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Traffic Congestion and Human Waste
Dumping in the Saanich Inlet

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LEGAL MEMORANDUM

By: Tim Thielmann (ELC Articling Student)¹
For: The Saanich Inlet Protection Society
Date: October 10, 2008
Re: **Traffic Congestion and Human Waste Dumping in the Saanich Inlet**

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I. INTRODUCTION

The Problems

Saanich Inlet Protection Society (SIPS) has retained the Environmental Law Clinic (ELC) to provide legal information with respect to two problems occurring in the Saanich Inlet: (1) Human waste dumping and (2) Traffic congestion

(1) *Human Waste Dumping*

The Human Waste Dumping project is one of a number of current activities and projects undertaken by SIPS. The Society currently operates a marine holding tank pump-out boat which services vessels that have holding tanks. Payment is by donation. Currently there are several older “liveaboards” in the Inlet which are without holding tanks. This means that human waste is continually being dumped untreated into the Inlet. This is of serious concern given the low “flushing-action” of the Inlet. SIPS has requested that the ELC provide legal information to assist in managing this unwanted disposal of human waste into the Inlet.

(2) *Traffic Congestion*

Due in part to the expansion and revitalization of the marinas in the area of Brentwood Bay, the Saanich Inlet has become clogged with derelict vessels and other abandoned structures such as barges, docks, and poorly placed or barely visible mooring buoys and steering lines. In particular, this unwanted material has accumulated at the mouth of Tod Inlet and Gowlland Tod Provincial Park, an area frequented in the summer by large numbers of recreational boaters. These obstructions create navigational hazards to the many boaters in small craft, kayaks, and

¹ I would like to thank Daleen Thomas, whose research provided the foundation for this work.

larger vessels that gather in the area on Saturday evenings to watch fireworks displays at Butchart Gardens.

This nautical congestion not only obstructs recreational navigation, but represents serious health and environmental hazards. Many of the vessels or other structures are in a state of disrepair, some are half-submerged, others have vessels attached to them, and one in particular serves as a barge with industrial equipment aboard, which, if it were to capsize could cause significant environmental damage. In the Willis Point area, and elsewhere, there is a haphazard assortment of mooring buoys, to which often-unidentified crafts are moored. Further, several boats in the area are moored illegally to private property by 'steering lines', some of which are submerged and difficult to see, posing a significant danger to shoreline navigators.²

Past Actions

In 1996, a coalition of governmental and non-governmental parties began working on a strategy to address marine pollution in low-tidal flushing marine areas in the Capital Region. A number of studies and consultative processes occurred, and by 1997, the Capital Regional District decided to introduce new environmental management strategies for the Victoria Harbour, Esquimalt Harbour, and Saanich Inlet.³ The BC Ministry of Environment nominated Saanich Inlet as a 'no dumping' zone under the *Pleasure Craft Sewage Pollution Prevention Regulation*, but to date the federal government has not designated these areas.⁴

On March 2, 2008, SIPS launched a formal complaint to Transport Canada regarding navigational and health hazards in the Saanich and Tod Inlets.⁵ SIPS requested that Transport Canada enforce provisions of the *Navigable Waters Protection Act* concerning the removal of unauthorized works or obstructions, and provisions of the *Private Buoys Regulation* concerning the appropriate labeling of buoys. It is our understanding that SIPS has not received a response to this complaint as of October 10, 2008.

It is our understanding that SIPS is interested in organizing a Roundtable discussion with interested parties such as local government representatives, non-governmental organizations, First Nations, recreational and tourism groups, and others to collaborate regarding long term strategies for maintaining the navigational and environmental integrity of the Saanich Inlet.

² Frances Pugh on behalf of SIPS, Letter to Transport Canada, Mr, Boris Glazar. Marine Safety, Victoria, Date: March 2, 2008.

³ Victoria Natural History Society website. <http://www.vicnhs.bc.ca/pleasure.craft.sewage.html>. And, BC Ministry of Environment, Environmental Protection Division website: http://www.env.gov.bc.ca/epd/epdpa/mpp/boat_sewage.html, last updated 2005.

⁴ According to the Victoria Natural History Society website, the initiative was scuttled by the Office of Boating Safety (Canada Coast Guard). Victoria Natural History Society website. <http://www.vicnhs.bc.ca/pleasure.craft.sewage.html>. A government informational brochure on Marine Protected Areas states that the Department of Fisheries and Oceans had not designated Saanich Inlet a 'no dumping' zone by 2000. Government of British Columbia, Ministry of Sustainable Resource Management. *Marine Protected Areas in BC*. January 2002, page 3.4. ftp://ftp.gis.luco.gov.bc.ca/pub/coastal/rpts/MSRM_PMPA.pdf

⁵ Frances Pugh on behalf of SIPS, Letter to Transport Canada, Mr, Boris Glazar. Marine Safety, Victoria, Date: March 2, 2008.

The Scope of this Memorandum

This memorandum provides an overview of the legal jurisdiction and applicable laws relating to the “human waste dumping” and “traffic congestion” issues, and then outlines several options for enforcing these existing laws. The second section of this memorandum provides information relevant to long term management strategies for the Inlet. It is intended to assist SIPS in facilitating a Roundtable discussion with interested parties. This information includes an array of programs, strategies, law reform projects, and a model law.

II. JURISDICTION

General

Sources of Federal Jurisdiction

The federal Crown’s jurisdiction over environmental matters such as waste-dumping, derelict vessels, or navigational congestion can be derived from a number of constitutional ‘heads of power’, including:

- “Navigation and shipping” – s. 91(1)
- “Sea Coast and Inland Fisheries” – s. 91(12)
- “Canals, Harbours, Rivers, and Lake Improvements – s. 108
- “Criminal Law” – s. 91(27)
- “Peace, Order, and Good Government” – s. 91

Sources of Provincial Jurisdiction

The Province, on the other hand, does not have jurisdiction to manage navigational issues such as marine traffic congestion. But, it has jurisdiction to regulate waste-dumping by virtue of the following constitutional powers:

- “Property and Civil Rights in the Province” - s. 92(13),
- “Generally all matters of a merely local or private nature in the Province” – s. 92(16), and possibly
- “The Establishment, Maintenance, and Management of Hospitals ...” – s. 92(7)

Resolving Conflicts between Federal and Provincial Jurisdiction

As a starting point, so long as the subject matter (the ‘pith and substance’) of a provincial (or federal) law falls squarely under an appropriate head of power, that law is constitutionally *valid*. In general, a valid law can have incidental effects on subject matters outside its scope of jurisdiction.⁶ This is quite common given the broad scope of the above ‘heads of power’ in the

⁶ The doctrine of interjurisdictional immunity is the exception to this rule. According to the doctrine of interjurisdictional immunity, provincial laws are not permitted to affect certain federal entities or subject matters,

Constitution and the complex nature of modern society. Further, federal and provincial governments can regulate different ‘aspects’ of a common subject matter and as long as there is no direct conflict between these laws.⁷ However, when a provincial and federal law directly conflict, the federal law prevails to the extent of the conflict.

In practice, where jurisdiction overlaps, federal and provincial governments often enter into agreements, such as memorandums of understanding, in order to negotiate the division of regulatory rights and responsibilities. However, in some cases, jurisdictional overlap can allow governments to ‘pass the buck’ allowing important issues to fall into regulatory gaps.

Jurisdiction over Waste-Dumping in Marine Inlets

The Courts have made it clear on several occasions that neither the provincial nor federal government has exclusive jurisdiction to regulate ‘the environment’, and that environmental issues will typically require a coordinated approach between all levels of government. In *Oldman River*, Justice LaForest stated:

“In Canadian constitutional law, the environment is an abstruse topic "which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty"

The discussion below outlines the jurisdictional bases for existing laws as well as the grounds for future federal or provincial laws that could be enacted in relation to marine pollution (and waste-dumping specifically) in areas such as the Saanich Inlet.

Federal Jurisdiction

In Canada, the federal Crown has jurisdiction over the sea and seabed, extending to 12 nautical miles from the nation’s coasts (i.e., the Territorial Sea).⁸ However, in 1984, the Supreme Court of Canada recognized an important exception to this rule. It held that the sea waters and sea bed between Vancouver Island and the mainland (i.e. the Georgia Strait) are within the territory of British Columbia.⁹

In *Re: Crown Zellerbach Ltd. Et al.* (1988) SCR 401, a majority of the Supreme Court of Canada

including interprovincial works, federally incorporated companies, federal parks, and others.

Hodge v the Queen (1883 JCPC)

⁷ The Supreme Court of Canada’s current view of the term “conflict” has been summarized as follows: provincial legislation will only be held to be in conflict with federal legislation if (a) it is impossible for those to whom the two enactments purportedly apply to comply with both; (b) it is impossible for the courts or other state decision-makers to give simultaneous effect to both enactments; and (c) application of the provincial enactment would frustrate the purpose of the federal law. See Elliot, R.M., “Safeguarding Provincial Autonomy from the Supreme Court’s New Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?” *supra.*, note 95.

⁸ *Reference Re: Offshore Mineral Rights*, [1967] S.C.R. 792

⁹ *Reference Re Ownership of the Strait of Georgia and Related Areas.*, [1984] 1 S.C.R. 388. The provincial Crown also enjoys ownership and jurisdiction over the foreshore—i.e., the area between the high and low tide marks along a shoreline. This provides the Province with the jurisdiction to regulate beach access, (though the construction of docks, wharves, or other constructs along the shore is governed by the federal *Navigable Waters Protection Act*).

held that the federal government has jurisdiction to regulate *marine pollution* within federal and provincial waters. The majority held that ‘marine pollution’ was a matter of ‘national concern’, falling within the peace order and good government (“POGG”) power of the federal Crown.

Subject matters within the national concern branch of POGG must be ‘single’ or ‘indivisible’ matters, and must be matters that go beyond the practical reach of provincial regulatory powers. In the majority’s view, the indivisibility of marine pollution was evident by “...the obviously close relationship... between pollution in coastal waters, including the internal marine waters of a state, and pollution in the territorial sea.” Further, the court asserted that the difficulty in discerning the boundaries between territorial and internal marine waters creates an “unacceptable degree of uncertainty for the application of [provincial] regulatory and penal provisions.” It also noted the obvious possibility of pollutants dumped into provincial waters moving into and affecting federal waters.¹⁰

Reflecting on this case, constitutional law expert, Peter Hogg, concludes:

“It seems, therefore, that the most important element of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces.”¹¹

The anti-dumping provisions of the *Canadian Environmental Protection Act* (Part 7, Division 3) are enacted on the basis of federal jurisdiction over marine pollution. Any future federal laws passed to address dumping in sea inlets could presumably be justified on this basis as well.

There are other constitutional ‘heads of power’ that could provide federal jurisdiction to regulate marine dumping in sea inlets such as the Saanich Inlet. The federal power over “Sea Coast and Inland Fisheries” (s. 91(12)) enables it to regulate marine dumping that affects fish and fish habitat, as is done through the *Fisheries Act* provisions prohibiting the deposit of ‘deleterious substances’ (examined below). Section 108 confers federal authority over “Canals, Harbours, Rivers, and Lake Improvements” and could provide jurisdiction to manage dumping if a sea inlet is designated as a federal harbour (which will be discussed below in relation to the *Fisheries and Recreational Harbours Act* below). Finally, the “Criminal Law” power in 91(27) can be used to prohibit activities that are harmful to public health and safety (while leaving room for provincial *regulation* of these matters as well).¹²

Provincial Jurisdiction

As stated above, the sea waters and sea bed between Vancouver Island and the mainland (i.e. the

¹⁰ Le Dain J.’s approach to the national concern doctrine is rather peculiar. He states (at para 35): “It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment.” Though indivisibility and ‘provincial inability’ are typically treated as distinct requirements for the national concern test, Le Dain J. appears to assert in the ‘provincial inability’ to regulate a matter (eg because of the interconnectedness of the subject matter) is relevant as an indicator of the indivisibility of the matter. As Hogg notes, these factors should probably be treated separately, as provincial inability to regulate a matter may arise due to other reasons than a subject matter’s indivisibility (see Hogg, note 67, at p. 454).

¹¹ Peter W. Hogg, *Constitutional Law of Canada*. 2nd ed. Toronto: Thomson, 2005. p. 454.

¹² *Re: Hydro Quebec* (1997), 217 NR 241 (SCC).

Georgia Strait) are within the territory of British Columbia.¹³ BC's authority to regulate dumping within its provincial territory (e.g. sea inlets in the Georgia Strait) could be derived from a combination of the following heads of power:

- “Property and Civil Rights in the Province” - s. 92(13);
- “Generally all matters of a merely local or private nature in the Province” – s. 92(16); and,
- “The Management and Sale of the Public Lands belonging to the Province”

In my view, both the BC *Environmental Management Act* and *Park Act* are constitutionally valid, as their ‘pith and substance’ relates to the three grounds above, not to ‘marine pollution’ or another matter within federal jurisdiction. Moreover, the anti-dumping provisions in these laws (which will be examined below) affect the subject matter of ‘marine pollution’, but do so without *directly conflicting* with any existing federal laws. The creation of a provincial regime for environmental management or parks management may *duplicate* some aspects of federal fisheries or marine pollution laws, it does not frustrate their purpose or make the simultaneous performance of both provincial and federal laws impossible.

Even if a court were to hold that the anti-dumping provisions in these provincial laws *did* frustrate the purpose of a federal law, the Province likely has the jurisdiction to create an inlet-specific marine-dumping law. This law could emphasize the ‘local and private’ nature of dumping within inlets (as opposed to dumping in other types of internal waters), due to the low-level of tidal flushing. Such a law would fall outside of federal jurisdiction over matters of ‘national concern’ because the factors in *Crown Zellerbach* (indivisibility and provincial inability) do not seem to apply: in most cases, there are easily identifiable boundaries between provincial inlets and extra-provincial waters; and, waste dumped into inlets does not normally affect extra-provincial waters.

Jurisdiction over Marine Traffic

The federal Crown also has jurisdiction over “navigation and shipping” by virtue of s. 91(10) of the *Constitution Act 1867*, which confers the right to regulate activities on the ‘navigable waters’ of Canada. Federal laws such as the *Navigable Waters Protection Act*, the *Canada Shipping Act 2001*, and the *Fisheries and Recreational Harbours Act* are based, at least in part, on this constitutional footing.

The Province, on the other hand, has no clear jurisdictional basis for regulating marine navigation and traffic congestion. Since the *Navigable Waters Protection Act* (and portions of the *Canada Shipping Act 2001*) create extensive administrative regimes to deal with these issues, it is unlikely that the Province could enact a law specifically designed to address these issues, even if restricted to sea inlets in provincial waters. The ‘pith and substance’ of such a law would likely fall within the federal jurisdiction under 91(10). However, it is possible that provisions of the BC *Park Act* that purport to regulate marine traffic in Provincial Parks are valid and

¹³ *Reference Re Ownership of the Strait of Georgia and Related Areas.*, [1984] 1 S.C.R. 388

applicable, since the pith and substance of that law pertains to provincial lands (s. 92(5), and there is no direct conflict between the Park Act provisions and the relevant federal provisions regarding abandoned and wrecked vessels.

Local Government Jurisdiction

The Saanich Inlet is bordered by a number of local governments in the Capital Regional District, including the municipalities of Central Saanich, North Saanich, and the Highlands, and the Juan de Fuca electoral area. For the following reasons, these local governments likely do not have jurisdiction for managing the traffic congestion and human waste dumping in the Saanich Inlet.

Local governments derive their authority to regulate from provincial jurisdiction. Its scope is set out in British Columbia's *Community Charter*¹⁴ and *Local Government Act*.¹⁵ The *Community Charter* creates areas of concurrent jurisdiction between the provincial government and municipalities. These areas are specified in section 9 and include: the protection of public health [s. 8(3)(i)]; the natural environment [section 8(3)(j)]; and the removal or deposit of soil or other material [s. 8(3)(m)].¹⁶

Despite the apparent breadth of these grounds, there appears to be a problem. The territorial limits of municipalities or electoral areas do not extend past the high tide mark and into the sea or sea bed. Local governments do not have jurisdiction to regulate matters outside of their territorial boundaries. Hence, it would appear that local governments have no jurisdiction to regulate matters occurring within the Saanich Inlet.

First Nations Jurisdiction

There are a number of First Nations reservations bordering the Saanich Inlet, and the traditional territories of (one or more of) these First Nations likely includes this area.¹⁷ However, it is

¹⁴ *Community Charter* [SBC 2003] http://www.qp.gov.bc.ca/statreg/stat/c/03026_02.htm#section9

¹⁵ *Local Government Act* [RSBC 1996] http://www.qp.gov.bc.ca/statreg/stat/l/96323_00.htm

¹⁶ The exercise of local governmental powers under s. 9 is restricted by certain requirements specified in the RAR, such as the obligation to obtain provincial approval of municipal bylaws, or to enact bylaws in accordance with provincial regulations or agreements (which would likely include BC's *Riparian Areas Regulation*). To date, provincial regulations under section 9 of the Community Charter have enabled municipalities to make regulations in the areas of pesticide control, invasive species, and watercourse protection." Environmental Law Clinic, University of Victoria, Deborah Curran, "Green Bylaws Toolkit: for Conserving Sensitive Ecosystems and Green Infrastructure", November 2007, http://www.greenbylaws.ca/images/greenbylaws_web1207.pdf p. 19 Page 19-20.

¹⁷ Six First Nations were consulted pursuant to a June 1995 Saanich Inlet Study: Tsawout Village at Saanichton Bay, located on the east side of Saanich Peninsula; Tseycum Village at Patricia Bay, located at the north east side of the Saanich Inlet; Pauquachin Village at Cole Bay, located at the mid-east side of Saanich Inlet; Tsartlip Village, located at the south east side of Saanich Inlet; Malahat Village, located on the mid-west side of Saanich Inlet; and Cowichan near Duncan. *Report on First Nations Consultation: Water Quality*, Prepared by: Bjorn O. Simonsen & Alison Davis, The Bastion Group Heritage Consultants, and James Haggarty, Shoreline Archaeological Consultants Ltd., Prepared For: Water Quality Branch, Environmental Protection, <http://www.env.gov.bc.ca/wat/wq/saanich/sisrofnc.html>

unlikely that, as a matter of Canadian law, the First Nations living near the Saanich Inlet have jurisdiction to regulate matters occurring within the Saanich Inlet.

Indigenous peoples in Canada have their own laws, customs and traditional forms of government. However, the law in Canada does not appear to recognize an inherent jurisdiction of First Nations to govern their traditional lands and ocean areas, although some legal scholars argue that there is such an inherent jurisdiction.¹⁸ And, although the *Indian Act* provides for a limited exercise of jurisdiction by Band governments over matters occurring on reserves, Canadian courts have generally held that reserve boundaries extend only to the high-tide mark (i.e. not into ocean areas), thus limiting the application of band bylaws.¹⁹

However, Canadian constitutional law recognizes a category of ‘aboriginal rights’, which provide some protection for fishing and marine harvesting practices of aboriginal peoples. These rights may give rise to fiduciary duties owed by Canadian governments to protect the health and safety of marine areas on which these practices depend.²⁰ Furthermore, Canadian governments must consult First Nations whose aboriginal rights (e.g. to fish) are potentially adversely affected by decisions in relation to those rights.²¹

III. ENFORCEABLE LAWS REGARDING HUMAN WASTE DUMPING

In my view, only the first of the following four laws applies immediately to human waste dumping in the Saanich or Tod Inlets: (1) s. 36(3) of the Fisheries Act; (2) s. 125 of CEPA; (3) s. 128-129 of the Regulations for the Prevention of Pollution from Ships and Dangerous Chemicals; and, (4) the Marine Pollution section of CSA, 2001.

Federal Laws

Fisheries Act, Section 36(3)

The *Fisheries Act* prohibits the deposit of substances that will harm fish, fish habitat, or the human use of fish.²² Section 36(3) states:

“... no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious substance that results from the deposit of the deleterious substance may enter any such water.”

¹⁸ See Kent McNeil, “The Jurisdiction of Inherent Right Aboriginal Governments.” October 11, 2007 <http://www.fngovernance.org/resources/index.htm>.

¹⁹ *R. v. Lewis*, 1996, SCC, p. 360. It has recently come to my attention that one or more First Nations in the area operate a marina, and that there may be boats that are moored within reservation boundaries. This may provide jurisdiction for those First Nations to regulate certain aspects of the activity in the marina. More research may be required on this issue.

²⁰ *Guerin v. The Queen* [1984] 2 S.C.R. 335

²¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73

²² Section 34(1)(e): ... "deposit" means any discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;

Section 34(1) provides a broad two-pronged definition of “deleterious substance”:

"deleterious substance" means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water,

The first branch of this definition essentially prohibits depositing *inherently toxic* substances; while the second prohibits the deposit of non-toxic substances *in quantities likely to harm fish or fish habitat*.²³ The first branch of the definition would apply to the leakage of boat fuel, and the second to the dumping of human waste into the water in ‘non-flushing’ inlets. Note that “high faecal coliform counts” have been documented in Tod Inlet and in Goldstream Park, resulting in prohibition of bivalve shellfish harvesting in these areas.²⁴ Thus, human and other waste appear to be causing deleterious effects upon shellfish, which are defined as “fish” under the Act. Fisheries and Oceans should be acting to prevent breaches of s. 36 that may be contributing to these fish closures.

Canadian Environmental Protection Act

Section 125 of the *Canadian Environmental Protection Act* (CEPA) prohibits the disposal of substances into the ocean (with the exception of waste or other matter, which can be disposed by permit).²⁵ However, s. 122(1)(f)'s definition of "disposal" *excludes* “a disposal of a substance

²³ This interpretation was upheld in *Fletcher v. Kingston (City)* (2004), 7 C.E.L.R. (3d) 198 (Ont. C.A.)

²⁴ Government of British Columbia, Ministry of Sustainable Resource Management. *Marine Protected Areas in BC*. January 2002, page 3.4. ftp://ftp.gis.luco.gov.bc.ca/pub/coastal/rpts/MSRM_PMPA.pdf

²⁵ Schedule 5 defines “waste or other matter” to include the following:

1. Dredged material.
2. Fish waste and other organic matter resulting from industrial fish processing operations.
3. Ships, aircraft, platforms or other structures from which all material that can create floating debris or other marine pollution has been removed to the maximum extent possible if, in the case of disposal, those substances would not pose a serious obstacle to fishing or navigation after being disposed of.
4. Inert, inorganic geological matter.
5. Uncontaminated organic matter of natural origin.
6. Bulky substances that are primarily composed of iron, steel, concrete or other similar matter that does not have a significant adverse effect, other than a physical effect, on the sea or the seabed, if those substances
(a) are in locations at which the disposal or incineration at sea is the only practicable manner of disposing of or thermally destroying the substances; and
(b) in the case of disposal, would not pose a serious obstacle to fishing or navigation after being disposed of.

that is incidental to or derived from the normal operations of a ship." Staff at Environment Canada indicate that human waste (i.e. sewage) is considered 'a substance that is incidental to or derived from the normal operations of a ship'. It appears therefore that section 125 does not therefore apply to the situation in the Saanich or Tod Inlets.

Canada Shipping Act, 2001 (Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals)

The regulations under the *Shipping Act, 2001* contain detailed provisions that will, eventually, apply to the dumping of sewage into sea waters from small vessels.²⁶ Technically, the *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals*²⁷ came into force on May 2007. But, it is being phased in gradually. Existing vessels are not required to comply with these rules until May 2012.²⁸

The discussion of the Regulations is thus for informational use only.

According to s. 199 of the Regulations, any ship that has a toilet must also have a marine sanitation device or a holding tank.

Section 129(1)(e)(i), requires that *treated* sewage be dumped at least one nautical mile from shore.²⁹

Untreated sewage must be deposited at least 3 nautical miles from shore while the ship is travelling at "the fastest practicable speed" (s. 129(1)(e)(ii)).

For ships located in waters that are less than 6 nautical miles from shore to shore, the following rules apply:

No sewage shall be deposited into these waters if there are sewage reception facilities available (s. 129(3)). However, if there are no such facilities, sewage must be deposited:

- while the ship is travelling at 4 knots or the fastest practicable speed; and,
- into the deepest waters located further from shore; and
- the deposit must not cause "visible solids" to be deposited on the shoreline.

For a step-by-step guide to these provisions, see APPENDIX 2.

²⁶ Not certified to carry more than 15 passengers, or weighing less than 400 gross tons.

²⁷ *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals*, available at <http://www.tc.gc.ca/acts-regulations/GENERAL/C/csa/regulations/400/csa450/csa450.html>

²⁸ The Regulations came into force on May 2007, but section 117(2) says that they only apply to existing ships after five years after this date.

²⁹ Even if the sewage is treated and dumped one nautical mile from shore, it must not: cause a film, sheen, or discoloration to develop on the water or shoreline (s. 129(2)(a)); cause sewage sludge or emulsion to develop under the water or along the shoreline (s. 128(2)(b)); or, contain any visible solids (s. 129(2)(c)).

Designated Sewage Areas

In ‘designated sewage areas’, the dumping of untreated sewage is prohibited, and the deposit of treated sewage is strictly regulated.³⁰ The rules for designated sewage areas are in force right now. Schedule 4 of the *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals* has a list of these areas. There are 17 areas designated in BC. However, Saanich Inlet and Tod Inlet are not on the list.

Under the former regulation, the BC government invited the public and local governments to suggest areas for protection based on the following criteria:

- used as a domestic water supply or for swimming;
- have extensive pleasure boat traffic and are poorly-flushed; or
- have a sensitive aquatic environment (e.g. shellfish resources).³¹

The Saanich Inlet was nominated by the BC government.³² But to date, the federal government has not designated it. It is not clear to me whether a definitive decision has been made regarding this nomination at this time.

Saanich Inlet SIPS may wish to lobby Transport Canada and other branches of the federal government to have the Saanich and Tod Inlets identified as ‘designated sewage areas’.

Canada Shipping Act, 2001 – Marine Pollution

The “Marine Pollution” section of the *Canada Shipping Act, 2001* contains various provisions regarding the inspection, detention, and disposition of boats that cause marine pollution. However, it is not clear whether its provisions prohibiting discharge of ‘pollutants’ apply to sewage dumping.

Section 165 of the *Canada Shipping Act 2001* states that “pollutant” means:

“(a) a substance that, if added to any waters, would degrade or alter or form part of a process of degradation or alteration of the quality of the waters to an extent that is detrimental to their use by humans or by an animal or a plant that is useful to humans ...”

Although this definition appears sufficiently broad to encompass the dumping of human waste, staff at the Canadian Coastguard indicate that this definition has been interpreted to include only hydro-carbon based pollutants.³³ This is an important issue because pollution response officers (PRO’s) have broad powers to address environmental hazards caused by discharge of ‘pollutants’

³⁰ *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals*, s. 118(B): “Effective immediately no ship shall discharge sewage in a designated sewage area, unless it is through a Marine Sanitation Device (MSD) with an output count of less than 14/100 mL

³¹ BC Ministry of Environment, Environmental Protection Division website: http://www.env.gov.bc.ca/epd/epdpa/mpp/boat_sewage.html, last updated 2005.

³² The geographical coordinates for Saanich Inlet were: lat. 48° 37’N long. 123° 30’W. All water south of line from Hatch Pt. to Moses Pt.

³³ Phone conversation, Jeff Brady, Pollution Response Specialist, Canadian Coast Guard: Environmental Response

as defined in s. 165(a).

PROs have powers to redirect, board, and inspect, or detain vessels that he or she believes might discharge or has already discharged a pollutant.³⁴ The Minister of Fisheries and Oceans has broader powers still. He or she can take any measures necessary to remedy the pollution, and can remove, destroy or sell the polluting vessel, and order necessary clean-up measures at the expense of the vessel owner.³⁵

Persons violating this Part are liable on summary conviction to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than eighteen months, or to both.³⁶

Oil Discharges - The Ship Source Oil Pollution Fund

Section 40 of the *Canada Shipping Act, 2001, Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals* prohibits dumping oil or oily mixtures into sea waters.

Transport Canada's "Ship Source Oil Pollution Fund ("the Fund") provides financial compensation for damage caused by ship-based oil pollution, and for the costs incurred through actions to prevent or clean up ship-based oil pollution. The Fund is typically accessed by insurance companies or government agencies that have a financial interest or statutory responsibility in taking prevention or clean-up measures. However, the *Marine Liability Act*, which sets the legal parameters for the Fund, indicates that compensation may be available for any person who incurs a *reasonable* amount of costs by taking *reasonable* measures to address the anticipated damage from oil pollution.³⁷

The Administrator of the Fund is responsible for determining whether a person will receive compensation and the amount of any compensation. The Administrator can only compensate claimants for costs which, in the Administrator's view, were reasonable in the circumstances. Because this evaluation takes place *after* the prevention or clean up measures, and *after* the claim has been filed, any person initiating such measures must accept the risk of not being compensated.

Detailed documentation will strengthen claims to the Fund, and should include information

³⁴ Section 175.1(2); s. 177(4).

³⁵ Section 180(1)

³⁶ Section 183(1) and (2)

³⁷ Note: "Reasonable" applies to both clean-up and preventive measures. However, there is no definition of "reasonable" in the *MLA*. It is noted that [ITOPF](#) says that for the international compensation regime "reasonable" "is generally interpreted to mean that the measures taken or equipment used in response to an incident were, on the basis of an expert technical appraisal at the time the decision was taken, likely to have been successful in minimizing or preventing pollution damage. The fact that the response measures turned out to be ineffective or the decision was shown to be incorrect with the benefit of hindsight are not reasons in themselves for disallowing a claim for the costs involved. A claim may be rejected, however, if it was known that the measures would be ineffective but they were instigated simply because, for example, it was considered necessary to be seen "to be doing something". On this basis, measures taken for purely public relations reasons would not be considered reasonable". See [ITOPF Handbook 2006-2007, p. 29](#). See also the website of the Office of the Administrator of the Ship Source Oil Pollution Fund: <http://www.ssopfund.gc.ca/english/cecriteria.asp>

related to: the ship(s) that caused or is (are) causing the pollution; evidence that the ship(s) caused or is (are) causing oil pollution; evidence of any potential or actual damage from this oil pollution; an ‘expert assessment’ of the estimated costs for preventing (or cleaning up) the damage from this oil pollution.³⁸

There are strict time limits for filing claims. If an oil discharge has caused damage, claims (for the clean up expenses) must be filed within two years of the time the damage occurred, and within five years of the original discharge. If no damage has (yet) occurred, claims (for prevention expenses) must be filed within five years of the original ‘occurrence’ anticipated to cause damage.

It is my understanding that the SSOPF has never been used to fund preventative measures initiated by a community group with no direct financial or legal interest in the prevention.³⁹ The normal procedure when ship-source oil pollution is identified is to contact the Canadian Coastguard or Environment Canada. However, in the case that these agencies are unwilling to address the issue and take appropriate measures to address this threat, should SIPS initiate its own prevention and rely on the Fund for financial compensation? In light of the fact that compensation can only be awarded *after* expenses are incurred, there are a number of factors that should be considered before such risks should be assumed. These include:

- Whether a direct legal or property interest in the anticipated damage is required to receive compensation for preventing that damage;
- In the case of derelict or wrecked ships, whether it is necessary to provide evidence of actual leakage in order to justify preventative measures such as ship removal;
- The basis on which the Administrator evaluates the reasonableness of the costs incurred (are the costs of ship disposal weighed against anticipated damages from oil pollution?)⁴⁰

Provincial Laws Regarding Human Waste Dumping

Environmental Management Act

Prohibitions against Sewage Discharge

Section 13 of the *Environmental Management Act* (“*EMA*”)⁴¹ prohibits persons from the unauthorized discharge of domestic sewage or waste into “any reservoir... or other natural body

³⁸ For more detailed information on claims, see the Office of the Administrator of the Ship Source Oil Pollution Fund website: <http://www.ssopfund.gc.ca/english/inforequired.asp>.

³⁹ Phone conversation with George Lagge, October 9, 2008. Office of the Administrator of the Ship Source Oil Pollution Fund: (613) 991-1726. <http://www.ssopfund.gc.ca/english/cecriteria.asp>

⁴⁰ For more information regarding the Fund or its operation, contact: The Fund Administrator: Office of the Administrator of the Ship Source Oil Pollution Fund: (613) 991-1726. ssopf@rogers.com; George Lagge, Analyst, Office of the Administrator of the Ship Source Oil Pollution Fund: (613) 991-1726. ssopf@rogers.com; David F. McEwen (legal counsel for the Fund): Alexander Holburn Beaudin & Lang LLP, (604) 484-1700

⁴¹ *Environmental Management Act*, available at http://www.qp.gov.bc.ca/statreg/stat/e/03053_00.htm

of water.”⁴²

Conservation officers can inspect private residences, including vessels⁴³ (by warrant if necessary).⁴⁴ If as a result of the investigation, there are reasonable grounds to believe an offence was or is being committed, the officer can “order a person to do anything the officer considers necessary to stop the contravention or prevent another contravention”, and can also seize property reasonably considered to be evidence of an offence.⁴⁵

Persons that commit offences under the *EMA* and its regulations can be subject to administrative penalties specified in the *EMA*.⁴⁶ The contravention of section 13 can result in a fine of up to \$2,000 or imprisonment for up to 6 months, or both.⁴⁷

Environmental Emergency Measures

Under section 87 and 88 of the *EMA*, if the Minister of Environment considers that an “environmental emergency” exists and requires “immediate action”, he or she can authorize and fund an immediate cleanup to address any hazard that has arisen. Section 87(1)(c) defines an environmental emergency as:

“...an occurrence or natural disaster that affects the environment and includes ...
(c) a spill or leakage of oil or of a poisonous or dangerous substance.”

It seems reasonable to consider the dumping of human waste into a non-flushing inlet to be a ‘leakage of ... a dangerous substance.’ The same is true for leaking fuel from abandoned vessels. The crucial issue therefore is whether these occurrences are causing an environmental emergency that requires *immediate action*. Given the fact that the trigger for such action is an ‘occurrence or *natural disaster*’, it seems unlikely that the ongoing dumping of human waste by numerous individuals would meet the immediacy requirement.

However, if SIPS possesses evidence regarding immediate health or environmental hazards caused by this activity, it should provide this information to the Minister of Environment and request the designation of an environmental emergency.

The Park Act

The southern portion of the Saanich Inlet is located within Goldstream Provincial Park, and the

⁴² “13. A person must not discharge domestic sewage or waste from a trailer, camper, transportable housing unit, boat or house boat onto land, into any reservoir or into any lake, pond, stream or other natural body of water, except (a) in compliance with a permit, an approval, an order, a waste management plan or a regulation, or (b) if disposal facilities are provided, in accordance with proper and accepted methods of disposal using those facilities, and in accordance with the *Health Act* and regulations.

⁴³ Section 111

⁴⁴ Section 109(2) and (3)

⁴⁵ Section 112(1)(a) and (b)

⁴⁶ Section 115(1)(a) and (b)

⁴⁷ Section 120.

entirety of the Tod Inlet lies within the Gowlland Tod Provincial Park.⁴⁸ In my view, the *Park Act* and its regulations could be applied to the sea areas within park boundaries (though, as discussed above, the Province may deny this jurisdictional implication).

The *Park Act*⁴⁹ (and regulations) authorizes park officials to address waste dumping (and unauthorized occupancy, discussed below) within park areas. Section 14 of the *Park Act* prohibits the transportation of any garbage, refuse and domestic or industrial waste through any park, and forbids the deposit of any material whatsoever in any park (without a permit).⁵⁰

Section 32(f) of the *Park, Conservancy and Recreation Area Regulation*⁵¹ prohibits depositing (without authorization) waste in a park, or allowing or causing waste to “flow on or seep into any land or water...” in a park.

The *Park Act* specifies the penalties for contravention of the Act and its regulations. Contravention of the *Park Act* can result in a fine of up to \$1,000,000 or imprisonment for up to one year, or both.⁵² Contravention of the Regulations can result in fines of up to \$200,000.⁵³ Continuing contraventions can result in separate fines for each day the contravention occurs.⁵⁴

What You Can Do about Marine Dumping

If you observe someone dumping sewage into the Saanich or Tod inlets:

- If there is harm to fish or fish habitat:
 - Contact Fisheries and Oceans Canada and request the enforcement of s. 36(3) of the *Fisheries Act*. It will be helpful to provide evidence that:
 - the waters are frequented by fish; and,
 - the waste dumping is harming fish, fish habitat, or the human use of fish in the area.⁵⁵
 - If Fisheries and Oceans Canada refuses to prosecute persons dumping this waste, it may be possible to contact legal counsel to launch a private prosecution.⁵⁶

⁴⁸ Goldstream Provincial Park map: <http://www.env.gov.bc.ca/bcparks/explore/parkpgs/goldstream/>. Gowlland Tod Provincial park map: http://www.env.gov.bc.ca/bcparks/explore/parkpgs/gowlland_tod/

⁴⁹ *Park Act*, [RSBC 1996]. http://www.qp.gov.bc.ca/statreg/stat/P/96344_01.htm

⁵⁰ *Ibid.* s. 14.

⁵¹ *Park, Conservancy and Recreation Area Regulation*, http://www.qp.gov.bc.ca/statreg/reg/P/Park/180_90_00.htm

⁵² *Park Act*, s. 28(1).

⁵³ *Park Act*, s. 28(2).

⁵⁴ *Park Act*, s. 28(3)

⁵⁵ Note that “high faecal coliform counts” have been documented in Tod Inlet and in Goldstream Park, resulting in prohibition of bivalve shellfish harvesting in these areas. Government of British Columbia, Ministry of Sustainable Resource Management. *Marine Protected Areas in BC*. January 2002, page 3.4. ftp://ftp.gis.luco.gov.bc.ca/pub/coastal/rpts/MSRM_PMPA.pdf

⁵⁶ Private prosecutions not been very successful to date, as many have been ‘stayed’ by government attorneys

- Contact a Pollution Response Officer (PRO) at Fisheries and Oceans Canada and request the investigation of a suspected marine pollutant discharge according to s. 175-177 of the *Canada Shipping Act, 2001*. Indicate that the definition of ‘pollutant’ in s. 165 of the Act should include ‘raw sewage’;
- Contact the BC Ministry of Environment to enforce the dumping prohibitions in s. 13 of the Environmental Management Act. You can also request that the Ministry *inspect* suspected waste-dumpers according to ss. 106 – 112 of the Act. Encourage the Ministry to apply the administrative penalties in s. 120 of the Act against those that perform prohibited dumping. This is probably a secondary option, as the Province may claim that it does not have jurisdiction to enforce the dumping provisions in s. 13 with respect to vessels located on and dumping into the ocean. Further research may be required to address this jurisdictional question (see related point above).

If waste is dumped within a Provincial Park:

- Contact BC Parks and request park officers or rangers enforce the prohibition against dumping waste in s. 28 of the *Park Act*. BC Parks may assert that the Province does not have jurisdiction over sea waters within park boundaries. If so, further research may be necessary to examine this legal question. It may be possible to seek legal action regarding this issue.⁵⁷

If waste-dumping represents an immediate danger to public health or safety:

- Contact the Minister of Environment and request the designation of an “environmental emergency” according to s. 87 and 88 of the *Environmental Management Act*; or
- Contact Fisheries and Oceans Canada and request that the Minister take the measures necessary to address the damage caused by the discharge of this pollutant (s. 180 of the *Canada Shipping Act, 2001*).

If you observe discharged ship oil or fuel:

- Contact Transport Canada and request that they enforce s. 40 of the *Regulations for the Prevention of Pollution from Ships and for Dangerous Chemicals* prohibiting discharge of oil or oily substances.
- If Transport Canada does not address the situation, contact the Office of the Administrator of the Ship Source Oil Pollution Fund to see if the Fund might provide compensation for clean-up or prevention efforts.⁵⁸

general prior to proceeding to trial.

⁵⁷ I am awaiting a response from Doug Bifford, Aquatic Specialist, BC Ministry of Environment. 250-387-1161. In phone conversation with other members of the Ministry of Environment staff, I was informed that BC Parks does not have jurisdiction over ocean areas and does not enforce dumping provisions therein.

⁵⁸ Contact one of the following: The Fund Administrator: Office of the Administrator of the Ship Source Oil

IV. ENFORCEABLE LAWS REGARDING TRAFFIC CONGESTION

Federal Laws Regarding Traffic Congestion

Canadian Environmental Protection Act

The prohibition against the deposit of substances in s. 125(1) of CEPA applies to the abandonment of vessels in sea waters. Section 125(1) says that

“No person or ship shall dispose of a substance in an area of the sea referred to in any of paragraphs 122(2)(a) to (e) [which includes Canadian territorial waters and internal waters of Canada].

Moreover, section 122(1)(e) indicates that “disposal” includes “the disposal at sea of a ship or aircraft,” as well as “the disposal or abandonment at sea of a platform or another structure...”

An enforcement officer from Environment Canada should be contacted to enforce these rules against abandoning vessels at sea.⁵⁹

Canada Shipping Act 2001

The *CSA 2001* provides a regulatory scheme according to which government officials can identify, remove, and dispose of or sell abandoned vessels and wrecks.

Wrecks

The Minister of Transport is authorized by the *CSA 2001* to deal with a ‘wreck’, which is defined in the Act to include:

“(a) jetsam, flotsam, lagan and derelict and any other thing that was part of or was on a vessel wrecked, stranded or in distress;”⁶⁰

Pollution Fund: (613) 991-1726. ssopf@rogers.com; George Lagge, Analyst, Office of the Administrator of the Ship Source Oil Pollution Fund: (613) 991-1726. ssopf@rogers.com; David F. McEwen (legal counsel for the Fund): Alexander Holburn Beaudin & Lang LLP, (604) 484-1700

⁵⁹ I am awaiting a response from Environment Canada regarding the applicability of these provisions to abandoned vessels, and in particular, what enforcement options there are when the owner of the abandoned vessel or structure is unknown.

⁶⁰ Section 153. Staff at Transport Canada do not appear to consider abandoned or dumped vessels to be ‘wreck’ according to this section of the Act. Ministry staff may also distinguish between ‘wreck’, which comes from ships or aircraft abandoned at sea, from other types of “debris” that can found in the sea. Jim Nailor, Receiver of Wrecks, Pacific Region, Transport Canada. Phone Conversation with Tim Thielmann. October 14, 2008.

Under the *CSA 2001*, a “receiver of wrecks” (“RW”) is appointed by the Minister of Transport. When a person finds and comes to possess wreck whose owner is unknown, that person must contact the RW and follow the RW’s instructions.⁶¹ That person is entitled to a salvage reward, which is extracted from the resale value of the wreck (and determined by the RW).⁶² The *CSA 2001* prohibits persons from possessing, concealing, destroying, selling or otherwise disposing of wreck that the person knows has not been reported to an RW.⁶³ The RW can do whatever he or she considers reasonable to identify the owner, but under the *CSA 2001*, the RW is not *required* to take any action with respect to a given wreck.⁶⁴

According to s. 160(1)(b), the RW may dispose of or destroy wreck ...

“... at any time if, in the receiver's opinion, the value of the wreck is less than \$5,000, the storage costs would likely exceed the value of the wreck or **the wreck is perishable or poses a threat to public health or safety.**”⁶⁵

If the owner cannot be identified, the RW can sell the wreck and use the proceeds of distribution to pay salvage awards, the cost of salvage, and other associated costs.⁶⁶

Detention of Unseaworthy Vessels

Section 222 of the *Canada Shipping Act, 2001* provides authority for marine safety inspectors (from Fisheries and Oceans Canada) to inspect and detain unsafe vessels.

If a vessel is deemed by an inspector to be ‘unseaworthy’, the inspector may choose to detain the vessel.⁶⁷ If the inspector believes that a vessel is so unsafe that it exposes passengers or crew members to “serious danger”, the inspector **must** detain the vessel.⁶⁸

⁶¹ Section 155(1).

⁶² Section 156

⁶³ Section 157. The common law historically recognizes the right to receive an award for salvaging abandoned or wrecked vessels. In general, the following three conditions must apply: (a) danger to the salvaged vessel; (b) a voluntary rendering of service (i.e. not pursuant to contractual or official duty to the vessel); and (c) a successful salvage (see *General Accident Indemnity Co. v. Panache IV (The)* [1997] F.C.J. No. 1539, at para 27). The provisions in the *CSA* appear to have narrowed these principles, requiring salvors to contact the RW, and allowing the RW to determine if any salvage awards apply.

⁶⁴ Section 155(2) and (3). There are no internal government policies directing RWs on how to exercise their powers under the *CSA 2001* and the *Navigable Water Protection Act*. In practice, the RW will ask whether the resale value of the wreck will cover the cost of retrieving, fixing, and selling it. Jim Nailor, Receiver of Wrecks, Pacific Region, Transport Canada. Phone Conversation with Tim Thielmann. October 14, 2008.

⁶⁵ Emphasis added. It is not common for wrecks to be removed for public safety reasons. Conversation with staff at Transport Canada indicate that for a wreck to be removed for public safety or health reasons, the decision would likely be made by senior officials within the agency. Jim Nailor, Receiver of Wrecks, Transport Canada. Phone Conversation with Tim Thielmann. October 14, 2008.

⁶⁶ Section 164(1) and (2). Note that persons that contravene this section of the *CSA*, for example by not reporting a wreck, can be liable for up to \$100,000 or to an imprisonment for up to one year, or to both

⁶⁷ Section 222(1) “If a marine safety inspector believes on reasonable grounds that a contravention of a relevant provision has been committed by or in respect of a vessel or that the vessel is not seaworthy, the inspector may make a detention order in respect of the vessel.”

⁶⁸ Section 222(2)

Navigable Waters Protection Act

Under this Act, the Minister of Transport —through the Receiver of Wrecks—has broad powers to remove and dispose of abandoned vessels or wrecks that are obstructing navigation in waters subject to federal jurisdiction.⁶⁹ Section 16 lays out a broad discretionary power of the Minister of Transport to remove and dispose of such obstructions as he or she sees fit. The Minister can sell the vessel or wreck,⁷⁰ and if the proceeds of disposition do not cover the cost of this process, the outstanding cost is owed by the owner, master or persons in charge of the vessel or wreck to the federal Crown.⁷¹

The Minister also has the authority under section 19 to order the removal of anchored, moored, or adrift vessels (i.e. non-wrecked vessels) that are causing navigational obstructions. Failure to comply with such orders is an offence, and results in a fine of up to \$5,000 (plus the cost of the removal of the vessel).⁷²

Private Buoy Regulations (Canada Shipping Act, 2001)

The SIPS letter dated March 2, 2008 to Transport Canada made formal complaint regarding several alleged violations of section 4 of the *Private Buoy Regulations* regarding the proper identification and placement of private buoys.

Section 5 of the Regulation indicates that the Minister of Fisheries and Oceans may require owners of private buoys to maintain or repair them so that they comply with the regulations.⁷³ Further, section 7 indicates that the Minister of Fisheries and Oceans may remove non-compliant private buoys.⁷⁴

Provincial Laws Regarding Traffic Congestion

The Park Act

As mentioned above, Tod Inlet and portions of the Saanich Inlet are located within provincial park boundaries. As discussed above, in our view, the Province has jurisdiction to regulate matters within its territory (including the sea and sea bed) in so far as there is no material conflict with federal legislation. Thus, provisions of the *Park Act* and Regulations should apply to traffic

⁶⁹ The Receiver of Wreck may distinguish bona fide ‘obstructions’ from mere ‘hazards’, and will typically only address obstructions to navigation. There are no internal government policy documents that assist the RW in deciding whether or how a navigational obstruction should be handled. In practice, obstructions to major shipping routes are given priority. The powers of the RW are thus highly discretionary. Jim Nailor, Receiver of Wrecks, Pacific Region, Transport Canada. Phone Conversation with Tim Thielmann. October 14, 2008.

⁷⁰ Section 17.

⁷¹ Section 18.

⁷²

⁷³ Section 5(1) If there is a need for increased visibility or better identification of a buoy for safety and the prevention of accidents, the Minister of Fisheries and Oceans may order the owner of the buoy to modify it according to the requirements set out in the *Procedures Manual for Design and Review of Short-range Aids to Navigation Systems* (TP9677), published in March 1989 by the Canadian Coast Guard, as amended from time to time.

⁷⁴ Section 7: “The Minister of Fisheries and Oceans may remove from any Canadian waters a private buoy that does not comply with these Regulations.”

congestion issues within the portions of the Saanich and Tod inlets that are within provincial park boundaries.

Section 39(2) of the *Park, Conservancy and Recreation Area Regulation*⁷⁵ (under the *Park Act*) specifies the maximum duration that a vessel may remain in a park:

“Except as authorized by a park officer, no person who owns a vessel or is responsible for a vessel shall allow that vessel to remain overnight in a park, conservancy or recreation area for more than 14 days in a calendar year.”

Under the Regulation, park rangers can, by written notice, require any person⁷⁶ to:

“...remove all personal property and dispose of all structures, improvements and works of any nature in a park, conservancy or recreation area and restore, repair or rehabilitate the area as nearly as possible to its natural condition, or restore, repair or rehabilitate the area to the satisfaction of the park officer issuing the order.”⁷⁷

Park rangers also have powers to evict, from a park, persons that contravene the Regulation:

“9 (1) A park ranger may order a person who does anything contrary to this regulation to leave a park, conservancy or recreation area, or a specified portion of it...”

As noted above, contravention of this Regulation can result in fines of up to \$200,000 and continuing contraventions can incur separate fines for each day the contravention occurs.⁷⁸

The implications of sections 39(2), 3(1) and 9 of this Regulation are clear. Vessels without park use permits cannot stay within park boundaries for more than 14 nights per year. Park officials that observe this contravention must apply the administrative penalties provided in the Act. The exercise of the eviction powers in section 3(1) and 9, however, is discretionary. SIPS can request that park officials exercise these powers. In our view, this is a reasonable request in light of the apparent ongoing nature of the contraventions of the 14 day time limit (and the waste depositing issue discussed above).⁷⁹

What You Can Do About Wrecks, Abandoned Vessels, or Other Obstructions

⁷⁵ *Park, Conservancy and Recreation Area Regulation*, http://www.qp.gov.bc.ca/statreg/reg/P/Park/180_90_00.htm

⁷⁶ Except those with a valid park use permit.

⁷⁷ *Park, Conservancy and Recreation Area Regulation*, s. 3(1)

⁷⁸ *Park Act*, 28(2) and (3)

⁷⁹ According to the local Receiver of Wrecks, Jim Nailor, BC Parks enforces these rules against all boats that are anchored to the seabed within Provincial Park boundaries. Jim Nailor, Receiver of Wrecks, Pacific Region, Transport Canada. Phone Conversation with Tim Thielmann. October 14, 2008. However, some individuals at BC Parks were uncertain whether the *Park Act* and its Regulations were enforced in sea areas.

If You Find a Wreck or Abandoned Vessel that is...

- **Perishable or a Threat to Public Safety:** Ask the local Receiver of Wrecks⁸⁰ (“RW”) to detain and dispose of the wreck according to 160(1)(b) of the *Canada Shipping Act, 2001*. Ask about opportunities for salvaging the wreck and about the possibility of salvage rewards.
- **A Navigational Hazard:** Contact the Receiver of Wrecks⁸¹ to enforce section 16 and 19 of the *Navigable Waters Protection Act* to remove and appropriately dispose of the obstruction. Provide as much evidence of obstruction(s) as possible.
- **Occupied and Unsafe/Unseaworthy:** Contact Fisheries and Oceans Canada. If there is a ‘serious danger’ to passengers, the inspector **must** detain the vessel according to section 222 of the *Canada Shipping Act, 2001*.

If the Obstruction is a Private Buoy: Contact Fisheries and Oceans Canada and request that the Ministry enforce sections 5 and 7 of the *Private Buoy Regulations* to require owners to modify or remove the non-compliant buoys.⁸²

If a Vessel or Wreck Has Been Within a Provincial Park for More than 14 Days: Unless the vessel owner has a park-use permit, contact your local BC parks office and request that they evict the vessel according to ss. 39(2), 3(1) and 9 of this *Park, Conservancy and Recreation Area Regulation*.⁸³

V. LONG-TERM STRATEGIES: PREPARING A ROUNDTABLE

For a discussion of the need for law reform, funding, and infrastructure development to support existing regulations against raw sewage disposal, see the Georgia Strait Alliance submission to the Minister of Transport, “Submission to Transport Canada on Proposed Ship Pollution Prevention Regulations,” available at <http://www.georgiastraight.org/?q=node/628>. Initial Considerations

The following considerations will deal mainly with long-term strategies to address abandoned

⁸⁰ In the Pacific Region, Contact: Regional Manager, Navigable Waters Protection Program, Transport Canada, Pacific Regional Office, 820-800 Burrard Street, Vancouver BC, V6Z 2J8, Phone: 604-775-8867, Fax: 604-775-8828

⁸¹ In the Pacific Region, Contact: Regional Manager, Navigable Waters Protection Program, Transport Canada, Pacific Regional Office, 820-800 Burrard Street, Vancouver BC, V6Z 2J8, Phone: 604-775-8867, Fax: 604-775-8828

⁸² SIPS should provide the information that was contained in SIPS’ letter to Transport Canada on March 2, 2008. R

⁸³ Additional research and considerations may be required if the BC government denies that it has jurisdiction to enforce these provisions of the *Park Act* and Regulations in sea areas.

and wrecked vessels.

Preparations

Developing a Coalition

A thorough survey of other affected groups, associations, governments, first nations and individuals is needed before a “coalition of the interested” can be formed. This project is a large undertaking for resolution as it involves municipal, provincial and federal legislative change and commitments to establishing regional, provincial and/or federal funding apparatuses.

Setting Terms of Reference

The Terms of Reference should not only address what can be done to clean up abandoned boats and marine pollution, but what can be done to prevent these occurrences.⁸⁴ It may be helpful to survey participants about their respective perspectives regarding the underlying causes of vessel abandonment, the existing remedies for addressing the issues, and the perceived regulatory or management needs in this area.

Data Collection

A comprehensive approach to marine management requires detailed information of the existing problems. With respect to existing abandoned vessels, there is a need for a thorough inventory, ideally using GPS coordinates accompanied by photographs.⁸⁵

Inquiries

An *inquiry* into an environmental issue may provide information useful for public education and can play an important role in directing reforms in government policy or legislation. If the Minister of Environment considers it necessary, he or she may order an inquiry and appoint a person to conduct it. The terms of reference and guidelines are set by the minister, and the person conducting the inquiry has the powers, privileges and protection of a commission of

⁸⁴ Questions asked in the Eastern Carolina Council survey included:

- What rules are you aware of that apply to abandoned and derelict vessels? (provide link or reference)
- What is your opinion as to the present and future scope of this problem?
- What experience has your agency had with this issue?
- What is your opinion as to what can and should be done about this problem?
- What caveats might you offer when addressing this problem?
- What jurisdictional problems are you aware of with this problem?
- If someone contacted your agency or government to ask how they might get an abandoned vessel removed, what do you tell them?
- If there is anything else on this topic you feel might be beneficial to incorporate into this report?

⁸⁵ Data collection is essential to addressing all aspects of this problem. The Eastern Carolina Council provided data collection training (1 day) and instructed volunteers (including US Auxiliary Coast Guard Volunteers) on how to properly fill out their forms and maps. They assembled basic information such as GPS coordinates, description of debris, description of the location found, and photos. This led to the development of a database. Some drawbacks noted were the inability for the Coast Guard to enter certain areas (their vessel was too large), the size of the search area (too large) and abandoned/derelict vessels and structures were a “moving target” susceptible to moving with strong currents, wind and/or storms.

public inquiry.⁸⁶

SIPS may wish to lobby the Minister of Environment to initiate an inquiry into the causes and solutions to marine pollution from human waste dumping. An inquiry could provide additional funding for data collection, an essential step in preparing a comprehensive management plan for marine pollution and traffic.

Area-Based Management Plan

Under the BC *Environmental Management Act*, ss. 89-91, the Minister of Environment can designate an area and establish a process for developing an area-based plan for environmental management. Under this process, the Minister can designate a responsible party for overseeing the plan, and can create technical advisory committees, or even require certain licencees or others affected by the plan to participate. The terms of reference must include measures for public and stakeholder consultation, and include a time limit for the plan.

However, these plans are non-binding; the Minister is only authorized to “require that persons making decisions or classes of decisions under this Act consider the plan in making the decisions.”

SIPS may wish to lobby the Minister of Environment to initiate an area-based management plan. Support from relevant governmental agencies and non-governmental parties would likely increase the chance of success.

Programs

Waste Minimization and Vessel Re-use/Recycling Programs

In many cases, boats are abandoned because that is the cheapest and easiest means of disposal for boat owners. To encourage boat owners to surrender vessels for recycling or disposal, it is necessary to develop incentives in addition to penalties for abandonment. In Sweden, a “car-scraping fund” is established through the initial purchase price of the car (and included in subsequent resale). Scraping facilities, which are themselves subsidized by the fund, repay car-owners a portion of the fund when they deposit the cars to the scrap yard. A similar deposit - refund scheme could encourage boats to be taken for disposal as well.⁸⁷

Waste minimization is the highest in a hierarchy of goals for vessel use, according to a recent study conducted by the International Council of Marine Industry Associations.⁸⁸ Many view vessel producers as the ‘weakest link’ in the product responsibility chain, and advocate for the principle of Extended Producer Responsibility (EPR) to reduce overall waste. Such approaches typically place greater financial or legal burdens on manufacturers to ensure that their vessels are appropriately disposed of or recycled at the end of the vessel’s life. One recent article on the

⁸⁶ *Environmental Management Act*, s. 113-114.

⁸⁷ Kathleen Stevenson, “End of Life Boat Hulls – The Current Situation and Disposal Options, University of Southampton, page 17-18. <http://www.thegreenblue.co.uk/research/documents/EndofLifeBoatHulls.pdf>

⁸⁸ International Council of Marine Industry Associations December 2007, Status Report on the Decommissioning of End of Life Boats, p. 5

topic suggests that incentives and monetary grants should be dedicated to encourage boat manufacturers and local boat sales companies to adopt 100% boat recycling policies within the manufacturing process.⁸⁹

Reuse is the next best goal for vessels. Depending on the boat materials, various parts may be reusable.

Vessels are constructed of a variety of materials, making *recycling*, which is the third-highest goal, a challenge. Wooden vessels can be stripped of valuable instruments (if there are any) and then recycling or disposing of the wood can occur. Steel-hulled vessels, on the other hand, can often be scrapped to a metal dealer for cash. Fiberglass boats, which are common and inexpensive to produce, pose a difficult problem since this material is not easily recycled.⁹⁰ There are various *recycling* programs that can extend the life-cycle of various vessels parts. However, fiberglass recycling programs have sprung up in Europe and Japan. And, it is now possible to grind cured laminate into “recyclate” to “add value to virgin or old laminates in a variety of applications.”⁹¹ Boat-recycling programs should be given careful consideration, especially in light of the hugely successful car-recycling programs in place in BC and elsewhere.⁹²

Disposal by landfill should continue to be restricted and used as a last resort rather than an acceptable alternative.

Funding

Substantial funding will be necessary to clean up vessels that are derelict or abandoned, to reduce vessel abandonment in the future. Funds can be drawn from a number of sources and in a number of ways. Some advocate taxes on boating licences, vessel registration, rental fees, or harbour fees. Others support point-of-sale approaches, which incorporate the cost of recycling or disposing of abandoned vessels into the initial purchase price of vessels.⁹³ Marine fuel taxes are

⁸⁹ Eric W. Sponberg, “Recycling Dead Boats”, Professional Boatbuilder,”
<http://www.gogreenfrp.com/pdfs/RecyclingDeadBoats.pdf>

⁹⁰ Note that Finland has incorporated recycling of boats into its car recycling facilities. The metal is recovered for reuse as a raw material and it is reported the plastic is used to gain energy. The glass fibres are used as fillers. However, much of the fiberglass material is of little value for recycling and may still have to be landfilled or incinerated. See Kathleen Stevenson, “End of Life Boat Hulls – The Current Situation and Disposal Options, University of Southampton <http://www.thegreenblue.co.uk/research/documents/EndofLifeBoatHulls.pdf>

⁹¹ International Council of Marine Industry Associations December 2007, Status Report on the Decommissioning of End of Life Boats, p. 5

⁹² The Honorable Mr. Williams in the Night Sitting of Thursday, March 29, 1973, when describing the success of the “SAM” program for recycling derelict and abandoned cars stated to the House that “25,262 abandoned or derelict vehicles (were) accumulated and delivered to the shredding plant in the Vancouver area in Richmond (=) 18,876 tons of material” for that fiscal year.

⁹³ BC’s *Financial Incentives for Recycling Scrap Tires Programme* (“FIRST”) is a good example. This program uses a combination of recyclate and recovery from energy programs. “For every new tire sold, the retailer collects an Advance Disposal Fee, commonly referred to as an eco fee, from the consumer and remits it to a fund used to pay for the recycling of tires. <http://www.tirestewardshipbc.ca/tirerecyclinginbc.php>. For another good example: the State of Maryland applies a 5% excise tax at the point of sale which is paid into the “Waterway Improvement Fund”. This fund “provides financial support to local governments, the Department of Natural Resources and federal agencies” for “capital projects and services” including: clearing of debris from navigable waters, installation of marine sewage pump-out stations, and other beneficial marine projects for the “general boating public.” See their

another option.⁹⁴ SIPS might also wish to explore existing government funds, such as Industry Canada's Environmental Technologies Fund, which subsidizes the Tire Recycling Program amongst others.⁹⁵

Law Reform

Designated Sewage Areas

As noted above, neither the Saanich Inlet nor the Tod Inlet are 'designated sewage areas'. If they were, the dumping of untreated sewage into those waters would be strictly prohibited. Further, the *Regulations* under the *Shipping Act, 2001* that affect sewage disposal are not legally binding until May 2012.

Under the former regulation, the BC government invited the public and local governments to suggest areas for protection based on the following criteria:

- used as a domestic water supply or for swimming;
- have extensive pleasure boat traffic and are poorly-flushed; or
- have a sensitive aquatic environment (e.g. shellfish resources).⁹⁶

The Saanich Inlet was nominated by the BC government.⁹⁷ However, to date, the federal government has not designated it. It is not clear to me whether a definitive decision has been made regarding this nomination at this time.

Saanich Inlet SIPS may wish to lobby Transport Canada and other branches of the federal government to have the Saanich and Tod Inlets identified as 'designated sewage areas'.

Fisheries and Recreational Harbours Act

The *Fisheries and Recreational Harbours Act*⁹⁸ gives the federal government expansive powers to maintain and repair harbours, including the power to remove abandoned or derelict vessels. This Act provides for inquiries where abandoned vessels pose safety risks, and enables enforcement officers, when necessary, to carry out the removal of such vessels to a suitable area. Costs for the recovery are charged to the owner, and if he or she cannot be found, officials can apply to a court for an order directing forfeiture of the vessel, which will then be sold or disposed of.

Fund Grants Manual for more information:

http://www.dnr.state.md.us/land/wwi/download/WWI_Program_Manual_Revised.pdf

⁹⁴ Funds could be diverted from the Motor Fuel Tax, which is governed by BC's *Motor Fuel Tax Act*.

⁹⁵ See the Industry Canada website: <http://www.ic.gc.ca/epic/site/fte-fte.nsf/en/Home>.

⁹⁶ BC Ministry of Environment, Environmental Protection Division website:

http://www.env.gov.bc.ca/epd/epdpa/mpp/boat_sewage.html

⁹⁷ The geographical coordinates for Saanich Inlet were: lat. 48° 37'N long. 123° 30'W. All water south of line from Hatch Pt. to Moses Pt.

⁹⁸ *Fisheries and Recreational harbours Act* [RSC] 1985 c. F-24. <http://laws.justice.gc.ca/en/F-24/index.html>

However, **the key provisions of this Act only apply to scheduled harbours.**⁹⁹ And, none of the harbours with which SIPS is concerned are so listed. The key provisions of this Act do not therefore apply at present to the traffic congestion and human waste dumping issues of concern to SIPS.

SIPS may wish to lobby Fisheries and Oceans Canada for the inclusion of Saanich Inlet as a 'scheduled harbour' under the *Fisheries and Recreational Harbours Act*.

Model Legislation

The existing laws regarding the removal or abandoned and derelict vessels and wreckage relies too heavily upon the discretion of government agencies that lack the political and financial interest in addressing these problems. Further, there is a lack of adequate incentives for manufacturers, boat owners, and others to ensure that ships are not simply dumped in sea waters when they are no longer wanted. Therefore, it may be useful to craft new legislation that proactively, seriously, and comprehensively addresses these issues.

California's Assembly Bill 1950, which revised the *Harbors and Navigation Code*, is a model piece of legislation which uses a creative mix of incentives and penalties to address a wide range of issues related to vessel abandonment and marine pollution. See Appendix 1 for the text of the bill.

We hope that the information provided in this memorandum is useful to your organization. If you have any questions about the research or recommendations above, please contact the Environmental Law Centre: elc@uvic.ca

Regards,

Tim Thielmann
ELC Articling Student

⁹⁹ More information on the Act and its Regulations can be found on the Government of Canada, Canada Business website:
http://www.canadabusiness.ca/servlet/ContentServer?pagename=CBSC_FE/display&c=Regs&cid=1081944207896