

REPORT TO CITY OF NANAIMO AND SNUNEYMUXW FIRST NATION ON COLLIERY DAMS 30-DAY PROCESS

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1. Background and Introduction

(a) Council Decisions

- In October 2012, Nanaimo City Council resolved to remove both the Middle and Lower Colliery Dams in 2013, to eliminate what was described as a deemed “unacceptable public safety risk” that had been identified in relation to the dams. After removing both dams, the City proposed to re-naturalize the Chase River and its surroundings.
- On May 13 2013, City Council resolved instead to take the necessary steps to build replacements for both dams and equip the Lower Dam to ensure it can be used for hydro generation. Snuneymuxw subsequently approached the City to discuss their treaty rights and to endeavour to engage collaboratively with the City on the impacts of the new plan for dam removal and replacement on fisheries and fish habitat related to the Chase River. That discussion led to a formal request by Snuneymuxw at a City Council meeting held on July 8 2013 that the City take 30 days for further discussions before awarding a contract for removal of the dams.
- City Council agreed, resolving that:
“The City seek to conduct further discussions, over a 30 day period ending August 8, 2013, with Snuneymuxw, exhausting all possible options and considerations before awarding a contract for the removal of the Colliery Dams.”
- In their discussions following the passing of the above resolution, the parties agreed that they hoped to be on a joint pathway concerning the future of the Colliery Dams by the end of the process.

(b) Facilitation of 30-day process

- On July 11, the City and Snuneymuxw agreed to jointly appoint a facilitator to assist them with their discussions over the 30-day process. I was appointed that afternoon to work with the two parties, and was asked as part of that process to engage with interested citizen groups, the Province of British Columbia (specifically, the Dam Safety Section (DSS) of the Ministry of Forests, Lands and Natural Resource Operations (FLNRO)), and Fisheries and Oceans Canada (DFO).
- The stated goal of the facilitation was to gather information, hear perspectives, and work to build on common interests towards a collaborative outcome. The role the principals asked me to take was to facilitate the process of discussions between them, assist them in engaging with DSS and DFO, gather any additional public input that could inform their discussions and deliberations, and to provide a public report on the information gathered through the engagement process.
- I was not asked to comment on or advise either of the parties on technical engineering matters; assessments of risk or public safety; the impact of delaying the removal of the dams for thirty days; the merits of any of the options for the dams or what course of action to take on the options, either in terms of selecting an option or recommending a process for further consideration of the options; the merits of

the content of public input and proposals; or any other substantive issue relating to the subject-matter of the 30-day process. Naturally, I would not have been in any position to make such comment or give any such advice.

- My task, in addition to facilitating discussions between the parties to assist them as they worked towards a collaborative outcome, was to present a balanced, neutrally-expressed chronology of the process and work that has taken place and a summary of public input. I have made recommendations in this report, but they are strictly process-oriented and should not be construed as implying either fault or merit on anyone's part.
- I will make one exception to the neutrality of my comments. That is, many individuals expended huge effort and time in responding to the 30-day process, and I would like to commend them in doing so. They include staff of both the City and Snuneymuxw, who devoted their evenings and weekends to undertaking the work required throughout the process above and beyond their regular working days and while having to manage numerous other ongoing responsibilities at the same time. I particularly commend Paul Silvey and Ted Swabey for being constantly accessible and devoting significant effort to the task before them and their principals. I also include in this comment staff of the Dam Safety Section, as I note in that section of this report, and thank them for their efforts. Finally, as I also note in the section on public engagement, many Nanaimo citizens worked hard over the 30-day process to take advantage of the opportunity to make their views known to me, and I would like to acknowledge that effort also.
- Over the course of the 30-day process I attended numerous meetings and discussions between the parties on a daily basis and monitored the work-in-progress as agreed by the parties. At my request, the City engaged an independent consultant selected by me, John McCormick, to assist with obtaining information from the public and summarize the results for the parties. The results of his efforts are summarized in Appendix A on page 18 and key points raised are set out in section 5, Engagement with the Public (page 13).
- With the information gathered from the 30-day process to support their discussions, the two parties expressed the hope that they would be on a joint pathway concerning the future of the Colliery Dams on or before August 8 2013.

(b) Report on 30-day process

- This report summarizes engagement of the parties in the 30-day process, the status of the work undertaken, and the results of public engagement as at August 3 2013.
- **Recommendations on process matters are set out in bold type in the body of the report.**
- The report is being delivered on August 3 to provide the parties sufficient time to review its contents in detail before the City Council meeting now scheduled for August 7 (see below) and the expiry of the 30-day process period on August 8. If any additional information is provided to me by the public prior to August 8, it will be forwarded to the parties.

(c) Status of discussions under 30-day process

- On August 2, a special open Council meeting was scheduled to be held at 4.30 pm on Wednesday August 7, the evening before the last day of the 30-day process. City staff proposed that Council consider recommendations to:
 - Cancel tender 1445 – removal of Middle and Lower Chase Dams;
 - Direct staff to transfer the \$2.5 million proposed to be used from the 2012 surplus to a special reserve to be used in the future for work associated with the risk mitigation of Colliery Dams;
 - Bring back a short term risk mitigation plan at the first available opportunity; and
 - Continue to engage the Snuneymuxw First Nation and the public and return at the first opportunity to Council to adopt a new strategy to deal with the long term mitigation of risks associated with the dams.
- The concepts contained in the recommendations have been discussed by the parties over the course of the 30-day process, and Snuneymuxw has indicated its support for City Council to consider the proposed recommendation. Both parties remain of the view that public safety remains a high priority and that work should continue on developing reasonable and effective short-term mitigation measures with respect to the dams, as well as a permanent solution that poses the least risk to the fisheries and fish habitat associated with the Chase River.
- In the meantime, I note that the parties are continuing to work to gather additional information, both as set out in section 2(d) below and from the public. Whether all of the information that the parties had hoped to obtain in order to inform their discussions will be available by the time of the proposed Council meeting on August 7 is uncertain at this time.
- There remain a number of outstanding questions and concerns on the part of the public regarding the various options under consideration by the parties over the 30-day process (see Engagement with the Public, page 13).
- There is also some uncertainty regarding timing considerations and the feasibility of completing any dam removal or repair work during the 2013 construction window that is generally accepted to be safe by experts in this field (see Timing Issues, page 5). I am advised that window closes, typically, between September 15 and October 15, before the commencement of sustained winter rainfall.
- Further engagement with DFO is required to satisfy compliance requirements of the *Fisheries Act* prior to commencement of any onsite deconstruction or construction-related activity that would constitute a violation of the Act (see Engagement with DFO, page 10).
- Additional engagement with DSS is also required to secure any approvals required for both short-term mitigation measures and any decision on permanent modification of the dams (see Engagement with DSS, page 8).

2. Work undertaken by the parties

(a) Issues facing the parties

- While the parties shared an interest in and placed a high priority on public safety and the integrity of the Chase River fisheries and fish habitat, as well as a mutual respect for each other's rights and responsibilities as governments, a range of other factors were also relevant to the parties as they discussed the options for the dams throughout the 30-day process. These included:
 - The City's legal responsibilities and liability as owner of the dams; advice received from the City's professional consultants to the effect that the dams have deficiencies and do not meet provincial safety standards; and the requirement by DSS (as the body responsible for dam safety in British Columbia) that the City ensure the dams meet provincial safety standards;
 - Outstanding questions and doubts raised by both Snuneymuxw and the public about the content of and conclusions drawn in the reports provided by the City's consultants;
 - A diverse range of public opinion that included both strong support for retaining the existing dams and strong concerns that the dams should be removed as soon as possible to remove the risk to public safety;
 - Uncertainty about the outcome of discussions with DFO on options for removal and rebuilding of the dams, and the likely length of time it may take to receive any necessary DFO authorization to undertake the work;
 - An initial lack of clarity on what to expect from the 30-day process; and
 - Timing issues.

(b) Timing issues

- It is appropriate in this context to make some comments regarding timing issues. City staff, consultants, contractors and representatives of DSS all appeared to be in agreement that for both of the dams to be safely removed in 2013, work would need to be completed within what is generally regarded as the safe construction season for such activity to take place: that is, expert opinion is that it is not safe or practical to undertake dam removal work in the rainy winter season (typically, commencing between September 15 and October 15):
 - Any sustained heavy rain occurring while work is incomplete would put a halt to the work and could prejudice the integrity of uncompleted work;
 - I was advised that all work would therefore ideally be complete by mid-late September, and certainly by the end of that month.
- For the project to be completed in that time frame, the general consensus also appeared to be that onsite work to remove both dams needed to start by July 15. The City's proposed contractor advised the City on July 16 that it may be able to complete the project (i.e. removal of both dams) if it could commence the onsite work by July 29 at the latest. Removal of one dam only (one of the options under

consideration) could commence at a later date, but similar considerations with respect to the need to complete the work before the rainy season would still apply.

- For any onsite work to commence, a number of procedural matters would have to be completed in advance. Those matters include assembling of heavy equipment and other resources, completion of contract documents, and setting up insurance. They also include regulatory requirements, that is, both statutory approval of the proposed work by DSS, and DFO authorization under the *Fisheries Act*,¹ and any other permits or authorizations that may be required (I was not advised that any other regulatory requirements would so apply).
- It could be assumed that DSS would cooperate in issuing its approval in an expeditious manner. However, the same assumption could not be made with respect to the DFO authorization, even if both parties are in agreement on the path forward for the dams and the Chase River. If the current decision to remove and rebuild the dams changes, a new application may have to be made with respect to the chosen path forward. Even with respect to the existing application before DFO, it is uncertain how long it would take DFO to issue an authorization (see section on engagement with DFO).

(c) Temporary hiatus in process

- Differences between the parties in expectations of scope and outcome of process and concerns about timing and liability issues led to a temporary hiatus in the process between July 17 and July 22 after Snuneymuxw First Nation withdrew from the 30-day process for the reasons stated in its press release of that date.
- However, both parties expressed a firm commitment to preserving a positive relationship. Thanks to the strong leadership of both Snuneymuxw Chief and Council and the Mayor and Council, the parties renewed their commitment to the 30-day process on July 22. Both parties actively re-engaged in the process, based on a joint expectation that the City would proactively undertake further investigation of the options for the dams, including removal of both dams with either rebuilding or re-naturalization to follow, removal of the Middle Dam only, and repair or remediation of one or both of the existing dams.
- The parties agreed as part of the basis for re-engagement that public safety remained a high priority and that some action to mitigate risks to public safety must occur. It was agreed that if no other viable option that better protected the Chase River fishery and fish habitat presented itself by the end of the 30-day process, the default option for mitigation in 2013 would be removal of the Middle Dam only (an option that had been analyzed and costed in existing engineering reports) with replacement to occur subsequently.
- However, Snuneymuxw retained serious concerns about the impacts on the fishery and fish habitat of removing and rebuilding even one dam. Within a very short time after reaching that agreement, it was established by the parties through discussions with the City's consultants that remediation (rather than removal and rebuilding)

¹ See section on engagement with DFO, page 10.

might be a viable option for both dams (see section 2(d) below for more detail). Given that was the case, and in light of Snuneymuxw's continuing concerns regarding the impacts of dam removal and rebuilding, the parties agreed that the Middle Dam removal option should not be a default option at the end of the process and embarked instead on undertaking further investigation of remediation options.

(d) Work undertaken by the parties

- Snuneymuxw and City staff immediately engaged in meetings with each other and with the City's engineers, consultants and contractors to discuss the work required, the considerations involved, what other analyses might be possible and most useful in the time available, and a timeline to produce the work. That work has been ongoing since. The work includes but has not necessarily been limited to:
 - Investigating warning signal plans and options as a mitigation measure;
 - Investigating feasibility and hydraulic mitigative effects/impacts of "lock blocking" tops of one or both of the dams;
 - Reviewing the inundation study and incorporating updated information such as the existence of rebar in the Lower Dam, to assess whether that affects the previous determination on risk of failure and/or breach and whether the risk is as high as previously thought;
 - Considering the viability of any other options not previously considered;
 - Reviewing the option of building new dams downstream of the existing dams;
 - Reviewing and reassessing the rehabilitation option as a priority, including addressing issues of what options exist for increasing spillway capacity or other mitigation for current limited capacity, and impacts of spillway expansion;
 - Reviewing removal of the Middle Dam only, including doing further analysis on the seismic risk assessment as standards have changed since the previous analysis was undertaken, and preparing information on remaining risks as it can be anticipated that the Dam Safety Section will want to know what mitigation is required/proposed with respect to the Lower Dam;
 - Reviewing the option of lowering the spillways on one or both dams and other options to increase capacity of spillways;
 - Preparing a report and environmental plan on sediment/erosion control for DFO in relation to Middle Dam only removal;
 - Further investigation of the fisheries impacts of removing the Middle Dam and rehabilitation/spillway expansion options;
 - Review of temporary dewatering mitigation proposals and costs; and
 - Reviewing the standards on which original cost estimates of rebuilding or rehabilitating the dams were based, and comparing the costs of doing the work to minimum standards required by the Dam Safety Section as opposed to the higher standards originally used.
- The latter task in particular has become one of the main focuses of the review work, and has been of significant interest both to Snuneymuxw and the public. It was the City's belief that the dams should be constructed or rehabilitated to survive a catastrophic event without the need for subsequent major repairs, removal or rebuilding. This is

considered to be a standard higher than the minimum required by the Dam Safety Regulations, which only require that the dams not fail catastrophically in a 1:10,000 year seismic event and that the spillways be able to pass maximum probable flood. As part of the 30-day review process, City staff have been undertaking a review of the cost differential between the higher standard that the replacement dams were designed to be constructed to and the minimum requirements of the Regulations.

- On its part, Snuneymuxw engaged SNC Lavalin to provide technical professional advice to the First Nation as it considered the options.

(e) Results of technical review

- As at the date of this report this additional work is ongoing, and the results are not yet available to the parties.
- **It is recommended that if possible the results of the additional work undertaken by the parties be made publicly available in due course, accompanied by any explanatory information that may assist the public in reviewing the contents.**

(f) Hydro generation component

With respect to the proposed hydro generation component on the lower dam, I was advised that City staff reviewed the cost of possibly incorporating a hydro generation capability on the Lower Dam. However, preliminary reports indicated that at the present time, the cost to build in that capability would be much greater than the value of power generated. Accordingly, it was then suggested that if the Lower Dam is repaired or replaced, that the dam be configured to accept a hydro generation unit at some point in the future if and when it could be demonstrated to be financially viable. I was advised that this is not the situation at the present time.

3. Engagement with Dam Safety Section, Water Management Branch

(a) Background

- According to correspondence from the Dam Safety Section (DSS), Water Management Branch (WMB) of the Ministry of Forests, Lands, and Natural Resource Operations (FLNRO) to the City and others, under the BC Dam Safety Regulation, provincial *Water Act*, the provincial government (through the DSS) is responsible for ensuring that all dam owners in the province are in compliance with their responsibilities under the legislation to have safe dams. The province has the authority and responsibility to order dam owners to immediately address hazardous conditions at a dam and potential safety hazards at a dam.
- Prior to the commencement of the 30-day process, the DSS had received the City's seismic and inundation reports and studies and based on the assessments contained in those reports, deemed the Colliery Dams to have "unacceptable deficiencies" and

present an “unacceptable risk” to public safety. Both dams were given an extreme consequence of failure rating (the highest possible in British Columbia).²

- The DSS communicated to the City that as owner of the dams it must take steps to mitigate the risk as soon as possible, and that leaving the dams in their present condition without any form of risk mitigation for an additional year was unacceptable. The DSS then accepted the City’s proposal to remove both dams as acceptable mitigation. DSS officials emphasized repeatedly to the City that risk mitigation should take place as soon as possible.

(b) 30-day process

- Throughout the 30-day process the DSS has continued to emphasize to the City that it is responsible for ensuring that the dams meet required safety standards and that it is the City’s responsibility to take action to mitigate the risk as soon as possible. DSS has been very clear that the provincial government will not tolerate a failure to take any action to mitigate the risks.
- DSS has also been consistently clear that it is not the role of the DSS to choose what option is best or most appropriate for risk mitigation. It is up to the dam owner (the City) to propose an acceptable proposal for risk mitigation. The DSS reviews the proposal, assesses whether it meets acceptable minimum safety standards (the DSS is guided by Canadian Dam Safety Association guidelines in this regard) and if so, accepts the proposal. It does not typically offer advice on mitigation options or work with proponents to develop proposals.
- However, the efforts of the parties to engage with DSS through the 30-day engagement process have had a number of positive outcomes to date. First, both FLNRO Minister Steve Thomson and DSS statutory decision-maker Glen Davidson confirmed to me at the outset of the process that the provincial government considers the Colliery Dams to be of the highest priority, and that staff of the DSS would be available to the parties throughout the process to assist in any way they could.
- I applaud the efforts of DSS staff in this regard. Mr. Davidson and other DSS staff were accessible at all times, attended numerous meetings with the parties and with members of the public to answer questions on DSS’s requirements and offer suggestions, and proactively engaged with City engineering staff and consultants to support the technical review work being undertaken as part of the 30-day process, discussing a range of options for risk mitigation, suggesting various ideas, and providing input as to the likelihood of various options meeting with applicable DSS requirements (including temporary mitigation steps).³

² Both Snuneymuxw and the public have expressed doubts about the contents of reports on which DSS relied and the hazard ratings given the dams based on those reports (see section 5). Re-examining aspects of those studies in light of the concerns raised was identified as part of the work to be undertaken in the 30-day process (see section 2).

³ DSS approval is required where any modification to the dams is proposed (e.g. removal of the dams). It is not required for activities that do not modify the dams (e.g. early warning systems).

- My observation was that initially, DSS continued to place pressure on the City to act in accordance with its proposal to remove the dams, and do so as soon as possible. That was consistent with DSS’s regulatory role and its position on the “unacceptable risk” to public safety posed by the dams, based on the engineering reports supplied to it. As the City had not proposed an alternative mitigation option, DSS confirmed that the only option in front of it continued to be dam removal (subsequently, removal then replacement of dams as of the May 13, 2013 City of Nanaimo Council resolution).
- However, as the 30-day process progressed, the emphasis on taking immediate action on dam removal shifted to an openness to considering other solutions to be proposed by the City arising from the work undertaken as part of the 30-day process, and to consideration of mitigation options to reduce the risks if the dams were to stay in place longer than originally intended.
- As the 30-day process proceeded, this shift of emphasis on DSS’s part from continuing pressure to act on the existing application to remove and replace the dams to assisting the parties with developing both short-term measures and alternative permanent solutions was very helpful to the parties as they analysed the options before them.
- While DSS’s position is that public safety remains a priority and the dams continue to be deficient and those deficiencies must be remedied permanently as soon as possible, DSS also indicated to the parties that resorting to a compliance order to force the City to remove the dams is extremely unlikely, even if the City decides that the dams will remain in place for the winter of 2013—2014. In part, the basis for that position is that the safe construction window to take down the dams may pass before any final decision is made, and DSS will not take any action that could increase the risk to public safety. However, there is a clear expectation by DSS that steps be taken to mitigate the risks as soon as possible even if the dams remain in place.

(c) Conclusion

- If the parties agree and the City decides to leave both dams temporarily in place for the winter of 2013—2014, DSS has confirmed it does not expect to issue a non-compliance order or an order to enforce the removal of the dams this year.
- However, public safety remains a serious concern for DSS, and the City must take action to put in place temporary risk mitigation measures to reduce the stated risks. DSS has made it clear that in addition to proposing temporary risk mitigation, an acceptable proposal for permanent risk mitigation must be submitted and implemented as soon as reasonably practicable.
- **If a mutually satisfactory path forward is found, it is recommended that both parties continue to engage with DSS to ensure a clear and ongoing understanding of its position with respect to various mitigation options and timing considerations.**

4. Engagement with Fisheries and Oceans Canada (DFO)

(a) Background

- On 26 March 2013 the City submitted a Project Notification and Review Application to DFO with respect to the proposed removal of both dams and re-naturalization of the Chase River. The application contemplates receiving the necessary authorization by June 15, enabling onsite work to commence by July 15 and dam removal to be completed by September 15 2013. Re-naturalization work would be complete by October 15.
- DFO subsequently communicated their preliminary assessment that the proposal may result in a net gain to fish habitat in the Chase River.
- Copies of two reports commissioned by the City from engineering consultant firm Klohn Crippen Berger, being biophysical assessments relating to fish, plant and wildlife habitat and fish species inventory and conceptual habitat compensation planning, one dated February 2013 and a later report dated July 2013, were provided to Snuneymuxw and to DFO to assist with consideration of the impacts of the proposal to remove and rebuild both dams.
- In a letter to Snuneymuxw from DFO dated July 8, 2013, DFO indicated that it had determined that the proposal to remove and rebuild would require a DFO authorization under subsections 35(2)(b) and 32(2)(c) of the *Fisheries Act* and requested input from Snuneymuxw about the potential impacts of the project on Snuneymuxw's current or traditional use and activities in the Colliery Dams area.
- It is important to emphasize that Snuneymuxw's view is that the relationship between Snuneymuxw and the Crown is not limited to providing information to DFO on current or traditional activities. Snuneymuxw have advised DFO officials that their treaty rights extend to recognition of Snuneymuxw's authority and right to carry on their fisheries as formerly and extend to rights with respect to fish habitat, rights that are supported by established case law. Snuneymuxw expects to work with DFO based on its treaty relationship with DFO in decision-making regarding Chase River fisheries and fish habit.
- Onsite work to begin the process of dam removal that would amount to a violation of the *Fisheries Act* cannot commence without a *Fisheries Act* authorization in place.

(b) Status of authorization

- Both parties advised me that prior to the 30-day process they had discussions with DFO regarding the City's application in order to support moving the application through DFO's decision-making process in a timely fashion, given the urgency associated with public safety. However, it appears that DFO did not commit to a specific course of action or outcome in those discussions.
- As already noted, DFO did not send an official referral to Snuneymuxw, asking for information, until July 8. The DFO official responsible for processing the application was on vacation until July 23. On Monday July 15 I contacted the individual

monitoring the file while she was away, to ask questions about the process. He advised:

- A decision by DFO on the City's application remained outstanding;
- DFO does not have a specific timeline pursuant to which it processes applications and had not committed to a date by which it would complete its review of this application;
- If DFO approves issuing an authorization for the project the processing time to issue the authorization may be as quick as one week but more typically takes up to two weeks and occasionally longer.

(c) 30-day process

- As part of the work undertaken in the 30-day process, both Snuneymuxw and the City wished to understand as much as possible about potential impacts to fish habitat and fisheries of the various options under consideration. As at the date of this report, that appears to remain a work-in-progress; no new information in this regard has yet emerged.
- The parties met with DFO officials on July 24 to:
 - Confirm that DFO understands that collaborative nature of the work being undertaken by the City and Snuneymuxw with respect to the dams;
 - Confirm that DFO understands the relationship between Snuneymuxw and the Crown in making decisions regarding the Chase River and other matters (see 5(a), above); and
 - Seek DFO's commitment to working proactively with Snuneymuxw and the City as part of the 30-day process of reviewing options for the dams and impacts of those options, and to expedite processing any revised application that results from agreement of the parties on the path forward as a result of the 30-day process.
- Subsequently, Mike Engelsjord (Team Leader, Fisheries Protection Program, Ecosystem Management Branch of DFO in Vancouver) telephoned me to advise that:
 - This issue is of high priority to DFO;
 - DFO staff dedicated to this file are ready and willing to work with Snuneymuxw and the City as they work on the options leading up to a potentially different application;
 - DFO is aware of the time frame and sense of urgency and have the flexibility as part of their standard approach to Fisheries Act approvals to treat issues like this with urgency and are prepared to do so.
 - DFO has encountered situations similar to this in the past.
- On August 2 the parties met with DFO Regional Director Sue Farlinger to brief her. Ms. Farlinger is the statutory decision-maker on the proposal. Ms. Farlinger reiterated DFO's continuing support for working with both parties as they develop both short-term and permanent solutions.

(d) Conclusion

- While DFO has indicated its willingness to work collaboratively with the parties, it is clear that it must also comply with its regulatory requirements and its obligations to work with Snuneymuxw First Nation prior to making a decision. DFO's internal procedures for processing applications may be expedited but must still be followed.
- Any proposal that requires a *Fisheries Act* application must still go through this process. It is difficult, if not impossible, to ascertain how long that may take even under an expedited process. A conservative estimate would be up to two weeks, but it may be longer.
- Planning for implementation of any agreed option arising out of the 30-day process must therefore take that timing consideration into account. **Assuming a mutually satisfactory path forward is selected that requires DFO involvement, it is recommended that both parties continue to work together to encourage DFO to expedite its decision-making process.**

5. Engagement with the Public

(a) Direction on public engagement

- The parties instructed me to engage with interested citizen groups and reach out to local stakeholders to seek their views on desirable and viable options for dealing with the dams, and the bases for their views.
- In particular, the parties wished to hear from the public any new or additional information about the options for the dams, to help inform their discussions.

(b) Steps taken

- With the agreement of the parties, I took the following steps:
 - Immediately arranged to create and publicize an email address (collieryfacilitator@shaw.ca) for public submissions regarding preferred options for the dams and supporting information on those options;
 - Made contact with representatives of interested citizen groups to inform them of the process and to solicit their assistance in publicizing it and connecting me to other interested parties;
 - Requested City staff to provide me with copies of all public correspondence and documentation of public submissions prior to July 8. I was advised that while public submissions at Council meetings are not documented in the minutes of Council meetings, video records of the submissions are available on the City's website. In addition, the Frequently Asked Questions that are posted on the City's website have been generated from questions raised in public submissions and correspondence;
 - Received promptly from City staff electronic copies of all written correspondence and submissions that had been made prior to the commencement of the 30-day process;

- Asked the City to what extent options for the dams proposed by the public had been considered and was advised that several options had been analyzed for feasibility and cost by their consultants and that analysis was contained in the publicly-available reports;
- At my request and with the agreement of the parties, arranged for the City to engage an experienced community development consultant, John McCormick (who was independently selected by me) to assist me in my work by reviewing the main themes of the historic submissions and correspondence, collating and summarizing the public information gathered through the 30-day process, and attending meetings with interested citizen groups to record the information submitted as part of his review.
- Early in the process, the parties discussed holding a large-scale public meeting as an opportunity to gather additional public input. After the temporary hiatus in the process however, the parties directed me to focus efforts on collecting feedback in the most efficient and effective manner in the limited time left available. We therefore continued to actively solicit feedback through emails and meet with groups as requested to receive presentations.

(c) Information received

- I received dozens of emails from individuals and groups expressing their views. The key matters raised in those emails are summarized below, as are (briefly, given the short time frame of the process) the main themes of the historic submissions.
- Some of the emails were copied directly to the parties. In any event, in addition to the summary below, all of the original correspondence received and the summaries of meetings have been provided to the parties to inform their further discussions and deliberations.
- Apart from the feedback on the dams themselves, two key process interests were heard:
 - Firstly, that all public input is given equal status and weight when presented to the parties for consideration, regardless of how it was delivered and from whom, and in particular that the input from what were described as “special interest” groups not be given greater consideration than that of individual submissions. That interest has been clearly conveyed to both parties, and I am taking the opportunity to do so again here; and
 - Secondly, that this summary of the process of public engagement and of the public input received is shared transparently by the parties. **I recommend doing so.**

(d) Main themes of feedback

The principal themes of the feedback received are summarized in Appendix A to this report. In addition, as previously noted, copies of all original correspondence and information received through both email and oral presentations have been provided to the parties in detail. The order in which themes are presented or issues summarized below, or the brevity with which they are summarized in order to emphasize the key

themes to the parties, does not carry with it any suggestion that any particular theme or issue bears greater importance or relevance than other themes.

(e) Conclusions

- As is clear from the above information, there was considerable uptake on the offer to provide further feedback. Those who responded took the opportunity to emphasize views and proposals that had been brought forward to date, with some limited additional material provided to support those views.
- The feedback obtained was very consistent with the general themes of public feedback provided prior to July 8. For example:
 - Serious concerns were raised about the continuing existence of the dams and fears regarding the stated risks to public safety posed by the dams, and urging the City to take immediate action to mitigate those stated risks;
 - Many interested citizen groups and individuals expressed a strong preference for retention of dams and lakes in Colliery Dams Park, and undertaking the least environmentally intrusive and most cost-effective work required to ensure public safety is not at risk;
 - While some did not have a view as to whether to retain the existing dams or build new ones, preservation of the existing dams was clearly the priority for many people;
 - Fears were expressed that if the existing dams are removed without a firm plan and commitment to rebuild, replacement dams will never be built;
 - Submissions were received asking high priority to be given to assessing the best options for sustaining the health and wellbeing of fish and fish habitat in both the existing lakes and the Chase River downstream of the lakes;
 - The archaeological and heritage values associated with the dams and the location of the lakes were expressed to be of significant importance by a number of groups;
 - Community, social, spiritual and recreational values associated with the lakes, the park and the area in general were also raised as being of high importance;
 - Questions and doubts continued to be raised regarding the bases for information contained in various studies and reports commissioned by the City, including the seismic and inundation studies based on which the dams were given the highest possible hazard rating;
 - Another concern expressed was that the engineering reports did not appear to leave much, if any room for consideration of alternative options to dam removal;
 - Requests were made for an independent review to be undertaken by qualified professionals of the assessment of risk for the dams and the options for risk mitigation;
 - Concerns were raised by the public (and by Snuneymuxw) about the fact that the proposed replacement dams were designed to a higher standard than that required by the DSS (noted previously in section 2) and that this may

have affected the analysis of viability of other options such as remediation, which were originally costed out based on the same higher-than-minimum standard.

- It is clear that many members of the public have made extensive efforts to read the lengthy, complex and numerous technical reports and studies that have been undertaken to date. Some individuals also took the time to make detailed proposals for how to address reported deficiencies in the dams, and submitted those to the parties for their consideration as they assessed the options and considerations. This amount of effort clearly indicates the continuing high level of public interest in the future of the dams.
- The City engaged experienced qualified consultants to prepare the reports and studies and provide professional advice to the City to support its decision-making. Nonetheless, as noted above, some groups and individuals have stated that they doubt some of the content of those reports and studies and have questioned or disputed some of the analyses and conclusions contained in them. Some have asked for access to more information and historic reports in order to compare historic data to that used in more recent studies.
- The City has endeavoured over the last few months to respond to those concerns through providing additional documents, information and explanations on its website and at open houses, and in direct discussions and correspondence with various groups and individuals. That information does not appear to have convinced those disputing the technical information in the consultants' reports.
- I have not been asked and in any event would not be able to assess or comment on whether the disagreement over the technical content arises from a misunderstanding of technical issues or whether there is any basis for the disagreement with the reports or concerns raised about them.
- However, one of the goals of the 30-day process was to ensure all the considerations relating to the options for the dams have been exhausted, and as at the date of this report, as noted previously, that work is ongoing. The results of this additional work may in due course be helpful in verifying, updating or clarifying technical and other information that is currently being questioned by the public.
- **What I do recommend is that the City continue to make diligent efforts to provide copies of documents and historical records and to share technical information and to communicate to the public clear, full answers on the technical information that has been received and to respond to their questions. Continuing to engage DSS to add their explanations will be helpful in this regard.**
- **In terms of process, I also recommend that:**
 - **As owner of the dams, in making its decision on their future following the conclusion of the 30-day process, City Council take the opportunity to explain in detail the rationale for its decision and address the key points that have been raised by the public, and how those points have been considered and addressed by Council in making its decision; and**

- **Depending on the outcome of discussions between Snuneymuxw and the City on or before August 8th, Snuneymuxw also consider sharing with the public how the public's views and input influenced Snuneymuxw decision-making.**
- More information may be received from the public via collieryfacilitator@shaw.ca **before August 8**, and if so will be forwarded to the parties.

6. Next steps

If the parties reach consensus on a joint path forward next week, **I recommend that they ensure that they discuss and agree upon very clear and specific actions, responsibilities, timelines, and expectations; clarify priorities for the options under consideration over the winter, given the stated shared primary concerns regarding both public safety and minimizing impacts on the Chase River fishery and fish habitat; identify goals for outcomes; discuss the respective roles of DSS and DFO and how the process of seeking any required approvals or authorizations will be conducted; and determine a joint process to inform the public on the agreed next steps.**

If the parties are unable to settle on a joint path forward, I encourage them to continue to maintain an open dialogue with each other about their next steps and maintain active communication with each other as they continue their government-to-government relationship with respect to other matters of common interest to them in Nanaimo.

The scheduled City Council meeting of August 7 will be an opportunity for both a public update and a formal decision by City Council on the path forward (whether that is acceptance of the path recommended by City staff, confirmation of the current resolution to remove both dams and rebuild them, or a different decision). **I recommend that (if this has not already been arranged) the meeting be televised if possible or recorded, with opportunities for the public to attend and hear the decision and the rationale for the decision.**

APPENDIX A: Main Themes of public feedback
Summary prepared by John McCormick

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Introduction:

As with the rest of this report, this is a summary of the input provided by the public and makes no assessment of the merits or otherwise of the technical issues and proposals articulated by community members in their submissions about the future of the Colliery Dams. All original submissions and information has been forwarded to the parties for their consideration. This summary provides a “snapshot” of the key themes of the submissions and information provided.

The role of the facilitator has been to encourage the community to provide their views and information about the best options for the dams to the parties who jointly appointed her – the City of Nanaimo and Snuneymuxw First Nation. Through this process and from the submissions, it became clear that these inputs could be grouped in overarching themes that reflect aspects of the community’s genuine interests and lived experiences in the future of the Colliery Dams.

This is how the findings in this section of the report are grouped and summarized. The themes that emerged are as follows:

- **Community Asset**, including its importance for recreational and tourism;
- **Protect the Ecosystem**, especially as this relates to the emerged ecosystem and fisheries;
- **Heritage and Other Historical Considerations** that affect the decision;
- **Reports and Studies** that have garnered reaction from respondents;
- **Liability and public safety** as a recognized aspect of the decision-making process and a key consideration;

- **Risk Mitigation** in the form of ideas about how to reach desired outcomes; and
- **Decision-Making Process** itself has been an oft-cited theme.

It is important to note that the order of themes has no bearing on the relative importance of each theme or submission. As such, all input has been summarized with equal weight and consideration.

THEME: Community Assets

Describing the Colliery Dams as community assets with cultural, historic, spiritual and recreational values attached to them can be described as at the heart of the calls to save the dams either through rehabilitation or replacement.

As such, the emotional connection to the dams has been strongly communicated, in statements such as the following, evoking images of “children walking up the hot sidewalk of the hill that leads back to the Reserve and other South End homes. They are happy and refreshed after a day spent swimming and adventuring in the Park.”

It is also pointed out that for Harewood, this community asset provides the only wild park in the area as well as place within a community that provides recreational opportunities for people who can’t afford to “drive to more affluent neighbourhoods where well-established parks are,” or for “children who can’t afford to pay the price to play in the chlorinated waters of the Aquatics Centre.” This affordability factor is mentioned by many who talk about their experiences of growing up around the Colliery Dams, of enjoying time there with a young family, taking a daily perambulation around the park or celebrating an important moment – a wedding or a passing – in the park.

Colliery dam is a place where people have many important memories. It's a place where we learned to swim, fell in love, walked beloved pets, and memorialized loved ones. It's a piece of nature in the middle of an every-growing city, a place for us to go for some peace and tranquility, an escape if you will, in our very backyards.

There was also a sense that the Colliery Dams need to be included in the vision of the growth of Nanaimo – as assets that decades from now will be seen as a treasured and important amenity of a growing city and that will enhance the image of Nanaimo – not dissimilarly to the way Stanley Park is synonymous with Vancouver: “Think of Vancouver with no Stanley Park”, one community member wrote.

It was noted that the Colliery Dams Park is the only park of any significance in the Harewood area, noting that other parks are few and are “artificial, small, and surrounded by galvanized chain link fences.” The hope was expressed that this one-of-a-kind park will remain part of the city for many generations to come.

THEME: Protect the Ecosystem

Another oft-cited theme is that the Colliery Dams have established a stable ecosystem and that the dams themselves have contributed to the diversity of life in the park, including the success of the salmon run below the dams.

The question was raised about how much or whether re-naturalization can enhance the salmon run, especially for coho, and whether salmon ever were able to go up the Chase River past the Dams. Some argue that the Chase River system, prior to the dams' construction, was not necessarily an ideal river for salmon, and suggest that the falls that existed in their original state would have stopped the salmon from migrating upstream.

There are worries that removing the dams will lead to the destruction of the salmon run. It was pointed out that the dams moderate the low flows in the summer, and torrents in the winter, and provide standing bodies of water that are needed by coho to grow and develop for the 12 months required before they venture out to the ocean.

As such, it is argued by several submissions, the removal of the dams will not only destroy the ecosystem that has developed over the 100 years that the dams have existed, it will also undermine the fisheries that have developed both in and below the dams – described as two separate fisheries in one submission.

Others submit that removal and re-naturalization represents an opportunity to “restore and rehabilitate the original length of spawning habitat in the Chase River system-up to 800 meters of additional length to the spawning channel.”

Several pointed out that there is some historical evidence that: “the original system had some waterfalls and possibly some pooling sections.” This information was used both to suggest that the amount of water retained by the dams is less than calculated in the 2012 Inundation Study, and to support the idea of re-naturalization because there would still be swimming, fishing and other recreational opportunities.

One submission argued for retaining the dams because re-naturalization would fill in the natural basins that it is suggested exist in the dam system:

These basins have played a very significant role in keeping silt, and other debris from harming the spawning channels, and will be needed more than ever, due to the clear cut logging that has [been] allowed to take place upstream from the dams, all the way to South Forks Dam. With long heavy periods of rain, these basins will continue to play a significant role in the health of the river below.

It is suggested by some that the plan to re-naturalize the Chase, including removal of the dams and the loss of the “basins” will not move the river toward resurrecting wild salmon

stocks, along with fears that doing so will undermine the “95 percent biodiversity in bird population, the highest in BC” that exists in the park and makes it “an ecological treasure that deserves the greatest respect and protection.”

The concern, expressed in several submissions is that a high priority needs to be placed on protecting one of the most significant Fisheries on Vancouver Island.

THEME: Heritage and Other Historical Considerations

Heritage values associated with the Colliery Dams and park were a significant part of the dialogue between the community and the facilitator, both through submissions by the Archeological Society of BC (Nanaimo Branch), the Nanaimo Community Heritage Commission and individuals who have concerns about the impact of changes to the Dams to developments that were built in the shadow of the dams.

The research on the archeological aspects of the park itself was again part of the dialogue, including a presentation at a Roundtable working session on July 31st 2013 that was chaired by the facilitator. The Pest House Cemetery, as well as a study of culturally modified trees (CMTs) suggests that the Colliery Dams Park has archeological considerations that some members of the community want addressed as part of the dialogue about the future of the dams.

The dams themselves are seen as heritage assets worthy of protection as one of the last remaining vestiges and reminders of the vibrant coal mining history that built the community of Harewood, and potentially as a tourism opportunity to be leveraged (the idea of a Miner Discovery Centre was introduced at the July 31st meeting).

There was uncertainty by one respondent about how: “removing the dams may affect a property and house that was built in the 50's, and the basement is not much higher than the water table.” The point of this and other submissions along this line is a view that developments proceeded with the presumption that the dams or other water controlling structures would be in place to mitigate flood damage.

THEME: Reports and Studies

Challenges to the reports and studies undertaken over the years – especially from 2002 to the 2012 – about aspects of the Colliery Dam from structural integrity to inundation risks were by far the most consistently identified theme running through the submissions.

The challenges were presented to the parties as a basis for reconsidering all options for the future of the dams, and in support of future studies to be undertaken, with temporary mitigation during the rainy season of 2013-14 to be put in place while other options are explored.

Multitude of City studies and reports since 2002 do not support the City's demand for the destruction of the dams while a temporary method of risk mitigation is put in place over this next winter, so that a proper evaluation of the dams can be done.

It is noted that no community member based an argument for re-naturalization on suggested report deficiencies.

Some questioned the safety standard and argued that perhaps the dams are structurally sound. It was a concern that once the dams are removed they will not in fact be rebuilt. In virtually all submissions in this regard, retaining the dams was the end goal.

This led to calls for an independent “second opinion” re-evaluation of the state of the dams and options to remediate any deficiencies.

The May 13th Council motion to begin removal of the dams this year was met with concern from several respondents who worried that this could leave the developments in the floodplain unprotected over winter. Several emails expressed the idea that the dams control the force of the river during high runoff because they slow down the cascade and capture the extra water, and “if they do fill up, the force of the flow has been stopped and the problem is just a very high river with minimal flooding.”

It was also disputed by many that the dams are virtually full all the time, as indicated in the 2012 Inundation Study. It was expressed by people who have lived experience with the dams that in summer the water level falls and even in the winter “there is still room to take on more water”.

At the same time, a clutch of submissions expressed the idea that because of the lack of dam blueprints, it would likely mean that until the dams were taken down, it would not be possible to fully determine the cost and design of dam rebuilding “without removing the dams first” to access soil samples and other assessment of the substrata on which the dams would be reconstructed.

Copies of articles written before the dams existed and at the time of its construction were provided to rebut specific report findings. For example, a 1910 newspaper article: “invalidates much of the [KCB] Engineering Report conclusions. It also casts doubt on the Inundation study, by showing that there were pre-existing pools of water at the dam sites. These volumes of water must be removed before an accurate volume of water that could overflow, can be arrived at.”

THEME: Liability and Public Safety

A number of submissions touched on the issue of liability with respect to the dams, and questioned what impact concerns about liability may have had on the City’s decision-making regarding dam removal.

Councillors [initially] advised that should a dam breach occur they could be held personally liable. Certainly the level of risk in the Harewood Plain, or anywhere else in Nanaimo for that matter, of an event contemplated by the Dam Safety Branch for the dams would level most homes as well as commercial and public buildings. It is noteworthy that there has not been an uprising from those living in the plain demanding the immediate removal of the dams. Quite the contrary.

In the latter example, there were concerns expressed that: “taking away the dams without knowing what will happen is absolutely negligent on the part of the city and if it does cause damage there will be claims against the city.”

Several submissions to the Facilitator suggested that Council’s decisions were being inordinately driven by liability concerns as reflected by this commentary: “the city of Nanaimo, in their quest to reduce 'liability', will take it upon themselves to blast these lakes out of existence.”

This liability concern has a direct link to public safety, in the submissions of many. Some suggested that the dams pose no or little risk to public safety and are a valuable cultural and recreational asset, while others were surprised that aesthetics would be valued higher than safety.

It became clear that not all homeowners below the dams held consistent views. Some argued that it is surprising that "Colliery Dams Preservation Society" have taken the approach that aesthetics is more important than the Inundation Study finding that as many as 150 lives could be lost in a catastrophic failure: “The dams were built over 100 years ago using leftover mining materials -- no technical drawings or specifications to show how they were built -- might last another 50 years or give way in a year.” This was counter-balanced by expressions of lived experiences that “over topping has already occurred during previous

flood events, with NO DAMAGE to lower dam” and that the dams have withstood a 1946 earthquake without any apparent compromising.

THEME: Risk Mitigation

Supporting a solution that retains recreational, ecological and heritage values, the public suggested a wide range of mitigating options: “We are certain that there are options available that preserve two of the most beautiful lakes in the city, while keeping people downstream from the dams safe.”

Some submitters expressed awareness of the complex nature of the technical challenges facing the City, and proposed very specific technical mitigation solutions. We have ensured that the parties are aware of those proposals as they review all the mitigation options.

There was a recommendation that before the dams are removed, the City needs to do a feasibility study as to what is going to happen when the dams are removed, including silt and sediment control in the riparian area.

Remedial ideas suggested to keep the dams – or allow for consideration of the options included (but weren’t limited to) suggestions to reduce water in middle dam or remove middle dam, build island to reduce water volume, and add new dams below the existing dams as an additional safety measure. For example,

My understanding is that the Middle Dam is the one most at risk. The idea is this; if the middle were to be decommissioned the lower dam rehabilitated and the old reservoir made more user friendly. The primary problem with the old reservoir is that I believe it is concrete lined and there is no real vegetation, that I am aware of, surrounding it.

And another example:

The mitigative measures could include, but are not limited to a gradual removal of the dams where needed, with a commensurate re-building to meet earthquake and safety standards that are acceptable and in place for comparative structures and conditions. This would retain the natural environment and present ecosystems that are dependent on the dams, as well as restoring the recreational features and historic assets that the Colliery Dams represent.

An idea appearing in several submissions is the suggestion to set up an early warning system at the lower dam. “Apparently there is an emergency response system in place already in case of an earthquake but an early warning system could be used re earthquake and/or flood...much like they do for tornadoes in the USA.” It was noted that City staff

indicated at a Council meeting that in the short term their emergency response system would be an acceptable effort to mitigate risk.

THEME: Decision-Making Process

A recurring theme of the submissions is a concern about the overall decision-making process on the dams. In particular, there was a perception that either by design or effect, the dialogue prior to July 8 was directed toward a pre-determined result that both dams must be removed as soon as possible.

Other questions were also raised about the high hazard ratings accorded the dams after the Dam Safety Section of the provincial government received the inundation and seismic studies, the contents of which were questioned by a number of submitters. In general, there was a feeling of dissatisfaction articulated by many about the decision-making process. This was reflected by some in an expression of appreciation for the appointment of a facilitator: "The facilitator a good step to reinvigorate the process. Provide true up-to-date record of communications."

Upon the appointment of a facilitator, several asked what will be done with the information after it has been gathered: "The City and Snuneymuxw will initially receive this report, will the information be given to KCB or City staff for analysis? If your job is to gather information for all options for keeping dams, will a decision be made on August 8th for whether we have dams in the future?"

Some submitters wanted to ensure that their interests as stakeholders were being properly taken into consideration and a strong desire to be part of the dialogue on reaching a solution.

While it is not uncommon for Municipal Councils to hold in-camera meetings, decisions made in-camera were a subject of public reaction:

Virtually all of the problems associated with the effective and efficient management of the risks: natural, physical and social, which may be posed by the dams and were finally, at least in their physical manifestation, recognized by the City, have come about due to a decision made in camera and without public notice or consultation to remove the dams and "re-naturalize" the Chase River bed in the Park.

A concern was noted by several submitters that specific community groups were "lobbying the public and in some cases misrepresenting or overstating their cause by stating the City is attempting to destroy the park. Online information on the group and on some petitions does not include information that Council has committed to rebuild the dams."

As with the theme of mitigation, there were several suggestions about how to move the process along. These include the idea of a referendum (although other submitters opposed a referendum), as well as breaking the issue into its two constituent parts: public safety, and parks and recreation expenditures respectively. And this:

Delaying a decision for an RFP on the future of the dams may be in the City's best interest at this time. With the City of Nanaimo undergoing some staff and task readjustments, as a result of financial and budget challenges, it may be appropriate to provide additional time for everyone to reacquaint themselves with matters that the public have raised, as well as positions and requirements for dam and public safety.

The Dam Safety Section did not escape public scrutiny with a concern expressed that there was “no explanation for letters arriving from the Dam Safety Branch on Jan 21 and again on May 13”, and a letter of concern sent to the Honourable Steve Thomson, BC Minister of Forests, Lands and Natural Resource Operations.

It was noted that while one respondent argued that, “it's extremely difficult to get someone to change his/her mind after a decision has been made, no matter how flawed the assumptions or insufficient the evidence”.

It was mentioned in several communications that the Snuneymuxw have Douglas Treaty protected rights to the fisheries on the Chase River, and that they “called for a new public process for exploring alternatives regarding the dams.” In this regard, it was seen by some as ‘disingenuous’ for city council to make the offer to rebuild the dams without input from SFN. In this regard, it was mentioned that there are hydro generation possibilities for the lower dam and that “the Band may not want this”.