




CITY OF HAMILTON
PUBLIC WORKS DEPARTMENT
Hamilton Water Division

TO:	Chair and Members Public Works Committee
COMMITTEE DATE:	November 18, 2024
SUBJECT/REPORT NO:	Kenilworth Drainage Channel Remediation (PW24073) (Ward 4)
WARD(S) AFFECTED:	Ward 4
PREPARED BY:	Cari Vanderperk (905) 546-2424 Ext. 3250
SUBMITTED BY:	Nick Winters Director, Hamilton Water Public Works Department
SIGNATURE:	

RECOMMENDATION

- (a) Further to Procurement Policy #12 Cooperative Procurement, that Council approve the joint cooperative procurement process with ArcelorMittal Dofasco, for the completion of the work or supply of goods and services for the remediation of the Kenilworth Drainage Channel to the aggregate upset limit of \$5M, and that the General Manager, Public Works be authorized to negotiate, enter into and execute any contract and any ancillary documents required to give effect thereto with the successful contractor(s) for that procurement process, in a form satisfactory to the City Solicitor,
- (b) That the General Manager, Public Works be authorized to negotiate, enter into and execute an agreement on the division of costs and delineation of responsibilities for the remediation of the Kenilworth Drainage Channel and any ancillary documents required to give effect thereto with ArcelorMittal Dofasco, in a form satisfactory to the City Solicitor; and,
- (c) That up to \$1.5M from the Storm Sewer Capital Reserve (#108010) and up to \$3.5M from the Waterworks Capital Reserve (#108015) be allocated to Capital Project ID #5182474001 to fund the works required for the remediation of the Kenilworth Drainage Channel.

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.

EXECUTIVE SUMMARY

This report is to recommend an alternative project delivery model for a time sensitive project to comply with a mandatory injunction (court order) by the Ontario Superior Court of Justice.

National Steel Car took legal action against the City of Hamilton (City) and ArcelorMittal Dofasco (Dofasco) asserting that it experienced 15 distinct floods between September 2010 and October 2021 due to lack of maintenance performed on the Kenilworth Drainage Channel (Channel). The legal action was initially launched in 2012 and has gone through various iterations and amendments to the claim.

The Channel is located in a highly industrialized area of the City's East End. The Channel is a receiver of one of the City's Combined Sewer outfalls, which originally discharged via Ogg's Inlet into Hamilton Harbour, prior to being channelized due to infilling by local industry over the past 50+ years.

As a result of the court proceedings on July 24, 2024, the City and Dofasco were jointly ordered per Court File # 12-36015, to conduct specific remedial actions on the Channel as soon as reasonably practical, taking into account the requirements to obtain all necessary permits/approvals. In addition, the ruling of the Ontario Superior Court of Justice determined that the City owns the majority of the Channel and is responsible for its operations and maintenance activities.

To complete the remediation of the Channel as quickly as possible, staff have contemplated alternative project delivery models to provide in-water dredging works, material disposal and all other ancillary activities related to dredging the Channel. The preferred procurement strategy being recommended is a cooperative procurement leveraging Dofasco's competitive procurement process to procure a qualified contractor(s) to complete the work.

The recommendations in Report PW24073 will provide Public Works with the authority and necessary funding to begin the remediation of the Channel as soon as possible. Should the recommendations in Report PW24073 be approved and ratified at the November 27, 2024, City Council meeting, Public Works, jointly with Dofasco and via Dofasco's competitive procurement process, will immediately proceed to request proposals from a selection of experienced contractors. Once a contractor is chosen the City will enter into its own contract with the successful contractor separately, to ensure the City's obligations of the court order are fulfilled. This approach will allow the City to achieve the best value for the remediation of the Channel while minimizing risk of further legal action against the City due to limited time constraints. It is anticipated that a contractor will mobilize to the site in January 2025 and that the remediation activities will be completed by mid 2025.

Alternatives for Consideration – See Page 6

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: The remediation of the Kenilworth Drainage Channel is unbudgeted. It is recommended that the work be funded up to a limit of \$1.5M from the Storm Sewer Capital Reserve (#108010) and up to \$3.5M from the Waterworks Capital Reserve (#108015). Should Council approve the staff recommendations the updated reserve balances would be \$2.57M and \$44.65M respectively.

Staffing: The remediation of the Kenilworth Drainage Channel was not included in Hamilton Water’s 2024 workplan. While there are no staffing requests being considered to plan and implement this project expeditiously, an equivalent of two FTEs are being allocated to this project which will result in impacts to timelines of other planned projects in 2024 and 2025.

Legal: The City is under a court order to remediate the Kenilworth Drainage Channel. A decision to not proceed in the most expeditious manner could be viewed by the Court as unreasonable and could result in the court finding that the City is in contempt of its order. The proposed recommendations outlined in Report PW24073 provides the City with a procurement model and appropriate budget to remediate the Kenilworth Drainage Channel as quickly as possible.

HISTORICAL BACKGROUND

The Kenilworth Drainage Channel is located in a highly industrialized area of the City’s East End. The Channel abuts the National Steel Car property to a point 3,300 feet north of Burlington Street where it intersects with Kenilworth Avenue North. Please refer to the Kenilworth Drainage Channel Maps attached as Appendix “A” to Report PW24073.

Originally, during significant wet weather, combined sewage was discharged directly into Ogg’s Inlet, a natural inlet of Hamilton Harbour, via a twin box culvert that was installed by the City in 1922. Over the years, due to incremental industrial infilling, channelization occurred with combined sewage continuing to discharge into the Channel during significant wet weather events. The Channel has never been maintained by the City, and Dofasco who conducted infilling over time, stopped dredging the Channel in 1994.

The combined sewage discharged to the Channel during significant wet weather originates from the Kenilworth Sewer Catchment Area, spanning 311-hectares. The combined sewage can contain high levels of sediment and has experienced a peak flow

rate of 11.7 million litres per hour, for several hours during a significant wet weather event. Due to the sediment levels of the combined sewage discharged into the Channel, there is an ongoing deposition of sediment along the entire length of the Channel, that contributes to blocking flow from entering Hamilton Harbour as it was intended. Beginning in 2012, National Steel Car filed legal action against the City and later added Dofasco to the claim in 2018, asserting that National Steel Car (National) lands experienced significant floods due to lack of maintenance performed on the Channel.

As a result of the court proceedings, on July 24, 2024, the City and Dofasco (AMD) received a court order by an Ontario Superior Court of Justice, per Court File # 12-36015, to do the following in the sequence noted as soon as reasonably practical, taking into account the requirements to obtain all necessary permits/approvals. The language for items a. through e. below was taken verbatim from the court order as follows:

- a. firstly, that the City and AMD immediately undertake the proactive preventative maintenance of the Channel in keeping with the accepted standard of practice including:
 - i. remove any and all obstructions from the culverts and pipes at Locations 2, 3 and 4,
 - ii. dredge the Sediment Basin to its refusal limit to remove all sediment and obstructions, including the sediment blocking the culverts at Location 4; and,
 - iii. the one-time dredging of the Channel to its natural depth or refusal limit as defined in the *ANA survey and removal of all other obstructions.
- b. secondly, that AMD task its engineers to design (with an engineer's stamp) a protocol for the remediation of the Channel on its property and Locations 2 and 3 to prevent flooding to National's property whether by increasing the size of any and all culverts, pipes and/or varying their elevation or increasing the size and/or depth of the Sediment Basin and/or width of the Channel or otherwise;
- c. thirdly, AMD undertake the work required by the remediation required by the design to be prepared pursuant to item b above;
- d. fourthly, that both AMD and the City task their engineers with designing (with an engineer's stamp) an annual maintenance protocol for their respective portions of the remediated Channel so as to ensure National does not flood; and
- e. fifthly, both parties undertake the work as required in the annual maintenance protocol when the remediation specified in b above is complete.

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*ANA Survey is in reference to a survey conducted by Ashenhurst Nouwens & Associates Inc.

To address item a. of the court order, the Channel will be dredged through a joint project between the City and Dofasco. The scope of work has been divided between both parties as described in the court order and per land/culvert ownership. Senior leadership from both parties have formed a Project Steering Committee and will negotiate the details of division of work and the associated costs.

A dredging contractor will be procured via Dofasco's competitive bidding process, with the project specifications curated by both the City and Dofasco. Bids will be requested from a selection of qualified contractors. Once a qualified contractor is procured under Dofasco's process, the City will enter its own contract with the contractor via Procurement Policy #12 – Cooperative Procurement, to ensure the City's requirements of the court order are fulfilled.

The consulting firm WSP Canada Inc. (WSP) will act as the permitting, design and contract administration consultant for the City and has been retained under Procurement Policy #10 – Emergency Procurement. Consultants acting for the City and Dofasco are working together on the required permitting and project specifications for an eventual contractor to perform all aspects of the scope of work. WSP has completed field work as per Hamilton Conservation Authority permit requirements and project design requirements. Debris removal along the Channel has concluded and site preparation is underway. It is anticipated that in-water remediation work will begin in January 2025 and be completed by mid-2025.

To address item d. of the court order, an annual maintenance protocol for the Channel is being developed by a third-party consultant and is anticipated to be completed in Q1 2025.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

The recommendations in Report PW24073 will provide Public Works with the authority and necessary funding to begin the remediation of the Kenilworth Drainage Channel as soon as possible to ensure compliance with the court order.

Procurement Policy - Section 4.12 - Policy #12 – Cooperative Procurement as written, only provides staff authority to enter into cooperative procurements with other government bodies, public authorities, conservation authorities, municipalities, academia, schools, hospitals and not-for-profit organizations. Therefore, in order to participate in a cooperative procurement with ArcelorMittal Dofasco, specific Council approval is required.

RELEVANT CONSULTATION

The Financial Planning Administration and Policy Division has been consulted and has confirmed that sufficient funds are available in the Storm Sewer Capital Reserve (#108010) and the Waterworks Capital Reserve (#108015) to support the recommendations in report PW24073.

The Procurement Division has been consulted on Report PW24073 to ensure compliance with the Procurement Policy and to provide guidance with respect to the procurement document to be issued by Arcelor Mittal Dofasco.

The Legal & Risk Management Services Division, Arcelor Mittal Dofasco, and WSP Canada Inc have been consulted and have provided input in the report.

ANALYSIS AND RATIONALE FOR RECOMMENDATION

The timing of this work is critical to ensure compliance with the court order. Hamilton Water has reviewed procurement options within the Procurement Policy to expedite delivery of remediation works.

To achieve the best possible value and timing for the remediation of the Kenilworth Drainage Channel, Public Works is recommending that Council delegate authority to the General Manager, Public Works to work jointly with Dofasco, under their competitive procurement process to request proposals from a selection of qualified contractors. Once a qualified contractor is procured under Dofasco's process, the City will enter into its own contract with the contractor via Procurement Policy #12 – Cooperative Procurement, to ensure the City's requirements of the court order are fulfilled. Since the City and Dofasco were identified in the court order as jointly responsible for remediation of the channel, delegated authority is required for the General Manager, Public Works to negotiate an agreement with Dofasco to establish delineation of responsibilities of work, and specifics around cost sharing.

Finally, the remediation of the Kenilworth Drainage Channel is unbudgeted. It is recommended that the project be funded from the Storm Sewer Capital Reserve (#108010), and the Waterworks Capital Reserve (#108015).

ALTERNATIVES FOR CONSIDERATION

Alternative 1:

Council may elect not to approve the recommendations in Report PW24073 which would require staff to deliver the project via the City's open procurement process utilizing a standard Request for Tender procurement model, including seeking budget

approval for the project through the 2025 Water, Wastewater and Stormwater Rate Budget process. In this scenario it is unlikely that the project could begin until mid 2025 at the earliest. Due to critical time constraints associated with the court order, staff do not recommend this option. This scenario would also significantly increase the risk associated with the project from an Occupational Health & Safety perspective as the work area is very restricted and it would be very challenging for multiple contractors (one working for the City and the other working for Dofasco), to work efficiently without risking that the City or Dofasco (or both), are deemed the Constructor of the project (as defined in the legislation).

Financial: The City may achieve some financial savings going through an open procurement process for the Kenilworth Drainage Channel remediation project, but this is not certain, and it is equally likely that the City will spend more depending upon how bidders respond to the health and safety risks related to multiple contractors working in a restricted work area. This scenario also creates financial risk if a health and safety incident occurred on the project and the Ontario Ministry of Labour determined that the City was the Constructor. Finally, given the risk of non-compliance of a court order, the City would experience additional significant financial impacts, as well as reputational damage.

Staffing: The remediation of the Kenilworth Drainage Channel was not included in Hamilton Water's 2024 workplan. While there are no staffing requests being considered to plan and implement this project expeditiously, an equivalent of two FTEs are being allocated to this project which will result in impacts to timelines of other planned projects in 2024 and 2025.

Legal: The City is under a court order to remediate the Kenilworth Drainage Channel. A decision to not proceed in the most expeditious manner could be viewed by the Court as unreasonable and could result in the court finding that the City is in contempt of its order. The proposed recommendations outlined in Report PW24073 provides the City with a procurement model and appropriate budget to remediate the Kenilworth Drainage Channel as quickly as possible. This scenario also creates legal risks if a health and safety incident occurred on the project and the Ontario Ministry of Labour determined that the City was the Constructor.

Alternative 2:

Council may elect to not approve recommendation (a) in Report PW24073 and instead direct staff to engage a contractor via Procurement Policy #11 – Single/Sole Source Procurement to ensure the City's requirements of the court order are fulfilled. This alternative would still require that Council approve recommendations (b) and (c) in

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Report PW24073 so that the General Manager, Public Works has authority to negotiate necessary agreement with ArcelorMittal Dofasco, and so that Hamilton Water has the financial approvals to complete the work.

In this scenario the work could still begin in January 2025 and be completed by mid-2025. However, this scenario is not recommended for similar reasons as Alternative 1. This scenario would also significantly increase the risk associated with the project from an Occupational Health & Safety perspective as the work area is very restricted and it would be very challenging for multiple contractors (one working for the City and the other working for Dofasco), to work efficiently without risking that the City or Dofasco (or both), are deemed the Constructor of the project (as defined in the legislation).

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APPENDICES AND SCHEDULES ATTACHED

Appendix "A" to Report PW24073 – Kenilworth Drainage Channel Maps