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BC Parks
Ministry of Environment
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Sunshine Coast Regional District
1975 Field Road
Sechelt, BC V0N 3A1

Dear Sirs/Mesdames:

Re: Sunshine Coast Regional District (SCRD) Water Infrastructure in Tetrahedron Provincial Park

We write on behalf of Daniel Bouman of the Sunshine Coast Conservation Association to enquire about the legal basis for a proposal to expand water infrastructure into Tetrahedron Provincial Park. It is our position that the proposed water infrastructure – which apparently would include blasting and trench building to build a permanent pipeline through the park – cannot be accomplished under BC's existing protected areas legislation and is therefore illegal. The fact that the Ministry of Environment has apparently invited a Park Use Permit suggests, incorrectly, that such activities can be accomplished under the existing *Park Act*.

It is further our position that the SCRD's recent Alternative Approval Process (AAP) to provide funding for the proposed water infrastructure was also illegal – in that local governments cannot raise funds for an illegal purpose. In the alternative, the questionable legality of the project should have been made clear to voters in the AAP process, and was not.

Background

As we understand it, the Sunshine Coast Regional District (SCRD) holds a series of existing water licences authorizing it to store water in Chapman Lake and make use of water in Chapman Creek as part of its water infrastructure. The licence for water storage is Conditional Licence 50724 (the "storage licence"), while the licences that authorize use of water from the creek are Conditional Licences 16599, 22345, 65258, 69217, 69999, and 107474 (the "use licences").

None of the existing use licences allow for the removal of water at Chapman Lake. Rather, the weir authorized under the Storage Licence allows the SCRD to control the release of water into the Creek, where it subsequently may be used under the Use Licences.

The Storage Licence has a priority date of 1967 and the weir and infrastructure were in place prior to the creation of Tetrahedron Provincial Park in 1995. One of the purposes in creating the park was to protect the headwaters of Chapman Creek and the SCRD's water quality.

The Tetrahedron Provincial Park is designated a Class A park under the *Protected Areas of British Columbia Act*.[1] This means that the boundaries of the park can only be modified through an Act of the Legislature.

BC's Park Act places significant restrictions on activities that can occur in a park, requiring the issuance of a Park Use Permit (PUP) for various activities. Apparently a PUP was issued in or around 1997 to allow the SCRD to carry out maintenance of the weir on Chapman Lake and other related activities. This PUP has since been amended and updated, most recently in 2014.

We acknowledge that it appears that the Province understood that the SCRD might one day wish to expand or alter its water infrastructure within the park. Notably, the Park's 1997 Management Plan had as an objective:

> To ensure there is an appropriate mechanism for authorizing existing and future watershed enhancement and infrastructure development that may be required by SCRD for future population growth on the Sunshine Coast.[2]

However, the Plan also acknowledged that this would likely not be possible within the current Park Designation and/or existing legal framework:

> Government, upon park designation, made a commitment to allow for continued management and enhancement of the Chapman/Gray Creek watersheds as future community water supply sources for the Sunshine Coast residents. However, the Park Act does not allow for improvements to existing watershed infrastructure in the park, and new methods of land designation must be reviewed in order to permit this type of non-conforming use within Tetrahedron Provincial Park.[3]

Instead, the plan promises to "review the options available to government"[4] and the park designation itself[5] to achieve this goal.

Park Act requirements

Under the *Park Act*, a Park Use Permit is required to obtain an interest in land[6] or to take a resource (which would include water) from[7] a Class A park. In both cases, a PUP is only granted where:

> in the opinion of the minister, to do so is necessary to preserve or maintain the recreational values of the park involved.[8]

In addition, a PUP to take a resource may only be issued where the minister is of the opinion that the "development, improvement and use of the park" for its designated purpose(s) will not be "hindered by it."

The current Park Use Permit, issued to the SCRD in 2014, is focused narrowly on the maintenance of the weir (and therefore Chapman Lake), which at this stage, could reasonably be considered "necessary to maintain the recreational values of the park."[9]

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1 *Protected Areas of British Columbia Act*, S.B.C. 2000, c. 17.
2 Tetrahedron Provincial Park Management Plan, p. 16.
3 Ibid., p. 12.
4 Ibid.
5 Ibid., p. 14.
6 Park Act, s. 8(1).
7 Ibid, s. 9(1).
8 Ibid, ss. 8(2) and 9(2).

However, we do not see how large-scale construction of additional water infrastructure, and the additional taking of water from the lake under an expanded water licence, meets this test.

In relation to the requirement that the development of the park for its designated purpose not be "hindered" by the "development, improvement and use of the park", the relevant part of Tetrahedron Provincial Park is designated for "natural environment zone," and while the zoning does recognize "existing and **some future** opportunity for development of the regional water system infrastructure" as an appropriate use, the objective of the zone is to "To provide a variety of easily-accessible off-road outdoor recreation activities in a largely undisturbed natural environment." It is difficult to see that significant construction activity, even if temporary, is consistent with the purpose of this zone.

These restrictions on the use of parkland have been strictly interpreted. In *West Kootenay EcoSociety v. BC*, Madame Justice Prowse of the BC Supreme Court struck down a government decision to re-locate a park road to accommodate a local developer, noting that:

> These restrictions and limitations on the Minister's decision-making powers (when the decision results in the disturbance, destruction, damage etc. of park land) are very much in keeping with the type of role that the Minister is to have in relation to parks as defined in s.3(1) of the ***Park Act*** – that is, a stewardship role.[10]

Given that the Management Plan itself recognizes that the expansion of SCRD water infrastructure cannot be accommodated within the Park designation, it is inappropriate for the Province and the SCRD to be proceeding as if it can.

None of the above should be taken as suggesting that the boundaries of Tetrahedron Provincial Park should be modified or that other measures should be taken to accommodate the SCRD proposal. We simply wish to note that the SCRD proposal is illegal under BC's protected areas legislation and the Minister of the Environment has a solid legal foundation to refuse the application for a PUP.

SCRD Alternative Approval Process (AAP)

The SCRD has recently held an AAP process to borrow money to pay for the proposed water infrastructure. We would suggest that the *Local Government Act* does not authorize regional districts to incur a debt in respect of activities which are illegal.

In the alternative, we would suggest that the AAP was misleading or that notice was incomplete to the extent that it failed to notify the public that the borrowing is for an activity not authorized by law.

We ask the SCRD to rescind the AAP and to hold off borrowing money until such a time, if any, as the legal barriers to proceeding with the project have been resolved.

Conclusion and requests

BC's Parks are a sacred legacy. When the *Protected Areas of British Columbia Act* was enacted, in 2000, the then-Environment Minister, Joan Sawicki, explained:

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[9] We are less clear that the authorization, in the current PUP, of the taking of additional water under a short-term use licence satisfies the test of being "necessary for the preservation or maintenance" of the park's recreational value.

[10] 2005 BCSC 784, para. 64.

> [E]stablishing parks and ecological reserves in schedules in an act in front of this Legislature provides **the highest possible protection to these areas for permanent retention of their boundaries**. Time and time again -- and we certainly heard it through the extensive legacy consultation that happened throughout British Columbia -- British Columbians are clear about that. They want to know that for **those areas that we have put in protected status, their boundaries are secure forever**. [Emphasis added]

While we understand SCRD's desire to manage the water supply for its residents, the legal protections of a park must not be ignored. We understand the SCRD has not fully explored alternatives to expanding this infrastructure, and in our opinion it should not be pursuing this extreme approach without having taken other measures first.

The 1997 Management Plan for the Park proposed that the government would "review the options open to government" related to the expansion of water infrastructure within the park. We would like to know if this review occurred and to request a copy if it did. If it did not, are there plans to conduct such a review?

We would urge the BC Ministry of Environment to reject the new applications for a new PUP and/or a new or revised Water Licence forthwith. Neither application can be considered under the *Park Act*. If the Ministry disagrees with this interpretation, please let us know the legal basis for this conclusion.

Sincerely,

Andrew Gage
Staff Counsel

Deborah Carlson
Staff Counsel

cc: Client