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November 22, 2012

Via facsimile (250.360.3130) and email (nmore@crd.bc.ca)

Core Area Liquid Waste Management Committee
c/o Capital Regional District
P.O. Box 1000
Victoria, BC
V8W 2S6

Attn: Nancy More, Clerk, Core Area Liquid Waste Management Committee

Dear Committee Members:

Re: November 27, 2012 Special Meeting
Motions relating to the Core Area Liquid Waste Management Plan

We write on behalf of our clients Georgia Strait Alliance ("GSA") and the T-Buck Suzuki Environmental Foundation ("T-Buck Suzuki"). As you are aware, these organizations have a long-standing interest in protecting BC's marine environment and coastal waters from pollution. To that end, they have worked for decades to advocate that the Capital Regional District ("CRD") must implement modern, advanced sewage treatment at the earliest opportunity.

Our clients' efforts including marshalling scientific work which demonstrated that the sewage outfalls at Macauley and Clover Points constitute contaminated sites at provincial law; their assessment was independently validated by the provincial government in 2006. From 2006-2010, they contributed actively and publicly to the development of the Core Area Liquid Waste Management Plan ("LWMP"), including Amendment No 8 to the LWMP which was approved in its current form by the provincial government on August 25, 2010.

Our clients also have expertise in the federal Wastewater Effluent Systems Regulations (SOR 2012/139) ("WSER"), having participated in developing the Canadian Councils of Ministers of the Environment *Canada-wide Strategy for the Management of Municipal Wastewater Effluent* which was the basis for developing the WSER, as members of the Core Advisory Group on the Municipal CCME-Wastewater Effluent Development Committee. As well, our clients were also members of the CRD Technical and Community Advisory Committee for the LWMP.

In addition, GSA and T-Buck Suzuki have supported prosecutions against local governments, including CRD and Metro Vancouver where evidence strongly suggested that their sewage discharges violated environmental law and constituted criminal offences.

Our clients have requested that we provide the Core Area Liquid Waste Management Committee ("the Committee") with a summary of legal information relevant to the motions. For the reasons set out below, we strongly discourage any Committee member from voting in support of the motions.

Recent factual developments

We are advised that a group of anti-sewage treatment activists are once again seeking to foment political opposition to sewage treatment in Victoria and the CRD, coincident with the current federal by-election campaign. We understand that these anti-sewage treatment activists have supported motions before the Committee, arguing that the Committee should scuttle the very LWMP that the CRD (and the Committee itself) took so many years to develop.

Presentations on the motions began on November 14, 2012 and will be continued on November 27, 2012, when the Committee will vote on motions proposed by Directors Derman and Desjardins.

In relevant part, the motion by Director Derman is that the Committee should *inter alia* suspend further action on the current sewage treatment project (under the LWMP) and should "lobby the federal government, at both the staff and the political level, to categorize current sewage practices in the Core Area as "low risk"." For reasons discussed below, this motion reflects a disturbing lack of understanding of CRD's legal obligations and of the operation of the WSER.

In relevant part, the motion by Director Desjardin is *inter alia* that the Committee "request an exemption in the federal wastewater regulations" and retain scientists who have the opinion that the LWMP is "the wrong plan".

Provincial legal requirements

Contaminated Sites Regulation and the Environmental Management Act Order

In 2005, GSA and T-Buck, along with Ecojustice, undertook a scientific assessment of contamination at the Macauley and Clover Points sewage outfalls. This assessment confirmed that the areas around the outfalls legally qualified as contaminated sites under the Contaminated Sites Regulation.[1] Consequently, they asked the provincial government to apply the Contaminated Sites Regulation to the outfall areas, and to issue a clean-up order. Our assessment was later validated in a study commissioned by the Ministry of the Environment.

In July 2006, the Minister of the Environment issued a legally binding Order under section 24(3)(a) of the provincial *Environmental Management Act* ("the Order").[2] The Order did not require the CRD to remediate already contaminated soils. However, the Order did direct the CRD to present a plan by 2007 detailing a fixed schedule for the provision of sewage treatment.

After years of difficult debate and exhaustive public consultation, in 2010, the CRD finally obtained provincial government approval for the LWMP as required under the Order. Subsequently, the Minister has approved amendments to the LWMP, including the most recent Amendment No 8 (approved August 25, 2010) which commits to secondary sewage treatment in operation by 2016.[3]

The LWMP is constrained by the built environment; it is not perfect and no waste management plan could be with such constraints. However, in our clients' view, the LWMP complies with the Order; it reflects the legal and environmental interests of CRD residents; and, when fully implemented, it will ensure much-needed protection to marine biodiversity, and provide community resource recovery opportunities. In addition, opportunities to improve the LWMP through choices of technology and other innovations will only make the plan stronger.

In our view, if Committee members were to approve the legally-flawed motions before them, they would effectively announce to the Province a clear intention to not comply with the Order and the currently approved LWMP.

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[1] B.C. Reg 375/96.

[2] S.B.C. 2003, c 53, Part 3. See also July 21, 2006 letter from Minister Barry Penner to Mayor Alan Lowe and CRD Directors.

[3] Capital Regional District, Core Area Liquid Waste Management Plan, Amendment No. 8, as approved by the Minister on August 25, 2010, at p.1.2.

Federal legal requirements

Wastewater Systems Effluent Regulations (WSER)

As you are aware including from recent correspondence from Environment Canada,[4] in June 2012, the federal government enacted the WSER. This followed a decade of consultation by Environment Canada, in which GSA and T-Buck were active participants.

Under the criteria set out in the WSER, which are largely objective and measurable, and not subjectively debatable, the CRD can only be assessed as falling into the "high risk" category.[5] The CRD's own scientific risk assessment, done in compliance with the WSER, correctly concludes that the Macauley and Clover Point outfalls *significantly exceed* the legal threshold for high-risk facilities.

Therefore under the WSER, on the assumption that the CRD applies for and receives a transitional authorization, the CRD is legally required to implement advanced sewage treatment by no later than 2020.[6] Thus it appears that the CRD has not more than eight years to implement advanced sewage treatment under the WSER (and indeed, under the provincial Order, the CRD has only six years to implement sewage treatment).

Some anti-sewage treatment activists have suggested that CRD could qualify for a "waiver" under the WSER. This is misleading, irresponsible and incorrect. The WSER does not work that way. As confirmed in Environment Canada's recent correspondence,[7] there is no such thing as a waiver under the WSER and no possibility of being exempted from the WSER.

Despite that Environment Canada has clarified to Committee members how the WSER works, Director Desjardin does not appear to have withdrawn her motion

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[4] Letter from James Arnott, Environment Canada to Jack Hull, CRD dated November 6, 2012, appended to Report to Core Area Liquid Waste Management Committee: Meeting of Wednesday, November 14, 2012 (EWW 12-73).
We note that Mr. Arnott is a credible authority on the WSER. In 2011, he was subpoenaed to give testimony to the Cohen Commission to explain the WSER (See Bruce I. Cohen, 2012, Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, The uncertain future of Fraser River sockeye, Final Report, Volume 3 – Recommendations-Summary-Process, Appendix E - Witnesses, p.168).

[5] More than 70 points, as determined by the System of Points – Final Discharge Point, Schedule 2, requires the tightest timeline under a transitional authorization (see WSER, subsection 24(2)).

[6] Indeed, if the CRD does not receive a transitional authorization, under the WSER, it will be legally required to meet the new effluent standards by January 1, 2015 – a mere two years from now. See WSER ss. 6(1) and 50(3).

[7] Letter from James Arnott, Environment Canada to Jack Hull, CRD dated November 6, 2012, appended to Report to Core Area Liquid Waste Management Committee: Meeting of Wednesday, November 14, 2012 (EWW 12-73).

that the Committee should "request an exemption in the federal wastewater regulations" and withdraw the LWMP.

Equally problematic, Director Derman's motion is based on the erroneous assumption that a WSER risk assessment arises not solely from the application of objective criteria prescribed by regulation, but rather from lobbying of federal politicians and bureaucrats. As Environment Canada and CRD staff have clarified,[8] the WSER does not work that way. The CRD cannot somehow "lobby" its way out of a legally required, scientifically-based assessment of risk.

To adopt motions that are based on a willful disregard for the law is ill-advised. As elected official with responsibilities to avoid putting the CRD at legal risk, these motions should be withdrawn. The motions irresponsibly undermine CRD's ability to ensure timely, prompt implementation of the LWMP. To seek to frustrate CRD's efforts to comply with the law is inappropriate. Local politicians should not recklessly threaten the CRD's ability to comply with the WSER or its deadlines – such behaviour is contrary to the public interest.

Species at Risk Act and Resident Killer Whales Critical Habitat Protection Order

In February 2009, the federal government issued the Critical Habitat of Resident Killer Whales Protection Order ("Protection Order"), under ss.58(1) and (4) of the *Species at Risk Act*, S.C. 2002, c. 29 ("SARA")[9]. The Protection Order makes it an offence to destroy any part of the Resident Killer Whales' critical habitat – including through pollution. The Resident Killer Whales' critical habitat was identified by Fisheries and Oceans Canada ("DFO") in the SARA Recovery Strategy for the Resident Killer Whales,[10] and is geographically delineated in the Protection Order. This protection extends to the biological aspects of critical habitat such as water quality. This critical habitat is, by definition, necessary for the survival or recovery of these killer whale populations.[11]

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[8] Report to Core Area Liquid Waste Management Committee: Meeting of Wednesday, November 14, 2012 (CRD EWW 12-73).

[9] *Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of the Killer Whale (Orcinus orca) Order,* SOR/2009-68; The Protection Order was issued shortly after GSA and other environmental organizations, represented by Ecojustice lawyers, commenced litigation in the Federal Court, which litigation ultimately culminated in February 2012 with the Federal Court of Appeal confirming the decision in the lower court that quality of the marine environment was an aspect of critical habitat protected by the Order. *David Suzuki Foundation v. Canada (Fisheries and Oceans)*, 2010 FC 1233 (aff'd *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40).

[10] Fisheries and Oceans Canada, *Revised Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada* (Ottawa: Fisheries and Oceans Canada, August 2011).

[11] *Species at Risk Act,* S.C. 2002, c. 29, s. 2(1) "critical habitat".

The southern Resident Killer Whales' critical habitat includes waters into which CRD sewage is discharged. Contaminants present in these sewage discharges, particularly toxic, persistent and bioaccumlative substance, have been documented to jeopardize the health, survival and recovery of resident killer whales.[12]

Current sewage discharges by the CRD into southern resident killer whales' critical habitat raise cause for environmental and legal concern. In our view, the CRD's ongoing sewage discharges may result in the destruction of parts of critical habitat in violation of the Protection Order and section 58(1) of SARA, and may constitute an offence. However, to date, we have not recommended to our clients that they pursue enforcement action against the CRD, on the understanding that, if fully implemented by 2016, the LWMP would significantly reduce these harmful discharges.

In our opinion, if Committee members were to support motions which would discard or weaken the LWMP, or delay its implementation, this could indicate a willful disregard for mandatory legal protection of the Resident Killer Whales' critical habitat. Violation of the Protection Order may attract future compliance or enforcement action by DFO or Environment Canada.[13]

Concluding comments

We reiterate that there are potential legal consequences resulting from a decision to abandon the Core Area Liquid Waste Management Plan. In this respect, we note that the City of Moncton and the company that they retained to implement a closure plan for a landfill site were charged with violations of the *Fisheries Act*. The City of Moncton pleaded guilty and the company was later found guilty of violations of the *Fisheries Act* for illegally permitting the deposit of deleterious substances into fish-bearing habitat. The company was not able to avail themselves of the due diligence defence because they were "willfully blind" in choosing the implementation option, having been forewarned by a professor of environmental studies that the preferred option may not be in compliance with the *Fisheries Act.*[14] Municipal counsellors and officials are not immune to prosecution, especially where they recklessly, knowingly or willfully approve motions which would likely result in the municipality violating environmental law.

We strongly discourage any Committee member from voting in support of the motion, particularly as the Committee does not appear to have requested any legal advice on the implications of rejecting the LWMP.

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[12] Recovery Strategy, *supra* at note 10, section 2.2.1 pp 17-23, and s. 3.2.2 p. 41, see also p. 22 "local point sources of contaminants into the marine environment include…municipal effluent outfalls".
[13] *SARA, supra* at note 11, ss. 58(1) and 97(1).
[14] *R v. Gemtec Ltd*., [2004] N.B.J. No. 389, 2004 NBQB 371 (aff'd *R. v. Gemtec Limited*, 2007 NBQB 199).

Thank you for considering our views and taking responsible action in the public interest.

Yours truly,

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