DENMAN ISLAND
LOCAL TRUST COMMITTEE
AGENDA

REGULAR BUSINESS MEETING
OF THE DENMAN ISLAND LOCAL TRUST COMMITTEE
held at 10:30 AM on Tuesday, July 17, 2012 at the Denman Seniors Hall,
1111 Northwest Road, Denman Island, BC

LATE ITEMS, ADDITIONS

AMENDMENTS/ADDITIONS
TO ITEMS:

7. APPLICATIONS AND PERMITS

7.1 DE-RZ-2011.1 (Denman Community Land Trust Association)
Memorandum dated July, 2012 regarding Cost Recovery Agreement for Legal Review of Housing Agreement – *attached*

8. DELEGATIONS

8.1 Graham Brazier for Denman Opposes Coal – *Submission attached*

13. NEW BUSINESS

13.3 Meeting Space Discussion

Islands Trust

Memorandum

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Date	July 16, 2012	File Number	DE-RZ-2011.1 (DCLTA)
To	Denman Island Local Trust Committee		
	For meeting of July 17, 2012		
From	Courtney Simpson Island Planner Northern Office		
Re	Cost recovery for legal review of housing agreement		

The Denman Community Land Trust Association has applied to the Local Trust Committee to rezone a portion of one lot at 2016 Northwest Road, for affordable housing. The Local Trust Committee has received three staff reports on the application and a draft bylaw to amend the Land Use Bylaw. Staff has received a draft housing agreement provided by the applicant, which is required to be adopted at the same time as the amendment to the Land Use Bylaw.

The cost of review of the draft housing agreement by Islands Trust legal counsel is considered an extraordinary processing cost that the standard rezoning application fee does not include, and as such the applicant is required to cover the cost. This is described in the Islands Trust Policy Manual policy 5.6.i "Application Processing Services".

The applicant will be required to enter into a cost recovery agreement and to do so the Local Trust Committee must pass a resolution to that effect. A resolution could read as follows:

That the Denman Island Local Trust Committee authorizes staff to enter into a housing agreement with the applicant of DE-RZ-2011.1, the Denman Community Land Trust Association, for the cost of legal review of a housing agreement.

pc David Critchley, DCLTA

An investigation of the Islands Trust legal authority with respect to the proposed Raven Underground Mine

prepared by Patti Willis, David Critchley & Graham Brazier

June 2012

Pages

Part I: The Threat Posed by the Raven Coal Mine Project to the Islands Trust Area

There are many threats to the Trust Area from the proposed Raven Coal Mine including implications to fauna and flora species and habitats, air quality, human health, visual and aesthetic values, noise, fresh & marine waters, socio-economic values including shellfish resources and property values and, of course, global climate change as a result of the continued extraction, processing and use of fossil fuels, such as coal.

For purpose of this presentation, we are concentrating on the threat of acid mine drainage (AMD), also referred to as metal leaching/acid rock drainage (ML/ARD), into the Trust Area because we believe it may be one of the most significant direct threats and one to which the Islands Trust might have authority to respond.

56% of the materials extracted at the mine will be reject or waste rock – estimated to be about 1.1 million tons per year and over the planned 16-year life of the mine, close to 18 million tons. The reject piles will be located above ground at the mine site in the heart of the Cowie Creek watershed, just above Baynes Sound. Exposed to air and precipitation, the massive waste piles could be expected to generate acid mine drainage, which can contain arsenic, cadmium, selenium, and mercury. Given the topography, geology, hydrology and meteorological conditions of the mine site area, the threat of AMD to alter the seabed in the Trust Area is real. (see map p. 27)

The Environmental Assessment Office (EAO) has recently approved the proponent's Application Information Requirements (AIR) – that is, the framework for the actual application, which the proponent is now preparing. The proponent expects to submit the application by the end of the year. At that point, the process will move from the "Pre-Application" to the "Application" stage, the latter including further opportunity for public comment. The proponent expects mine construction to begin in 2013 and mine operation in 2014

Part II: Background.

A Review of Islands Trust action re: Raven Underground Coal Proposal

The Islands Trust has the laudable distinction of being the sole local government to explicitly oppose the proposed Raven Coal Mine as stated in a Trust Council resolution of March 24, 2010, which reads:

That the Islands Trust Council request the Chair to write to the Premier of British Columbia and the Minister of State for Climate Action, and the Minister of Energy, Mines and Petroleum Resources ***expressing opposition to the proposed Raven Underground Coal Project****, noting that the Islands Trust and the Province of British Columbia are both signatories to the British Columbia Climate Action Charter which states that reducing greenhouse gas emissions is a common goal of the parties to the Charter and noting concerns about potential impacts upon the environment of the Trust Area*

Since that time, the Trust has addressed the issue by a variety of means including:

1. Trust Council letters to provincial government officials and submission to public comment period on the project's draft Application Information Requirements
2. Hornby Island LTC and Denman Island LTC representation on the provincial Government Working Group (GWG) with DI representative having made 3 major written submissions regarding deficiencies in the draft project Application Information Requirements (dAIR)
3. DI Trustees' submissions and public meeting participation during public comment periods, and letters to provincial and federal officials
4. DI LTC and Trust Council letters to other local governments regarding the position of the Islands Trust on the issue.

A review of Islands Trust documents shows that the nature of the opposition to the project is wide-ranging and identifies:

1. <u>Greenhouse Gas emissions</u>: Potential for significant from mine construction/operation and transport of the coal to overseas markets; Islands Trust & Province are signatories to the BC Climate Action Charter 3/24/10 – a coal mine adjacent to the Trust Area counters efforts within the Trust Area to reduce emissions
2. <u>Duty to protect Trust Area ecosystems</u>: IT mandate to exercise precautionary principle and duty to protect Trust Area ecosystems, diversity of native species & habitats; and, prevent pollution of air, land & fresh & marine waters of the Trust Area
3. <u>Lack of appreciation of boundaries of Trust Area</u>: Proximity of the Islands Trust Area and lack of appreciation of special boundaries of Trust Area; lack of recognition by the proponent of the Islands Trust as a local government relevant to the project even after DILTC representative to the GWG consistently raised this concern
4. <u>Inadequacy of the EAO/CEAA assessment process</u>: lack of adequate consultation and transparency; curtailed public comment periods; flawed information organization and data presentation; failings as identified by BC Auditor General (July 2011); need for a Full Joint Review Panel

5. Inadequate information including: mine, water management, and decommissioning/reclamation plans; liability regime to protect public interest;
6. Potential impact on the shellfish industry in Baynes Sound: Potential irreparable destruction of the thriving shellfish industry in Baynes Sound with the concomitant loss of over 500 jobs; Need for expanded Marine Environment Local & Regional Study areas
7. Potential degradation of an Important Bird Area and the associated impacts on the wealth of seabirds that either overwinter in or migrate through the area;
8. Potential expansion of the project to include Bear and Anderson Lake coal tenures: Concerns about potential expansion of the project to include Bear and Anderson Lake coal tenures; and burden of cumulative effects
9. Potential for severe damage to fish habitat: Acid rock drainage and potential for severe damage to fish habitat in several watercourses and amphibian habitat in the associated riparian areas; freshwater study area too small to encompass entire Raven Tenure; lack of salmonid stock assessment
10. General impacts on Denman Island – lack of clarity about Air/water, Noise, Visual/aesthetic, Ecosystem impacts / rare and endangered species, mosses/lichens, plants & animals pre-project assessment (surveys) and ongoing monitoring
11. Potential negative health impacts on sensitive individuals, and perhaps everyone, residing in the area near the proposed mine; inadequate health models
12. Transportation burden on Hwy
13. Inadequate definition of "Sustainability": definition of "Sustainability" for purposes of the Raven project is framed narrowly and inconsistent with IT understanding of this principle

Part III: Jurisdiction of the Trust

A: Comments on the Duties and Powers of the Trust

To state the obvious, the Island Trust Act establishes a trust. It uses trust language throughout and it requires the election of "trustees". In law, trustees are literally "entrusted" with the protection of trust property. Trustees are not merely custodians, managers, administrators or counselors. They are held to a high standard of fidelity and are required to always act in the best interests of the trust.

The object of the trust is clearly set out in section 3 of the Act: "...to preserve and protect the trust area and its unique amenities and environment..." for the described people.

In our view, this direct language mandates that trustees:

i) must be vigilant in recognizing threats to the "unique amenities and environment" of "the trust area", and

ii) must take active steps to prevent harm to the trust area from identified threats.

In other words, it is not permissible that a trustee would merely wait for harm to occur and then react. A trustee must be pro-active in the protection of the trust assets. We note that the Trust Policy Statement, Part II, speaks of the Trust being an "initiator", amongst other things. We think this role must be emphasized.

What is "the trust area" that the trustees must preserve and protect? It is described as "land" within the boundaries set out in Schedule A in the Act. In regard to the area of Baynes Sound it extends to the high water mark on the easterly shore of Vancouver Island. The local trust area specifically includes Denman Island as a named island in Schedule B of the Act and, significantly, the meaning of "island" is expanded by a definition in section 1 which states:

" "island" means all of the land that makes up an island, and <u>includes surrounding land attached to and extending from an island, whether or not water flows over or under it" (emphasis added).</u>

It is to be noted that in 1984 the Supreme Court of Canada (Reference re: Ownership of the Bed of the Strait of Georgia, [1984] 1SCR388) determined that "the lands, including mineral and other natural resources of the seabed and subsoil covered by the waters of ...the Strait of Georgia... is the property of the Queen in Right of the Province of British Columbia." The case is relevant for two reasons. First, it establishes ownership of the seabed by the province, so that is is clear that the province has power to delegate jurisdiction over the seabed as it appears to have done in the Islands Trust Act. Secondly, the case confirms the view that the seabed, which would include Baynes Sound, is "land" that is covered by water. In other words, the seabed is regarded simply as land that is submerged.

This judicial view of the seabed, coupled with the definition of "island" in the Act, gives support to the conclusion that the Local Trust Committee has some jurisdiction over the seabed of Baynes Sound, and that it has a duty to preserve and protect it and its "unique amenities and environment" as required by section 3 of the Act.

We note also that the existing Trust Policy Statement, which was approved by the minister, contains a reference to the "sea floor of the Trust Area". The policy states:

"4.6.2 Trust Council holds that there should be no extraction of aggregate from the foreshore or the sea floor of the Trust Area."

It appears that to date the Trust has taken the view that the trust area includes the "water surface" (see correspondence of David Marlor to Graham Brazier April 10, 2012, section B. below). Also, the Trust website homepage states that "The trust area covers the islands and waters between the British Columbia mainland and southern Vancouver Island…". Despite these assertions of jurisdiction it seems that in the past the Trust has been reticent to regulate with regard to the use of the water areas. We recognize that the jurisdiction over the water is at least mixed, since the federal Crown has powers over navigation and "fisheries". Whether the fisheries powers cover shellfish (especially those grown on the seabed) is an open question, notwithstanding the fact that the province and the federal governments have entered into an agreement in that regard. We are concerned that the Trust's authority over the waters of Baynes Sound (whether the surface or the column) is very much a grey area, whereas the case for authority over the seabed is much stronger. We think that the Trust's authority over the seabed should be emphasized in all dealings with other governments and agencies.

We are puzzled as to why the Official Community Plan for Denman Island appears to be applicable to only a portion of the trust area as set out in the OCP paragraph 2, and why zoning regulations in the "Water" designation should be limited "to the 30 metre bathymetric line off Vancouver Island or mid-channel, whichever is furthest west in Baynes Sound…" (see policy #3 under "The Marine Environment").

We wonder how can trustees legally choose to <u>not</u> preserve and protect a portion of the area that has been entrusted to them? Agreements that are made with other local governments, or even with the provincial government itself, cannot over-ride the requirements of the Islands Trust Act and the duties it imposes. Any such agreements that are contrary to the spirit and intent of the Act are void and must be disregarded.

Accordingly, we urge the Local Trust Committee to take steps to assert jurisdiction over the seabed throughout the entire local trust area, and to investigate the types of regulations that may be created to protect the seabed, and its ecosystems, from the potential effects of coal mining adjacent to the trust area. For example, it may be useful to designate the entire seabed as a development permit area, and it is probably better that such be done prior to the approval of a coal mine rather than later. Moreover, such steps would be useful in dealing with the alarming proposals for sea-cucumber and geoduck cultivation within the trust area.

We recognize that the Local Trust Committee does not hold all the powers of the province, or even those of a regional district. However, we believe that the seriousness of the present threats demand that all possibilities and creative uses of the "land use" powers be thoroughly investigated and implemented to the extent possible for the preservation and protection of the trust area.

If the dry land of Denman Island was adjacent to the mine would the Trust stand by while a conveyor was built to dump mine waste onto Denman Island? Surely the mandate of the Act and the duties imposed by the law of trusts, would compel trustees to investigate all legal avenues and take all reasonable steps to protect the trust area. In the present circumstances the proposed mine appears to be hydrologically connected to the trust area, the conveyor is water powered by gravity and the waste is in liquid molecular form. We believe that the present situation demands the same vigilance, the same investigations and the same actions to be taken as in the hypothetical circumstances posed above. In our view, there can be no more urgent matter, for both the Local Trust Committee and the Trust Council, than to take all the steps and implement all the measures within their power to address the threats an adjacent coal mine poses to "the trust area and its unique amenities and environment".

B: Correspondence with Trust planner David Marlor re: jurisdiction.

From: David Marlor
To: Graham Brazier

"....the schedule attached to the Islands Trust Act defines the Trust Area and **it is interpreted to include all the water surface** to the high water mark or the municipal boundary." April 10, 2012

C: Jurisdictional references in the correspondence of Islands Trust re: Raven Proposal

Trust Council resolution of March 24, 2010:
That the Islands Trust Council request the Chair to write to the Premier of British Columbia and the Minister of State for Climate Action, and the Minister of Energy, Mines and Petroleum Resources ***expressing opposition to the proposed Raven Underground Coal Project****, noting that the Islands Trust and the Province of British Columbia are both signatories to the British Columbia Climate Action Charter which states that reducing greenhouse gas emissions is a common goal of the parties to the Charter and noting concerns about potential impacts upon the environment of the Trust Area* (emphasis added)

Following the passage of this resolution, the Islands Trust has stated its opposition to the proposed Raven Project in numerous letters to all levels of government as well as to various government departments. The jurisdictional claim has been articulated in two pieces of correspondence: one on behalf of the Denman Island Local Trust Committee written by Louise Bell on June 6, 2011 and the other on behalf of the Trust Council written by Sheila Malcolmson, Chair on June 24, 2011 (copies appear in Appendix A)

D: Islands Trust Jurisdiction overlooked in the Environmental Review process:

At every opportunity throughout the environmental review process attention has been drawn to the jurisdiction issue and yet to-date the proponent has made no reference to the Islands Trust in any of its application material, including the final AIR/EIS (Application Information Requirements/Environmental Impact Statement) which was released in June 2012. (see Appendix B for details)

Part III: Exercise of Legal Authority

A: A legal opinion obtained by the Gulf Islands Alliance in 2007 concluded with the following paragraph:

> In conclusion, the scheme of the *Islands Trust Act*, to paraphrase Southin J.A. in *MacMillan Bloedel*, is not simply filled with statements of "mere piety" that have no effect on the exercise of powers by the Trust Bodies. It expresses a clear and vigorous legislative intention to preserve and protect the trust area and its unique amenities and environment, and vests the Trust Bodies with the duty to do so. The specific measures required to fulfil that duty are addressed, in part, through the Trust Policy Statement. In my opinion, for a Trust Body to legally exercise its powers, it must comply with both the spirit and the letter of the Act.

(The full text of the opinion can be found in Appendix C)

This interpretation concludes that the Trust Bodies are duty bound to act when the Trust Area is under threat of environmental degradation. The question may now be what are they bound to do?

B: Several approaches that might be considered in an effort to protect the Trust Area (Baynes Sound) from the potential negative effects of the coal mine were offered by David Critchley at the February 28, 2012 meeting of the DILTC:

□ engaging the Islands Trust's legal council to advise what legal powers are available and how they might be exercised to protect the marine environment of Baynes Sound

□ hiring an independent expert to address the hydrology and the potential for mine pollution

□ investigating the extension of the Island Trust's jurisdiction on the Buckley Bay side of Baynes Sound

□ designating a new Development Permit Area to enhance the legal position

□ obtaining background sampling now to provide a baseline and information in the case of future litigation

Chair Luckham advised that legal opinion regarding water zone jurisdiction has been obtained recently and the issue is being considered. (for a follow-up see Appendix D)

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Appendix A:
Islands Trust Correspondence re: Raven Proposal

a)

IslandsTrust

Louise Bell
Denman Island Local Trustee
PO Box 70
Denman Island BC V0R 1T0
Tel: 250-335-2113
Email: lbell@islandstrust.bc.ca

June 6, 2011

Rachel Shaw
Environmental Assessment Office
836 Yates St
Victoria, B.C. V8W 9V1

Andrew Rollo
Canadian environmental Assessment Agency
757 Hastings St
Vancouver, B.C. V6C 1A1

Dear Ms. Shaw and Mr. Rollo:

Re: <u>Environmental Assessment of Proposed Raven Underground Coal Mine</u>

Thank you for your clear explanation of the environmental assessment process now underway for the proposed Raven Underground Coal Mine at the three public meetings held last week. I appreciate that the joint assessment process is complex and will take years, and I thank you for your diligence in taking extra steps to maximize the effectiveness of the public process at this stage of the assessment, in assisting the public to understand and participate in the process and in making the public's input available in as transparent a manner as possible.

At the public meeting on June 3 at Union Bay, I spoke about the fact that the Islands Trust, a body created by the Province in 1974 through enactment of the *Islands Trust Act,* was not mentioned in the draft Application Information Requirements (dAIR) for the proposed mine. This omission is surprising, given the attention the dAIR gives to the two regional districts that would be affected, were this project to reach fruition. You responded, Ms. Shaw, that the Islands Trust had been invited to be part of the Working Group, which reflected acknowledgement from your office of the existence of Islands Trust Area or something like that. I consider this response inadequate and am therefore writing to reiterate my concern.

Trustees Tony Law from Hornby island and David Graham from Denman Island are themselves participants in the Working Group because the Islands Trust is without resources to have staff undertake this role, as has been the practice for other local governments, and their comments are recorded in the tracking table. That should, in my view, have emphasized the need for the dAIR to pay particular attention to the proximity of the Trust Area. However, it seems to have worked the other way as, despite their contributions and, I might add, despite my letter to you, Mr. Rollo, of Sept 6, 2010 describing the Islands Trust, the dAIR is silent on the need to consider the potential negative impacts on the Islands Trust, in particular on Denman Island.

Section 3 of the *Island Trust Act*, sets out the object of the Islands Trust, which is as follows:

to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the area and of the Province generally, in cooperation with municipalities, regional districts, improvement districts, other persons and the government of the Province.

The Islands Trust is unusual in that it is the only mandated form of government in Canada. In fact, it may be the only such form of government in the world, although I am not at all sure of this.

The Islands Trust Area includes about 480 islands in the Strait of Georgia and Howe Sound, plus all surrounding waters. With the exception of the areas abutting large cities (e.g., Nanaimo, Victoria, Courtenay/Comox), the marine component of the Trust Area extends to the high water mark on Vancouver Island and the Mainland. The *Island Trust Act* divides the Trust Area into geographic areas for the purpose of community planning and land use regulation. David Graham and I are the elected officials for Denman Island Local Planning Area, which includes Bayne Sound, and it is our role to concern ourselves with any project that threatens either the natural environment or the rural character, socio-economic diversity or other unique amenity of this our area. A description of these amenities and policies for their protection are articulated in the Denman Island Official Community Plan, which may be found at www.islandstrust.bc.ca/ltc/de/bylaws.cfm.

As a Vice Chair of the Islands Council, I chair three local trust committees, including the Hornby Island Local Trust Committee, which represents a community also concerned about the potential negative impacts of the proposed mine on the environment and natural amenities of its local trust area. Most Hornby Island residents attending the June 3 meeting left relatively early as the last ferry to Hornby on Fridays is at 10:00 p.m. and is often crowded, and so you didn't hear from many of them. However, I also encourage you to consider their Official Community Plan, which may be found at www.islandstrust.bc.ca/ltc/ho/bylaws.cfm.

The object charges the Islands Trust to work in cooperation with others to preserve and protect the Islands Trust Area and names the kinds of bodies with which we are intended to partner in carrying out this mandate, including the provincial government. Thus it is my responsibility to encourage you to pay particular attention to the object. An amendment to the Islands Trust Act in 1990 required the Islands Trust to create the Islands Trust Policy Statement, which, once approved by the Minister, would expand on the meaning of the object. The Policy Statement was adopted in 1994. Although minor amendments have since been made over time, the Policy Statement remains much the same today. I encourage you both to pay particular attention to this document, which may be found at www.islandstrust.bc.ca/tc/polstatement.cfm.

Section Policy 3.1.9 of the Policy Statement states:

Trust Council encourages actions and programs of other government agencies which:
• place priority on the side of protection for Trust Area ecosystems when judgment must be exercised,
• protect the diversity of native species and habitats in the Trust Area, and
• prevent pollution of the air, land and fresh and marine waters of the Trust Area.

The subjects identified in this policy are most certainly a concern of the residents of Denman Island, as you head at the June 3 meeting. My point in describing the Policy Statement and citing this particular policy is to emphasize that, in my view, the *Islands Trust Act,* through the object, strongly encourages you to take a precautionary approach with all issues relating to the proposed mine that could impact Baynes Sound.

There are a number of definitions for the precautionary principal, including the definition that Mr. Rollo cited on June 3. When chairing a Gambier Island Local Trust Committee meeting this year, I used the following definition, which has been used by several other local trust committees:

Precautionary Principle: The recognition that when an activity raises threats of harm to the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically.

My understanding is that this definition is an adaptation of the definition quoted in Section 31 of the judgment for Spraytech vs. Hudson (2001) SCR 241 in the Supreme Court of Canada, which states that a municipality or local government can rely on the precautionary principle to enable it to enact a bylaw that would prevent pesticide use and for the same reasoning the municipality could refuse to approve a bylaw that does not respect the principle. The case recognized the principle as used and defined in international law, specifically in the Bergen Ministerial Declaration on Sustainable Development (1990).

Regardless of the definition, the underlying directive is essentially the same and is particularly applicable to undertakings that might negatively impact the Islands Trust Area in any way. As in the policy cited above, when judgment must be exercised priority should be placed on the side of protection for the Trust Area ecosystems. Difficult as this may be given the legislated requirements of your agencies, I repeat that the stipulation stems from provincial legislation enacted 37 years ago.

As a result of this legislation, the Islands Trust is more than simply a group of nearby local governments albeit sharing a mandate, although indeed each local trust committee is a local government body in its own right as it holds the authority for land use decisions for its local trust area. Additionally, however, the activities of this federation of local governments are defined by the Islands Trust Council, the group of 26 elected officials from across the Trust Area, through its role as a taxation authority and in setting the budget for all Islands Trust undertakings.

Increasingly over time, the Islands Trust Council has seen fit to direct an increasing portion of its budget to work that is designed to promote the object on a broad scale. Much of this work is advocacy to promote the aspects of the Policy Statement, as set out in the Strategic Plan, which may be found at www.islandstrust.bc.ca/tc/reports.cfm. For example, this term the Islands Trust Council is undertaking enhanced advocacy for the protection of the marine environment throughout the Trust Area as one of the measures of success of Strategic Plan Objective 4.2, which is as follows:

to encourage recognition and support of the Island Trust object in policies and programs of other levels of government and agencies.

In summary, the unique organizational structure of the Islands Trust and its legislated mandate to work cooperatively with others are designed to preserve and protect the Islands Trust Area. The unusual foresight and unanimity of provincial legislators almost four decades ago has served the provincial government well, and our responsibility as elected officials today is to do our utmost to continue to protect this biologically rich and culturally unique region for the residents of the islands and of the province generally. I am asking for your cooperation in this endeavour.

Please include the substance of this letter be in the tracking table for public comments and give it your careful consideration. Feel free to contact me for assistance as needed.

Yours sincerely,

Louise Bell

Louise Bell

e.c. The Honourable Peter Kent, Federal Minister of the Environment
The Honourable Terry Lake, Provincial Minister of the Environment
Sheila Malcolmson, Chair, Islands Trust
Denman Island Local Trust Committee
Hornby Island Local Trust Committee
Coalwatch Comox Valley

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b) (Sheila Malcomlson, Islands Trust Chair to Provincial & Federal Environmental Review Agencies)

June 24, 2011 File No.: TAS/Coal -1

Andrew Rollo, Canadian Environmental Assessment Agency

Rachel Shaw, Environmental Assessment Office

Dear Andrew Rollo and Rachel Shaw:

Re: Draft Application Information Requirements for the Raven Underground Coal Mine

I am writing on behalf of the Islands Trust Council and of concerned residents of Denman and Hornby Islands to provide comments on the draft Application Information Requirements (dAIR) for the proposed Raven Underground Coal Mine project.

On June 15, 2011, at its regular quarterly meeting, Trust Council unanimously adopted the following resolution:

That the Islands Trust Council write to the Environmental Assessment Office and to the Canadian Environmental Assessment Agency expressing concern about the proposed Raven Underground Coal Mine on Vancouver Island regarding:

- *the need for the environmental assessment process to include a full review by a panel of independent experts;*
- *the potential impact on marine water within the Islands Trust Area, in particular on Baynes Sound; and*
- *the greenhouse gas emissions that would result from the project.*

Overview of Islands Trust

The Islands Trust is a federation of independent local governments that represents 25,000 people living within the Islands Trust Area. The trust area covers the islands and waters between the British Columbia mainland and southern Vancouver Island, including 13 major and more than 450 smaller islands and encompassing an area of 5200 square kilometres. The Islands Trust has a legislated mandate "to preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of the province generally, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the Government of British Columbia."

The *Islands Trust Policy Statement*, approved by the BC Minister of Municipal Affairs in 1994, was developed to meet responsibilities of the Islands Trust identified in *Islands Trust Act*1 and to address the need for leadership in achieving the mandate cited in this legislation.

In the Roles and Responsibilities section the Policy Statement states:

The Islands Trust Council cannot effectively implement the Policy Statement without the support of all stakeholders. Assistance, cooperation and collaboration are required from local trust committees, island municipalities, the Trust Fund Board, the Provincial Government, other government agencies, non-government organizations, communities, First Nations, property owners, residents and visitors.

Further, Policy 3.1.9 of the Policy Statement states:
Trust Council encourages actions and programs of other government agencies which:

□ *place priority on the side of protection for Trust Area ecosystems when judgment must be exercised,*

□ *protect the diversity of native species and habitats in the Trust Area, and*

□ *prevent pollution of the air, land and fresh and marine waters of the Trust Area.*

As a result of our legislated mandate and its interpretation in the Policy Statement, it is our practice in the Islands Trust to actively enlist others to support the protection and preservation of the trust area. Accordingly, we encourage you to take a precautionary approach with all issues relating to the proposed mine that could impact the ecology of the Trust Area, in particular the marine areas, or the unique amenities of the nearby islands.

Our Concerns

1. Proximity of the Islands Trust Area

The areas of jurisdiction for the Denman Island and Hornby Island Local Trust Committees lie directly east of the proposed mine site. The Denman Island Local Trust Area is less than six kilometres from the proposed mine portal and includes Baynes Sound, the marine area most likely to be affected by the project. About 2200 people live on Denman and Hornby islands, many of whom are deeply worried about the effects of the project on the Baynes Sound ecosystem and the impacts that the industrial noise, artificial light and air-born fine and ultra-fine particulate matter from the proposed mine would have especially on the Denman community. Many residents are also worried about the negative economic impacts of the project from the decrease in local tourism, lowered property values and loss of young families fearful about potential health effects. The dAIR are unclear as to whether Denman and Hornby islands are included in the relevant study areas, analyses and on-going monitoring, in particular for noise and air quality. Neither the Islands Trust nor the Denman and

Hornby Official Community Plans are mentioned in the dAIR, despite the fact that Comox Valley Regional District sources are cited including its Regional Growth Strategy and the Electoral Area Plan for Area 'A'. As a result there is uncertainty as to whether the proponent appreciates the spatial boundaries of the Islands Trust Area and its proximity to the proposed mine.

We request therefore that, before the environmental impact assessment process proceeds further, the proponent review the *Islands Trust Act* and Policy Statement and the Denman Island and Hornby Island Official Community Plans to determine their bearing on the project and amend the dAIR accordingly.

2. The Assessment Process

The dAIR do not provide sufficient information for the proponent to forecast the extent of mine impacts. The following are examples of important information that is missing:

☐ the mine plan, including details of the extent of the underground workings, surface layout, processing of ore, waste and product;

☐ a water management plan, detailing source and uses of process water at surface, pumping and dewatering of underground workings, water treatment, effluent release, emergency plans;
and

☐ proposals for the eventual decommissioning of the mine and for site remediation.

Information such as this is needed for the public to forecast the full extent of mine impacts, in particular, those relating to acid rock drainage. The only way to ensure that all necessary information is available before the application requirements are finalized is to upgrade the current Comprehensive Review to a Full Independent Review Panel, thus allowing for the identification and thorough exploration of all outstanding issues and giving ample opportunity for the public, including qualified experts, to provide their opinions.

3. Potential Impact on Baynes Sound

The biggest concern for Trust Council in the topics covered in the dAIR is the project's potential impact on marine waters in the Islands Trust Area, especially in Baynes Sound. Designated an Important Bird Area2, this body of water is the winter home for tens of thousands of waterbirds. Baynes Sound hosts globally, continentally and nationally significant populations of 11 species, several of which are of special conservation concern. Nevertheless, there is no mention of birds in the dAIR. Baynes Sound is also home to large marine mammals such seals, sea lions and orcas.

Additionally gravel and sand shores of Baynes Sound are the breeding ground for Pacific herring and other forage fish, which support the salmon and other large fish that are so important to this area.

Last, the nutrient-rich waters of Baynes Sound support a shellfish industry of international renown. Shellfish farming in this area provides jobs to over five hundred nearby residents; however, the industry depends on water that is free of toxic metals and other potential contaminants.

The dAIR are inadequate to provide assurance that Baynes Sound water quality will be unaffected by the proposed mine. The geographic area to be studied should be expanded to encompass the full tenure area of the project to ensure that water courses and groundwater will not be contaminated, leading over time to degradation of the ecology of Baynes Sound. In particular, the marine baseline studies and the modeling studies for groundwater and aquifer impacts should be expanded to assess both short and long-term effects, especially acid rock drainage. Last, more detailed baseline data are needed so that initial metal concentrations in the marine food-web are established to allow for effective monitoring of the bio-accumulation of metals over time.

4. Potential for Greenhouse Gas Emissions

Although the dAIR acknowledges the potential of the mine to generate greenhouse gas (GHG) emissions, it is unclear how this impact would be addressed. Further, the GHG emissions resulting from the shipping and burning of coal at overseas destinations are not included, even though they clearly contribute to climate change. The updated Project Description by the proponent states that some of the product may be sold as thermal coal, rather than metallurgical coal, depending on market conditions at the time of sale. We understand that the terms of reference for the environmental impact assessment do not include related emissions beyond Canada's borders; however, all emissions associated in any way with this project contribute to climate change and thus are a concern.

As a result of the provincial government's Bill 27 (Green Communities Statutes), communities across BC were required to set targets for the reduction of GHG emissions, many adopting the provincial targets of 33% by 2020 and 80% by 2050. As local governments attempt to inspire citizens to design and undertake actions to achieve these targets, it is disheartening to see our governments considering applications for projects that would create significant increases in GHG emissions.

Understanding the limitations of the terms of reference on the broad GHG emissions, we therefore would simply ask that the dAIR stipulate clearly the specific requirements for mitigating the effects of the GHG emissions resulting directly from the project.

In conclusion and for the reasons stated above, we are deeply concerned that the joint environmental impact assessment process currently underway is not being conducted at the most comprehensive level of scrutiny. Accordingly we repeat the request above that the process be revised to include a joint federal/provincial Independent Expert Review Panel with the full public hearings that are part of this process and that the assessment timeline be extended to provide ample opportunity to accommodate this more robust assessment process.

Thank you for your attention to our concerns.

Sincerely,
Sheila Malcolmson
Chair, Islands Trust Council

Attachment – Islands Trust Area map
cc The Honourable Peter Kent, Minister, Environment Canada
The Honourable Terry Lake, Minister of Environment, BC
Denman Island Local Trust Committee
Hornby Island Local Trust Committee
Islands Trust Website

Appendix B: <u>**Islands Trust Jurisdiction overlooked in the Environmental Review process:**</u>

Between June 25, 2010 and May 14, 2012, the Denman Island LTC, represented by Trustee David Graham, submitted comments on versions of the draft Application Information Requirements (dAIR). Early drafts of the AIR revealed a lack of explicit reference to and acknowledgement of the Islands Trust, its mandate, legislation and jurisdiction. This oversight was brought to the attention of the EAO via the comments including in the most recent, noted below. However, the final AIR, approved by the EAO in June 2012, still excludes the Islands Trust. A subsequent note by the proponent dated June 7 on a table on the EAO website that tracks comments, stated in response to the LTC comment – "Project is confined to Vancouver Island and appropriate land use framework is outlined in the AIR."

DENMAN ISLAND TECHNICAL COMMITTEE COMMENTS ON "PENULTIMATE" DRAFT AIR (MAY 2012) FOR RAVEN UNDERGROUND COAL PROJECT

Submitted by David Graham,

member of Denman Island Local Trust Committee, and representative to the Government Working Group for the Raven Project

May 14, 2012

(in part)

EAO Process (General); Regulatory Framework: We remain concerned about the lack of acknowledgement and recognition of the jurisdiction of Islands Trust. The dAIR (May 2012) continues to exclude explicit reference to and acknowledgement of the Islands Trust, its mandate, legislation and jurisdiction. Although the proponent's comment in the tracking table indicated that v7 of the dAIR "has been updated to reflect this comment," neither v7 nor dAIR (May 2012) were revised and this same oversight persists. In fact, there is no mention of the Islands Trust at all. Among concerns of the DTC is uncertainty as to whether the proponent appreciates the spatial boundaries of the Islands Trust Area, which cover the islands and waters between the British Columbia mainland and southern Vancouver Island, including Howe Sound and as far north as Comox. That is, its jurisdiction reaches to the high tide mark on Vancouver Island and therefore includes Baynes Sound, in close proximity to the Raven Project. The Islands Trust mandate is to exercise the precautionary principle with a duty to protect Trust Area ecosystems, diversity of native species & habitats; and, prevent pollution of air, land & fresh & marine waters of the Trust Area.

Appendix C: Legal Opinion obtained by the Gulf Islands Alliance (GIA)

Mandell Pinder
Barristers & Solicitors

422 – 1080 Mainland Street, Vancouver BC V6B 2T4
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† Also of the Alberta Bar
†† Also of the Ontario Bar

June 6, 2007

The Gulf Islands Alliance
P.O. Box 795
Salt Spring Island, BC V8K 2W3

Dear Sir:

The Gulf Islands Alliance has asked me to provide a legal opinion on the following question:

> Are a Local Trust Committee ("LTC"), the Trust Council and/or the Executive Committee (the "Trust Bodies") created under the *Islands Trust Act* R.S.B.C. 1996, c. 239 as amended (the "*Islands Trust Act*") required to exercise their powers consistent with the trust objects stated in s. 3 of the *Islands Trust Act*?

I am pleased to provide the requested opinion by this letter. In brief, it is my view that s. 3 of the *Islands Trust Act* places a positive legal obligation on Trust Bodies to act in furtherance of the trust objects, namely the preservation and protection of the trust area. A decision by a Trust Body that was made for a purpose other than the statutory purpose stated in s. 3 would arguably fall outside the Trust Body's statutory power, and be vulnerable to legal challenge.

The Islands Trust Policy Statement (Bylaw No. 17, as amended – the "Trust Policy Statement") imposes further constraints on the exercise of powers by Trust Bodies. Under the *Islands Trust Act*, neither the Trust Council nor the Executive Committee may approve a bylaw that is contrary to or at variance with the Trust Policy Statement. The Trust Policy Statement contains specific directions regarding the implementation of the preserve and protect mandate stated in s. 3, and the approval of a bylaw that contravened or failed to implement those directions would arguably fall outside the statutory powers of the Trust Council and Executive Committee.

1. Analysis

The *Islands Trust Act* is a unique piece of legislation in British Columbia. The Legislature has, through the *Local Government Act* RSBC 1996, c. 323, granted local governments extensive powers to regulate the use of land within their boundaries through zoning and permitting bylaws. Pursuant to s. 1 of the *Local Government Act*, those powers are granted

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for the general purpose of enabling local governments to represent and respond to the needs of their communities:

> s. 1 The purposes of this Act are
> (a) to provide a legal framework and foundation for the establishment and continuation of local governments to represent the interests and respond to the needs of their communities,
> (b) to provide local governments with the powers, duties and functions necessary for fulfilling their purposes, and
> (c) to provide local governments with the flexibility to respond to the different needs and changing circumstances of their communities.

The *Local Government Act* does not provide specific direction to local government officials on how to prioritize or rank these needs. That determination is left to the local governments themselves.

The *Islands Trust Act* was originally enacted in 1974, subsequently amended and then, in 1989, repealed and replaced with the current legislation. In contrast with the *Local Government Act*, the *Islands Trust Act* gives the Trust Bodies created under it very specific direction on the purposes for which the powers created under the Act may be exercised, and the objects that should be achieved through the exercise of those powers.

Section 3 states the object, or purpose, of the Islands Trust (all underlining is for emphasis and does not appear in the original):

> s. 3 The object of the trust is to <u>preserve and protect the trust area and its unique amenities and environment for the benefit of the residents of the trust area and of British Columbia generally</u>, in cooperation with municipalities, regional districts, improvement districts, other persons and organizations and the government of British Columbia.

Section 4 places the responsibility for fulfilling those purposes with the Trust Bodies:

> s. 4(1) The trust council, executive committee, local trust committees and trust fund board are continued <u>for the purpose of carrying out the object of the trust.</u>

Sections 8 and 9 (in relation to the Trust Council), 21 (in relation to the Executive Committee) and 24 (in relation to LTC's) preface the grant of specific powers to each Trust Body with the obligation that the powers are to be exercised "<u>for the purposes of carrying out the object of the trust</u>".

Thus it is apparent from the plain language of the Act that the powers of the Trust Bodies have been granted for the purposes of fulfilling the trust objects stated in s. 3, and the objects of the trust operate to direct and, if necessary, constrain the powers of the Trust Bodies. This interpretation is supported by the decision of the BC Court of Appeal in *MacMillan Bloedel v. Galiano Island Trust Committee*, [1995] BCJ No. 1763, the seminal decision interpreting the *Islands Trust Act*. The respondent MacMillan Bloedel had successfully challenged bylaws passed by the Galiano Island Trust Committee as being *ultra vires*, or outside, the Trust Committee's powers under the Act. The Court of Appeal reversed the lower Court decision and

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restored the bylaws. In doing so, two members of the Court specifically noted the unique nature of the *Islands Trust Act* and in particular s. 3:

> If there were no s. 3 of the *Islands Trust Act*, I might be of a different opinion, but s. 3 is not a mere piety. To put it another way, these by-laws were enacted for the purposes or the objects of s. 3 as well as for the health and welfare of the inhabitants of Galiano Island. They therefore had a lawful purpose. (*per* Southin J.A. at para. 130)
>
> The history of the *Islands Trust Act* indicates a legislative intent to increase the powers of local trust committees. It also shows an intent to give increased effect to the object statement now contained in s. 3 by setting out the object statement in a separate section of the Act. I think it is a clear inference that local trust committees exercising the powers conferred under the Act, including the powers conferred in both s. 4(4) and s. 27(1)(a), have a legislative mandate to act in conformity with [the] object statement in s. 3. (*per* Finch J.A. at para. 177; emphasis added)

Both Justices emphasized the importance of s. 3 in supporting the exercise of the bylaw making power at issue on the appeal. Finch J.A.'s reasons extend further by noting that the exercise of powers by LTC's must as well be in conformity with s. 3. This confirms the view expressed above that s. 3 acts as an ultimate limit on the purposes for which Trust Bodies can use their powers. A Trust Body decision that is not directed to achieving the preservation and protection of the trust area and its unique amenities and environment, would arguably be outside the scope of powers granted to the Trust Body under the Act.

The exercise of zoning bylaw powers to permit increased residential density provides an example of how this limit operates. Increased density creates direct impacts – road networks, fragmentation of landscapes, increased water usage - that *prima facie* affect and impair the unique amenities and environment. These negative effects do not impair or limit the power of a municipality governed by the *Local Government Act*, to adopt zoning and permitting bylaws authorizing increased density. The municipality may deem increased density to be in the best interests of its residents, because of the expanded economic activity or tax base it may bring, or because the development will contribute funds towards the construction of amenities such as a community centre. Under the *Local Government Act*, municipalities are empowered to engage in this kind of trading off of environmental or natural values, for other benefits.

A LTC operating under the *Islands Trust Act*, in contrast, is mandated to place the preservation and protection of the trust area's environment uppermost in its considerations. When considering whether to authorize increased density, a LTC may not trade off the trust mandate of environmental protection in pursuit of other purposes collateral to that mandate. The LTC must ensure that the trust mandate and purposes are carried out. If the circumstances of the enactment of the bylaw disclose that the predominant purpose of a bylaw is to fulfil a purpose other than the preservation and protection of the trust area and its unique amenities and environment, the bylaw is *prima facie* beyond the LTC's statutory mandate and susceptible to legal challenge.

The Trust Policy Statement also operates to restrict the power of Trust Bodies in enacting bylaws. Under s. 15, the Trust Council is required to prepare a "trust policy statement" that is a "general statement of the policies of the trust council to carry out the object of the trust. (emphasis added)." The Trust Policy Statement contains five parts, three of which are particularly relevant here. In PART II – THE ISLANDS TRUST'S OBJECTS AND GUIDING PRINCIPLES, the Trust Policy Statement cites s. 3 and invokes a strong commitment to preserving and protecting the Islands Trust area through land use planning and regulation. In Schedule I the following definitions of preserve and protect are adopted:

> **Preserve** – to maintain in a given condition. Preservation often requires maintaining the processes that generate the desired condition.
>
> **Protect** – to maintain over the long term by managing, or if necessary limiting, the type and intensity of development or activity to ensure that valued attributes are not compromised or destroyed.

In PART III – ECOSYSTEM PRESERVATION AND PROTECTION and PART IV – STEWARDSHIP OF RESOURCES the general commitments stated in Part II are particularized through specific "Commitments of Trust Council" and "Directive Policies". Directive Policies identify matters that must be addressed by LTC's through their respective OCP's and bylaws (Trust Policy Statement, p. 3). By way of example, the Trust Policy Statement requires LTC's to address the following issues regarding forest lands and ecosystems in their OCP's and bylaws:

(a) "the protection of unfragmented forest ecosystems … from potentially adverse impacts of growth, development and land-use" (Directive Policy 3.2.2).

(b) "the need to protect the ecological integrity on a scale of forest stands and landscapes (Directive Policy 4.2.6).

(c) "the retention of large land holdings and parcel sizes for sustainable forestry use, and the location and construction of roads, and utility and communication corridors to minimize the fragmentation of forests" (Directive Policy 4.2.7).

(d) "the designation of forest ecosystem reserves where no extraction will take place to ensure the preservation of native biological diversity" (Directive Policy 4.2.8)

Neither the Trust Council nor the Executive Committee, as the case may be, can approve a bylaw of a LTC if it is "contrary to or at variance with the trust policy statement." While the Act does not explicitly state that the LTC may not adopt bylaws contrary to or at variance with the Trust Policy Statement, the limitation is inherent in the fact that the bylaw requires approval by the Trust Council or Executive Committee.

The phrase "contrary to or at variance with" is also found in the *Vancouver Charter* and the previous *Municipal Act*, and has been judicially considered on several occasions. In general, the law requires that a bylaw must be in "absolute and direct collision" with a higher level planning document such as the Trust Policy Statement before it will be found to be contrary to or at variance with that higher level document[1].

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[1] *Pender Islands Trust Protection Society v. North Pender Island Local Trust*, 2001 BCSC 1451; *Rogers v. Corporation of the District of Saanich* (1983), 22 MPLR 4 (BCSC)

This test sets a high standard. However, the Directive Policies are mandatory and prescribe specific requirements that must be addressed through LTC bylaws. Using the Directive Policies cited above as an example, there is a strong argument that a bylaw adopting or amending an OCP that failed to contain specific measures designed to preserve unfragmented forest land base and large lot sizes, would be "at variance" with the Trust Policy Statement and accordingly outside the bylaw approval powers of the Executive Committee and/or Trust Council.

In the interests of thoroughness I will address three further issues. The first is whether the *Islands Trust Act* creates a trust in the full legal sense to which the principles of trust law apply. The Legislature may impose upon itself, or any delegated body within its statutory power, the duties of a trustee in relation to public assets, including the environment and natural resources, by clearly expressed legislative intention[2]. The use of terms with defined meaning in trust law, such as "objects", "trust" and "trustees" suggests that this intention is present in the *Islands Trust Act*.

Despite two decades of case law under the *Islands Trust Act*, this issue has yet to be definitively addressed by a Court, and remains an outstanding question. As the plain language of the Act and existing legal precedent are sufficient to answer the question posed in this opinion, a detailed analysis addressing whether the Act creates an enforceable trust is not required. It is sufficient to point out that the Legislature's use of the language of trusts expresses a clear intention to impose enforceable limits on the exercise of powers by Trust Bodies, which limits would only be rendered more restrictive in the event a Court were to rule that the *Islands Trust Act* creates a "true" trust to which the common law and equitable principles of trust law apply.

The second issue is legal commentary regarding the treatment of the *Islands Trust Act*, and in particular the purposes section, in previous Court decisions. In "The Islands Trust: 30 Years of Protecting B.C.'s Gulf Islands" (2005) 2 D.M.P.I. (2d) March 2005, Issue 3, the author questions whether s. 3 has been given meaningful legal effect by the Courts. In particular, the author points to the decision in *Denman Island Local Trust Committee v. 4064 Investments Ltd.* (2001), 96 B.C.L.R. (3d) 253 (B.C.C.A.), in which the Court struck down bylaws concerning the protection of forest lands and the regulation of forestry on Denman Island, as indicating a judicial reluctance to breathe life into s. 3.

The *Denman Island* decision is distinguishable and does not undermine the opinion expressed above. The issue before the Court in the *Denman Island* case was the validity of bylaws described by the Court as enacting a "detailed regulatory scheme" for logging on private lands. The Court's conclusion that the bylaws exceeded the LTC's jurisdiction, rests on its view that the extensive regulation of forestry by the Province through other Acts and regulations, is incompatible with a general grant of power to the LTC to regulate that same matter though the *Local Government Act*. The Court makes it clear that it was the LTC's attempt to directly regulate forestry itself, that put the bylaw beyond the LTC's jurisdiction.

In my view, there is nothing in the *Denman Island* decision which contradicts the fundamental point expressed in this opinion, which is that the plain language of s. 3 indicates that

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[2] *Waters' on Law of Trusts in Canada* (3rd ed.) p. 567

Trust Bodies must use their delegated powers for purposes and objects consistent with the preserve and protect mandate.

The final issue is the implication of recent authority from the Supreme Court of Canada regarding the powers of municipal bodies, for the proper interpretation of the powers of Trust Bodies under the *Islands Trust Act*. In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485 and related decisions, the Supreme Court stated that a previously restricted approach to interpreting municipal powers has been abandoned in favour of a "broad and purposive approach" consistent with the modern approach to drafting municipal legislation, which has moved away from granting municipalities lists of specific powers in favour of the grant of general powers necessary to fulfilling their purposes and functions (*United Taxi Drivers' Fellowship*, para. 6). Thus the law with respect to municipal powers is arguably moving towards a more expansive approach in which the municipality, rather than the Court, is best situated to determine the appropriate balancing of the competing needs of its community.

In my view this line of authority does not detract from the conclusions expressed above. As noted, the *Islands Trust Act* is not standard local government legislation. It contains a clearly expressed legislative intention to direct the exercise of powers by Trust Bodies towards achieving the trust objects stated in s. 3, and is an exception to the modern approach to drafting municipal legislation relied on by the Supreme Court in *United Taxi Drivers' Fellowship*.

In conclusion, the scheme of the *Islands Trust Act*, to paraphrase Southin J.A. in *MacMillan Bloedel*, is not simply filled with statements of "mere piety" that have no effect on the exercise of powers by the Trust Bodies. It expresses a clear and vigorous legislative intention to preserve and protect the trust area and its unique amenities and environment, and vests the Trust Bodies with the duty to do so. The specific measures required to fulfil that duty are addressed, in part, through the Trust Policy Statement. In my opinion, for a Trust Body to legally exercise its powers, it must comply with both the spirit and the letter of the Act.

Yours truly,

MANDELL PINDER

Tim Howard
Barrister & Solicitor

Appendix D: **Trust's Legal Opinion** (an exchange between Patti Willis and Peter Luckham following the release of the minutes of the February 28, 2012 meeting of the DILTC)

From: Patti Willis [pcdsres@telus.net]
Sent: April 5, 2012 2:34 PM
To: Laura Busheikin
Subject: Request for information - legal opinion re IT water jurisdiction

Hello Laura:

......I note in the Draft minutes of the LTC meeting of February 28, 2012 that Chair Luckham reported that a "legal opinion regarding [Islands Trust] water jurisdiction has been obtained recently." This is noted in Item 11 - Town Hall Discussion. His comments came in the context of a discussion of strategies that the Islands Trust might take relative to the proposed Raven Coal Mine.

I would be grateful to receive a copy of the legal opinion cited by Chair Luckham.

Thanks for your work.

Patti Willis

^^

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Peter Luckham, Trustee
Islands Trust
250-246-4802
Websites: www.islandstrust.bc.ca | www.islandstrustfund.bc.ca
Preserving Island communities, culture and environment
```

On 4/6/2012 4:33 PM, Laura Busheikin wrote:
Hi Peter,
Can you follow up on this (and cc to me so I stay informed)?
Laura

^^

----- Original Message -----
From: Peter Luckham
To: Laura Busheikin ; pcdsres@telus.net
Sent: Friday, April 06, 2012 7:58 PM
Subject: Re: FW: Request for information - legal opinion re IT water jurisdiction

Hi Patti, thank you for your interest in Marine Jurisdiction and the Raven Coal mine.
I do not recall exactly what I might have been thinking of in that context just at this moment.
I would have to go back through my notes to see if I can figure out what I was thinking at the time.

That said, the content and recommendations regarding legal opinions are kept confidential to protect the trust in the event of a legal challenge or action that the information may be important to the trust position.

I will go back over my notes and let you know what I might have been referring to. I will not be able to reveal the detail.

I am sorry for this inconclusive answer, but we cover so much business in a month and often get a variety of legal opinions in different trust area's some times they are relevant to other areas and sometimes not. I suspect it was an issue in a different trust area, as I know that we have not sought any legal opinion regarding Raven Coal mine.

^^

----- Original Message -----
From: Patti Willis
To: pluckham@islandstrust.bc.ca ; Laura Busheikin
Sent: Saturday, April 07, 2012 1:41 PM
Subject: Re: FW: Request for information - legal opinion re IT water jurisdiction

Thanks for this Peter. If you are able to "deconstruct" your remarks at the LTC mtg of Feb 28 as to their context, I'd be grateful.

I can appreciate that the IT may wish to keep the details of legal opinions confidential as they may pertain to a possible case that's "in stream" or any anticipated litigation.

What I am interested in is if there is any legal leverage that the IT might have relative to the proposed Raven Coal Mine, such as preventing potential pollution of air, land and water in the Trust Area (the exercise of the precautionary principle) and issues re provincial/local govt climate change commitments.

So, it's not the use of a legal opinion to fend off litigation of the IT, but perhaps being used preemptively in the case of potential damage to the Trust Area, that is, to determine if the IT has authority that it could be exercising?

Anyway, I would be happy to hear more on this from you.

....
Patti Willis
^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^^

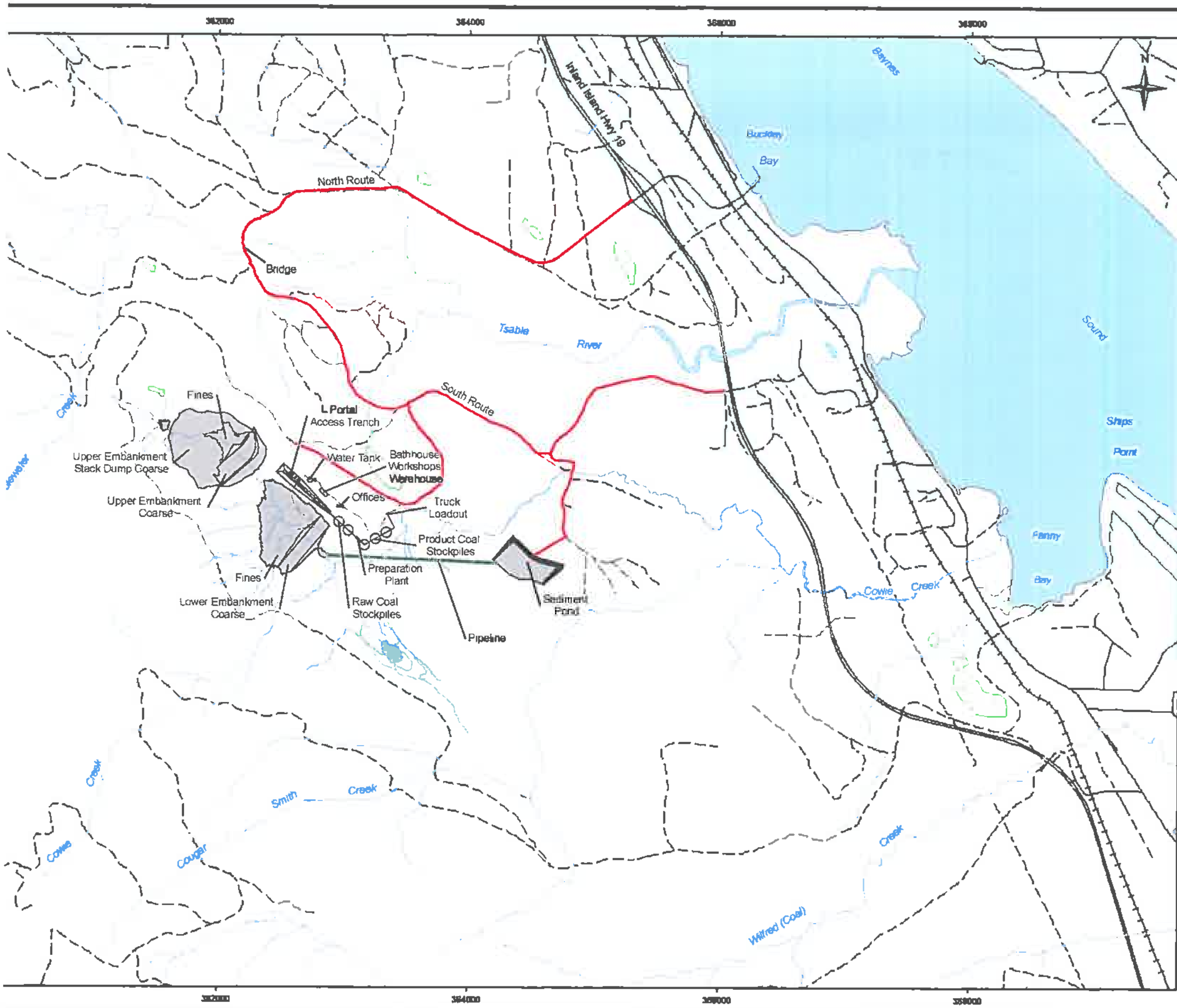
----- Original Message -----
From: Patti Willis
To: Peter Luckham
Sent: Tuesday, May 29, 2012 7:30 AM
Subject: Request for information - legal opinion re IT water jurisdiction

Hello Peter --

Below is an exchange that we had earlier this year regarding IT marine jurisdiction that may have relevance to the Raven Coal Mine issue. I don't remember that I actually ever received a reply from you to my last e-mail of April 7. Could you please review it and reply at your convenience?

Many thanks,
Patti Willis

^^^



Reference
LIDAR (5m) used to define Cowie and Cougar Smith Creek Watercourses
TRIM used in other watersheds
Basedata: TRIM

CLIENT: Compliance Coal Corporation

PROJECT: Raven Underground Coal Project

Conceptual Infrastructure

DATE: February 22, 2010	ANALYST: BO	Figure 2-4
JOB No: VE51897	CHKD: BO	PDF FILE: 18-50-004_mine_site.pdf
GIS FILE: 18-50-004		
PROJECTION: UTM Zone 10	DATUM: NAD83	amec

An investigation of the Islands Trust legal authority with respect to the proposed Raven Underground Mine

prepared by Patti Willis, David Critchley & Graham Brazier

June 2012

Conclusion

What we would like the Local Trust Committee to do:

a) request the Chair of the Islands Trust write a strongly worded letter to the Environmental Assessment Office (EAO) regarding the lack of response of the EAO to the interests of the Islands Trust in the Raven Underground Coal Mine proposal as they have been put forward at every opportunity throughout the process to date. To emphasize the concerns of the Islands Trust in this regard, the letter should include specific references to the authority/jurisdiction material outlined in part III of the material attached.

b) request the Trust undertake independent scientific analysis of the composition of several samples of the seabed taken from the location where Cowie Creek empties into Baynes Sound for use as baseline data. Data gathered could offer significant information important for the future preservation and protection of the seabed.

c) request the Trust appoint a staff member to be responsible for collecting and monitoring information relative to the project and that that staff member report to the full council at its regular quarterly meetings.

d) request that when the Policy Statement is next reviewed, policies related to the preservation and protection of the seabed as well as those which address the potential impact on the Trust Area of large-scale projects sited outside its boundaries be fully explored.

e) request the Trust include allocations for legal and scientific opinion regarding the Raven Project in their next budget cycle.

f) request that the LTC thoroughly investigate all creative uses of its "land use" powers and implement them to the extent possible for the preservation and protection of the whole trust area including those lands which are underwater.