



November 8, 2015

Mr. Kevin Haberl
Director of Resource Authorizations, South Coast Region
Ministry of Forests, Lands & Natural Resource Operations
200 – 10428 153rd Street
Surrey, BC V3R 1E1

Dear Mr. Haberl:

Re: Review of Draft Pender Harbour Dock Management Plan

Assignment

In early August, 2015 I was contracted by the Ministry of Forests, Lands & Natural Resource Operations (“Ministry”) to undertake an independent review of a draft Dock Management Plan (“DMP”) for the Pender Harbour area of British Columbia. The DMP was released for public comment in April, 2015.

In undertaking this review, I was asked to seek input from members of the community, including property owners who have docks adjoining their property, and representatives of the *shíshálh* Nation (previously known as the Sechelt Indian Band), with a view to exploring options for an appropriate land use management framework that will achieve the DMP’s objectives while also contributing to addressing community concerns.

My terms of reference indicate the following matters are “out of scope” for this report: constitutional and case law matters related to Aboriginal peoples and Federal-Provincial division of powers, common and case law related to riparian rights of access, provincial policies on fees for Crown land applications and land rental rates, rights and title interests of *shíshálh* First Nation or any other First Nation and reconciliation initiatives between the Province and any First Nation.

Process of My Review

Between August and October, 2015 I arranged and facilitated a number of small group discussions to allow for an interactive dialogue about a range of issues and concerns related to the DMP. In total, I met with approximately 75 community members, including representatives of the Pender Harbour Consultation plan working group (both in the Lower Mainland and in the Pender Harbour area) which is made up of property owners with docks, representatives from the Chamber of Commerce, and the Pender Harbour Living Heritage Society. I also met with representatives of the Sunshine Coast Regional District, the MLA for Powell River - Sunshine Coast, the MLA for West Vancouver – Capilano, the MLA for Port Moody – Coquitlam, and Chief Calvin Craigan and Councillor Garry Feschuk of the *shíshálh* Nation. I also met with a group of individuals who are registered under the federal government’s *Indian Act* (commonly referred to as “status Indians”) who live at Pender Harbour and are not members of the *shíshálh* Nation.

In addition, I received numerous submissions from people who were not able to physically attend meetings, and spoke to a number of property owners by telephone. I have also had the benefit of reviewing comments which were submitted to the Ministry following release of the DMP this spring.

I would like to acknowledge and thank Sunshine Coast Regional District Chair Garry Nohr and Electoral Area Director for Egmont and Pender Harbour, Frank Mauro, for providing me with a boat tour of Pender Harbour, which assisted me in getting a better understanding the geography of the area. I am also grateful to Karen Neilson with the Ministry for providing note taking assistance and logistical support.

Background

According to the Ministry, waterfront property owners in British Columbia enjoy the Common Law Right of riparian access to their properties. Broadly speaking, this is the right to access any part of their property by boat without the interference of human-made structures. However, the Ministry notes that being the owner of a water front property does not give the right to construct a dock, wharf or other moorage facility on Crown land [emphasis added], such as the water over the bed of Pender Harbour. Rather, the Ministry takes the view that private moorage authorizations can be granted or refused according to criteria established by policy and depending on the circumstances prevalent in any given location.

Unofficial Moratorium

Beginning in 2003, provincial government authorizations for the more than 300 docks (a “dock” is defined as a structure used for the purpose of mooring boats and for providing pedestrian access to and from the moored boats) in the Pender Harbour area were no longer routinely issued or renewed.

These authorizations, officially referred to as Licences of Occupation but more commonly known as “leases” or “tenures”, had typically been granted for 10 year terms prior to 2003. Tenures are required for docks since, by their very nature, they occupy the foreshore (land between the ordinary high and low water mark) which is considered to be provincial Crown land in most cases in British Columbia. The standard document in use today to codify the tenures has a provision requiring the posting of adequate security to help indemnify the Ministry for costs in the event terms of the tenure are not complied with, but this requirement has not been enforced in practice.

It appears that the change in approach by the provincial government agency responsible for issuing tenures for docks (currently the Ministry, but previously Land & Water BC Inc. and later the Integrated Land Management Bureau) was prompted by concerns expressed by the *shíshálh* Nation.

First Nations Interest

In a letter dated August 14, 2003 to Land & Water BC Inc. in response to a specific tenure renewal application, the *shíshálh* Nation council objected to the process by which tenures were being considered and to the volume of applications sent to the *shíshálh* Nation for their input as part of what is known as a referral process. In the letter, Land & Water BC Inc. was asked whether a report into environmental impacts of the specific dock in question (in the Garden Bay area of Pender Harbour) had been done (as will be mentioned later, the issue of whether an environmental assessment or study has been done is a question that continues to be asked today by those who are opposed to the DMP). If not, the *shíshálh* Nation council stated their desire to have such a study undertaken.

According to the August 14, 2003 letter, evidence indicates there had been a large village site near what is now known as the Garden Bay area of Pender Harbour, and that their forefathers engaged in regular and long-term use of areas in the vicinity of Pender Harbour with “evidence of continuity of occupation by the Sechelt, preceding 1846 and extending to the present day.” The *shíshálh* Nation indicated that they have recorded 60 archeological sites throughout the harbour, and asserted “untrammelled rights of access to the exercise of our aboriginal rights” and “aboriginal title rights to the whole of Pender Harbour...as part of our comprehensive claim to our traditional territory.”

Discussions between the *shíshálh* Nation and Land & Water BC Inc. ensued. In the meantime, applications for dock tenures were informally put in abeyance for what was expected to be a period of a few months at most.

Proposed Study of Pender Harbour

By the end of January, 2004 there appeared to be agreement between the *shíshálh* Nation and Land & Water BC Inc. to conduct a joint study of Pender Harbour looking at habitat and environmental issues,

archeological values, unauthorized moorage and filled foreshore, among other things. It was expected that the study would be complete in November, 2004.

On May 21, 2004, the constituency assistant to the late Harold Long (who was then the MLA for Sunshine Coast) was advised by Land & Water BC Inc. that new private moorage applications would not be accepted for the Pender Harbour area until a joint *shíshálh* Nation and Land & Water BC Inc. "archeological/use study and analysis is complete."

Archeological and Environmental Studies

Archeology

I was given access to a report dated December, 2004 entitled, "Archeological Inventory of Sixteen kilometers of foreshore along the coastline of Pender Harbour within the territory of the *shíshálh* Nation, southwestern B.C." The inventory involved the southern portion of the Pender Harbour coastline, near the communities of Madeira Park and Irvine's Landing, and included the coastline of Pearson, Martin, Charles, Calder, Mary and Dusenberry Islands. However, the inventory does not appear to have included the areas known as Gunboat Bay or Garden Bay. The report contains the following paragraph:

Over the last century both residential and commercial development has resulted in severe damage to the history of Pender Harbour which to a large extent is represented by and contained within the archaeological record. Every effort should be made to preserve and study what remains of this history prior to its complete destruction from ever increasing development.

One of the recommendations from this 2004 report was that

The remaining foreshore within Pender Harbour should be subject to additional Archaeological survey. This will help to provide a better understanding of the location of the remaining archaeological resources within Pender Harbour. This will assist all levels of Government in planning, provide more clarity for developers and preserve the history of the *shíshálh* Nation.

The DMP requirement for dock tenure applications to be supported by field surveys (to assess the archaeological resource potential of a site if such surveys haven't been conducted previously) may be meant to address this recommendation. Due to concerns that widely-publicizing the location of archeological sites could result in vandalism or theft of valuable artifacts, information in the December, 2004 report (and perhaps others that I am not aware of) has not been shared with property owners.

Environmental

I am not aware of any recently completed studies looking at the impact of docks on habitat and aquatic life in Pender Harbour.

However, the Ministry did provide me with access to a report which was prepared in November, 2004 for Land & Water BC Inc., entitled *Summary Review of Environmental Information for the Pender Harbour Basin*". This report consisted of a literature review of studies done in connection with Pender Harbour and mentions that:

"the Pender Harbour basin provides habitat for a variety of shellfish, crustaceans, and finfish. The exact species utilizing the basin habitats is not documented...."

The report concluded that "the information regarding marine resources specific to Pender Harbour basin is sparse" [emphasis added] and recommended additional studies to examine shellfish populations and locations, as well as habitat related to finfish populations. It is not clear if these recommended studies were undertaken.

Tenure Renewals Stalled

Following the letter of August 14, 2003 from the *shíshálh* Nation, there were one or two intervals when some dock tenures were granted or renewed in the Pender Harbour area, but they were the exception. Instead, existing tenures reverted to a month-to-month term and tenure holders continued to receive invoices for lease payments from the provincial government.

In October, 2011 a letter from the Ministry to then Chief Garry Feschuk and council of the *shíshálh* Nation from the Ministry of Forests, Lands & Natural Resource Operations noted that efforts to find an “acceptable mechanism” for reviewing new tenure applications in the Pender Harbour area had not been successful. The letter notes that the proposed private moorage facilities [docks]:

“involve minimal improvements that can easily be removed. No concerns were raised by referral agencies to [sic] that have not been addressed. Access to the foreshore to practice aboriginal rights will not be impeded. Due to the large number of docks and marine traffic (both motorized and non-motorized) in Pender Harbour, the right to harvest marine resources was impaired many decades ago. The Province recognizes that the *shíshálh* Nation has a strong *prima facie* claim for aboriginal rights and title in Pender Harbour, and is interested in understanding further the nature of these aboriginal interests and how they may be impacted....”

Tenure Moratorium Formalized

What is referred to as a “map reserve” under the authority of the *Land Act* was put in place in 2012 for the Pender Harbour area, preventing the issuance of further tenures. Until that time, an informal moratorium on the issuance or renewal of tenures was in place, but as previously noted some tenures were granted for 5 year terms (these apparently expire in 2017). The tenures which were granted after 2003 appear to have been the exception, rather than the rule.

Not surprisingly, property owners with docks (or those wanting docks), including those whose livelihood depends upon commercial and recreational access to salt water by using docks, became increasingly frustrated with the delay in obtaining tenures. This frustration was communicated to officials with the Ministry and also to senior elected representatives.

The Dock Management Plan

Made available to the general public in April, 2015, the DMP was developed over a period extending more than 24 months as a result of the Ministry working directly with the *shíshálh* Nation.

The goal of the Ministry was to find a way to resume the routine processing of dock tenure applications while meeting the concerns of the *shíshálh* Nation.

According to the DMP itself (a copy of which is attached to this report), it is an instrument of policy to provide guidance in relation to existing or proposed docks in the area commonly known as Pender Harbour (the specific area is identified by way of a map in Appendix A of the draft DMP).

The stated objective of the DMP is to “promote responsible and appropriate dock development by:

- helping to minimize and mitigate impacts to marine resource values;
- protecting archaeological resources from future disturbance;
- contributing to address impacts, including cumulative impacts, of dock development on Aboriginal interests; and
- advancing collaborative management between the *shíshálh* Nation and the Province of British Columbia.”

Separately, the Ministry has added that the provincial government “jointly drafted the dock management plan with the *shíshálh* Nation to address the cumulative impacts of docks and dock construction in Pender Harbour due to its environmental and cultural significance.”¹

The Ministry has suggested that the DMP is part of a broader objective of improving relations with the *shíshálh* Nation, as it has noted the provincial government “is seeking to develop a New Relationship with the *shíshálh* Nation and other First Nations across British Columbia. The Constitution, as well as case law, has outlined the requirement to consult with First Nation and to develop new and collaborative approaches to engagement.”²

By way of further context, in September, 2014 BC’s Minister of Aboriginal Relations and Reconciliation, John Rustad, was quoted in the *Coast Reporter* newspaper as saying “the province understands that the management of Pender Harbour is a long-standing issue with the Sechelt First Nation. We are committed to good-faith negotiations that will lead to reconciliation and improved economic and cultural opportunities for the people of Sechelt First Nation.”

Content of Dock Management Plan

The DMP would establish four zones within Pender Harbour and contains dock construction and maintenance guidelines. Many of the construction and maintenance guidelines are similar to what is expected by the Ministry elsewhere in British Columbia, but there are additional restrictions or requirements which vary depending on which of the four zones an existing or proposed dock is located in.

Requirements found in the DMP include a “preliminary field reconnaissance” (defined as a field survey to assess the archaeological resource potential of the study area and identify the need and appropriate scope of further field studies, which are to be performed by a qualified professional under the *Heritage Conservation Act*), identification of any “critical habitat” within the footprint of a dock project, a plan for the protection of any identified critical habitat, and a “management plan” (which is defined in detail in section 7 of the DMP).

Summary of Four Zones for Pender Harbour

Zone 1 – no new docks permitted (“red zone”)

Zone 2 – new docks only if for multi-party use or commercial use (“purple zone”)

Zone 3 – new docks of all types allowed, if consistent with DMP requirements and not overlapping with critical habitat (“yellow zone”)

Zone 4 – new docks of all types allowed, if consistent with DMP requirements (“green zone”)

The DMP applies to applications for dock tenures in the Pender Harbour area for:

- (a) the construction of a new dock;
- (b) the relocation of a tenured dock within a project footprint;
- (c) changes to the dimensions of a tenured dock;
- (d) an existing Dock that was not previously authorized under Tenure; and
- (e) the repair or rebuilding of Tenured Docks damaged or destroyed by fire, explosion, flood, or other casualty. These applications are to be treated as applications for Replacement Tenures and will require a Management Plan.

Of note, only portions of the DMP would apply to the renewal of existing tenures docks, and only if an archeological assessment has not previously been conducted for that tenure (dock) or if there are certain deficiencies regarding “management plans” associated with the tenure.

¹ “Frequently Asked Questions” document posted to the Ministry’s website, dated June 11, 2015.

² Ibid.

However, the DMP does apply to existing docks if they have not previously been authorized by the Ministry (or relevant predecessor agency), ie. if they were built without a tenure having been granted. Please refer to the attached DMP for a more fulsome description of requirements.

Consultation on Dock Management Plan

The DMP was made available to the general public in April, 2015. The Ministry twice extended the initial 30 day public comment period.

A number of information sessions were held, which culminated in a meeting in June, 2015 in the Madeira Park area of Pender Harbour and was reportedly attended by as many as 400 people. Much frustration was expressed with the quiet process by which the DMP was developed by the Ministry, and with the new restrictions and additional requirements (and anticipated costs) contained in the DMP. In addition, some attendees reportedly reacted loudly and negatively to a prayer given by a *shíshálh* Nation elder and to introductory comments by a Ministry official acknowledging the meeting was being held on the traditional territory of the *shíshálh* Nation.

By the time the Ministry engaged the writer for this assignment, almost 300 written or email comments had been submitted by more than 200 different people. The vast majority of the comments received express opposition to some or all of the DMP.

Feedback from Small Group Meetings of Property Owners

A wide variety of comments were brought forward from property owners during the course of the meetings which were held from August to October, 2015. In addition, I received numerous written comments.

Some topics were raised in every meeting and in most of the correspondence which I received. The most common general issues or concerns expressed were:

- Complaints about lack of public consultation and input into development of the DMP.
- Insistence that docks are integral to the economy and way of life at Pender Harbour, as they provide reliable access for navigation (both recreational and commercial).
- Curiosity as to why a DMP was developed for Pender Harbour – eg. “why are we being singled out?” – and not other areas along the BC coast. This question stems from sentiment that there is nothing particularly unique about Pender Harbour from an environmental perspective to warrant the additional requirements contained within the DMP, compared to standards required by the Ministry and Fisheries & Oceans Canada elsewhere.
- Questions as to whether any environmental studies been done which support more stringent measures for dock design and maintenance, or which indicate docks are causing harm to fish and other species in the area identified in the DMP as Zone 1. If so, why have they not been released to the public? Why is the Ministry going beyond what the Department of Fisheries & Oceans requires?
- Skepticism regarding the archeological significance of the foreshore, given that it is under water more than once per day and considering the effects of residential and commercial development for the past 100 years or more.
- Suspicions that the DMP’s requirements for archeological surveys and studies are motivated by a desire to generate revenue for the *shíshálh* Nation, since they have offered to make qualified staff available for these surveys for \$500 each.
- Belief that the *shíshálh* Nation doesn’t or shouldn’t have aboriginal rights or title to the foreshore of Pender Harbour due to their apparent physical absence for much of the past 100 years, or if they do have such rights, that the non-aboriginal population should not be impacted.

- Concern that the BC Government has granted too much influence to the *shíshálh* Nation in managing the foreshore, and has tolerated the establishment of two unauthorized structures erected by the *shíshálh* Nation on Crown land (provincial park) in the past year, thereby potentially bolstering a future aboriginal title claim.
- Related to the point immediately above, objections were raised about the use of the *shíshálh* Nation logo alongside the logo of the BC Government on the top of the DMP, and to the use of the phrase “collaborative management between the *shíshálh* Nation and the Province of British Columbia” under the heading of *Principles and Objectives* in the DMP.
- Confusion regarding section 6.1 (a) of the DMP (“The Province will encourage prospective applicants for new dock tenures to engage with the *shíshálh* Nation early, prior to submitting an application”). What form would such engagement take? What is the purpose?
- Suggestions that the BC Government should let the courts decide whether the *shíshálh* Nation actually have a legitimate claim to aboriginal rights and title involving the foreshore of Pender Harbour before agreeing to “co-management” with the *shíshálh* Nation.
- Anger over alleged comments attributed to leaders from the *shíshálh* Nation to the effect that they will own the foreshore throughout the Sunshine Coast, and the *shíshálh* Nation will have the final say as to whether docks are permitted.
- Political/philosophical objections to a level of government (*shíshálh* Nation), for which residents of Pender Harbour are not eligible to vote, being granted a formal role in developing policy and guidelines which govern the activities of the Pender Harbour residents.
- Regret that tensions and animosity have increased between the *shíshálh* Nation and the non-aboriginal community.
- Statements that any government efforts at reconciliation generally with First Nations (including with the *shíshálh* Nation) should not directly affect or impact the non-aboriginal population, or at least not the non-aboriginal population in the Pender Harbour
- Worries that property values near the water, especially for water access-only lots, have been devalued significantly due to uncertainty as to whether dock tenures will be granted/renewed, and due to public controversy over the DMP. Specifically, I was told that in 2014 there were 4 or 5 properties that sold for in excess of \$1 million, but this year there have been no sales in the Pender Harbour for prices in excess of \$1 million. This information has not been independently verified.
- Warnings that the requirements of the DMP will eventually be imposed elsewhere in BC with negative economic consequences if the DMP is implemented for Pender Harbour.
- Less frequently, property owners expressed their opinion that they were without representation when it came to development of the DMP. These individuals did not believe that either the provincial government (as represented by the Ministry) or the Sunshine Coast Regional District is advocating on their behalf, but instead are pursuing a “government agenda.”
- In conjunction with comments about a lack of representation, some individuals expressed theories (which I firmly believe are unfounded) that the DMP is meant to punish voters in the Constituency of Powell River – Sunshine Coast for electing an Opposition MLA, or that Pender Harbour has a small population so the government can get away with experimenting with a DMP, or that the interests of Pender Harbour property owners are being sacrificed to somehow gain First Nations support for the BC Government’s liquefied natural gas agenda.

More specific concerns, comments or suggestions from property owners include the following:

- The BC Government and/or *shíshálh* Nation should conduct a comprehensive archeological assessment of the Pender Harbour foreshore, rather than have it done on a site-by-site (“piecemeal”) basis. Alternatively, the BC Government or *shíshálh* Nation should pay the cost of archeological surveys required by the DMP
- The BC Government and/or Fisheries & Oceans Canada should do an environmental study or assessment of existing docks to determine whether they are in fact having a negative impact on aquatic life and habitat in Pender Harbour.
- Rather than an outright prohibition on new dock tenures in Zone 1 (“red zone”), each application should be assessed on its own merits including environmental and archeological factors. Some property owners felt all zones should be eliminated from the DMP.
- Efforts should be made to deal with sewage from old septic systems and recreational boaters who dump sewage into Pender Harbour, as these issues are more harmful than docks. Similar comments were made about abandoned, derelict boats.
- Unauthorized new docks have been built since 2003, and continue to be built.
- The BC Government and/or *shíshálh* Nation should compensate property owners for a decrease in property values.
- Untenured docks should be “grandfathered” and existing tenured docks should be exempted from additional studies (archeological) and the full requirements of a “management plan” (as described in section 7 of the DMP) when applying for replacement tenures.
- Removal of untenured docks may cause more environmental disturbance than leaving them, provided the docks are adequately maintained.
- Pender Harbour residents need an agent or representative, funded by (but independent of) government, to defend their interests when policies like the DMP are being formulated.
- A small number of individuals, who have been registered under the federal government’s *Indian Act* (commonly referred to as “status Indians”) live at Pender Harbour, and are not members of the *shíshálh* Nation. It’s been asserted they may have a stronger title and rights claim to Pender Harbour than the *shíshálh* Nation, and that they don’t support the DMP.
- Instead of establishing individual policies like the DMP as an accommodation or reconciliation measure, the BC Government should pursue comprehensive treaties to provide more certainty and stability.

Perspective of the *shíshálh* Nation

Following the first open house about the DMP on April 11, 2015 the *Coast Reporter* newspaper quoted Councillor Garry Feschuk and hereditary Chief of *shíshálh* Nation as saying he heard “a lot of good questions that came from all of the residents and I think we can incorporate some of their comments” into a revised DMP.

I met with Chief Calvin Craigan at the *shíshálh* Nation offices on two occasions, once at the start of my assignment and again later in the process (at which time Councillor Garry Feschuk was also in the meeting). Chief Craigan and Councillor Feschuk were clearly troubled by the reaction of certain residents of Pender Harbour during the public meeting of June 13, 2105 and mentioned that individual band members have reported increased tension and a number of unpleasant interactions with the non-aboriginal community in recent months.

However, Chief Craigan said the DMP represented a compromise on the part of the *shíshálh* Nation and that changes or “watering down” of the DMP at this stage would not be acceptable to the *shíshálh* Nation. He did acknowledge that there may be misunderstandings on the part of property owners as to what the DMP entails and that communication could be improved.

It is clear that to Chief Craigan and Councillor Feschuk, Pender Harbour has a very important place in the history of the *shíshálh* Nation. In their view, their forefathers did not voluntarily give up the area when they relocated to Sechelt. Their band has worked for many years to achieve the DMP.

Findings

Finding #1

There has been a significant deterioration in the relationship between the shíshálh Nation and the non-aboriginal community.

It is evident that some level of tension has existed for an extended period of time. However, fear and anger on the part of property owners regarding the DMP (and the process by which it was developed by the BC Government and the *shíshálh* Nation), has increased feelings of resentment towards the *shíshálh* Nation, its members and the BC Government. These feelings are not universal, with a significant number of Pender Harbour residents expressing regret that “things have come to this”, but appear widespread.

Finding #2

The general public, at least in the area of Pender Harbour, is not fully aware of the degree to which the BC Government has embarked on efforts to reconcile with First Nations; or why; or what this may mean to the non-aboriginal community.

It appears that the government’s duty to consult and to accommodate, where appropriate, the interests of aboriginal peoples when the government is considering a decision that might adversely impact potential or established aboriginal or treaty rights, is not at all understood or recognized by the public. Many of the property owners I met with seemed truly mystified as to why First Nations seem to have so much influence over government decision making when it comes to Crown land.

Finding #3

Access to boats, and hence to the waters of Pender Harbour, is an integral part of the local culture and economy since the waterways form an important part of the transportation network in Pender Harbour.

Finding #4

Studies in support of additional requirements for docks in Pender Harbour have not been shared with the general public. The absence of such studies or reports showing a negative environmental or archeological impact from docks poses a serious impediment to building public understanding of, and support for, the DMP. While an archeological inventory was completed for the south side of Pender Harbour in 2004,³ this appears not to have been done for the north side, including Gunboat Bay and Garden Bay. Information about the location and details of archeological artifacts has not been shared with Pender Harbour dock owners.

I have not been provided with studies indicating that existing docks in Pender Harbour have had a negative environmental impact on aquatic life, including fish. While it may seem intuitive that a large number of docks along the shoreline would have some negative effect on the environment, the lack of empirical evidence makes it difficult for property owners who see large numbers of herring under and beside their docks to accept that “docks are a problem.” Secrecy about the location and type of archeological values at Pender Harbour similarly detracts from public understanding of such issues.

Finding #5

There is some misunderstanding as to what the DMP would require.

³ *Archeological Inventory of Sixteen kilometers of foreshore along the coastline of Pender Harbour within the territory of the shíshálh Nation, southwestern B.C.*, Peter Merchant Consulting. December 2004.

For example, more than a few property owners told me that they objected to having to pay fees of \$500 to the *shíshálh* Nation in support of an application for a dock tenure. While media articles have referenced such a fee, there is no mention in the DMP of a requirement to pay fees to the *shíshálh* Nation. Further, many property owners have stated their objection to the DMP on the basis that it gives the *shíshálh* Nation “the final say” as to whether a tenure application will be approved. The DMP does not contain a clause which gives the *shíshálh* Nation decision making authority with respect to foreshore tenures in the Pender Harbour (but it also does not explicitly state that the Ministry is the final decision maker).

Finding #6

The purpose and method of Section 6.1 (a) of the DMP (“The Province will encourage prospective applicants for new dock tenures to engage with the shíshálh Nation early, prior to submitting an application”) is not clear.

What form would this engagement take? It is not clear what the purpose of such engagement is given that the Ministry continues to be the final decision maker for dock tenure applications.

Finding #7

Since the unofficial moratorium on the issuance of dock tenures came into effect, a significant number of new docks have been constructed even without being granted an appropriate tenure. Without changes to the DMP as drafted, there is likely to be increased non-compliance.

While I have not been able to quantify the number of unauthorized docks in Pender Harbour, I have consistently been told that the number has been increasing.

Finding #8

While the standard written agreement used by the Ministry for private dock tenures has a provision requiring the posting of adequate security to help cover costs to the Ministry in the event of default or non-compliance, this requirement has not been enforced in practice.

Recommendations

There are a number of actions which I believe will assist in reducing tensions and addressing the controversy related to the DMP for Pender Harbour. It is understood that these recommendations are not binding on the Province of British Columbia, the Ministry, the *shíshálh* Nation or any other organization.

Recommendation #1

The BC Government should devise and implement a public education strategy to inform the public about the imperative for reconciliation with First Nations, and what this means in practical terms for British Columbians.

This recommendation may technically be out of scope for this report, but for reconciliation to be meaningful and lasting, it must involve more than just agreements and discussions between institutions of government, including First Nations governments. Rather, individual members of both aboriginal and non-aboriginal society need to feel, and be, included in reconciliation in order to reduce and prevent social divisions. The problems identified in my Findings #1 and #2 led me to arrive at this recommendation.

Recommendation #2

The Ministry, perhaps with support from Fisheries and Oceans Canada, should conduct an in-depth environmental study of the impact of docks in Pender Harbour, with a focus on but not limited to Zone 1 as defined in the DMP. Such a study should, among other things, examine whether sewage from boats or onshore dwellings and commercial operations is having a negative impact. Ongoing monitoring of

environmental conditions and habitat impacts should be undertaken, and an annual limit on new tenure applications should be considered depending on the outcome of studies/monitoring.

As noted in the discussion about feedback from property owners, the lack of publicly-available empirical evidence to support greater restrictions on dock locations and construction methods has undermined support for the DMP and its stated objectives of protecting marine resource values.

Recommendation #3

Informed by the results of the environmental study in Recommendation #2, the Ministry should identify opportunities for habitat restoration and enhancement projects in Pender Harbour.

Recommendation #4

Efforts should be made to increase public awareness and understanding of the significance of Pender Harbour archeological sites. In support of this objective, the BC Government should complete an archeological inventory for the north side of Pender Harbour (eg. Gunboat Bay and Garden Bay) sufficient to satisfy the requirements for a “preliminary field reconnaissance” in the DMP, and make a summary of the results publicly available. A summary of the archeological inventory conducted in 2004 for the south side of Pender Harbour should also be made public. In both cases, the results for a specific location should be made available to bona fide prospective tenure applicants for use in support of their application, fulfilling the requirements for a “preliminary field reconnaissance” as set out in the DMP.

While the rationale for keeping precise locations secret when it comes to archeological sites is understandable, it also contributes to public skepticism that such sites exist or that they are meaningful in a cultural and historic sense. Completing an archeological inventory of the north side of Pender Harbour would emphasize the “public good” aspect of archeological objects, and releasing a summary of the results (including from the 2004 inventory on the south side) would contribute to public awareness.

Recommendation #5

The DMP should be amended to eliminate the absolute prohibition on new docks in Zone 1, and instead require appropriate studies from qualified professionals to demonstrate a proposed dock will be designed and constructed in such a way as to avoid significant adverse environmental or archeological effects.

This amendment alone could significantly reduce opposition to the DMP from property owners.

Recommendation #6

The Ministry should start requiring the posting of adequate security for tenures in Zone 1 to help defray costs to the provincial government in the event of default or non-compliance with the tenure agreement.

In the event that a dock in Zone 1 is not adequately maintained (or otherwise falls into non-compliance) and the situation is not rectified within a reasonable period of time, the posting of adequate security would protect taxpayers from the cost of repairing or removing the dock.

Recommendation #7

The DMP should be amended to explicitly state the issuance of dock tenures does not grant exclusive access to the foreshore, and that members of the public, including members of the shíshálh Nation, continue to have a right to make lawful use of resources on the foreshore (eg. harvesting of shellfish).

Recommendation #8

Consideration should be given to adjusting/fine-tuning the zone boundaries as defined in the DMP based on information contained in the environmental study mentioned in Recommendation #2 and the archeological inventories referred to in Finding #6 and Recommendation #3.

Recommendation #9

While studies are ongoing and consideration is given to revising the DMP, the Ministry should within the next 90 days, grant 2 year dock tenure renewals as a gesture of goodwill to those property owners who have faced uncertainty and stress over the past decade or more. Similarly, tenures should be granted to those applicants who have been waiting many years, and spent considerable sums, planning for appropriately built docks if those applications meet the standards contained in a finalized DMP.

Recommendation #10

The Ministry should make it clear, either with additional wording in the DMP or through other means, that archeological surveys or studies required by the DMP can be conducted by either qualified professionals working for the shíshálh Nation or by any other qualified professionals. Consideration should be given to informing property owners of how they can locate a qualified professional for this purpose.

This measure would help reduce suspicions amongst property owners that the requirement for archeological surveys (including “preliminary field reconnaissance assessments” described in the DMP) is motivated largely by a desire for revenue generation on the part of shíshálh Nation.

Recommendation #11

Property owners with untenured docks should be eligible to obtain a Licence of Occupation (tenure), provided they can meet the requirements of the DMP (assuming the DMP is implemented) which apply to tenure renewals.

As noted in Finding #5, new docks continue to be built even though new tenures are not being granted. Ultimately, this situation undermines the credibility of the Ministry and its regulations and could result in inferior quality docks being constructed, with potentially more harm to the environment. In addition, the provincial government forgoes revenues which would otherwise be collected in the form of tenure fees.

Recommendation #12

Docks that are derelict, untenured and not in compliance with the DMP should be removed, following an adequate notice/warning period. A variance or appeal process should be made available under the DMP.

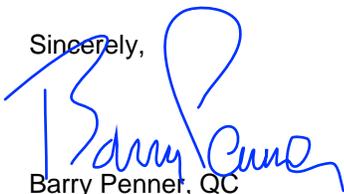
Recommendation #13

The Ministry should produce an easy-to-understand brochure to help explain the DMP.

Conclusion

It is my hope that this report will provide guidance and assistance in moving forward with this complex issue, and more importantly, that it can help provide a basis for improved relations between the residents of Pender Harbour and the shíshálh Nation. Please do not hesitate to contact me if you have any questions or require clarification.

Sincerely,



Barry Penner, QC
Penner Pacific Advisory Services⁴

⁴ A division of Barry Penner, Q.C. Law Corporation

Appendix 'A'

Schedule of Group Meetings

August 12	Sechelt
August 19	Sechelt & Pender Harbour
August 25	Lower Mainland
August 27	Powell River and Pender Harbour (Garden Bay)
September 1	Pender Harbour (Garden Bay)
September 2	Pender Harbour (Madeira Park – 2 meetings)
September 14	Pender Harbour (Madeira Park – 2 meetings)
September 28	Lower Mainland
September 30	Lower Mainland
October 1, 2015	Pender Harbour (Madeira Park)





PENDER HARBOUR DOCK MANAGEMENT PLAN

1.0 INTENT OF DOCK MANAGEMENT PLAN

The Pender Harbour Dock Management Plan (the DMP) is an instrument of policy that provides guidance in relation to docks authorized or proposed under the *Land Act* within the Management Area, as identified in Appendix A.

2.0 PRINCIPLES AND OBJECTIVES

In addition to the principles and objectives outlined in other applicable provincial Operational Land Use Policies, the objective of the DMP is to promote responsible and appropriate dock development by:

- helping to minimize and mitigate impacts to marine resource values;
- protecting archaeological resources from future disturbance;
- contributing to address impacts, including cumulative impacts, of dock development on Aboriginal interests; and
- advancing collaborative management between the *shishálh* Nation and the Province of British Columbia.

3.0 DEFINITIONS

“Commercial Dock” means a Dock operated year-round or seasonally as ancillary to a commercial operation and may include breakwaters;

“Critical Habitat” means habitat that is important for: (a) sustaining a subsistence, commercial, or recreational fishery, or (b) any species at risk (e.g., terrestrial or aquatic red- and blue-listed species, those designated by the Committee on the Status of Endangered Wildlife in Canada, or those SARA-listed species), or (c) its relative rareness, productivity, or sensitivity (e.g. eelgrass meadows, kelp forests, foreshore salt marsh vegetation, herring spawning habitat, and potential forage fish spawning beach habitat);

“Dock” means a structure used for the purpose of mooring boats and for providing pedestrian access to and from the moored boats, and may consist of a single dock, wharf or pier (including walkway ramp) and includes Private Moorage Facilities, Group Moorage Facilities, Strata Title or

Condominium Moorage Facilities, Commercial Docks and Marinas, but does not include Industrial Docks;

“Dock Footprint” means the area that lies directly under the Dock;

“Dock Management Zones” means those zones within the Management Area and as depicted in Appendix B.

“Foreshore” means that land in tidal areas lying between the high tide and the mean low tide and that land in non-tidal areas that is alternatively covered by water and exposed with the normal rise and fall of the level of the body of water, i.e. that land between the ordinary high and low water mark;

“Group Moorage Facility” means a multi-berth moorage similar to a private moorage facility but for the personal use of a group or association of residents from the surrounding community;

“Industrial Dock” means a dock providing moorage that is ancillary to an upland general industrial use as defined under the Province’s General Industrial Use Land Use Policy;

“Management Area” means the Pender Harbour area identified in Appendix A;

“Management Plan” means the management plan as described in section 7.

“Marina” means a dock providing moorage on a fee for service basis, includes ancillary uses (e.g. marine way, boat ramp, etc) and may include: the sale of gasoline, groceries, or supplies to the boating public whether provided on the dock or on the upland; and provision of scheduled service by float plane companies;

“Natural Boundary” means the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself;

“Preliminary Field Reconnaissance” means a field survey that is designed to assess the archaeological resource potential of the study area, and to identify the need and appropriate scope of further field studies, and is performed by a Qualified Professional under the *Heritage Conservation Act*;

“Private Moorage Facility” means a dock that is:

- (a) permanently affixed to aquatic Crown land and any ancillary structures such as a boat lift and anchor lines; and
- (b) is for the personal and private use by one or a number of individuals or a family unit for boat moorage;

“Project Footprint” means the area approved under an existing authorization, or the area under application for authorization under the *Land Act*;

“Qualified Professional” means an applied scientist or technologist, acting alone or together with another qualified professional, if

- (a) the individual is registered and in good standing in BC with an appropriate professional organization constituted under an Act, acting under that associations code of ethics and subject to disciplinary action by that association, and
- (b) the individual is acting within that individual’s area of expertise.

“Replacement Tenure” means a subsequent Tenure agreement issued to the Tenure holder for the same area and purpose as under the original Tenure;

“Riparian” means the vegetated transitional area between terrestrial and aquatic ecosystems, and is delineated from the natural boundary upland for a distance of 15 metres;

“Strata Title or Condominium Moorage Facility” means a multi-berth moorage similar to a Private Moorage Facility but used by the residents of a waterfront strata or condominium development;

“Tenure” means

- (a) any interest in Crown land that is granted or otherwise established under a prescribed instrument, or
- (b) a prescribed designation or other status that, under an enactment, is given to, conferred on, or made or otherwise established in relation to Crown land.

and includes those Tenures which terms may have expired but are authorized by the Province to continue on a month-to-month basis.

“Tenured Dock” means a Dock that is authorized by a Tenure.

4.0 APPLICATION OF PENDER HARBOUR DOCK MANAGEMENT PLAN

4.1 This DMP applies to applications within the Management Area for authorization of:

- (a) the construction of a new Dock;
- (b) the relocation of a Tenured Dock within a Project Footprint;
- (c) changes to the dimensions of a Tenured Dock;
- (d) an existing Dock that was not previously authorized under Tenure; and
- (e) the repair or rebuilding of Tenured Docks damaged or destroyed by fire, explosion, flood, or other casualty. These applications will be considered and treated as applications for Replacement Tenures and will require a Management Plan.

- 4.2 This DMP does not apply to an application for a Replacement Tenure except in the following circumstances:
- (i) section 6.2 applies where no archaeological assessment over the Project Footprint was completed in the past, and
 - (ii) section 7.1(f) applies where no Management Plan is attached to the Tenure or where the Management Plan attached to the Tenure does not include information on how ongoing maintenance activities will be conducted or where such information is not consistent with the Best Management Practices as set out in section 8.0 as supported by the opinion of a Qualified Professional.
- 4.3 This DMP does not apply to applications for:
- (a) an assignment of a Tenure to a different Tenure holder;
 - (b) a consent to mortgage; and
 - (c) subject to 4.1(b) and 4.1(c), the modification of the provisions of a Tenure.

5.0 DOCK MANAGEMENT ZONES

- 5.1 The Dock Management Zones within the Management Area are shown in Appendix B.
- 5.2 If a Project Footprint crosses the boundary between two Dock Management Zones, the more stringent zone requirements will apply.
- 5.3 The management objectives for each Dock Management Zone are set out in Table 1.

Table 1 – Dock Management Zones		
<i>Zone</i>	<i>Intent</i>	<i>Description</i>
1	The intent is to not allow new Dock Tenures in this zone due to the significant natural and cultural resources.	New Dock Tenures will not be issued.
2	The intent is to limit new Dock Tenures to those that can be shared by multiple parties or used for commercial purposes, and which are consistent with the Dock Management Plan, in order to reduce the impact on the natural and cultural resources in the area.	New tenures for Private Moorage Facilities will not be issued.
3	The intent is to allow new Dock Tenures of all types provided that they are consistent with the Dock Management Plan and the Project Footprint does not overlap with Critical Habitat.	No restrictions on the type of Dock Tenures that may be issued. The application must demonstrate that the dock does not overlap with Critical Habitat. New dock applications in which the proposed Project Footprint overlaps Critical Habitat will not be accepted. In order to reduce the environmental impact of multiple private moorages, residents will be encouraged to pursue Group Moorage facilities or Strata Title Moorage Facilities.
4	The intent is to allow new Dock Tenures of all types provided they are consistent with the Dock Management Plan.	No restrictions on the type of Dock Tenures that may be issued.

6.0 APPLICATION REQUIREMENTS

6.1 APPLICATIONS FOR NEW TENURES

- (a) The Province will encourage prospective applicants for new dock tenures to engage with the shíshálh Nation early, prior to submitting an application.
- (b) An applicant must provide the following information as part of the application:
 - (i) the identification of any Critical Habitat within the Project Footprint and the plan for the protection of any identified Critical Habitat;
 - (ii) a Preliminary Field Reconnaissance assessment of archaeological resources in the Foreshore area of the Project Footprint; and
 - (iii) a Management Plan, including specifications regarding the design of the Dock.
- (c) The Province will initiate First Nation consultation on the application once it receives the information identified in section 6.1 (b).

6.2 APPLICATIONS FOR REPLACEMENT TENURES

Where an applicant seeks a Replacement Tenure the Province will:

- (a) encourage the prospective applicant to engage with the shíshálh Nation early, prior to submitting an application;
- (b) require the tenure holder to submit a Preliminary Field Reconnaissance assessment as part of the application for a Replacement Tenure where one has not been completed in the past;
- (c) require the Management Plan submitted in support of a Replacement Tenure describe how ongoing maintenance activities will be consistent with the Best Management Practices set out in Section 8.0 and supported by the opinion of a Qualified Professional, where no Qualified Professional opinion was obtained in the past.

6.3 The Province may require the applicant to submit additional archaeological assessments depending on the results of a Preliminary Field Reconnaissance of the Project Footprint and the potential impact of the proposal on First Nation interests.

6.4 Cultural materials recovered during the course of archaeological investigations should be deposited to the *shíshálh* Nation *tems swiya* Museum, subject to the requirements of the *Heritage Conservation Act*.

7.0 MANAGEMENT PLAN REQUIREMENTS

- 7.1 A Management Plan for a proposed Dock or Replacement Tenure must demonstrate the following:
- (a) structures will not unduly block access along the foreshore for public access, or for First Nations harvesting of marine resources for food, social and ceremonial purposes;
 - (b) Dock construction will not include the use of native beach materials (e.g. boulders, cobble, gravel, sand, logs);
 - (c) filling, dredging, or blasting will not be undertaken within the Project Footprint;
 - (d) the Dock and Dock Footprint will be kept in a safe, clean and sanitary condition;
 - (e) all work, including dock construction, dock use, refueling of machinery and washing of buckets and hand tools, will be conducted in a manner that will not result in the deposit of toxic or deleterious substances (e.g. sediment, un-cured concrete, fuel, lubricants, paints, stains).
 - (f) ongoing maintenance activities will be consistent with the Best Management Practices set out in section 8.0, and supported by the opinion of a Qualified Professional.
 - (g) For docks that fall under 4.1, the design of the Dock is consistent with the Best Management Practices set out in section 8.0 and supported by the opinion of a Qualified Professional.
- 7.2 For new Docks, and Docks rebuilt under Sec. 4.1(e), an applicant must submit written confirmation by a Qualified Professional, confirming that the Dock was constructed in accordance with the approved Management Plan.

8.0 DOCK CONSTRUCTION AND MAINTENANCE GUIDELINES – BEST MANAGEMENT PRACTICES

- 8.1 Applicable Crown Land Use policies, as amended from time to time, will apply to all applications for Tenures as well as existing Tenures in the Management Area.
- 8.2 Critical Habitats should be avoided within the Dock Footprint. Docks should not be installed over these habitats unless the design mitigates for potential impacts and does not result in losses to these habitats.
- 8.3 Design of a Dock should not include components that block the free movement of water along the shoreline. Crib foundations or solid core structures made of cement or steel sheeting should be avoided as these types of structures result in large areas of vegetation removal and erosion in Riparian areas.
- 8.4 The bottom of all floats should be a minimum of 1.5 metres above the sea bed during the lowest tide. Dock height above lowest water level should be increased if deep draft

vessels are to be moored at the Dock. The Dock and the vessel to be moored at the Dock should not come to rest on the foreshore sea bed during the lowest tide of the year.

- 8.5 Access ramps or walkways should be a minimum of 1.0 metre above the highest high water mark of the tide and not exceed a maximum width of 1.5 metres.
- 8.6 All improvements should be a minimum of 5.0 meters from the side property line (6.0 meters if adjacent to a dedicated public beach access or park) and at least 10 meters from any existing dock or structures, consistent with Federal requirements under Transport Canada's *Navigable Waters Protection Act*. All Docks should be orientated at right angles to the general trend of the shoreline.
- 8.7 Docks should be constructed to allow light penetration under the structure. Light penetration is important and can be facilitated by spacing the decking surface of the Dock and minimizing the width of the structure. North/south Dock alignments are encouraged whenever possible to allow light penetration.
- 8.8 Grating should be incorporated into ramps, walkways, or floats to increase light and reduce shading of the bottom. When grating is impractical, deck planking measuring 15cm (6 in) and spaced at least 2.5cm (1 in) should be used to allow light penetration.
- 8.9 The replacement of the decking surface of a Dock should be undertaken in a manner that is consistent with sections 8.7 and 8.8.
- 8.10 Concrete, steel, treated, or recycled timber piles are acceptable construction materials although steel is preferred. Detailed information on treated wood options can be obtained on-line from the Fisheries and Oceans Canada website (*Guidelines to Protect Fish and Fish Habitat from Treated Wood Used in the Aquatic Environment in the Pacific Region*).
- 8.11 Access to the Foreshore for construction purposes should be from the adjacent upland property wherever possible. If heavy equipment is required to work on the Foreshore or access is required along the Foreshore then the advice of a Qualified Professional or Fisheries and Oceans Canada should be obtained.
- 8.12 Works along the Foreshore should be conducted when the site is not wetted by the tide.
- 8.13 Applicants are advised to contact Fisheries and Oceans Canada to ensure proposed activities, and the scheduling of those activities, complies with Fisheries and Oceans Canada requirements including the fisheries works window.
- 8.14 The upland design of the Dock, including anchor points, should avoid disturbing riparian vegetation adjacent to the Dock Footprint due to its role in bank stabilization and erosion control.

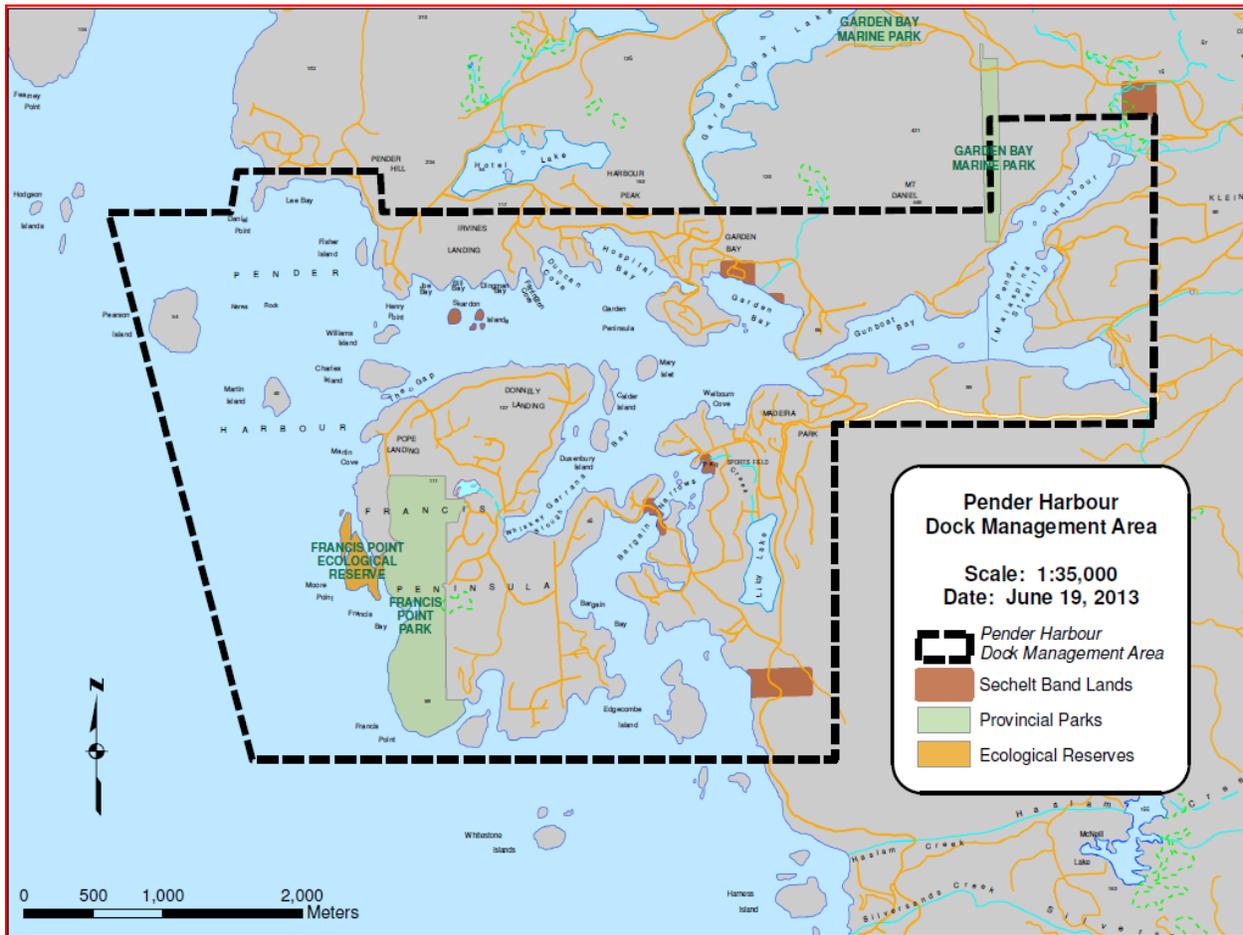
9.0 APPENDICES

Appendix A Pender Harbour Dock Management Area Map

Appendix B Pender Harbour Dock Management Zone Map

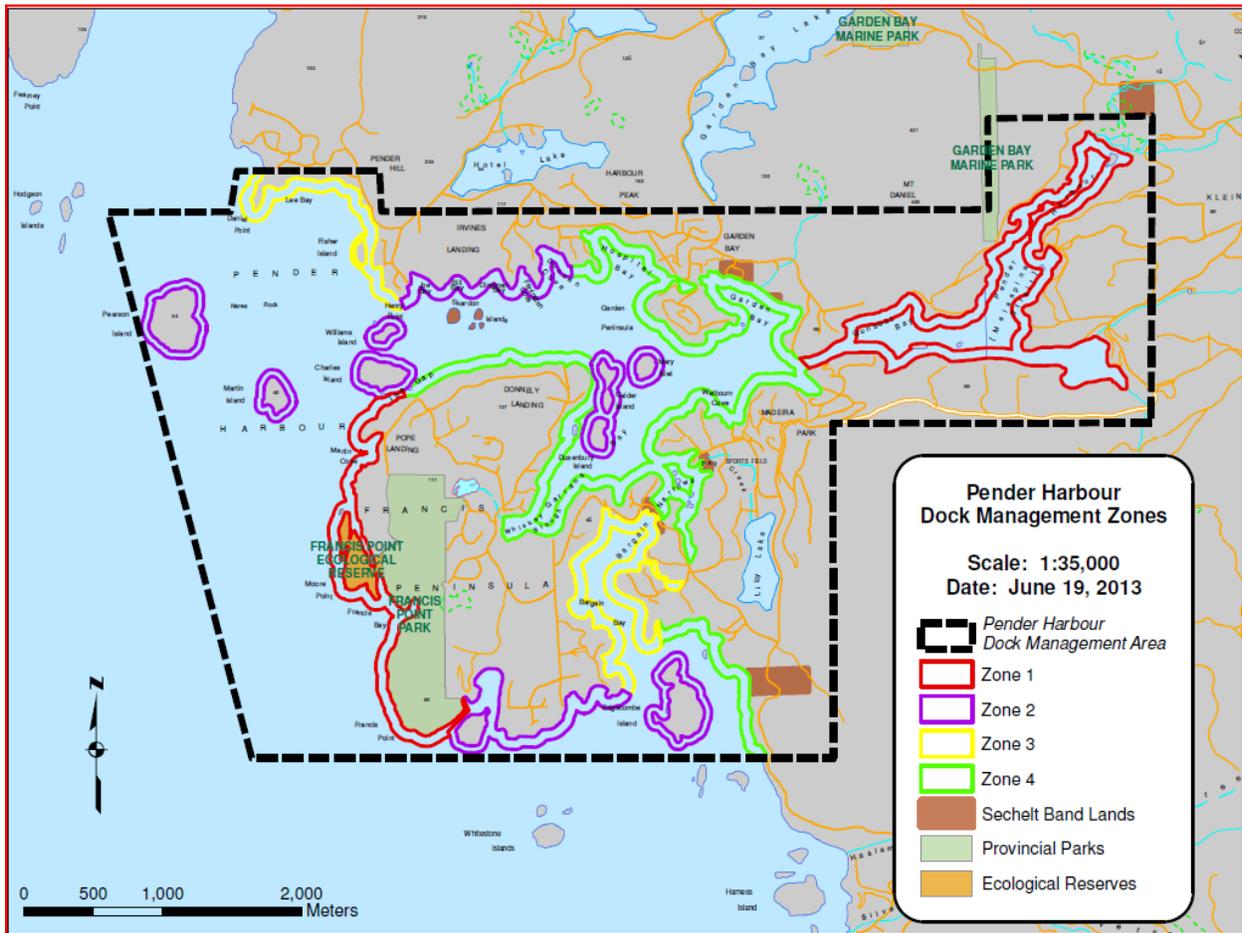
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Appendix A - Pender Harbour Dock Management Area Map



Note: Original map located with the Ministry of Forests, Lands and Natural Resource Operations:
(shared drive/maps/Pender Harbour/map_pender_harbour_dock_management_area_jun2013)

Appendix B - Pender Harbour Dock Management Zone Map



Note: Original map located with the Ministry of Forests, Lands and Natural Resource Operations:
(shared drive/maps/Pender Harbour/map_pender_harbour_dock_management_zones_jun2013)