



## Snuneymuxw First Nation

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Ministry of Forests, Lands and Natural Resources  
PO Box 9340 STN PROV GOVT  
Victoria, BC  
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Attention: Scott Morgan, Head, Dam Safety

Dear Mr. Morgan

**Re: Application by the City of Nanaimo to Remove and Replace the Middle and Lower Chase River Dams**

We acknowledge receipt of your June 17 and June 26 letters.

SFN has serious concerns regarding the plan by the City to remove and potentially replace the Middle and Lower Colliery dams. These concerns have been exacerbated by the actions of the City and Province to date. The following are some of SFN's concerns.

Treaty of 1854 and the right of SFN to carry on its fisheries as formerly

On December 23, 1854, Snuneymuxw and the British Crown entered into a treaty at Nanaimo.

By virtue of s. 35 of the *Constitution Act, 1982*, the rights enshrined in the Treaty of 1854 are constitutionally recognized and affirmed. This includes the right of Snuneymuxw to carry on its fisheries as formerly.

The "fisheries clause" in the Douglas treaties has been interpreted in legal decisions including the leading case of *Claxton v. Saanichton Marina Ltd.* (1989). In that case, the British Columbia Court of Appeal held that the reference to "fisheries" in the Douglas Treaty of 1852 (North Saanich) includes both the right to fish and the right to protection of the places where fishing is conducted or that are vital to sustaining those fisheries.

In *Snuneymuxw First Nation v. HMTQ et al.* (2004), the BC Supreme Court also considered the meaning and effect of the “fisheries clause” in the Snuneymuxw Treaty of 1854. The following findings by the Court in that case are instructive:

“The treaty [of 1854] would seem, at the least, to entitle the [Snuneymuxw] First Nation to priority over the fish stocks that exist ... [and it] also places responsibilities on the Crown and vests the First Nation with powers to manage the fishery in such a manner as not to jeopardize the constitutionally protected rights of the Douglas treaty First Nation.”

A vital interest and concern of SFN in reviewing the City’s application to remove and replace the Middle and Lower Colliery Dams is to protect SFN fisheries on the Chase River system by avoiding or mitigating harmful impacts resulting from removal and replacement of the dams.

However, it is apparent from the approach adopted to date that protection of SFN fisheries on the Chase River system is a peripheral consideration. This is especially evident from the decision by the City to replace the dams without any analysis or consideration of the potential impacts to fisheries if this decision is actually implemented. It is also apparent from the conduct of the Province in that despite SFN’s request in its June 19 email for information from the Province about its assessment of the impacts to fisheries from dam removal and replacement, no information has been provided. We can only assume the Province has not provided this information because it has not seriously considered the impacts to fisheries.

The SFN fisheries on the Chase River system include cutthroat trout, rainbow trout/steelhead, coho, chinook and chum. The Chase River system also contains some high quality spawning, rearing and overwintering habitat for salmon. SFN is very concerned that the impacts to our Treaty protected fisheries, including fish habitat, from removal and replacement of the dams, have not been thoroughly investigated or carefully considered by either the City or the Province.

### The Approach of the City

In late 2012, SFN was approached by the City about its plan to dewater and remove the Middle and Lower Chase River dams and “renaturalize” the areas affected. Following initial discussion, a process for engagement was developed in which the City provided some information about removal of the dams. Snuneymuxw was not advised the dams may be replaced.

In May, 2013, Snuneymuxw became aware through the local press that City Council had adopted the following resolution:

“... that staff proceed with immediate removal of the lower and middle Chase River Dams and 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”.

Confronted with this sudden change, SFN pressed the City for an explanation. The only explanation given by the City was that City Council succumbed to pressure exerted on them by concerned citizens opposed to removal of the dams. No prior engagement with SFN occurred before the decision to replace the dams was made. It is uncontested that no consideration of Snuneymuxw rights and interests took place before reaching the decision to remove and replace the dams including any impacts on Snuneymuxw fisheries.

### A Two-Stage Process

The City has requested (and the Dam Safety Section has apparently accepted) that the application for removal and replacement of the dams be considered in two stages even though it is a single application. In your June 17, 2013 “information letter”, you advise that SFN’s assessment of the application should be confined to the “dam removal portion of the application only”. SFN rejects this approach as flawed, self-serving and unreasonable.

In its July biophysical assessment report (stage 3), the City draws a distinction between temporary loss of habitat (e.g. dewatering of the reservoirs) and permanent loss of habitat. It also outlines a conceptual habitat compensation strategy in which it concludes that a net gain in fish habitat will result from the removal and replacement of the dams. Without commenting on the factual basis for this conclusion, it is clearly premised on the replacement of the dams. Yet, the City has acknowledged on several occasions that replacement of the dams may not occur and the Province itself acknowledged this at a recent meeting with Minister Thomson. In fact, the July report refers to “potential subsequent replacement” of the dams. This is highly significant for SFN in assessing the overall impacts to fisheries from dam removal and the measures required to mitigate these impacts including a habitat compensation plan. It is simply not logical to divide the application into two stages as if the dam replacement can be considered separately from dam removal in assessing overall cumulative impacts to fisheries.

### Prejudgment by the Province and Flawed Provincial Process

The Province claims in the June 26 letter that it is committed to meaningful engagement on this file. However, the conduct of the Province to date belies this claim. In the June 21 letter from the Dam Safety Section to the City, you expressly advise the City to “[p]lease proceed with your planned removal of the Middle Chase River Dam and the Lower Chase River Dam as soon as possible”. This advice was given before any engagement with SFN by the Province and without consideration of the Treaty of 1854 and the potential impacts to SFN fisheries from dam removal.

This is reinforced by your so-called June 17 “information letter”. In the letter, you advise that “it is imperative that removal occur this summer and thus we are providing a short time frame for comments”. It is obvious from this statement that any concerns raised by SFN will not affect the outcome. This prejudgment is not consistent with meaningful engagement by any standard. It is also not consistent with the obligation of the Crown to act honorably in its dealings with SFN.

The excuse given by the Province for the unseemly haste is that the fisheries window will not be met if it does not authorize dam removal by July 15 and that work begin immediately, because the fisheries window closes on September 15. This is grossly misleading. In conversations this week with DFO, it was confirmed by DFO that the fisheries window is a guideline only, and further it was specifically stated that this guideline is not generally enforced. Furthermore, in its Project Notification to DFO, the City stated that work may be conducted outside of the fisheries window. In fact, in conversations with the City they acknowledged that this is very likely.

SFN has approached the City and Province with an alternative to the current and deeply flawed process for engagement with SFN. In effect, SFN has proposed:

- Lowering of water levels in both dams take place as needed to mitigate risk. The Province has acknowledged that is an acceptable mitigation measure.
- A feasibility study to be completed from July 15 to August 15 to examine the option of maintaining both dams dewatered over the 2013-2014 winter season, and alternatively of maintaining the lower dam dewatered while middle dam is removed. The feasibility study would be conducted by an independent team of technical experts.
- Immediately upon completion of the feasibility study, the parties work to reach a consensus, and that consensus will be implemented.

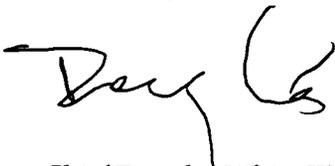
This proposal by SFN is balanced and addresses the public safety risks associated with the Middle and Lower Chase River Dams and SFN’s constitutionally protected treaty

rights and interests in fisheries. Unfortunately this proposal has not been taken seriously to date.

Finally, SFN is also very concerned that the approach by the Province to this file is not consistent with the Reconciliation Agreement and Engagement Protocol entered into by Snuneymuxw and the Province. SFN received an "information letter" from the Province on June 17. The letter effectively states that a decision has been made and invites SFN "comments" within a "short time frame" because "it is imperative that [dam] removal occur this summer ..." Yet, despite this SFN advised that it was willing to include this file in the pilot the EPRWG is currently conducting on condition that sufficient time is allowed for engagement. The response of the Province was quite simply that the timelines established by it for proceeding with its decision for dam removal will not be changed. The apparent reason for this is the so-called limitation of time created by DFO's fisheries window. As noted earlier, the information the Province is relying on concerning DFO is misleading and inaccurate.

Given the above, we do not think the Province is in a position to proceed in the predetermined manner it has indicated. Even basic consideration has not been given to the impacts from dam removal and replacement on Snuneymuxw's rights and interests. There is time for meaningful engagement with SFN while risk mitigation proceeds in an orderly way, as outlined in our reasonable proposal. When I met with Minister Thomson on Tuesday he proposed exploring the fisheries window as part of identifying if more time was available for Snuneymuxw's proposal. That exploration has been done, there is time, and I expect real and proper engagement to occur. The Province is not justified in refusing to properly engage and consider this matter from the perspective of impacts on our Treaty fisheries as is constitutionally required.

Yours truly,

A handwritten signature in black ink, appearing to read "Doug White", with a stylized flourish at the end.

Chief Douglas White III Kwulasultun, B.A., J.D.  
Barrister & Solicitor