



**CITY OF HAMILTON
PUBLIC WORKS DEPARTMENT
Hamilton Water Division**

TO:	Mayor and Members General Issues Committee
COMMITTEE DATE:	September 7, 2022
SUBJECT/REPORT NO:	Chedoke Creek Order – Remediation Update (PW19008(r)) (City Wide)
WARD(S) AFFECTED:	City Wide
PREPARED BY:	Cari Vanderperk (905) 546-2424 Ext. 3250
SUBMITTED BY:	Nick Winters Director, Hamilton Water Division Public Works Department
SIGNATURE:	
SUBMITTED BY:	Carlyle Khan General Manager Public Works Department
SIGNATURE:	

Discussion of Private & Confidential Appendices “B” and “C” to this report would be in Closed Session, pursuant to Section 9.1, Sub-sections (a), (e) and (f) of the City’s Procedural By-law 21-021, as amended, and Section 239(2), Sub-sections (a), (e) and (f) of the *Ontario Municipal Act, 2001*, as amended, as the subject matter pertains to:

- **the security of the property of the municipality or local board;**
- **litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board; and,**
- **advice that is subject to solicitor-client privilege, including communications necessary for that purpose; and, a position.**

OUR Vision: To be the best place to raise a child and age successfully.

OUR Mission: To provide high quality cost conscious public services that contribute to a healthy, safe and prosperous community, in a sustainable manner.

OUR Culture: Collective Ownership, Steadfast Integrity, Courageous Change, Sensational Service, Engaged Empowered Employees.

RECOMMENDATION

Whereas staff plans to resume its efforts with the Chedoke Creek Remediation Project, namely continue with the dredging of the creek, with an appropriate Operational Safety Plan in place, and in keeping with the outstanding Director’s Order No. 1-PE3L3;

- (a) That staff be directed to continue to consult with the Mississaugas of the Credit First Nation, the Huron-Wendat Nation, the Six Nations of the Grand River, and the Haudenosaunee Confederacy Chiefs Council (through their representative agency, the Haudenosaunee Development Institute), throughout the Chedoke Creek Remediation Project;
- (b) That the General Manager, Public Works Department, or designate be authorized and directed, where appropriate, to concurrently negotiate, enter into and execute agreements for Indigenous Environmental Monitors to support the Chedoke Creek Remediation Project with the Mississaugas of the Credit First Nation, the Huron-Wendat Nation, the Six Nations of the Grand River, and the Haudenosaunee Confederacy Chiefs Council (through their representative agency, the Haudenosaunee Development Institute), in a form satisfactory to the Solicitor, and without exceeding the existing approved project budget; and,
- (c) That Appendices “B” and “C” to Report PW19008(r), respecting the Chedoke Creek Order – Remediation Update, remain confidential.

EXECUTIVE SUMMARY

The City of Hamilton (City) was served a Director’s Order No. 1-PE3L3 (Order) by the Ministry of the Environment, Conservation and Parks (MECP) on December 4, 2020, as a result of the discharge from the Main/King combined sewer overflow tank that occurred for several years and was discovered and stopped in July 2018. The goal of the Order is to improve the condition of Chedoke Creek and Cootes Paradise and one of the requirements is for the City to conduct targeted dredging of the sediment within specific zones of Chedoke Creek. The Order requires the targeted dredging to be completed by December 31, 2022.

In late July 2022, a contractor for the City of Hamilton, Milestone Environmental Contracting Inc., began mobilizing equipment and preparing the Dredge Material Management Area at Kay Drage Park with the intention of starting the in-water targeted dredging work on August 22, 2022.

On August 18, 2022, preparation work at the site was paused after two individuals representing the Haudenosaunee Development Institute (HDI) blocked access to the site via the Kay Drage Park Bridge with a vehicle and stated that they were exercising their treaty rights to attend the site. The HDI representatives indicated that they and an

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undisclosed number of others would continue to come to the work site and would not permit the work to proceed until certain conditions had been met and their consent for the project had been sought and received.

Previous engagement related to this project with First Nations Communities began in 2021, including the Mississaugas of the Credit First Nation, the Huron-Wendat Nation, and two organizations representing the Haudenosaunee people. Consultation with the Haudenosaunee included the elected Council of the Six Nations of the Grand River through their Lands and Resources department, and with the Haudenosaunee Confederacy Chiefs Council (HCCC) through their representative agency, the HDI.

Consultation efforts from 2021 with the Mississaugas of the Credit First Nation, the Huron-Wendat Nation and the Six Nations of the Grand River concluded in favour with the work plan and measures to mitigate any negative environmental impact as related to dredging efforts and plans to remediate Chedoke Creek. HCCC/HDI representatives stopped participating in the Spring of 2021 and indicated strongly that the work should not proceed without their consent and approval, which has not been provided to either the City or the MECP.

Work on the site has remained paused since August 23, 2022, to develop an Operational Safety Plan to restart the dredging work, to allow for discussions with the HDI to address their concerns and to inform and update Committee/Council of the latest developments, along with Staff's recommendations forward. The potential cost of the delay is estimated to be \$15,000 per day for the contractor to remain on standby, and if submitted by the contractor, will follow the standard policy and procedures for a Request for Change Order as per the contract.

The City has engaged in dialogue and correspondence with HCCC/HDI representatives to address their concerns and explore options to have HCCC/HDI representatives on site for environmental monitoring activities with the provision of capacity funding. Unfortunately, the City and the HCCC/HDI have been unable to come to an agreement at this time.

Staff has kept the MECP updated on the project status and the progress of discussions with the HCCC/HDI. The MECP recently confirmed (via letter) attached as Appendix "A" to Report PW19008(r), their authority regarding the issuance of Orders and that it is the City's responsibility as delegated by the Province to consult with the HCCC/HDI regarding their concerns. While the MECP has indicated verbally that they may be open to an extension to the December deadline based on the recent circumstances, Staff are unable to confirm this position. Failure to achieve the deadlines stipulated in a Director's Order No. 1-PE3L3 may result in further charges and penalties. The City's consultant (Wood) has assessed the critical path of the project and has identified that the in-water dredging work must start by September 22, 2022 for the completion of the dredging to be achievable by December 31, 2022.

After consultation with Legal Services and the City's Senior Leadership Team, Staff plan to resume its efforts with the Chedoke Creek Remediation Project, namely continue with the dredging of the creek, in line with the requirements outlined in the MECP Order to the City. However, it is understood from discussions between City staff and representatives from the HCCC/HDI that should the City resume any works on the project, a protest may ensue on-site by representatives of the HCCC/HDI and their supporters, to attempt a work stoppage. Prior to any work commencing, and in order to ensure the safety of workers on site and general public in the area, the security of equipment and property, staff have discussed options that are summarized within Confidential Appendix "B" to Report PW19008(r). Staff have begun working with the contractor and other supporting parties to develop a renewed site safety plan which will allow the work (which involves the use of heavy machinery) to continue, while accommodating people's right to demonstrate at the site in a manner that ensures everyone's physical safety.

Consultation will continue with all First Nations Communities, including the HCCC/HDI throughout the project, but in order to address specific concerns raised by the HCCC/HDI, staff have included a recommendation in this report that Council authorize staff to negotiate and execute agreements where appropriate with the First Nations for Indigenous Environmental Monitors to be on site during the remediation/dredging work.

These agreements will be specific to the Chedoke Creek Remediation Project and will be accommodated within the approved budget. However, given the stringent schedule within which the project must proceed, the negotiation and execution of the agreements will proceed concurrently with the resumption of the project works.

Alternatives for Consideration – See Page 10

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: Total costs to keep the contractor on standby are estimated to be \$15,000 per day, but staff are working with the contractor to mitigate the delay costs as much as possible. Costs associated with the Operational Safety Plan for the Project are outlined in Confidential Appendix "B" to Report PW19008(r). With plans in place to resume the project works, all costs associated with the delays that have occurred to date and with the Operational Safety Plan can be accommodated within the City's approved budget and contingency for the project. Standard policy and procedures for a Request for Change Order will be followed, if needed.

The City may incur costs for capacity funding to support Indigenous Environmental Monitors for the project. These costs are to be determined

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through agreement negotiations, but there are uncommitted funds available in the City's approved budget which will not be exceeded.

Staffing: N/A

Legal: Legal comments are provided within Confidential Appendix "C" to Report PW19008(r).

HISTORICAL BACKGROUND

In late July 2022, a contractor for the City of Hamilton (City), Milestone Environmental Contracting Inc. (Milestone), began mobilizing equipment and preparing the Dredge Material Management Area at Kay Drage Park with a target of starting the in-water targeted dredging work on August 22, 2022.

The targeted dredging activities aimed to remove approximately 22,000 tonnes of contaminated sediments from the base of the Creek, much of which resulted from a prolonged discharge from the Main/King combined sewer overflow tank that occurred for several years and was discovered and stopped in July 2018. The dredging work forms part of Director's Order No. 1-PE3L3 that was issued by the Ministry of Environment, Conservation, and Parks (MECP) on December 4, 2020, and must be completed by the end of December 2022. The dredging efforts are separate though complementary to the City's broader watershed management efforts in the area, which are currently being contemplated in the Watershed Action Plan process.

Compliance with the MECP Order is mandatory, and a failure to meet the conditions of the Order, including the prescribed deadline, could result in significant additional financial penalties for the City.

The physical site preparation follows significant efforts to meet all permitting and approval requirements from regulators and other organizations, including:

- 1) Fisheries and Oceans Canada, MECP,
- 2) Ministry of Transportation,
- 3) Transport Canada,
- 4) Hamilton Conservation Authority, and
- 5) Royal Botanical Gardens.

Much of the permitting and approvals secured are designed to ensure that any negative impacts on the local environment and related species are mitigated to the greatest extent possible.

In addition to meeting all permitting and approval requirements, the City engaged in consultation with numerous First Nations on the project, including the Mississaugas of

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the Credit First Nation, the Huron-Wendat Nation, and two organizations representing the Haudenosaunee people.

Consultation with the Haudenosaunee included the elected Council of the Six Nations of the Grand River through their Lands and Resources department and the Haudenosaunee Confederacy Chiefs Council (HCCC) through their representative agency, the Haudenosaunee Development Institute (HDI). The consultation efforts were initiated in early 2021 and have been led by the City's consultant Wood Environment & Infrastructure Solutions, Inc.

A summary of this consultation has been included as Appendix "D" to Report PW19008(r).

Consultation efforts concluded that while the majority of First Nations partners that were consulted were generally favourable of the dredging efforts and plans to clean up Chedoke Creek, HCCC/HDI representatives indicated strongly that the work should not proceed without their consent and approval, which they indicated had not been provided to the City or the MECP as the City's regulator.

The HCCC/HDI's position on the Chedoke Creek clean-up project was similar to positions taken on other City projects, which HCCC/HDI representatives have stated should not be planned or executed until such time that the City has a broader relationship agreement in place with the HCCC/HDI that recognizes their authority to provide consent and approval on municipal plans and projects across the City.

Pausing of the Chedoke Creek Dredging Work:

On August 18, 2022, preparation work at the site was paused after two individuals representing the HCCC/HDI blocked access to the site via the Kay Drage Park Bridge with a vehicle and stated that they were exercising their treaty rights to attend the site. The HCCC/HDI representatives indicated that they and an undisclosed number of others would continue to come to the work site and would not permit the work to proceed until certain conditions had been met and their consent for the project had been sought and received.

Conditions included an agreement with the City to hire environmental monitors from HCCC/HDI and a commitment to the broader relationship agreement with HCCC/HDI outlining the need for their consent on City projects, as outlined in the United Nations Declaration of the Rights of Indigenous People. The United Nations declaration is referenced in the City's Urban Indigenous Strategy. It acts as a guiding document in the City's efforts to create a broader and more detailed First Nations engagement strategy. To date, it has not been adopted as a policy document by the City of Hamilton.

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Work on the site has remained paused since August 23, 2022, due to safety concerns and to allow for discussion with the HDI. The City has engaged in dialogue and correspondence with HCCC/HDI representatives to discuss their concerns further and explore options to have HCCC/HDI representatives on site for environmental monitoring activities with the provision of capacity funding. These efforts included direct interactions between HCCC/HDI representatives with both the former and current Directors of Hamilton Water, and the former and current General Managers of Public Works. During this period, the City also began working with the contractor to develop a renewed site safety plan that would allow the work (which involves the use of heavy machinery), to accommodate people's right to demonstrate at the site in a manner that ensures their physical safety and that of the contractors.

The City is not currently able to directly enter into Indigenous Environmental Monitoring agreements due to the absence of a Council approved policy around construction and environmental projects. The City's contractor has legal care and control of the site under the *Occupational Health and Safety Act* and is open and willing to enter into such an agreement with the HCCC/HDI. In the interest of fairness, similar offers have been made to the other First Nations partners who participated consultation efforts for the project.

Further, the City indicated in writing that it has no authority to enter into a broader relationship agreement assigning consent authority over the City's legal responsibilities to the HCCC/HDI and that the inclusion of such a provision as a condition of having the work moving forward at Chedoke Creek was better addressed to the Ontario Government as the Province's Crown in Right.

The City sought guidance from Provincial Authorities on how best to proceed as the duty to consult with First Nations concerning any and all treaty obligations falls within their jurisdiction and City efforts to engage its First Nation partners are being carried out on its behalf. However, the Province subsequently advised the City (via letter) attached as Appendix "A" to Report PW19008(r) that it is the City's responsibility to consult with the HCCC/HDI regarding their concerns.

The conditions of broader consent and the City's ability to enter directly into environmental monitoring agreements remain at issue. At present, discussions between the HCCC/HDI and the City remain stalled, though discussions on broader First Nations participation in the project in partnership with Milestone are ongoing. Under its contractual obligations, the City is exposed to potential costs of approximately \$15,000 per day on the Chedoke Creek Remediation.

First Nation Consultation and Engagement Policies:

Through efforts guided by the City's Urban Indigenous Strategy, adopted by Council in 2019, the City remains committed to developing plans, policies, and procedures in

partnership with First Nations communities that would provide for meaningful engagement and inclusion of Indigenous peoples and nations in City plans and initiatives. The Strategy itself lays out 40 actions the City will undertake to build its capacity in this area and includes:

- The development of guidance and policy tools for senior leaders on how many of the principles of the United Nations Declaration of the Rights of Indigenous People may be incorporated into City business;
- The development of tools that would allow improved meaningful consultation with urban Indigenous peoples and First Nations communities on municipal projects, plans, and approvals; and,
- Improvements in how the City works with First Nations when conducting archaeological, environmental, construction and monitoring initiatives on City property. (An Indigenous Archaeological Monitoring Policy has drafted and subsequently been adopted by the City in 2020, but to date further policy work has not yet been completed.)

Though delayed due to the impacts of the COVID-19 pandemic, the City remains committed to implementing the Strategy's recommendations, which will provide the City with a policy framework that allows it to meet its commitments to Reconciliation, as approved by Council. These efforts are being led by the City's Indigenous Relations Office.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

The policies that apply to this report include:

- Urban Indigenous Strategy – Adopted by City Council to guide the City's path to Reconciliation and support the interactions of City staff with the First Nations.
- Ministry of the Environment, Conservation and Parks Director's Order No. 1-PE3L3 made under Section 16.4 of the Ontario Water Resources Act, R.S.O. 1990 – Issued to the City on December 4, 2020, the Order stipulates required works to be conducted by the City, with deadlines, as a result of the discharge from the Main/King combined sewer overflow tank that occurred for several years and was discovered and stopped in July 2018.

RELEVANT CONSULTATION

The following groups have been consulted:

- City of Hamilton Senior Leadership Team

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- Legal Services Division – Corporate Services Department
- Indigenous Affairs Office – Healthy & Safe Communities Department
- Corporate Finance Division – Corporate Services Department
- Corporate Communications – City Manager’s Office
- Wood Environment & Infrastructure Solutions, Inc.
- Milestone Environmental Contracting Inc.
- Additional parties consulted are identified in Confidential Appendix “B” to Report PW19008(r).

ANALYSIS AND RATIONALE FOR RECOMMENDATION(S)

The City was served a Director’s Order No. 1-PE3L3 (Order) by the Ministry of the Environment, Conservation and Parks (MECP) on December 4, 2020, as a result of the discharge from the Main/King combined sewer overflow tank that occurred for several years and was discovered and stopped in July 2018. The goal of the Order is to improve the condition of Chedoke Creek and Cootes Paradise and one of the requirements is for the City to conduct targeted dredging of the sediment within specific zones of Chedoke Creek. The Order requires the targeted dredging to be completed by December 31, 2022.

Work was progressing and on target to meet the deadline, until August 18, 2022, when work at the site was paused due to safety concerns and for the City to engage in further dialogue with HCCC/HDI representatives.

Initially the HCCC/HDI representatives indicated that they would permit the Project to resume within one week, provided that two conditions were met:

1. That the City obtains consent from the HCCC/HDI for the Project; and,
2. That the City executes an Environmental Monitoring Agreement with the HCCC/HDI that allows Indigenous Environmental Monitors to support the Project.

The first condition is discussed at length in this report and is not an option that is available to the City at this time. However, the recommendations in Report PW19008(r) address the second condition as discussed below.

Staff advised the HCCC/HDI that the City is not currently able to directly enter into Indigenous Environmental Monitoring agreements due to the absence of a Council approved policy around construction and environmental projects. However, the City’s contractor, who legally has care and control of the site under the *Occupational Health and Safety Act*, was open and willing to enter into such an agreement with the HCCC/HDI. The City offered to support an agreement between the City’s contractor and the HCCC/HDI, and this offer was initially accepted. Unfortunately, the HCCC/HDI later

indicated they could not support that approach and insisted that the agreement be with the City.

As a result, and in order to continue to work with the HCCC/HDI to reach a resolution that is reasonable and supported by all parties, Staff have recommended that the General Manager, Public Works be authorized to negotiate and execute agreements, where appropriate and within the approved project budget, for Indigenous Environmental Monitors to support the Chedoke Creek Remediation Project only. In the interest of fairness, Staff have requested authority to support agreements with all the First Nations partners who participated consultation efforts for the project, not just with the HCCC/HDI.

It is important to note that there are factors that remain undetermined that may result in it being inappropriate for the City to execute agreements with the First Nations partners for this type of project. Those factors include:

- a) Health & Safety and Liability – The *Occupational Health & Safety Act* and associated regulations include strict provisions and responsibilities regarding the “Constructor” on a construction project. There are exemptions that allow a project owner to contract certain specialists directly and have them participate in a construction project that has been awarded to a general contractor who is the “Constructor”, but it remains unclear whether these exemptions apply to Indigenous Environmental Monitors.
- b) Costs for the capacity funding to support the Indigenous Environmental Monitors will need to be negotiated and fit within the City’s approved project budget.

ALTERNATIVES FOR CONSIDERATION

Alternative options to the recommendations of Report PW19008(r) will risk the City’s compliance with the Ministry of the Environment, Conservation and Parks Director’s Order 1-PE3L3 and therefore are not proposed in this report. In addition, improving the condition of Chedoke Creek and Cootes Paradise by completing the dredging work will be further delayed.

ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN

Community Engagement and Participation

Hamilton has an open, transparent and accessible approach to City government that engages with and empowers all citizens to be involved in their community

Healthy and Safe Communities

Hamilton is a safe and supportive City where people are active, healthy, and have a high quality of life.

Clean and Green

Hamilton is environmentally sustainable with a healthy balance of natural and urban spaces.

APPENDICES AND SCHEDULES ATTACHED

Appendix “A” to Report PW19008(r) – Letter from the Ministry of the Environment, Conservation and Parks, dated September 2, 2022

Confidential Appendix “B” to Report PW19008(r) – Security of the Property of the Municipality

Confidential Appendix “C” to Report PW19008(r) – Legal Opinion

Appendix “D” to Report PW19008(r) – Summary of Engagement with Indigenous Nations