alteration of heritage sites and objects.<sup>87</sup>

### ***Water Protection Act***

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<sup>80</sup> *Ibid.*, s. 7. Per s. 5(3), Class A parks are the parks named in Schedules C and D of the *Protected Areas of British Columbia Act*, S.B.C. 2000, c. 17. For the BC park boundary adjustment policy, see the BC Parks website: [http://env.gov.bc.ca/bcparks/planning/bound\\_adj\\_policy.html](http://env.gov.bc.ca/bcparks/planning/bound_adj_policy.html).

<sup>81</sup> See the “Draft Terms of Reference for the Upper Pitt River Water Power Project, Application for an Environmental Assessment Certificate”, at page 69, which sets out the plan to seek a park boundary adjustment, online: [http://a100.gov.bc.ca/appsdata/epic/documents/p291/d25465/1203704618323\\_ab877e2e9ab1433eb461a38c7aa5c447.pdf](http://a100.gov.bc.ca/appsdata/epic/documents/p291/d25465/1203704618323_ab877e2e9ab1433eb461a38c7aa5c447.pdf). The public opposition to the project is documented in news articles such as: “Pitt project was bungled from the beginning,” *the Province*, p. A06, 27-Mar-2008; and, Scott Simpson, “B.C. government rejects Pitt power project” *Vancouver Sun* (March 26, 2008).

<sup>82</sup> *Park Act*, *supra* note 79, s. 13.

<sup>83</sup> *Ibid.*, ss. 8(3) and (4). Park-use permits in Class A parks, by contrast, may only be granted if *necessary* to preserve the recreational values of the park: ss. 8(1) and (2).

<sup>84</sup> *Ibid.* In regards to conservancies, the Minister actually has explicit power to issue a permit authorizing road construction in a conservancy listed in Schedule F if the road is to provide access to natural resources lying beyond the conservancy (*Ibid.*, at s.20.1). More stringent rules apply to Class A and C parks, for which a permit authorizing an interest in land or exploitation of resources must not be issued unless, in the opinion of the minister, to do so is “necessary to preserve or maintain the recreational values of the park involved” (*Ibid.*, at ss. 8-9).

<sup>85</sup> *Heritage Conservation Act*, R.S.B.C. 1996, c. 187.

<sup>86</sup> Susan Green, Heritage Register Officer, BC Ministry of Tourism, Culture and the Arts, Personal Communication, 22 February 2010.

<sup>87</sup> *Heritage Conservation Act*, *supra* note 86, s. 12(2)(a).

Although the purpose section of the *Water Protection Act*<sup>88</sup> states that the Act is meant to “foster sustainable use of British Columbia’s water resources in continuation of the objectives of conserving and protecting the environment,” the legislation deals solely with transfer or diversion of water between the province’s nine major watersheds and the export of water out of the province.<sup>89</sup>

Concerns about the *Water Protection Act*:

- **Most ROR projects are not subject to the Act.** Unless a proponent needs to remove or divert a large quantity of water from one of the nine major B.C. watersheds defined in the Act to another such watershed, the *Water Protection Act* does not apply.<sup>90</sup>

### ***Transportation Act***

The *Transportation Act*<sup>91</sup> was enacted in 2004 and replaced the former *Highway Act*<sup>92</sup>, which dealt with the establishment, maintenance, alteration and regulation of public highways in BC.

Concerns about the *Transportation Act*:

- **Permits deal with public safety, not environmental protection.** If a ROR project needs to construct water pipelines or power lines within a right-of-way of a provincial road or highway, it must obtain an approval under section 62 of the *Transportation Act* in the form of a utility permit. The policies guiding these permit decisions exhibit a presumption in favour of accommodating utilities and focus on the protection of public safety on provincial highways.<sup>93</sup> Environmental concerns do not appear to factor largely or at all into these approvals.<sup>94</sup>

<sup>88</sup> *Water Protection Act*, R.S.B.C. 1996, c. 484.

<sup>89</sup> “Water Protection Act Information”, Ministry of Environment: Water Stewardship Division, online: [http://www.env.gov.bc.ca/wsd/water\\_rights/water\\_act\\_info/index.html](http://www.env.gov.bc.ca/wsd/water_rights/water_act_info/index.html).

<sup>90</sup> Specifically, the Act only applies to projects diverting or extracting “10 cubic metres per second of water or more”, or about “190,000,000 gallons of water a day”. Proposed projects such as a major diversion from the North Thompson River into the Columbia River are prohibited under this Act. According to the Ministry of Environment website, smaller scale projects and those allowing major water transfers within a watershed are not subject to the Act, and “[i]t is the intention that both of these categories be covered by the *Environmental Assessment Act*”, “Water Protection Act Information”, BC Ministry of Environment, Water Stewardship Division, online: [http://www.env.gov.bc.ca/wsd/water\\_rights/water\\_act\\_info/index.html](http://www.env.gov.bc.ca/wsd/water_rights/water_act_info/index.html)). However, many of these smaller waterpower projects will never undergo a provincial environmental assessment due to the high thresholds required under the Regulations of the EAA (discussed above).

<sup>91</sup> *Transportation Act*, *supra* note 5.

<sup>92</sup> *Highway Act*, R.S.B.C. 1996, c. 181.

<sup>93</sup> See Province of British Columbia, Ministry of Transportation and Highways, Highway Planning Branch, “Utilities Manual”, 1995, online: <http://www.th.gov.bc.ca/permits/linked%20documents/working.pdf> at p. 2.1-1.

<sup>94</sup> The purpose of a utility permit is to provide protection:

- to highway systems and structures against damage by utilities
- for highway users against hazards associated with utilities
- by providing an indemnity for the Ministry against liability claims
- for future use of the highway right-of-way

“Approval Process: Ministry Decision”, BC Ministry of Transportation, online:

## ***Significant Projects Streamlining Act***

The *Significant Projects Streamlining Act*<sup>95</sup> came into force in 2003 and empowers the government to designate a project<sup>96</sup> as a “provincially significant project”.<sup>97</sup> This designation triggers an expedited approval process authorizing government to remove<sup>98</sup> any constraints that “may impede or otherwise interfere with the completion or operations of the project”.<sup>99</sup> The BC environmental assessment is the only regulatory process whose constraints on project development are not subject to “streamlining” or “replacement” under the Act.<sup>100</sup>

Concerns about the *Significant Projects Streamlining Act*:

- **The Act allows proponents and government to avoid existing legislative requirements and environmental protection measures.** This Act provides government the authority to circumvent most environmental checks on ROR projects should the government so desire. It allows for political interference and creates concerns about the reliability of the environmental protections provided by existing laws. Circumventing project approvals also deprives the public of opportunities for input.<sup>101</sup>

## **FEDERAL LEGISLATION**

### ***Canadian Environmental Assessment Act***

The *Canadian Environmental Assessment Act*<sup>102</sup> (“CEAA”) is designed to ensure that the environmental effects of major projects are reviewed before federal authorities take action in connection with them. An EA only occurs under the CEAA if there is a legal “trigger”. A responsible authority (any of 35 federal departments) is required to undertake an EA if the authority:

- Proposes or undertakes a project;
- Grants money or any other form of financial assistance to a project;
- Grants an interest in the land to enable a project to be carried out; or
- Exercises a regulatory duty in relation to a project by issuing a permit or license that is included in the *Law List Regulations*,<sup>103</sup>

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<http://www.th.gov.bc.ca/permits/Ministry%20Decision.asp>.

<sup>95</sup> *Significant Projects Streamlining Act*, S.B.C. 2003, c. 100

<sup>96</sup> Section 1 of the Act provides the following definition of a project: “project” includes the planning, development, construction, operation, modification or dismantling of a work, thing or activity.”

<sup>97</sup> *Significant Projects Streamlining Act*, *supra* note 96, s. 3(1).

<sup>98</sup> The Act uses the word “replace” instead of “remove”, but despite the euphemism, the effect of these provisions is the same.

<sup>99</sup> *Significant Projects Streamlining Act*, *supra* note 96, ss.1, 3(2).

<sup>100</sup> *Ibid.*, s. 11(2)(b).

<sup>101</sup> The provisions of this Act have not yet been invoked in British Columbia.

<sup>102</sup> *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

<sup>103</sup> *Law List Regulations*, SOR/94-636.

in relation to a “project” as defined in section 2 of the Act.<sup>104</sup>

Concerns about the *Canadian Environmental Assessment Act*:

- **Most ROR projects that undergo federal EA are only subject to a screening.** Approximately 99 percent of all federal EAs are conducted as screenings.<sup>105</sup> A screening is the least rigorous level of assessment under CEAA (the next levels are a comprehensive study and panel review). Public participation and follow-up are at the discretion of the responsible authority.<sup>106</sup> An independent review of the federal EA process recently found that screenings were “weak,” often consisting of checklists or generic statements, and providing “limited or no analysis or explanation of how environmental effects were rated.”<sup>107</sup>
- **Federal EAs have also been widely criticized as failing to adequately address cumulative effects.**<sup>108</sup>
- **The Federal Government has just announced revisions to federal environmental assessment rules which will weaken environmental protections.**<sup>109</sup>

### *Fisheries Act*

The *Fisheries Act*<sup>110</sup> governs the management of fisheries and the protection of fish habitat. It is administered by Fisheries and Oceans Canada (“DFO”). DFO authorizations under the Act are a common trigger for federal environmental assessments (“EAs”) of ROR projects. Section 35(1) of the Act prohibits the harmful alteration, disruption or destruction (“HADD”) of fish habitat. DFO may only issue a permit authorizing HADD if a federal EA of the project has been conducted. The proponent may be required to conduct mitigation, monitoring or contingency measures prior to receiving a HADD permit.

The *Fisheries Act* also prohibits depositing deleterious substances in water frequented by fish (subject to authorization under regulations).<sup>111</sup> It further requires that sufficient spillway be provided over an obstruction so that fish can travel over it, that owners of obstructions allow for the passage of migratory fish during construction, and that sufficient flows be provided below an

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<sup>104</sup> The definition of “project” in section 2 includes “physical works” and “physical activities”. “Physical activities” are prescribed for inclusion in section 59(b) of the *Inclusion List Regulations*, SOR/94-637.

<sup>105</sup> “Status Report of the Commissioner of the Environment and Sustainable Development”, November 2009, at sections 1.38-39, (“OAG Report”) online: Office of the Auditor General, [http://www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_200911\\_e\\_33253.html](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200911_e_33253.html).

<sup>106</sup> CEAA, *supra* note 103, s. 18(3).

<sup>107</sup> OAG Report, *supra* note 106.

<sup>108</sup> *Ibid.*, at s. 1.33.

<sup>109</sup> See *Globe and Mail*, March 31, 2010, “Ottawa revises rules of environmental review regime” at <http://www.theglobeandmail.com/news/politics/ottawa-revises-rules-of-environmental-review-regime/article1518844/?service=email>.

<sup>110</sup> *Fisheries Act*, R.S.C. 1985, c. F-14.

<sup>111</sup> *Ibid.*, s. 36(3).

obstruction.<sup>112</sup>

Concerns about the *Fisheries Act*:

- **DFO has watered down the definition of HADD. Fewer projects now trigger the requirement for HADD permits or federal EAs.** In 1995, regulations were enacted making section 35(2) of the *Fisheries Act* a CEEA trigger. Prior to that time, DFO issued considerably more HADD permits under s. 35(2). Specifically, in 1990-91 there were over 12,000 authorizations issued. But in 1995-96 there were just 339, and in 2008-09 only 280. There is no evidence to suggest a dramatic decline in the number of projects that harmfully alter, disrupt, or destroy fish habitat. It stands to reason that DFO has radically altered its interpretation of what counts as a HADD of fish habitat such that fewer works are now considered to have harmful effects.<sup>113</sup>
- **Enforcement of deleterious substance prohibitions and other protective provisions is limited.** A recent report by the Auditor General of Canada identified numerous enforcement problems under the Act, including the inconsistent review of project proposals; and poor monitoring of mitigation, habitat loss, and compensation measures by approved projects. The report concluded that DFO could not demonstrate that it was adequately protecting fish habitat, as required the Act.<sup>114</sup>

### *Species at Risk Act*

The federal *Species at Risk Act*<sup>115</sup> (“SARA”) sets out the following process for protecting at-risk species. Following assessment by an independent scientific body, species are listed on Schedule 1 to the Act as endangered, extirpated or threatened. The Minister must then prepare a Recovery Strategy and an Action Plan that identify critical habitat to the extent possible. Once identified, critical habitat on federal land or for aquatic species or migratory birds must be protected within 180 days. If the species is on private, provincial or territorial land, the Minister may choose to recommend an order from the Governor in Council protecting critical habitat.

Concerns about the *Species at Risk Act*:

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<sup>112</sup> “...of such quantity of water, at all times, as will, in the opinion of the Minister, be sufficient for the safety of fish and for the flooding of the spawning grounds to such depth as will, in the opinion of the Minister, be necessary for the safety of the ova deposited thereon” *Ibid.*, s. 22.

<sup>113</sup> Arlene Kwasniak, “Slow on the Trigger, The Department of Fisheries and Oceans, the Fisheries Act and the Canadian Environmental Assessment Act” (2004) 27 Dalhousie L.J. 347 at 373. DFO’s administrative policy confirms the above interpretation. Under DFO’s Risk Management Framework, the issuance of a section 35(2) authorization is not recommended for projects placed in the “low risk” category (P. Duck, “An ENGO perspective of the Department of Fisheries and Oceans’ Risk Management Framework” prepared for the Canadian Environmental Network, September 26, 2006. See also A. Kwasniak, F. Gertler & I. Corriveau, “ENGO Concerns and Policy Options Regarding the Administration and Delegation of Subsection 35 (2) of the Fisheries Act, Proposed Subsection 35 (3) and Consequences for Federal Environmental Assessment” (1996), prepared for the Fisheries Act Working Group, Canadian Environmental Network by the Quebec Environmental Law Centre.).

<sup>114</sup> See Scott Vaughan, “2009 Spring Report of the Commissioner of the Environment and Sustainable Development to the House of Commons”, Office of the Auditor General of Canada (May 2009), online: [http://www.oag-bvg.gc.ca/internet/English/parl\\_cesd\\_200905\\_e\\_32544.html](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_200905_e_32544.html).

<sup>115</sup> *Species at Risk Act*, S.C. 2002, c. 29.

- **Habitat protection is discretionary for most BC species.** Under SARA, habitat protection is mandatory only for aquatic species, migratory birds, and on federal land. Approximately 94% of the land in BC is provincial Crown land.<sup>116</sup> For species on provincial Crown or private land, SARA requires the Minister to recommend an order to protect a species and/or the habitat upon which it depends if he or she is of the opinion that a province is failing to effectively do so. To date however, despite the fact that BC has no species at risk legislation, no Minister has ever made such a recommendation, and the government has never passed such an order.<sup>117</sup>
- **Implementation of the protections under the Act has been slow.**<sup>118</sup> The Auditor General recently reported that the federal government had made “unsatisfactory progress” regarding the listing of species and development of recovery strategies under the Act. This report also concluded that the government was regularly failing to meet the statutory deadlines for recovery strategies.<sup>119</sup>
- **Recovery strategies fail to identify critical habitat.** The same report found that 92% of recovery strategies failed to identify critical habitat, the most important element of species conservation.<sup>120</sup> In BC there are at least 37 species for which officials have not obtained the requisite data to identify critical habitat, contrary to the duty under s. 41(1) (c) of the Act.<sup>121</sup>
- **The BC government has removed critical habitat from recovery strategies.** BC is required by agreement with Canada to prepare recovery strategies for at-risk species within the province, but documents obtained by the UVic Environmental Law Centre and Ecojustice Canada through FOI requests revealed a government policy to remove critical habitat from recovery strategies.<sup>122</sup>
- As a result of the above failures in implementation, many at-risk species remain without legal protection. Until such implementation occurs, waterpower projects in BC are likely to degrade habitat or otherwise impact at-risk species that do not yet enjoy the protections that would otherwise be available under SARA.

### *Navigable Waters Protection Act*

<sup>116</sup> BC Ministry of Agriculture and Lands, “Crown Land Factsheet” (no date), online: MAL [http://www.agf.gov.bc.ca/clad/crownland\\_factsheet.pdf](http://www.agf.gov.bc.ca/clad/crownland_factsheet.pdf)

<sup>117</sup> David Suzuki Foundation et al., *Canada’s Species at Risk Act: Implementation at a Snail’s Pace* (April 2009), online: [http://www.naturecanada.ca/endangered\\_atrisk\\_saraRC2009.asp](http://www.naturecanada.ca/endangered_atrisk_saraRC2009.asp).

<sup>118</sup> *Ibid.*

<sup>119</sup> Status Report of the Commissioner of the Environment and Sustainable Development to the House of Commons, March 2008.

<sup>120</sup> *Ibid.*

<sup>121</sup> Two recent judicial review applications have found the responsible Minister in breach of the Act for failing to identify critical habitat in recovery strategies for at-risk species: *Environmental Defence Canada v. Canada (Minister of Fisheries and Oceans)*, [2009] F.C.J. No. 1052 (T.D.); *Alberta Wilderness Assn. v. Canada (Minister of Environment)*, [2009] F.C.J. No. 876 (T.D.).

<sup>122</sup> In fact, although there are 49 species for which government officials are aware that it is scientifically possible to identify critical habitat, such habitat is only legally identified for 6 of these species. “ELC Requests Investigation into BC’s Refusal to Protect Endangered Species Habitat”, Environmental Law Centre, online: [http://www.elc.uvic.ca/press/endangered\\_species\\_request.html](http://www.elc.uvic.ca/press/endangered_species_request.html).

The *Navigable Waters Protection Act*<sup>123</sup> (“NWPA”) is designed to protect the public right of navigation. It ensures that works constructed in navigable waterways are reviewed and regulated so as to minimize the overall impact upon navigation.

Concerns about the *Navigable Waters Protection Act*:

- **Effects on fish habitat and other environmental impacts are not within the purview of the Act**, and therefore are not considered during any authorization process for ROR projects. It is misleading to point to the NWPA as a means for environmental protection or regulation.

## CONCLUSION

The BC government has made determined efforts to streamline environmental regulation in recent years. There remain a substantial number of statutes, regulations, and associated licences, permits, and other authorizations applicable to the environmental footprint of ROR projects. But this review suggests that there is little correlation between the number of applicable laws or approvals and the effectiveness of environmental protection. Many of these provisions are either rarely applicable, rendered ineffective by internal limitations, or of only a peripheral relevance to the assessment of environmental impacts.

The lack of clear, legislated standards to govern land tenure and water licence applications under the *Land Act* and *Water Act* leaves broad discretion to government officials. The majority of applicable regulatory procedures lack adequate public access to information and local government oversight. Appeal provisions are narrow in scope, unclear, and impractical. These features make existing regulatory procedures appear secretive and do not foster adequate public accountability. Amendments to the *Utilities Commission Act* require approvals to consider important environmental factors such as greenhouse gas reduction and the promotion of clean energy, but not potential impacts to wildlife habitat or water quality. This has created an unbalanced basis for decisions under that Act. In addition, key regulatory thresholds have been lowered or re-interpreted resulting in fewer ROR projects undergoing provincial and federal environmental assessments. Finally, there is evidence to suggest that monitoring and enforcement measures are underfunded, unimplemented, or ineffective due to the issuing of only nominal deterrents. These deficiencies, and the others discussed in this report, illustrate that BC’s current regulatory framework fails to provide adequate environmental protection in the context of ROR development.

## GLOSSARY

CEAA	Canadian Environmental Assessment Act
CPCN	Certificate of Public Convenience and Necessity (Utilities Commission Act)
DFO	Fisheries and Oceans Canada
EA	Environmental Assessment
EAA	Environmental Assessment Act

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<sup>123</sup> *Navigable Waters Protection Act*, *supra* note 5.

EAB	Environmental Appeal Board
EIA	Environmental Impact Assessment
EPA	Electricity Purchase Agreements (Utilities Commission Act)
FOI	Freedom of Information
FOIPPA	Freedom of Information and Protection of Privacy Act
FRPA	Forest and Range Practices Act
GWMs	General Wildlife Measures (Forest and Range Practices Act)
HADD	harmful alteration, disruption or destruction (of fish habitat) (Fisheries Act)
ILMB	Integrated Land Management Bureau
IPP	Independent Power Project
MOFR	Ministry of Forests and Range
NWPA	Navigable Waters Protection Act
OLTC	Occupants Licence to Cut
ROR	run-of-river (hydroelectricity projects)
SARA	Species at Risk Act
WMA	Wildlife Management Area (Wildlife Act)
WSD	Water Stewardship Division (Ministry of Environment)