Environmental impact evaluation and petroleum development

Joan Allin*

This paper describes and evaluates the provisions in the Environmental Protection and Enhancement Procedures — 1981 Revision, the National Development Act 1979 and the Petroleum Act 1937 that require a consideration of the likely environmental impacts of a petroleum proposal before the proposal proceeds. Particular emphasis is given to the type of information that is required to be submitted, the need to consider alternatives, the opportunities for public participation, and the role of the Commission for the Environment.

Environmental impact evaluation (EIE) is the general term that will be used in this paper to describe the process for considering and, where possible, minimising the environmental impacts of a proposal.[1] Environmental impact evaluation should occur throughout the planning and implementation of a proposal,[2] from the very

* Senior Lecturer in Law, Victoria University of Wellington.

1 The process is variably described in the Environmental Protection and Enhancement Procedures — 1981 Revision as environmental impact assessment and environmental assessment. A 1982 Commission for the Environment brochure "Environmental Impact Assessment — A Guide to Environmental Protection and Enhancement Procedures (1981)", recommended that the distinction between the process of environmental impact assessment and a document called an environmental impact assessment be made by using the lower case for the process and upper case for the document; unfortunately, this distinction cannot be made in speech. It was then suggested in *Environmental Audits and Appraisals 1976-81 — A Review* (Commission for the Environment, Wellington, 1983) 155 that the phrase environmental impact assessment be applied to the process, and the term Environmental Impact Documentation (EID) be used to describe any environmental documentation that is not an environmental impact report (EIR). Since there have already been several documents that have been called environmental impact assessments and since an EIR is a document that considers environmental implications, my suggestion would be to call the process environmental impact evaluation, and to call any document that is not an environmental impact report, an environmental impact assessment.

2 In general, environmental impact reports and audits are prepared only for specific projects, although the Environmental Protection and Enhancement Procedures — 1981 Revision state that EIE is to be applied to, inter alia, the "management policies of all government departments which may affect the environment" (para. 2(a)) and "the provisions included, or to be included, in proposed legislation affecting the environment . . ." (para. 2(d)). More emphasis should be placed on the use of EIE for management policies, such as resource depletion policies, and for legislative provisions that affect the environment, for example tax incentives for petroleum exploration and development or, in another context, tax incentives for logging.

early stage at which the proposal is first contemplated and its possible environmental effects considered, to the preparation of a document that describes and evaluates the environmental effects of the proposal, to the decision as to whether or not the proposal should be approved, and finally to monitoring of the environmental effects of the proposal, once it has proceeded.[3] The opportunity for public participation should also be an integral part of the EIE process.

First the provisions for environmental impact evaluation that are set out in the Environmental Protection and Enhancement Procedures — 1981 Revision will be discussed, and the adequacy of those procedures evaluated. The provisions of the National Development Act 1979 will then be discussed, and consideration will be given to the effect that the 1981 revisions to the Environmental Protection and Enhancement Procedures may have on the meaning of the environmental impact report that is required under the National Development Act. Finally, the way in which the Petroleum Act 1937 provides for environmental impact evaluation will be considered.

I. ENVIRONMENTAL PROTECTION AND ENHANCEMENT PROCEDURES — 1981 REVISION

The Environmental Protection and Enhancement Procedures — 1981 Revision (1981 Procedures),[4] a Cabinet directive, state that the process of environmental impact assessment (also referred to as environmental assessment) and, where appropriate, environmental impact reporting is to be applied to government and government funded works and management policies that may affect the environment, and also to the granting of certain licences and permits (including licences and authorisations under the Petroleum Act 1937) that may have environmental implications.[5]

If the process of environmental impact assessment indicates that the proposal is "likely to have a significant effect on the human, physical or biological environment", then an environmental impact report is required.[6] The proponent is generally

3 The main emphasis of this paper is to evaluate the adequacy of the provisions for EIE that exist before a proposal proceeds, so the monitoring of environmental impacts, once the proposal has proceeded, will not be discussed. Proper monitoring of the environmental effects of a project or policy can help to prevent unnecessary environmental damage because adequate monitoring will, in many cases, provide advance notice of potential problems.

4 The Environmental Protection and Enhancement Procedures were introduced in November 1973 to reflect a Cabinet directive with respect to the protection and enhancement of the environment. A further Cabinet directive resulted in the Environmental Protection and Enhancement Operations in 1978 that allowed variations in some situations from the provisions for EIE set out in the Environmental Protection and Enhancement Procedures. The latest Cabinet directive, reflected in the Environmental Protection and Enhancement Procedures — 1981 Revision, introduces most regressive and unfortunate changes in the provisions for EIE.

5 Commission for the Environment *Environmental Protection and Enhancement Procedures — 1981 Revision* (Commission for the Environment, Wellington, 1983) para .2.

6 Ibid. para. 14.

responsible for ensuring that the environmental impact assessment process is carried out and for the preparation of any environmental impact report (EIR).[7] The EIR is forwarded to the Commission for the Environment, public notice of receipt of the EIR is given and submissions are invited,[8] and the Commissioner for the Environment then prepares an audit.[9] In some situations, the documentation of the environmental implications of a proposal may be carried out by some means other than an EIR and audit.[10]

A. Definition of "Environmental" Impacts

"Environmental" impacts are not specifically defined in the 1981 Procedures, but it is clear that "environmental" is used in a broad way: it does not include only biological and physical effects. Paragraph 14 states that an EIR should be prepared when there is likely to be a significant effect on the "human, physical or biological environment". In addition to questions about the physical and biological effects of the proposal, questions to be considered in determining whether an EIR should be prepared include:

1. Does the proposal affect existing communities or involve the establishment of new communities of a significant size?[11];

2. In respect of those living in the neighbourhood, is the proposal likely to have a long term effect on their living conditions or quality of life or their use and enjoyment of the environment?[12];

3. Are scenic, recreational, scientific or conservation values likely to be affected?[13];

4. Does the proposal affect any areas or structures of historical or archaeological importance?[14];

5. Are the environmental effects of the proposal likely to be of substantial public interest?[15]

Although the consideration of the physical and biological effects of a proposal is usually of a reasonable standard, discussion of the social and cultural effects of a proposal is often quite superficial. In fact, in spite of the provisions in paragraph 14, it has been noted recently that "there is continuing debate on the extent to which economic and social issues should be covered by environmental procedures".[16] If economic and social issues are not discussed in the EIE process, however, there is generally no forum in which these issues can be canvassed.

The Waitangi Tribunal's comments[17] concerning the proposed ocean outfall for the synthetic petrol plant illustrate the importance of a thorough and

7 Ibid. paras. 9, 11.
8 Ibid. para. 29.
9 Ibid. para. 36.
10 Ibid. para. 7.
11 Ibid. para. 14(b).
12 Ibid. para. 14(c).
13 Ibid. para. 14(f).
14 Ibid. para. 14(h).
15 Ibid. para. 14(i).
16 I. Speden, J. Robertson, K. Warren, P. Wilkinson, *Environmental Audits and Appraisals 1976-81 — A Review* (Commission for the Environment, Wellington, 1983) 1.
17 *Report Findings and Recommendations of the Waitangi Tribunal on an Application by Aila Taylor for and on behalf of Te Atiawa Tribe in Relation to Fishing Grounds for the Waitara District,* Ministry of Maori Affairs, Wellington, 17 March 1983.

early consideration of the social and cultural implications of a proposal. In the EIR for the synthetic petrol plant, there was not any mention of the likely cultural implications of the proposed ocean outfall on the Te Atiawa people; it was, however, felt relevant to mention twice a war that occurred in 1860.[18] If the cultural impact of the proposal had been considered adequately early in the planning process, N.Z. Synthetic Fuels Corporation Limited may have chosen not to proceed with the proposed ocean outfall and the time and expense of the Waitangi Tribunal inquiry, the very late changes to the plans for effluent disposal, and the Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983 may not have been necessary.

B. Content of the EIR/Stage at which the EIR is Prepared

The content of an EIR will be very much dependent on the stage in the planning process at which it is prepared. An EIR prepared early in the planning process will inevitably have fewer specific details about the proposal than an EIR prepared much later. Early preparation of the EIR, however, makes it much more likely that the proponent will not have rigid preferences and therefore will be more receptive to suggested changes. If suggestions for changes, especially major ones, are made after the proponent's preferences have become more fixed, the likelihood of conflict, delay and increased costs is apparent.

A consideration of alternatives[19] is fundamental to the use of an EIR as a planning document. What alternatives are available? What are the relative advantages of each of the alternatives? Which alternative, if any, is preferred, and why? Although a proponent should not be expected to consider all of the environmental implications of every conceivable alternative, an EIR that does not consider the relative merits of reasonable alternatives should be considered to be deficient. An EIR that does not adequately consider alternatives cannot possibly form the basis for public comment and a decision on what is the best alternative; it must inevitably lead to a narrow discussion on whether the particular proposal advanced is acceptable, without any adequate appreciation of what alternatives are available. The whole point of preparing an EIR should be to ensure that environmental factors are as fully considered as the financial and technical aspects of a proposal, thereby allowing the selection of the best option for the proposal on the basis of adequate information.

The 1981 revisions to the Procedures seriously detract from the adequacy of the EIR as a planning tool. The 1981 revisions also cause significant internal inconsistency in the 1981 Procedures.

18 Bechtel Petroleum Inc., En-Consult Technology Ltd *New Zealand Synthetic Fuels Corporation Limited Proposed Synthetic Petrol Plant at Motunui North Taranaki Environmental Impact Report* (Bechtel Petroleum Inc., En-Consult Technology Ltd, Wellington, 1981) 5.14, 5.26.

19 Alternatives may be limited to issues such as site and technology selection. Other jurisdictions require that the EIR consider not only alternative ways of carrying out the proposal but also alternatives to the proposal (see, e.g., the Environmental Assessment Act (Ont.) s. 5(3)).

Paragraph 4 states that:

> Environmental impact assessment is a process whereby a *conscious and systematic effort is made to assess the environmental consequences of choosing between various options* which may be open to the decision-maker . . . Environmental assessment *must begin at the inception of a proposal, when there is a real choice between various courses of action including the alternative of doing nothing. It must be an integral part of the decision-making process proceeding through all the development stages of a proposal through to actual implementation* (Emphasis added).

Paragraph 8 describes an EIR as:

> a written statement *describing the ways of meeting a certain objective or objectives and the environmental consequences of so doing.* The statement is to be an objective evaluation setting out clearly and precisely, with appropriate documentation, *the environmental consequences of a proposed action and of the alternatives to that action,* and ways of avoiding or ameliorating any harmful environmental consequences (Emphasis added).

Paragraphs 4 and 8 were not altered in the 1981 revision; however, new paragraphs were added that are clearly inconsistent with the statements in paragraphs 4 and 8. Paragraph 18 states:

> where a *specific project proposal* has been selected *with form, location, scope and operational characteristics clarified,* the environmental impact report shall:
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> (i) *describe* the existing environment;
>
> (ii) *describe* the project;
>
> (iii) *describe the direct physical and biological impacts* of a project and *provide a general treatment of significant impacts on the surrounding community*;
>
> (iv) list the associated works and the responsibility for them.
>
> In general the *impacts considered, need only be those caused by the works and the operation of the works for which the proponent of the project is financially responsible* (Emphasis added).

Paragraph 19 continues:

> The scope of the impacts considered in an environmental impact report of a specific project proposal and the extent to which alternative industrial processing technologies are addressed may be the subject of prior discussion between the proponent of the project, the Commissioner for the Environment and representatives of appropriate Government departments. *Where choices between alternative technologies for aspects of a project have been made by the proponent these alternatives do not need to be described in the environmental impact report.* For aspects of the project *where a choice between technological alternatives has not been made and where these have significantly different environmental impacts, the alternatives and their impacts should be described in the environmental impact report* (Emphasis added).

And if paragraphs 18 and 19 did not make the issue perfectly clear, paragraph 20 states that:

> The format for an environmental impact report is dependent on the extent to which design and other commitments have been made . . .

Clearly the changes made in 1981 substantially reduce the need for the proponent to consider alternatives in the EIR and, one would imagine, put the Commissioner for the Environment in a very weak position in trying to convince an uncooperative proponent that viable alternatives should be discussed and evaluated in the EIR. Paragraphs 18 and 19 essentially allow a proponent to describe what is going to be done, how it is going to be done and what the direct environmental implications will be. The EIR in such a situation is an

information document, perhaps a promotional exercise for the project, but it is not an EIR that can form the basis for rational discussion of the best way in which the proposal can proceed or, indeed, whether the proposal should proceed at all. Paragraphs 18, 19 and 20 allow the proponent to be in control of deciding whether the EIR is a planning document or a promotional document. Entrusting such decisions to a proponent is unacceptable. In fact, a proponent who chose to exercise the options given by paragraphs 18, 19 and 20 would almost inevitably be confronted with strong public resentment and opposition, but that is not the issue. A proponent should not be given the opportunity, by unilateral action, to restrict significantly the amount of information that is made available to the public, the Commissioner and, ultimately, the decision-maker.

In addition to restricting the need to consider alternatives, the 1981 amendments restrict the need to consider the cumulative environmental effects of a proposal. There are situations in which the environmental impacts of the project itself are relatively minor but the cumulative impacts of developments caused by or related to the project may have very significant environmental implications. Although one of the factors to be considered in determining whether or not an EIR should be prepared is whether the proposal, although not significant environmentally on its own, would be likely to stimulate further developments which would have a significant environmental impact,[20] paragraph 18 significantly restricts the need to consider cumulative effects in an EIR by stating:

> In general the impacts considered, need only be those caused by the works and the operation of the works for which the proponent of the project is financially responsible.

C. Public Participation and Audit

The 1981 Procedures provide a reasonably good opportunity for public participation. When an EIR is received, the Commissioner inserts notices in the Gazette and in the Public Notices column of newspapers, and calls for public submissions to be made within six weeks.[21] Copies of the EIR are also sent to interested organisations and individuals.[22] Anyone may make a "representation or comment on the environmental implications" of the proposal.[23] Although not specifically sanctioned in the 1981 Procedures, members of the Commission for the Environment's audit team usually conduct one or more site visits to discuss the project with local people. In addition, such site visits help to provide free press coverage of the existence of the proposal, the EIR, and the opportunity to make submissions to the Commission.

In preparing the audit, which is "an independent opinion from the Commissioner for the Environment on the environmental implications of the proposal" described in an EIR,[24] the Commission for the Environment is to take into account any representations made by the public as are "appropriate".[25] Arguably, any public comments that criticised the lack of consideration of alternatives or cumulative effects in an EIR would not be "appropriate" to be considered by

20 Supra n. 5, para. 14(g).
21 Ibid. para. 29(a).
22 Ibid. para. 29(b).
23 Ibid. para. 29(a).
24 Ibid. para. 34.
25 Ibid. para. 35.

the Commission, since the EIR would comply fully with the 1981 Procedures. In the audit, in addition to "not[ing] and verify[ing]" the information in the EIR, the Commissioner is to provide additional information and make any comments "as are appropriate".[26] Presumably it would not be "appropriate" to include in an audit any public or Commission for the Environment criticism that the EIR did no more than comply with the basic requirements of paragraphs 18 and 19. Since public submissions on policy aspects of a proposal are to be referred by the Commission to the appropriate body,[27] presumably it is also not appropriate to comment on those policy issues in the audit. The Commissioner is not to "concern himself with the economic implications of the proposal including those relating to alternative resource use."[28] *Environmental Audits and Appraisals 1976-81 A Review* states that:[29]

> This has been interpreted by the Commissioner to mean that only the *"economic implications of alternative resource use"* are excluded from the scope of the audit. Use of a resource frequently has environmental as well as economic impacts and for this reason the environmental implications of alternatives can be highly relevant.

The 1981 Procedures focus on what the Commissioner should *not* include in an audit; the earlier Procedures focussed much more on what *should* be included in an audit.[30]

Recently, there has been an increase in the use of documentation other than an EIR and audit for use in the environmental impact evaluation process. When the possibility of different forms of documentation in the EIE process was first sanctioned in the Environmental Protection and Enhancement Operations in 1978, the Operations also stated that the "thoroughness or quality of the study and the opportunities for public involvement [were not to be] reduced." In fact, when EIRs and audits are not prepared, the quality of the study is usually adversely affected as are opportunities for public involvement. For the McKee development, for example, Petrocorp prepared a document entitled "Planning and Environmental Implications" and another entitled "Environmental Implications of Product Pipelines"; the Commission produced the "McKee Oilfield Development Environmental Appraisal". The Petrocorp documents were prepared very late in the planning process. "Planning and Environmental Implications" is quite instructive concerning the role and timing of the document:[31]

> *Since September 1980* Petrocorp has been engaged on further development of the oilfield, and have also undertaken investigations into the optimum development options. These have *now reached a stage where firm development proposals can be set out.* The *basic programme to utilise the resource has been agreed on.* Prior to construction commencing a *number of detailed technical decisions have yet to be made*; nevertheless, the overall picture of the project can be presented at this stage (Emphasis added).

26 Ibid. para. 34.
27 Idem.
28 Idem.
29 Supra n. 16, 9.
30 Compare paras. 34 and 35 of the 1981 Procedures with para. 30 of the Environmental Protection and Enhancement Procedures (November 1973).
31 Petroleum Corporation of New Zealand (Exploration) Ltd *McKee Oilfield Development Planning and Environmental Implications* (June 1983) 1.

This document was presented in June 1983, Environmental Implications of Product Pipelines was published in July 1983, and the Environmental Appraisal is dated August 1983. The urgency of the project was noted by Petrocorp when it explained that construction of the wellhead and production station facilities would commence during the 1983-84 summer construction season, with the laying of the pipeline to be carried out in conjunction with that of the synthetic gasoline pipeline, commencing early in the first quarter of 1984.[32] Clearly, the documents were not intended to form the basis for decisions to be made, but were meant to inform the Commission and the public about what was going to happen and the environmental safeguards that would be used.

The Commission's appraisal which was prepared without the benefit of public submissions,[33] explained that:[34]

> As consent under the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967 are also required before development can proceed, both of which include procedures providing for public involvement, the Minister of Energy decided, after consulting with his colleague the Minister for the Environment, that an [EIR] was not necessary. Instead the Minister adopted the Petrocorp proposal for an environmental assessment report to be prepared which would provide background information to allow local authorities and members of the public to assess the effects of the development prior to any hearings.

There are two issues raised by this explanation. First, to what extent are the provisions for public involvement under the Town and Country Planning Act and the Water and Soil Conservation Act acceptable alternatives to the EIR and audit process and second, to what extent did the EIE process adopted by Petrocorp allow the public to assess the effects of the development prior to any hearings.

With regard to the first issue, when the Clifton County Council conducted the hearing for the conditional use application for the McKee development, not all objections were dealt with; some objections were considered to be outside the jurisdiction of the Council in dealing with a conditional use application.[35] Further, when appeals are heard by the Planning Tribunal under the Town and Country Planning Act and the Water and Soil Conservation Act, a consideration of the relative merits of various alternatives not proposed by the applicant is generally not appropriate.[36] The restriction of the issues that are considered under the Town and Country Planning Act and the Water and Soil Conservation Act means that these procedures are not really very acceptable alternatives to the participation afforded by the EIR and audit procedures (if the proponent has not availed itself of paragraphs 18 and 19 and decided not to discuss alternatives).

With regard to the second issue, the EIE process adopted by Petrocorp allowed

32 Ibid. 10.
33 Commission for the Environment *McKee Oilfield Development Environmental Appraisal* (August 1983) 2.
34 Ibid. 1.
35 See Report and Decision of the Clifton County Council Planning Committee (adopted by the Council on 9 September 1983) 5-6.
36 See *Annan* v. *NWASCA* (1981) 7 N.Z.T.P.A. 417, 423-424 and the decisions noted there.

the public limited opportunity to assess the effects of the development prior to any hearings. The two Petrocorp documents are dated 27 June and July 1983; the date of release of the July document is not specified. Objections and submissions with respect to the conditional use application and the granting of water rights were to be lodged by 1 August 1983. The Commission's appraisal was dated August 1983 but was not released until early September, after the deadline for lodging objections and submissions had passed. The Commission's appraisal would have been available to the public only just prior to the Clifton County Council hearing that was held on 6-7 September 1983.

The McKee situation is just an example of the difficulties that can arise when "variant" procedures are adopted for documentation in the EIE process. If EIRs and audits are to be used less frequently, then to protect against any further deterioration of the EIE process, more specific details must be provided concerning:

1. the content of the "variant" document;
2. the opportunities for public input;
3. the availability of public input to the Commission in the preparation of its appraisal; and
4. the timing of the release of the various documents and public input.

Further, consideration should be given to providing an opportunity for open discussion concerning the need for an EIR and audit in controversial cases when it is proposed that an EIR and audit not be prepared.

II. NATIONAL DEVELOPMENT ACT 1979

If the criteria of section 3(3) are met, then applications for, *inter alia,* prospecting licences, mining licences and pipeline authorisations under the Petroleum Act 1937 may be made under the National Development Act[37] and an environmental impact report must be prepared.[38]

A. Definition of "Environmental"

As with the 1981 Procedures, there is no National Development Act definition of environment or environmental. Section 3(2)(f), however, states that in the application to the Minister of National Development to have the provisions of the National Development Act applied to a work, the applicant must include a statement of the "economic, social, and environmental effects" of the project. The implication to be drawn is that environmental effects are different from economic and social effects; an environmental impact report would presumably, therefore, not need to consider the economic or social impacts of the proposal.

B. Content of EIR/Stage at which the EIR is Prepared

The National Development Act also does not define environmental impact report and makes no reference to the Environmental Protection and Enhancement Procedures. An EIR under the National Development Act is prepared very late in the planning process; consents are being sought for a particular "work" at a

37 National Development Act 1979 s. 18(2).
38 Ibid. s. 5.

particular location.[39] Furthermore, since the reasons for the choice of the site and why it is preferred to other practicable sites must be included in the application to have the provisions of the National Development Act applied to the work, the implication is that an evaluation of alternative sites is not necessary in the EIR. The Commission for the Environment seems to accept that a National Development Act EIR is site specific, although some National Development Act EIRs have included a reasonably good discussion of alternative sites.[40]

The content of an EIR was considered by the Court of Appeal in *EDS* v. *South Pacific Aluminium (No. 4)*.[41] EDS challenged the validity of the EIR of the proposed aluminium smelter and argued that the environmental effects of the Clutha River hydro electric project should have been included in the EIR because the only reason for the Clutha River scheme was the immediate need to provide electricity for the aluminium smelter. The Court of Appeal decided that, although the case was marginal, the EIR "sufficiently signposted" the "secondary implications" of the aluminium smelter.[42] In the judgment, there are several interesting statements concerning the content of an EIR under the National Development Act.

The Court of Appeal noted that the National Development Act "set up a screening process that will enable an informed assessment to be made of the environmental implications likely to arise" from the project.[43] Further:[44]

> . . . the statutory intention concerning [an EIR] is that the document will include adequate and reliable reference to every matter that is significant and relevant and so provide a coherent and sufficient basis for consideration by the public and by those local authorities and individuals who may be affected and by the Commissioner himself as a starting point for the important audit he must make.
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> . . . there must be a real and sufficient link between the less direct effects likely to flow from projected works if they are to be regarded as relevant. But it could not be Parliament's intention that in every context a discussion limited to site-specific environmental implications will satisfy an applicant's responsibility to provide a realistic impact report. If that were the case the "green light" could well be given to some major industrial project which involved insignificant environmental implications considered by reference only to the site itself, but manifold and adverse effects when assessed against the further construction of another undertaking which alone could give it industrial meaning and with which it clearly would be inextricably involved. There appears to be an example in this very case of works that ought to be considered together. It is expected that ancillary harbour works at Aramoana will promote the viability of the smelter and it would seem that South Pacific and the Harbour Board have realised that although their respective works have an independent status and that each is different in character from the other nonetheless they are but two aspects of one general scheme and so should be dealt with together in their [EIR].

In reaching their decision about the meaning of a National Development Act EIR, the Court of Appeal referred to paragraphs 4 and 8 of the Environmental Protection and Enhancement Procedures. The case arose, however, prior to the 1981 Procedures and, as has already been discussed, paragraphs 18 and 19 of the 1981 Procedures are clearly inconsistent with the general statements in paragraphs 4 and 8. In particular, the statement of the Court of Appeal that South

39 Ibid. s. 3(2).
40 See e.g. supra n. 18, 2.1-2.7.
41 [1981] 1 N.Z.L.R. 530.
42 Ibid. 536.
43 Ibid. 534.
44 Ibid. 534-535.

Pacific Aluminium's aluminium smelter and the Harbour Board's reclamation should be dealt with together in an EIR is not consistent with paragraph 18 of the 1981 Procedures where it is stated that "In general the impacts considered, need only be those caused by the works and the operation of the works for which the proponent of the project is financially responsible."

The Court of Appeal discussed the statutory intention concerning the content of an EIR. Assistance in determining this statutory intention was obtained from the Procedures as they were prior to the 1981 revision. To what extent, if any, will the 1981 revision, not an Act of Parliament, but a Cabinet directive, be successful in altering the statutory intention in the National Development Act as to the content of an EIR?

C. Public Participation

As under the 1981 Procedures, notice of receipt of the EIR is given and the public are given six weeks to make submissions to the Commissioner.[45] Statutory authorities that would normally grant the consents sought must make a recommendation to the Planning Tribunal as to whether or not the consent sought should be granted.[46] Notice, albeit more restricted, is also given of the Planning Tribunal inquiry,[47] and a number of people may appear, including any body or person affected by the proposed work and any body or person representing some relevant aspect of the public interest.[48] Although people who have made written submissions to the Commissioner for the Environment have clearly shown an interest in the proposal, these people are not given written notice of the date on which the Planning Tribunal inquiry will commence. This lack of notice is relevant because widespread newspaper coverage of the dates of the Planning Tribunal inquiry is not likely to occur until the inquiry begins, but in order to appear at the inquiry people must give five weeks notice to the Tribunal.[49] Further, since the public notice of the inquiry must be given between six and eight weeks prior to the Planning Tribunal inquiry,[50] people will have between one and three weeks to give notice of their intention to appear. It is apparent that if the public notice in the newspaper is not seen, people may easily not give their notice by the required date; the Planning Tribunal has indicated that simply failing to see the notice is not an "exceptional circumstance" under section 8(4) to allow late filing of a notice of intention to appear at the inquiry.[51] The difficulty in watching for public notices in the newspaper is exacerbated by the fact that the various National Development Act notices that are given at various stages of the proceedings are not placed in the same newspapers.[52]

45 Supra n. 37, s. 5(2).
46 Ibid. s. 6.
47 Ibid. s. 7(4).
48 Ibid. s. 8(1).
49 Ibid. s. 8(4).
50 Ibid. s. 7(3).
51 See unreported Appendix IV to the *Report and Recommendations of the Planning Tribunal* for the Synthetic Petrol Plant (December 1981).
52 For example in Wellington the Minister's notice of referral of the application for the proposed aluminium smelter at Aramoana to the Planning Tribunal was published in *The Dominion* (Wellington, 2 May 1981, 26); notice of the EIR appeared in *The Evening Post* (Wellington, 18 July 1981, 20); notice of completion of the audit appeared in *The Evening Post* (Wellington, 17 October 1981, 19); finally, the Planning Tribunal's hearing notice appeared in *The Dominion* (Wellington, 6 November 1981, 20).

D. Audit

In *EDS* v. *South Pacific Aluminium (No. 4),* the Court of Appeal also discussed the Commissioner's function in auditing an EIR. The Court was considering the possibility of an audit of an inadequate EIR and stated:[53]

> It would of course be extraordinary if [the Commissioner] were to feel inhibited in the discharge of his own responsibility by the absence of reference in [an EIR] to some relevant matter. That consideration is reinforced by the requirement of s. 5(3) that the Commissioner consider the environmental implications *of the work* — rather than confine himself to an assessment of the environmental impact report.

Section 2 of the National Development Amendment Act 1981 amended section 5(3) of the National Development Act to state that the Commissioner will "audit the environmental impact report by examining and giving his opinion on the accuracy and adequacy *of the report*[53a] in so far as it relates to the proposed work". The intention to limit the Commissioner's audit function is obvious.

E. Planning Tribunal Inquiry

Unlike the 1981 Procedures, the National Development Act provides some opportunity for consideration of the environmental implications of a proposal by an independent judicial tribunal, even though the EIR and audit have been considered to be inadmissible,[54] and even though the tribunal only makes a report and recommendation to the Minister of National Development.[55] The Planning Tribunal inquiry is not, however, a wide-ranging hearing that looks at various alternatives and selects the best option. The Planning Tribunal is to take into account the matters that would have been considered if the consents had been sought in the normal way.[56] Furthermore, the Planning Tribunal is not to consider the policy issues outlined in section 3(3), except to the extent that it is necessary to comply with section 9(1).[57]

F. Control over the Scope of the EIR and Planning Tribunal Inquiry

Except for the control of section 4(2) of the National Development Act that allows the Minister of National Development to delete from the application any consent sought, or add to the application any consent not sought, the proponent/applicant decides which consents will be sought under the National Development Act procedures and which will be sought in the normal way. As with paragraphs 18 and 19 of the 1981 Procedures that allow a proponent, by unilateral action, to restrict the information available, so too can a proponent under the National Development Act by unilateral action limit the information made available, restrict the Commissioner's audit, and control the matters considered by the Planning Tribunal. If a consent is not sought under the National Development Act, then the EIR will not need to consider the environmental implications of consents

53 Supra n. 41, 535.
53a Emphasis added.
54 *EDS* v. *NWASCA* (1976) 6 N.Z.T.P.A. 49, but see also *EDS* v. *South Pacific Aluminium (No. 4)* [1981] 1 N.Z.L.R. 530, 537.
55 Supra n. 37, s. 10(1).
56 Ibid. s. 9(1).
57 Ibid. s. 9(2) as amended by the National Development Amendment Act 1981 s. 6.

that are not sought since, strictly speaking, those environmental impacts are not relevant to the consents that are sought under the National Development Act. Furthermore, the Planning Tribunal cannot consider those environmental implications unless in some way it can be shown that the environmental impacts of consents not sought are relevant to the consideration of consents that are sought.[58] The Commissioner for the Environment may be able to criticise the omission from the EIR if the definition of "proposed work" in section 5(3) does not simply mean the work as it is proposed in the application under the National Development Act but the "proposed work" with all of the consents that will be necessary to make the "proposed work" functional.

If a proponent can avoid the discussion of a significant environmental impact until after the work has been declared to be a work of national importance and a number of consents have been granted, then when the remaining consents are sought in the normal way, there is likely to be very strong pressure for the consents to be granted. All relevant consents should be sought in the National Development Act application so that all of the relevant issues can be considered together.

The importance of having all issues ultimately decided together is reflected in the events that have occurred concerning waste disposal from the synthetic petrol plant. Under the National Development Act, New Zealand Synthetic Fuels Corporation Limited sought, inter alia, a specified departure to build the plant at "Site 1" and a water right to discharge waste from an ocean outfall at Motunui.[59] The Planning Tribunal decided that some consideration of alternative sites was relevant in deciding whether or not the specified departure should be granted, and evidence was heard about the relative advantages and disadvantages of Sites 1 and 22. Site 1 was much higher quality land than was Site 22, but Site 1 had some advantages. In the end, the main reason for the Planning Tribunal's approval of Site 1 was the ability to dispose of waste from Site 1 through an ocean outfall; the specified departure and the water right for the ocean outfall were granted. The Tribunal did, however, state: "If we had also concluded that the proposed discharge of plant effluent from the marine outfall should not be permitted, then the basis for the choice of Site 1 would have been undermined".[60] Following the Waitangi Tribunal inquiry into the effects of the ocean outfall on the Te Atiawa people, the Synthetic Fuels Plant (Effluent Disposal) Empowering Act 1983 was passed; it cancelled the water right for the ocean outfall and granted a right to discharge effluent through the Waitara Borough Council's outfall. The main reason for the Tribunal's preference of high quality Site 1 land over lower quality Site 22 land has disappeared. With hindsight, the synthetic petrol plant is probably built on the wrong site. The example clearly illustrates the desirability of having all issues considered and decided before action is taken on a proposal.

58 Ibid. s. 9(1).
59 (1982) 8 N.Z.T.P.A. 138.
60 Ibid. 149-150.

III. PETROLEUM ACT 1937

There are some very substantial differences between the provisions for environmental impact evaluation in the 1981 Procedures and the National Development Act, and the much more inferior provisions for EIE in the Petroleum Act. The 1981 Procedures apply to projects that need prospecting and mining licences under the Petroleum Act; the provisions for EIE under the Petroleum Act are apparently considered to be a fulfilment of the obligations set out in the 1981 Procedures. In my opinion, the provisions for EIE in the Petroleum Act are most unsatisfactory.

A. Prospecting Licence

Section 5(1) of the Petroleum Act 1937 allows the Minister of Energy to grant a prospecting licence on such terms and conditions as the Minister may specify. Section 5(3) requires that a condition be imposed that the licensee "will diligently and continuously" carry out the work programme "in accordance with recognised good oilfield practice". Recognised good oilfield practice is not defined and the criteria by which one would determine good oilfield practice are not stated. The Petroleum Act does not specify any criteria by which the Minister should be guided in determining whether a prospecting licence should be granted, although the main emphasis of the Petroleum Act seems to be on the exploitation of resources rather than the protection of the environment.[61] The only specific statement concerning the protection of the environment is in regulation 102 of the Petroleum Regulations 1978 where provisions are included to avoid pollution of the environment.

Once a prospecting licence has been granted, the licensee must obtain further consents for the effective use of the prospecting licence. If the prospecting licence affects any land under section 29,[62] no person shall "enter on any [section 29 land] . . . or commence or carry on any mining operations [which includes prospecting] thereon except with the prior written consent of the appropriate Minister."[63] The consent of the Chief Inspector is required to carry out geophysical prospecting[64] and consent of the Chief Inspector is also required for any well drilling.[65]

It is not until the stage of getting consent for well drilling under a prospecting licence that the first reference to any documentation of the environmental implications of prospecting is mentioned. Regulation 40(3)(b) of the Petroleum Regulations 1978 states that before granting his consent, the Chief Inspector may require the applicant to provide "an environmental assessment". The practice is apparently always to have an "environmental assessment questionnaire" form completed. The form asks a number of questions and leaves several lines beneath each question,

61 See e.g. the long title and ss. 14A, 14B and 14C.
62 E.g. National Parks, public reserves, wildlife refuges, the seabed of the territorial sea, the continental shelf.
63 Petroleum Act 1937, s. 29(3).
64 Petroleum Regulations 1978 reg. 22. Regulation 21 defines geophysical prospecting as "prospecting for petroleum, by seismic, gravimetric, electrical, radioactive, or geochemical methods."
65 Ibid. reg. 39.

presumably for the answer. In June 1983 separate forms were prepared for onshore and offshore drilling. The onshore environmental assessment form[66] remained very similar to the form used previously except for a desirable change to include specific questions about the proposed disposal of site wastes and an undesirable change to omit the final question on the earlier form. The question omitted is:

> In your opinion what is the likely effect of each stage of the prospecting programme on the vegetation, existing land use, waterways, birdlife, wildlife, ecology, historical and archaeological sites, and the present public use, and planned future uses of the area?

The final matter to be considered on the new form is: "Anticipated likely permanent deterimental (sic) effects."

These questions are the only ones on the forms that ask the licensee to evaluate the likely environmental effects of the prospecting licence. The evaluation that is sought in the new form is not nearly as satisfactory as the earlier evaluation that was required; only *permanent* detrimental effects need to be mentioned, and the licensee is given less guidance concerning the types of areas in which detrimental effect should be considered. No specific question is asked about the cumulative environmental impacts of the proposed drilling and any other existing wells; question 1.9 simply asks the licensee to mention any existing environmental damage, previous well drilling, etc. Much more evaluation of the environmental impacts should be required of the licensee.

With respect to the offshore questionnaire,[67] it is almost impossible to imagine how the questionnaire can, with conscience, be called an environmental assessment questionnaire. The means for disposal of various types of waste must be stated, but there is nothing directing the licensee to evaluate any effects caused by the waste disposal and there is no requirement for the licensee to consider whether any environmental impacts might be caused by something other than disposal of waste, for example, the placing of the drilling rig and subsequently drilling in an environmentally sensitive environment. The licensee does not even need to consider whether the area in which drilling will occur is environmentally hardy or sensitive.

In addition to discovering what the likely environmental impacts of a project will be, one of the prime purposes of environmental impact evaluation is to encourage the proponent to anticipate and minimise future environmental effects; these environmental assessment questionnaires do little to encourage the proponent to evaluate the likelihood and gravity of any future environmental impacts.

B. Mining Licence

If the holder of a prospecting licence can satisfy the Minister that petroleum has been discovered and that any conditions in the mining licence will be complied with, the holder of the prospecting licence, on making application prior to the

66 See Appendix 1.
67 See Appendix 2.

expiry of the prospecting licence, has the right to surrender the prospecting licence or part thereof and to receive in exchange a mining licence.[68]

Regulation 7(1)(g) of the Petroleum Regulations 1978 requires that where an application for a mining licence is made, such application must be accompanied by a "written statement assessing the potential environmental impact of the proposed mining development programme, including a description of any proposed safeguards", but there is no discretion given to the Minister under section 11 to refuse to grant a mining licence on the basis of likely adverse environmental impacts.

Section 12(1) states that the Minister may grant a mining licence on such terms and conditions as the Minister may in his discretion specify. Any conditions that were imposed on the prospecting licence with respect to any future mining licence are of crucial importance since if the prospecting licence[69]

> specified any term or condition to be included in such mining licence, no other or additional term or condiition which modifies or conflicts with such specified term or condition shall be included in the mining licence without the consent of the licensee.

Although the mining licence is automatically granted, section 29 may require a further consent if the mining is to take place on certain areas of land. As noted before, section 29(3) states that:

> No person shall enter on any land [to which the section applies] . . . or commence or carry on any mining operations thereon except with the prior written consent of the appropriate Minister.

Mining operations means:[70]

> mining for petroleum; and includes prospecting for petroleum; and also includes, when carried out at or near the mining or prospecting site for the purposes of or necessarily in association with mining or prospecting,
>
> (a) The extraction, production, treatment, processing, and separation of petroleum; and
>
> (b) The construction, maintenance, and operation of any works, structures, wells, buildings, storage tanks, pipelines, machinery, plant, wireless apparatus, telephonic equipment, railways, tramways, reservoirs, waterways, appliances, or chattels — whether carried out by a licensee or not.

The issue is whether consent to commence or carry on any mining operations is satisfied by the appropriate Minister's consent at the prospecting stage or whether mining operations should be broken down into the prospecting, mining and production phases (in so far as the latter comes within the definition of mining operations) so that the appropriate Minister's consent is required to commence or carry on each type of mining operation. The issue is especially relevant between the prospecting and mining stages, since a prospecting licence can be readily converted into a mining licence, and at the prospecting licence stage, prior to an application for permission to drill, there is little provision for an assessment of the likely environmental effects of prospecting and mining in the area. Even when the prospecting licence holder applies for a permit to carry out

68 Supra n. 63, s. 11.
69 Ibid. s. 12(4).
70 Petroleum Amendment Act 1982, s. 2.

well drilling under the prospecting licence, the amount of information about the environmental impacts of the drilling is quite minimal.

A mining licence is comprised of an initial term which is not to exceed four years[71] and a specified term that is not to exceed 40 years,[72] except in certain specified situations. "Within a reasonable period" after the grant of the mining licence for an initial term, the licensee must submit a proposed work programme for the development of the petroleum discovery "in accordance with recognised good oilfield practice."[73] Except to the extent that this phrase incorporates some consideration of environmental factors, there is no requirement in the Petroleum Act or Regulations that the environmental impact of the work programme be considered or discussed.[74] This is inappropriate, since there is considerable potential for a work programme to have a substantial effect on the environment; "works" in the context of a work programme means "permanent works or structures (including production facilities, pipelines, and treatment, processing and storage facilities) not capable of being moved without substantial dismantling."[75] Although the Petroleum Act does not require any specific documentation of the environmental implications of a proposed work programme, the 1981 Procedures may allow for the preparation of some documentation of environmental impacts, if approval of a work statement comes within paragraph 2(d) of the 1981 Procedures, i.e. if the approval of the work statement is a licence, authorisation, permit, or privilege issued pursuant to the Petroleum Act.

If the work programme is approved, then the Minister must extend the mining licence for the specified term.[76] The work programme constitutes "the working obligation of the licensee under the licence . . . and the licensee shall be required to carry out the works and undertake the production of petroleum and comply with all other terms of the approved work programme".[77]

C. Resource Utilisation

The Minister may withhold approval for a work programme if the Minister is satisfied that development in the manner set out in the work programme would be contrary to recognised good oilfield practice[78] or that producing petroleum in the types or quantities in accordance with the production programme in the work programme would be contrary to the national interest;[79] the licensee may modify the proposed work programme.[80] There is no provision for any public input prior to the Minister's decision concerning whether the programme is in accordance with recognised good oilfield practice or whether the production programme would be in the national interest. There is no provision for any appeal from the Minister's

71 Supra n. 63, s. 13(2)(a).
72 Ibid. s. 13(3)(a).
73 Ibid. s. 14A(3).
74 The information that is required to be submitted includes a description of the proposed works and their location and use, the construction schedule, date of commencement of production, the details of the petroleum production programme and also includes information concerning the cost of financing of the work programme. Ibid. s. 14A(3).
75 Ibid. s. 14A(1).
76 Ibid. s. 14A(11)(a).
77 Ibid. s. 14A(11)(b).
78 Ibid. s. 14A(4)(b).
79 Ibid. s. 14A(4)(c).
80 Ibid. s. 14A(5).

decision, except that if the Minister withholds approval on the basis that the programme is contrary to recognised good oilfield practice the licensee may refer the issue for arbitration.[81] When the issue is whether or not the programme is in the national interest, section 14A(9) states that the decision is that of the Minister alone and restrictions are placed on any right of review. The Minister also has the power to postpone development where he is satisfied that the rate of development of the petroleum discovery would be contrary to the national interest[82] and, although the licensee must be given "a reasonable opportunity to make representations to [the Minister] regarding the work programme",[83] there is no provision for anyone else to make representations; the Minister's decision is final and, again, restrictions are placed on the right of review.[84] Finally, when a petroleum discovery has been made and the licensee fails to apply for a mining licence, and failure to develop the petroleum discovery would be contrary to the public interest, the Minister may, after notice has been given and if still no mining licence is sought, reduce the area in the prospecting licence to exclude the petroleum discovery, or revoke the prospecting licence.[85] Again there is no provision for public input, the Minister's decision is final, and the right of review is restricted.[86]

The issue of the rate of depletion of resources is clearly seen to be a policy decision to be made by the Minister. Similarly, in the National Development Act, the policy issues in section 3(3) are not, generally, to be considered by the Planning Tribunal; these policy factors are seen to be a matter for the Governor-General in Council.[87] In the Synthetic Petrol Plant hearing, the Planning Tribunal refused to consider the resource utilisation issue, that is, whether it was appropriate to use the natural gas resource to produce synthetic petrol,[88] although there was a great deal of interest in and controversy over that issue. Similarly, in *Annan* v. *NWASCA (No. 2),* the Planning Tribunal, in reconsidering the grant of a water right for the high dam at Clyde, refused to consider whether the end use, the aluminium smelter, should exist and merely inquired into whether it would exist.[89]

There has been much controversy recently about the lack of any opportunity for public input into the "policy" issues of resource use and resource depletion.[90] It is obvious that once these issues have been decided, the range of available alternatives will be restricted, and any public input will be restricted, at best, to comparing the limited alternatives that remain. There is a very considerable feeling that there should be opportunities for input at the early policy stage when decisions are made concerning resource depletion and use. The Petroleum Act provides no opportunity for any public consideration as to whether the proposed production schedule is in the national interest.

There are varying views as to the way in which input at the policy level could occur. Some feel that a commission of inquiry should be established or that the

81 Ibid. s. 14A(7).
82 Ibid. s. 14B(1).
83 Ibid. s. 14B(6).
84 Ibid. s. 14B(8).
85 Ibid. s. 14C(1).
86 Ibid. s. 14C(8).
87 Supra n. 37, s. 9(2).
88 (1982) 8 N.Z.T.P.A. 138, 142.
89 (1982) 8 N.Z.T.P.A. 369, 371.
90 See e.g. Environmental Council *Environmental Implicatiions of Energy Policy* (Wellington, 1983).

Commissioner for the Environment could be responsible for conducting such an investigation; others feel that an independent tribunal should hear evidence and cross-examination and make either a decision or a recommendation at the early policy stage; still others are uncertain about the forum in which such public debate should occur but are certain that there is a need for the discussion to take place. Many feel that the ultimate decision, after having considered the public input, must be for the government; some do not agree and think that the decision should be made by an independent tribunal.[91] The demand for public consultation on the utilisation of natural resources is likely to increase, rather than decrease, in the future.

D. Pipeline Authorisation

In contrast to the lack of any specific requirement in either the Petroleum Act or the Regulations that a prospecting or mining licence application describe any section 29 land that might be affected by the mining operations, section 51(2)(c) states that an application for a pipeline authorisation must include: "Sufficient details to describe the extent to which the application relates to any land to which section 29 applies." Unlike under section 29, however, where the applicant seeks approval from the appropriate Minister, the Minister of Energy seeks the relevant approval when section 29 land is affected by an application for a pipeline authorisation; furthermore, such approval "shall not be unreasonably withheld".[92]

The limited provisions that require consideration of the environmental implications of well drilling and mining licences are set out in the Regulations; in contrast, the provision requiring consideration of the environmental implications of a pipeline authorisation is contained in the Petroleum Act, not the Regulations. Section 51(4) states that an application for a pipeline authorisation must be accompanied by "a report setting out the effects the construction and subsequent operation of the proposed pipeline may have on the physical and social environment through which it passes".

Further, the Ministry of Energy and the Commission for the Environment have prepared complementary guides to the Petroleum Act pipeline procedures. The guides are only in draft form, but if they proceed as presently drafted there is considerable emphasis on the need to consider alternatives and physical, biological and social impacts; the importance of widespread and early consultation in the local community is also emphasised. In contrast, there is relatively little such guidance given with respect to the consideration of environmental factors at the prospecting and mining phases.

E. Public Participation and Access to Information

No information provided by a licensee under section 47E of the Petroleum Act is to be disclosed without the consent of the licensee until five years from the date

91 On the issue of public input at the policy stage, see the papers presented in Auckland at the Planning for Major Resource Utilisation Seminar organised by EDS and the Centre for Continuing Education, University of Auckland (26 November 1983).

92 Supra n. 63, s. 52(2).

the information was provided or the expiry, surrender, etc., of the licence.[93] The secrecy provisions of section 47E do not appear to extend, however, to the environmental assessment questionnaire for well drilling consents under regulation 40(3)(b) of the Petroleum Regulations 1978, or the "written statement assessing the potential environmental impact of the proposed mining development programme" under regulation 7(1)(g) of the Petroleum Regulations 1978 that must accompany a mining licence application; this information is not furnished by a licensee under section 47E. Nevertheless, the environmental assessment questionnaire and the environmental statement that accompanies the mining licence application are considered to be secret and will not be released.[94] The apparent secrecy of this information is a significant difference from the 1981 Procedures and the National Development Act. It is also not surprising that, when confronted with a refusal to release these documents, one begins to suspect the adequacy of the information and evaluation contained in the documents. With the consent of the petroleum exploration company, one environmental assessment questionnaire for well drilling from an expired licence was released. The responses on the questionnaire contained nothing even remotely of a competitive, commercial nature to justify any secrecy.

Neither the Petroleum Act nor the Regulations makes any provision for public notice or input with respect to the application for a prospecting or mining licence, or for the approval of a work programme. The Prospectus for Petroleum Exploration in New Zealand states that applications for prospecting and mining licences may be referred to "other reporting agencies such as the Commission for the Environment" and that the reports back from the agencies will "normally include a recommendation as to whether the grant of a licence is favoured," and what conditions should be imposed.[95] To date, since Ministry of Energy approval was not forthcoming, it has not been possible to obtain a copy of the Commission's recommendations with respect to various applications. With the assistance of the Official Information Act, it may be possible to obtain these recommendations and to see to what extent the Commission's recommendations are reflected in the terms and conditions attached to the licences.[96] It is understood that when the Commission for the Environment and the Ministry of Transport, with respect to offshore licences, are asked to comment, the time given for comment is often too short and the information provided to them is often inadequate. Since the licensee need apply for a consent to drill only 30 days before the anticipated drilling date,[97] one can appreciate that there is little time to investigate thoroughly any issues that

93 Ibid. s. 47E(5).

94 An application for access to this information has not yet been made under the Official Information Act 1982.

95 Ministry of Energy *Prospectus for Petroleum Exploration in New Zealand* (Government Printer, Wellington, 1980) 37.

96 There has also been some difficulty in obtaining information about the terms and conditions that have actually been imposed on licences. Although s. 5 of the Petroleum Amendment Act 1982, which amends s. 25(3) of the Petroleum Act, states that a copy of every licence granted shall be open for inspection, the terms and conditions attached to the licence are not open for inspection. Surely the licence together with the terms and conditions attached thereto should be available for inspection.

97 Supra n. 64, reg. 40.

may arise with respect to the application, if drilling is to begin as scheduled. Some consideration ought to be given to determining whether the petroleum exploration companies could reasonably be expected to give more than 30 days notice of well drilling.

Section 29 allows for a limited type of public input in some situations. Where the area in question is land in a National Park, the Minister of Lands must consult with the National Parks and Reserves Authority, and where a public reserve is concerned, the Minister must consult the administering body of the reserve.[98] Where any other land at issue under section 29 is held by or on behalf of or is controlled even in part by any local authority, public body, or trustees, the Minister must consult them.[99] There is no opportunity for any general public input prior to a decision of the appropriate Minister with respect to mining operations, etc. in any of these sensitive areas and there is no opportunity for any appeal from the appropriate Minister's decision.

In contrast to the lack of public notice of a prospecting or mining licence application, section 52(1) provides for the Minister to direct the applicant to give notice of an application for a pipeline authorisation. Regulation 6 of the Petroleum Pipelines Regulations 1964 states inter alia, that notice of the pipeline authorisation application must be published at least once in the Gazette and twice in newspapers circulating in the districts through which the pipeline is to pass; the notices do not, however, invite public submissions on the application. In the absence of the appointment of a Commission of Inquiry[100] (which has been established only once, for the Lyttelton-Woolston LPG pipeline), the Minister makes the decision as to whether or not the authorisation should be granted and considers "all matters, circumstances and representations which he considers relevant".[101] Section 53(2) states that in considering any application for a pipeline authorisation, the Minister shall generally have regard to the public interest, the financial ability of the applicant to construct, operate, and maintain the proposed pipeline, and any effect which the construction or operation of the pipeline may have on any land to which section 29 applies. People receive notice of the pipeline authorisation application and may make unsolicited representations to the Minister. The Minister must consider them, if he considers them relevant, but there are clearly problems with making unsolicited representations and convincing the Minister that they are relevant to the pipeline authorisation.

In draft amendments to the pipeline regulations, the opportunity for public notice and input is advanced further. In particular, it is proposed that people be given 30 days to make submissions in respect of an application for a pipeline authorisation. This proposed amendment should be adopted, and some of the public notice and input ideas in Part II of the Petroleum Act, which deals with

98 Supra n. 63, s. 29(6).
99 But no decision of the Minister is invalid because of the lack of such consultation where the land is not in a national park or public reserve. Ibid. s. 29(7).
100 Ibid. s. 54 provides that a commission of inquiry may be appointed.
101 Ibid. s. 53(1).

pipelines, ought to be incorporated into the Part I prospecting and mining licence provisions. The disparity shows, again, that the public are allowed to become involved only very late in the EIE process; production is assured, the petroleum must be transported by pipeline to a specific location, and public comment is restricted to discussing the specifics of the route that should be followed.

IV. CONCLUSION

The provisions for environmental impact evaluation with respect to petroleum development are not really very satisfactory.

There is little opportunity for public input into the important decisions with respect to resource use and depletion policy.[102] Even at the more specific project level, a decision that the project does not need to be evaluated by an EIR and audit takes place in private, and without any opportunity for public input. Furthermore, with the exception of the National Development Act, there is a presumption against the preparation of an EIR and audit; a presumption in favour of the preparation of an EIR and audit would be more successful in ensuring that EIRs and audits are prepared when appropriate. If the presumption against the preparation of EIRs and audits continues, there must be some guidelines developed with respect to the content of the document, timing of its release, the opportunities for public participation, and the role of the Commission for the Environment.

When an EIR is required, the 1981 revisions to the Environmental Protection and Enhancement Procedures allow a proponent, if it should so choose, to restrict substantially the information that is contained in the EIR. The effect that these revisions will have on the EIR required to be prepared under the National Development Act 1979 remains uncertain. The information sought in the environmental assessment questionnaires for consent for well drilling under the Petroleum Act, especially in the offshore well drilling questionnaire, is quite inadequate. Proponents should be required to provide better information concerning the likely environmental impacts of the proposal and of any available alternatives, and more evaluation of those impacts should be required. Further, while one can appreciate the need for commercial secrecy in some matters, the total secrecy surrounding the documentation of the environmental impacts of petroleum prospecting and mining is quite unnecessary and undesirable.

The 1981 revision to the Environmental Protection and Enhancement Procedures and the National Development Amendment Act 1981 attempt to limit the ability of the Commissioner for the Environment to comment on aspects of a proposal. This is a regressive step; the Commissioner's ability to comment on the environmental implications of a proposal should be wide, and environmental implications should be interpreted in its very widest sense. The Petroleum Act 1937 does not even require any audit or appraisal by the Commission for the Environment; although the Commission's comments are usually sought, the time allowed for this

102 See Environmental Council *Environmental Implications of Energy Policy* (Wellington, 1983) 7-9 for an evaluation of the effectiveness of the Energy Advisory Council as a means of providing public input in the energy planning process.

input is often inadequate. Statutory recognition of a role for the Commission for the Environment should be included in the Petroleum Act, or perhaps in a statute of more general application.

APPENDIX 1

ENVIRONMENTAL ASSESSMENT QUESTIONNAIRE DRILLING OF AN ONSHORE WELL UNDER THE PETROLEUM ACT

Applicant

Location of proposed wellsite

Name of well

SECTION 1 Description of the Area

1.1 *Topography etc.* — Describe the country surrounding the proposed wellsite

1.2 *Vegetation*

1.3 *Present Land Uses* — e.g. farming (type and productivity), residential, industrial, reserve, national park, wilderness area.

1.4 *Birdlife, Wildlife and Ecology* — Is there anything of note?

1.5 *Historical and Archaeological Sites* — Your attention is drawn to the Historic Places Act 1980 which makes provision for the protection of archaeological sites. An archaeological site is any place which was associated with human activity more than 100 years ago and which is likely to provide evidence as to the exploration, occupation, settlement or development of New Zealand which would not otherwise be available. Do you know of any Historical or Archaeological sites within the application area?

1.6 *Distance From Nearest Point of Drill Site to Nearest Dwelling*

1.7 *Present Public Use of the Area for Recreation or other use,* e.g., picnicking, walking, scenic enjoyment.

1.8 *Planned Future Use of Surrounding Land* — Do you know of any proposed change from the present land use?

1.9 *Other Points Worthy of Mention,* e.g., fire hazard, existing environmental damage, previous well drilling.

SECTION 2 Proposed Site Works

2.1 *Access to Wellsite* — Describe present road access and proposed new roading required — length etc.

2.2 *Area to be fenced at Wellsite*

2.3 *Living Accommodation (maximum number of persons) at Wellsite*

2.4 *Miscellaneous wellsite buildings* (type, uses, numbers, caravans etc.)

2.5 *Proposed Disposal of Site Wastes*
(a) *Sewage and kitchen effluent*
(b) *General site surface drainage*
(c) *Liquid from mud pits, sumps and cementing plant*
(d) *Solids from sumps*

2.6 *Stream Sediment Load* — Is any increased sediment or bed load likely to be caused in local streams, rivers?

2.7 *Anticipated likely permanent deterimental* [sic] *effects*

Signed: Date:
On behalf of:

APPENDIX 2

ENVIRONMENTAL ASSESSMENT QUESTIONNAIRE FOR OFFSHORE PETROLEUM WELLS

Applicant:
Name of proposed well:
Location (lat./long. grid reference):
Water depth at proposed well site:
Drilling vessel or semi-submersible (Name):
Supply base location (Port):
Means for disposal of edible kitchen wastes:
Means for disposal of solid wastes other than edible or drilling wastes:
Proposed mud system (brief description):
Will oil muds be used (excluding pipe lax. pills):
Means for cuttings disposal:
Means for disposal of deck, drill floor and cement plant washings:
Signed on behalf of:
By (Name and title):