



**REPORT TO CORE AREA LIQUID WASTE MANAGEMENT COMMITTEE
MEETING OF WEDNESDAY 07 JANUARY 2009**

SUBJECT **CORE AREA WASTEWATER MANAGEMENT PROGRAM – APPROVAL OF CONSULTATION AGREEMENT WITH BRITISH COLUMBIA AND THE ESQUIMALT NATION**

PURPOSE

To develop an effective engagement and consultation process on the wastewater treatment project with the Esquimalt Nation.

BACKGROUND

- The minister of environment responded to the Capital Regional District's (CRD) proposed amendment to the Core Area Liquid Waste Management Plan, and to the supporting *The Path Forward* report, in a letter dated 14 December 2007. In that letter, he advised the CRD to develop a consultation process with First Nations with regard to the wastewater treatment project.
- The courts have emphasized that the federal and provincial governments must consult with First Nations when making decisions that may affect aboriginal and treaty rights and accommodate those rights where appropriate. Provincial decisions will be required to approve the wastewater treatment project.
- The CRD cannot assume responsibility for the legal obligations to consult now imposed on the senior governments. It can, however, be delegated procedural steps, such as gathering information on First Nations' interests.
- The CRD and the province have entered into a staff-level agreement, which sets out that the province is responsible for the consultation process and that it is delegating certain aspects of that process to the CRD.
- The CRD is eager to work with its First Nations neighbours in a meaningful way on the wastewater treatment project to seek their input, to apply their input to avoid problems and to seek opportunities to work together.
- To date the CRD and the province have entered into similar engagement/consultation protocols with the Songhees and Beecher Bay Nations.

ALTERNATIVES

1. That a formal agreement be entered into with the province and the Esquimalt Nation to guide the consultation process on the wastewater treatment project.
2. That an informal approach to working with First Nations be maintained to satisfy consultation obligations on the wastewater treatment project.

FINANCIAL IMPLICATIONS

The Esquimalt First Nation will likely require capacity funding to provide feedback on an endeavor as complicated and large as the wastewater treatment project. In the proposed formal agreement, which is attached, the province is responsible for responding to and providing any capacity funding. Where such an agreement does not exist, the Esquimalt First Nation may turn to the CRD, as the proponent for the project, for capacity funding.

OTHER IMPLICATIONS

The formal agreements with the Songhees, Beecher Bay, and now potentially the Esquimalt Nation, are an important step in bringing First Nations into the wastewater treatment project because they clearly set out the consultation process; the roles and responsibilities within that process for the province, CRD and First Nations; and First Nations' buy-in to that process.

Important to the CRD is that the province retains responsibility for the consultation process, including accommodating any rights that may be affected by the final project design. The CRD's role will be to provide useful information to the First Nations, provide meaningful opportunities for feedback and then work with First Nations to use that feedback, where appropriate, in the design of the project. The First Nations' role is to ensure they are available to receive information, do their best to provide good feedback in an efficient manner and work toward solutions.

The agreements also include a commitment to push Canada to work with the parties to achieve win-win solutions if federal Crown land is needed for sewage treatment, at the same time as First Nations are also asking for land to settle treaty or outstanding specific claims. As well, the parties agree to work together to ensure that the federal government is aware of and meets its consultation obligations if federal decisions are required to complete the project. The agreements can also be amended to include Canada if so desired.

Finally, the agreements include a dispute resolution process to reflect the parties' commitment to building strong working relationships and working issues through in a collaborative manner.

SUMMARY

As part of his response to *The Path Forward* report, the minister of environment requires that the CRD report on how First Nations will be consulted on the wastewater treatment project. The best approach to achieving an efficient and effective consultation process is to set out that process in a formal agreement, which includes the roles and responsibilities of each of the parties within that process. The proposed formal agreement with the Esquimalt Nation achieves that, as with the previously signed Memorandums of Understanding with the Songhees and Beecher Bay Nations. It clearly sets out that the province is responsible for the consultation process, including the accommodation of any affected aboriginal rights and the provision of capacity funding required by the First Nation; it captures the CRD's commitment to provide good information to the First Nation, seek its input into the design of the project and use that input where appropriate; and it clearly states the intention of the First Nation to provide feedback on its interests and rights in a timely manner and work to solutions in the design of the wastewater system. The agreement also commits the parties to work together if federal Crown land is needed for sewage treatment or federal decisions are required to approve the project. Such agreements are also important steps in capturing the commitment of the CRD and the Esquimalt Nation to build strong working relationships.

RECOMMENDATION

That the Core Area Liquid Waste Management Committee recommend to the Board that the attached wastewater treatment project consultation agreement with British Columbia, the Esquimalt Nation and the Capital Regional District, dated 05 December 2008, be approved for signature by the Board Chair.

John Balogh
Special Advisor, Aboriginal Relations

Dwayne Kalynchuk, PEng
General Manager, Environmental Services
Concurrence

Kelly Daniels
CAO Concurrence

COMMENTS

JB:cl
Attachment: 1

Wastewater Treatment Project Consultation Agreement

This Agreement is dated for reference December 5, 2008.

BETWEEN

**HER MAJESTY THE QUEEN IN RIGHT OF
THE PROVINCE OF BRITISH COLUMBIA**
(as represented by the Minister of the Environment)
hereinafter "British Columbia"

and

ESQUIMALT NATION
(as represented by the Chief of the Esquimalt Nation)
hereinafter "Esquimalt Nation"

and

THE CAPITAL REGIONAL DISTRICT
(as represented by the Chair of the Capital Regional District)
hereinafter "CRD"

(collectively referred to as "the Parties")

WHEREAS

- A. Section 35 (1) of the *Constitution Act, 1982* states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
- B. A key objective for Esquimalt Nation is to secure more land for its growing community and to facilitate Esquimalt Nation's economic development.
- C. Esquimalt Nation claims Aboriginal title to the area set out in **Schedule "A"**.
- D. In July 2006, the CRD was directed to develop a secondary Wastewater Treatment System, pursuant to the British Columbia *Environmental Management Act* ("Project").
- E. The Project may consist of facilities on various parcels of land within the Capital Regional District.
- F. The options under consideration by the CRD for the location of Project facilities include land within the Esquimalt Nation traditional territory as set out in Schedule "A", some of which land is currently owned by the Government of Canada.

- G. The Crown has an obligation to consult with First Nations when contemplating decisions that may affect their rights under s. 35 of the *Constitution Act, 1982* (“Section 35 Rights”) and, where appropriate, the Crown must also seek to achieve a reasonable accommodation of any Section 35 Rights that stand to be infringed by a Crown decision.
- H. The CRD is willing to participate in a consultation process with Esquimalt Nation on the Project on the basis that it is performing certain delegated functions of British Columbia’s consultation obligations towards Esquimalt Nation, and it enters into this Agreement on that basis.
- I. The CRD also wishes to engage its First Nation neighbours in a meaningful way by seeking their input about the Project and, where feasible, to incorporate that input into the design of the Project so as to avoid or minimize any potential adverse effects upon their Section 35 Rights and other interests, to reduce the likelihood for disputes, and to seek enhanced opportunities for collaboration between the CRD and neighbouring First Nations.
- J. More generally, the CRD and Esquimalt Nation would like to develop a positive working relationship to address the various issues that affect them both as neighbours, and they intend for this Agreement to be an initial step in building that working relationship.
- K. British Columbia recognizes its duty to consult with Esquimalt Nation about the Project and wishes to fulfill that obligation.
- L. The CRD and British Columbia intend to collaborate in an efficient and effective manner to address the Section 35 Rights and interests of the Esquimalt Nation that may be affected by the Project, as set out in their Letter of Understanding, which is attached to this Agreement as **Schedule “B”**.

IN CONSIDERATION OF THE MUTUAL PROMISES CONTAINED IN THIS AGREEMENT THE PARTIES AGREE AS FOLLOWS:

Purposes

1. The purposes of this Agreement are as follows:
 - a. to establish a meaningful consultation process for the Parties for the Project (“Consultation Process”);
 - b. to establish the respective roles of the CRD and British Columbia in the Consultation Process, in accordance with their Letter of Understanding;
 - c. to foster a positive and productive working relationship among the Parties in respect of the Project;
 - d. to seek opportunities to develop constructive working relationships between Esquimalt Nation and the CRD in other areas of mutual interest and to enhance opportunities for the Parties;
 - e. to foster collaboration amongst the Parties in encouraging the federal government to work openly with both the CRD and Esquimalt Nation to discuss, and where possible, address the CRD’s need for land to build Project facilities and Esquimalt Nation’s asserted need to acquire more land.

CRD Commitments

2. The CRD will provide to Esquimalt Nation, in a timely fashion, relevant information about the Project, and no less information than the CRD provides in any of its other engagement processes for this Project.
3. The CRD will provide Esquimalt Nation with the opportunity to present its concerns and any information relating to the Project or its perceived impacts upon the Section 35 Rights and other interests asserted by Esquimalt Nation.
4. The CRD will seriously consider the information and concerns that Esquimalt Nation presents in relation to the Project and the CRD will seek, to the extent reasonably possible, to address those concerns.
5. If the CRD decides not to address a concern raised by Esquimalt Nation or decides not to address it in the manner proposed by Esquimalt Nation, the CRD will provide Esquimalt Nation and British Columbia with written reasons for that decision.

6. The CRD will advise British Columbia of any position that it takes vis-à-vis any concerns raised by Esquimalt Nation in the Consultation Process.
7. The CRD will provide Esquimalt Nation with a copy of any report which it makes to British Columbia on the status of the Consultation Process and a summary of the exchanges between Esquimalt Nation and the CRD in the Consultation Process.

British Columbia Commitments

8. British Columbia will maintain ultimate responsibility for the Consultation Process.
9. Where Esquimalt Nation identifies relevant information about the Project that is not being provided to Esquimalt Nation by the CRD, British Columbia will provide that relevant information to Esquimalt Nation, in a timely manner, provided that information is in British Columbia's control
10. British Columbia will provide Esquimalt Nation with the opportunity to present all of its concerns and any information relating to the Project or its potential impact on all of the Section 35 Rights and other interests asserted by Esquimalt Nation.
11. British Columbia will seriously consider the information and concerns that Esquimalt Nation presents and seek, to the extent reasonably possible, to address those concerns.
12. Where British Columbia decides not to address a concern raised by Esquimalt Nation or decides not to address the concern in the manner proposed by Esquimalt Nation, British Columbia will provide Esquimalt Nation and the CRD with written reasons for that decision.
13. British Columbia will advise the CRD of any position that it takes vis-à-vis concerns raised by Esquimalt Nation in the Consultation Process.

Esquimalt Nation Commitments

14. Esquimalt Nation will provide to the CRD and British Columbia, in a timely manner, relevant information about Esquimalt Nation's Section 35 Rights and other interests asserted by Esquimalt Nation relating to the Project, including information on how those Section 35 Rights and other interests may be impacted by the Project.

15. Esquimalt Nation will make itself available to meet with the CRD and British Columbia to discuss the Project and present responses to the information it receives from the CRD and British Columbia.

Tripartite Commitments

16. The Parties will participate in the Consultation Process in good faith at all times.

17. The Parties will endeavor to maintain a common information base wherever practical and keep a common record of major discussion points, action items, and decisions.

18. The Parties will work together to identify opportunities arising out of the project that may benefit one or more of them and where mutually agreeable, will work together in an effort to achieve those benefits.

19. As long as there remains a possibility of the CRD acquiring federal lands within the Esquimalt Nation traditional territory to build the Project, the Parties will collaborate to encourage the Government of Canada to consult with Esquimalt Nation about the potential impact of the use of the federal lands on Esquimalt Nation's asserted Section 35 Rights and other interests. This collaboration may include the following:

- a) providing information or updates in writing to the Government of Canada relating to the Consultation Process and, in particular, outstanding issues;
- b) exploring strategies, such as letter writing and inter-governmental meetings, to encourage Canada to make land available to both the CRD and Esquimalt Nation; and
- c) amending this Agreement to include the Government of Canada as a party.

Capacity Funding

20. Esquimalt Nation asserts that it has no independent funding to participate in the Consultation Process.

21. British Columbia will provide \$10,000 to support Esquimalt Nation participation in the Consultation Process.

22. In the event that Esquimalt Nation considers that it does not have sufficient funds to adequately support its participation in the Consultation Process it will provide notice to the other parties.

23. The parties will meet within a reasonable amount of time to discuss Esquimalt Nation's concerns.
24. British Columbia will consider a request by Esquimalt Nation to provide additional capacity funding to participate in the Consultation Process.
25. Any disputes regarding the discussion of capacity funding will be referred to the dispute resolution section of this agreement.

Confidentiality

26. If Esquimalt Nation, British Columbia, or the CRD confirms that any information that any of them provides in the Consultation Process is confidential, the Parties undertake not to disclose that information to the public, subject to any disclosure requirements under British Columbia's *Freedom of Information and Protection of Privacy Act* or as may otherwise be required by law.

Dispute Resolution

27. For the purposes of this Article, a "Dispute" is defined as any disagreement arising out of the interpretation of this Agreement of which written notice is provided by a Party in the manner required by this Agreement.
28. A Party that raises a Dispute must give written notice of the Dispute to the other Parties by setting out a summary of the particulars of the Dispute.
29. The Parties will make best efforts to meet within two weeks of the written notice being given of the Dispute and will attempt to resolve the Dispute through collaborative negotiations.
30. If the meeting referred to in paragraph 29 fails to resolve the Dispute, the Parties may jointly agree to refer the Dispute to mediation, and will confirm that agreement in writing.
31. The mediator will be jointly appointed by the Parties. If the Parties cannot agree on the appointment of a mediator within thirty days of agreeing to engage in mediation, the Parties will request the appointment to be made from a roster made up of mediators from the British Columbia International Commercial Arbitration Centre. Each Party will bear its own costs in the mediation and the Parties will share the others costs of the mediation equally.

32. Unless the Parties otherwise agree, the mediation process will serve to provide non-binding recommendations to the Parties.
33. The fact that a Dispute resolution process is taking place or has taken place (including the date, location and participants) will be part of the public record. Factual information, specific conversations, canvassing of options and other creative exchanges will be without prejudice to positions the Parties may subsequently take in any litigation associated with the Dispute, and will not be admitted into evidence in any litigation related to the Agreement or be deemed to constitute an admission of liability.

General Provisions

34. Nothing in this Agreement obliges a statutory decision-maker to act in a manner inconsistent with provincial or Canadian law, and nothing in this Agreement fetters or is to be interpreted as fettering the discretion of a statutory decision-maker.
35. This Agreement does not recognize, modify, suspend, limit, amend, deny, abrogate, extinguish or replace any Section 35 Rights.
36. This Agreement does not constitute a treaty or a land claim agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*.
37. The Parties acknowledge that they may have differing positions regarding the nature and scope of Esquimalt Nation's Section 35 Rights.
38. Nothing in this Agreement is intended to limit the participation by Esquimalt Nation in any public processes established by British Columbia or the CRD to assess the Project.
39. This Agreement does not limit the positions that any Party may take in any other ongoing or future negotiations, settlements, court actions or proceedings between the Parties concerning Esquimalt Nation's Section 35 Rights or any other rights or interests.
40. There will be no presumption that any ambiguity in any of the terms of this Agreement should be interpreted in favour of any particular Party.
41. This Agreement and any amendment to it constitute the entire Agreement between the Parties with respect to the subject matter of this Agreement, unless otherwise agreed by the Parties.

42. Esquimalt Nation represents that this Agreement is binding on Esquimalt Nation and that all necessary actions have been taken to authorize the execution of this Agreement by Esquimalt Nation.
43. British Columbia represents that this Agreement is binding upon it and that all necessary actions have been taken to authorize the execution of this Agreement.
44. The CRD represents that this Agreement is binding upon it and that all necessary actions have been taken to authorize the execution of this Agreement.

Ratification

45. The CRD ratifies this Agreement when the Chair or the CRD, or his/her authorized representative, has signed the Agreement and has delivered the execution page to the First Nation in accordance with the notice provisions set out in this Agreement.
46. British Columbia ratifies this Agreement when the Minister of Environment or his/her authorized representative, has signed the Agreement and has delivered the execution page to the First Nation in accordance with the notice provisions set out in this Agreement.
47. Esquimalt Nation ratifies this Agreement when the Chief of Esquimalt Nation has signed the Agreement and has delivered the execution page to British Columbia in accordance with the notice provisions set out in this Agreement.

Term

48. This Agreement takes effect on the date it is signed by all of the Parties and, subject to termination in accordance with the terms in this Agreement, it expires on the date of completion of the Project unless the Parties agree to extend the term of the Agreement.

Termination

49. Any Party may terminate this Agreement by giving the other Parties 60 days' advance written notice.

Amendments

50. The Parties may make amendments to this Agreement. Any such amendments shall be in writing and ratified by the appropriate signatories.

Notice

51. Any notice or other communication required or permitted to be given under this Agreement must be given in writing and will be deemed to have been well and sufficiently given if:

- a. sent by courier or personally delivered to the Party's representative at the address set out below or to such other representative or address as the Party may from time to time direct in writing; or
- b. sent by facsimile to the number set out below or to such other number as the Party may from time to time direct in writing.

52. A person(s) may be designated from time to time by any of the Parties to act as the representative of that Party for the purposes of this Agreement. Until the Parties to this Agreement are otherwise advised, the designated persons who represent each of the Parties are:

Chief Andy Thomas Esquimalt Nation	1189 Kosapsum Crescent Victoria, B.C. V9A 7K7 Fax: (250) 384-9309
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Randy Alexander Manager Regional Environmental Protection Ministry of Environment	2080-A Labieux Road Nanaimo, B.C. V9T 6J9 Fax: (250) 751-3103
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John Balogh Special Advisor Aboriginal Relations CRD	625 Fisgard St. PO Box 1000 Victoria, B.C. V8W 2S6 Fax: (250) 360-3270
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IN WITNESS WHEREOF the Parties have signed this Agreement:

Signed on behalf of Her Majesty the Queen in Right of the Province of British Columbia, as represented by Minister of the Environment, in the presence of:))) _____) Minister Barry Penner) _____
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Signature: _____)
) _____
) Date
Name of Witness: _____)

Signed on behalf of the Capital
Regional District, as represented by
the Chair of the Capital Regional
District, in the presence of:)
) _____
) CRD Chair Denise Blackwell
Signature: _____)
) _____
Name of Witness: _____) Date

Signed on behalf of the Esquimalt
Nation, as represented by the Chief
of Esquimalt Nation, in the presence
of:)
) _____
) Chief Andy Thomas
Signature: _____)
) _____
Name of Witness: _____) Date

Schedule A
Esquimalt Nation Traditional Territory



0 0.5 1 2 3 Kilometers
 Projection: UTM ZONE 10N NAD 83

- ▲ Summits
- DND Land
- Highways
- Major Roads

APPENDIX A ESQUIMALT NATION TRADITIONAL TERRITORY

The Capital Regional District does not warrant the accuracy within this map, nor will it accept responsibility for errors or omissions. The CRD reserves the right to alter or update the information without notice. Maps should not be used as navigation tools.

Schedule B

**Capital Regional District/Province of British Columbia
Letter of Understanding**

**Consultation and Engagement with Potentially Affected First Nations
Re: CRD Wastewater Treatment**

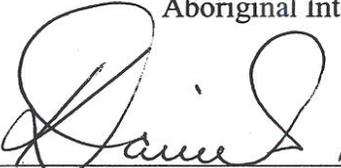
Whereas:

- The Parties – the Capital Regional District (CRD) and the Province of BC – are mutually committed to the implementation of the direction to the CRD from the Minister of Environment (MOE) that was issued in July 2007²⁰⁰⁶ pursuant to the *Environmental Management Act* pertaining to Wastewater Treatment (the “Project”).
- The existing Aboriginal and treaty rights of First Nations are protected under the *Constitution Act, 1982*.
- The federal and provincial governments (“the Crown”) have an obligation to consult with First Nations when making decisions that may affect First Nations’ existing Aboriginal and treaty rights (“Aboriginal Interests”) and, where appropriate, to accommodate such Aboriginal Interests.
- The Crown may delegate procedural aspects of such consultation to third parties such as the CRD; these steps include exchanging and gathering information pertinent to assessing the potential for impacts upon Aboriginal Interests as a result of proposed activities relating to the Project.
- The CRD is anxious to engage its First Nations neighbours in a meaningful way -- to seek their input, to apply their input to avoid and mitigate any potential adverse effects to their Aboriginal Interests, to reduce the likelihood for disputes, and to seek opportunities to work together.
- The CRD and MOE intend to collaborate in an efficient and effective manner to address the Aboriginal Interests of First Nations that may be impacted by the Project.

The Parties therefore agree as follows:

- The Parties will work together to ensure there is a clear understanding of their respective roles in the discharge of their respective responsibilities as regards the First Nations potentially affected by the Project.
- The CRD will partner with the Province to facilitate the discharge of the Crown’s legal duty to consult with First Nations, and likewise to meet the CRD’s commitment to engage in a meaningful way with those First Nations affected by the Project. To this end the CRD’s efforts will include the following:
 - generating appropriate processes for engaging with potentially affected First Nations;
 - ensuring that First Nations have adequate and timely information concerning the Project, including the potential impacts of sewage treatment and related facilities upon their current and traditional activities;
 - providing First Nations with opportunities for effective input before decisions are made by either the CRD or the MOE (in respect of the Project);

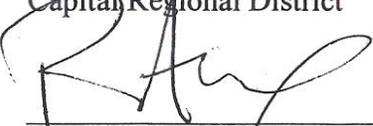
- where feasible, applying First Nations' input to the Project;
 - referring information received by the CRD in writing to British Columbia in a timely fashion, relating to any outstanding issues respecting any Aboriginal Interests that may be raised by First Nations;
 - ensuring that the CRD's engagement process with First Nations follows a timeline that is complementary to the public consultation process to be undertaken with respect to the Project; and,
 - satisfying the Minister of Environment's reporting requirements on the status and content of engagement with First Nations that are potentially affected by the Project.
- The MOE will partner with the CRD to facilitate the discharge of the legal duty to consult with First Nations, and to assist the CRD in meeting its commitment to engage First Nations that may be affected by the Project. To this end, MOE's efforts will include the following:
 - maintaining responsibility for the consultation process with First Nations;
 - providing advice to the CRD on the level of engagement required with individual First Nations that may be affected by the Project;
 - meeting directly with, responding directly to, and, where appropriate accommodating, potentially affected First Nations concerning potential impacts upon their Aboriginal Interests that are more appropriately addressed by the Province; and
 - providing information to the CRD on MOE's response to information received through the CRD engagement process or directly from First Nations regarding potential impacts upon their Aboriginal Interests.
 - Where the Parties agree that it is necessary to do so, they will:
 - develop joint strategies, plans and or timelines to guide consultation and engagement with First Nations potentially impacted by the Project; and
 - work to assist the Government of Canada in satisfying its legal obligations to consult with First Nations with regard to the potential impacts upon any Aboriginal Interests that may result from the Project.



Kelly Daniels
Chief Administrative Officer
Capital Regional District

05/20/08

Date



Randy Alexander
Environmental Protection Manager
Vancouver Island Region
Ministry of Environment

MAY 27, 2008

Date