




COMMUNICATION UPDATE

TO:	Mayor and Members City Council
DATE:	October 13, 2022
SUBJECT:	Chedoke Creek Remediation - HW.22.10 (City Wide)
WARD(S) AFFECTED:	City Wide
SUBMITTED BY:	Cari Vanderperk Director, Watershed Management Public Works Department
SIGNATURE:	

Project Delays Due to Continued Interference

Further to the information provided in the Communication Update HW.22.09 on October 3, 2022, the information provided at the September 7, 2022 General Issues Committee in Report PW19008(q), and the recommendations adopted from Report PW19008(r), construction work in preparation for the targeted dredging of Chedoke Creek resumed on Wednesday, September 21, 2022 and has been completed.

The in-water dredging work was planned to commence September 28, 2022. However, members of the Haudenosaunee Development Institute (HDI) continue to attend the site daily, tying off their watercraft to the dredger pipeline within the active construction site, expressing they are exercising their treaty rights, which has delayed the work due to health and safety concerns.

The City of Hamilton's (City) contractor (Milestone) has repeatedly asked the HDI representatives to follow the established processes to have them safely attend the site, but they continue to refuse. They have been advised repeatedly that they are putting themselves at risk, and that work cannot proceed due to concerns for their safety. They have been asked repeatedly to leave the active construction area to exercise their treaty rights from a safe location, and they continue to refuse. The Hamilton Police Service (HPS) has been engaged and have had similar conversations with the HDI representatives with respect to their presence on site, but the work continues to be obstructed. More recently, there have been escalations of the behaviour by the HDI representatives, aimed at intimidating Milestone and their subcontractors. Furthermore,

the City was advised by Milestone that, at some point between the evening of October 3, 2022 and the morning of October 4, 2022, someone broke into the dredging barge and stole various tools and equipment, but they were not able to identify those responsible. To-date, the HPS is continuing to monitor the situation and has stated that an emergency court injunction may be required to prevent further interruptions.

These delays have impacted the project schedule and Milestone's ability to complete the in-water dredging in advance of the current Ministry of the Environment, Conservation and Parks (MECP) Order #1-PE3L3 (Order) deadline of December 31, 2022. The City's consultant (WSP, formerly Wood) continues to analyze the critical path of this project and has indicated that even if work were able to proceed imminently, meeting the Order deadline would be unlikely due to the approaching winter season. WSP is currently evaluating all options available regarding project timing.

Contractor Work Refusal

The City, Milestone, and WSP have been responding daily to work site interruptions, changing demands from the HDI, and the requirement to review and respond to various communications. All of this has resulted in significant delays to the Chedoke Creek Workplan and an estimated \$466,000 in additional costs to the community (as of October 3rd). These costs continue to increase by approximately \$10,000 to \$15,000 on a daily basis, whenever the City's contractor is on standby.

On October 5, 2022 the City received a letter from Milestone indicating that a key subcontractor, who owns and operates the dredging barge, had invoked their right to refuse work due to dangerous and intimidating behaviour from the HDI representative(s) on site, and will continue refusing work until a safe and secure work environment is provided for their employees. As a result, Milestone's letter also advised the City that all project work would cease until uninterrupted and unimpeded access to the work site can be provided by the City.

On October 6, 2022, the City agreed to allow Milestone to stand by, and not continue to attempt dredging works until further notice. Milestone has not demobilized any equipment from the site at this time, but the only staff on-site consist of a skeleton crew during daylight hours for site monitoring purposes, and by private security overnight. Representatives from the HDI continue to attend the work site regularly to assess whether any work is being attempted.

Request for MECP Intervention and Order Deadline Extension

Due to the ongoing challenges that have been experienced with the delays to the Chedoke Creek Remediation Project, on October 6, 2022 the City sent a letter (attached as Appendix A to Communications Update HW.22.10), to the MECP District Manager formally requesting the following:

1. That the MECP immediately issue an order to the HDI under Subsection 196(2) of the *Environmental Protection Act* and Subsection 104(3) of the *Ontario Water Resources Act*, requiring that they permit the City to have access to the work area; and,
2. That the MECP immediately extend the deadlines in the Director's Order to, at a minimum, December 31, 2023.

Should the MECP agree to issue and enforce the requested order, the City will engage with Milestone about resuming works. However, as stated in the letter to the MECP, completion of the in-water works before December 31, 2022, is unachievable. Decisions need to be made regarding the best path forward which include:

- Begin dredging operations immediately in 2022 to take advantage of current weather conditions and remove as much sediment as possible, with the plan to pause the operation when the frozen conditions persist, resuming in the spring 2023, pending authorization from permitting agencies to work within the typical fish spawning season (March 15 to July 15); or
- Pause the project for the remainder of 2022 and demobilize equipment on site with the plan to begin dredging operations in the spring 2023, pending authorization from permitting agencies to work in the water within the typical fish spawning season (March 15 to July 15); or
- Pause the project for the remainder of 2022 and demobilize equipment on site with the plan to begin dredging operations July 16, 2023, once the fish spawning season has ended.

As stated previously, WSP is currently evaluating these options and will be making recommendations to the City soon.

Environmental Monitoring Agreements

The recommendations from Report PW19008(r) authorized staff to continue consultations 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 HDI) on the Chedoke Creek Remediation Project as well as to negotiate and enter into agreements, where appropriate, to provide for Indigenous Environmental Monitors to attend the work site throughout the duration of the project.

As an update, please be advised that staff have reached out to each First Nation community who have been consulted throughout the project to discuss their participation in Environmental Monitoring and the terms of any necessary agreements.

SUBJECT: Chedoke Creek Remediation - HW.22.10 (City Wide) - Page 4 of 4

A Participation Agreement has been reached between the City and the Mississaugas of the Credit First Nation to accommodate their environmental monitoring of the dredging project, once the work resumes, and has an upset limit for the duration of the dredging aspect of the project at \$40,000.

Conversations with the Huron-Wendat Nation, the Six Nations of the Grand River are ongoing and have been positive. Conversations with the Haudenosaunee Confederacy Chiefs Council (through their representative agency, the HDI) have been unsuccessful to date.

Staff have been communicating with the HDI regularly since August 18 to try to find a reasonable accommodation that allows this project to proceed without further delay. Unfortunately, staff have encountered obfuscation and changing demands. At this time, all communications from the City to the HDI are being conducted through representative legal counsel. However, HDI representatives continue to email City staff and members of Council directly. The most recent communication from the HDI indicated that costs to engage with the HDI are now totaling \$350,000.

While ongoing and meaningful consultation and project monitoring are important to all parties, ensuring the safety of everyone attending the project site is paramount.

All community partners that have been engaged throughout this project have been kept apprised of the status as changes occur. As always, we will continue to keep members of Council informed.

APPENDICES AND SCHEDULES ATTACHED

Appendix A - Letter to MECP from the City dated October 6, 2022.



TIME-SENSITIVE COMMUNICATION

October 6, 2022

Stephen Burt, Manager
Hamilton District Office
Ministry of the Environment, Conservation & Parks
119 King Street West, 9th Floor
Hamilton, ON L8P 4Y7

**Re: Director's Order #1-PE3L3 - Chedoke Creek Workplan
Request for MECP Intervention**

Dear Stephen,

This letter is a follow-up to the City's most recent Chedoke Progress Report submitted to your office on September 30, 2022, and the subsequent monthly meeting held on October 4, 2022.

The City has kept the MECP informed of the challenges that have been experienced since August 18, 2022, resulting directly from the daily attendance and interference by members of the Haudenosaunee Development Institute (HDI) at the work site.

Challenges with Undertaking Work

On August 18, 2022, preparatory work at the site was paused after two individuals representing the HDI blocked access to the site with a vehicle via the Kay Drage Park Bridge and claimed that they were exercising their treaty rights. The 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 until HDI's consent for the project had been applied for and received. Work on the project had to be paused while internal City discussions took place regarding the demands from the HDI and the City's ability to meet those demands.

Preparatory work at the site resumed on August 22, 2022, and on August 23, 2022, the City reached a verbal agreement with the HDI that would involve the City's contractor entering into an agreement with the HDI to engage the HDI for environmental monitoring. However, later that day, representatives from the HDI again attended at the site and stopped work from proceeding. The City was informed by a different HDI representative that attended at the site that the agreement for environmental monitoring could only be directly between the HDI and the City. As a result, on August 23, 2022, work on the site was again paused, while City staff worked to determine next steps.

The City continued discussions with the HDI regarding their concerns and determined that City staff needed authority from City Council to directly negotiate and enter into agreements with the HDI to retain individuals from the HDI to participate in the work. It was also determined that an Operational Safety Plan needed to be developed prior to resuming the project, given the safety concerns arising from the attendance on-site of parties other than the contractor.

Inability of City to Secure Cooperation from HDI

On September 7, 2022, City staff presented report PW19008(r) to the City's General Issues Committee (Committee) with recommendations related to the project. Representatives from the HDI elected to delegate to Committee during that same meeting. The Committee members voted to support the staff recommendations, which were ratified at the September 14, 2022 City Council meeting. The General Manager, Public Works was authorized to enter into agreements for Indigenous Environmental Monitors to support the Chedoke Creek Remediation Project in a form satisfactory to the City of Hamilton Solicitor, and without exceeding the existing approved project budget.

Work on the project resumed on September 21, 2022 with a revised site health and safety (H&S) plan implemented by the City's contractor. This H&S plan included recommendations from the City's Operational Safety Plan including scripting to be used if HDI representatives or other interested parties attempted to access the site. Provisions were included to allow these parties on-site as escorted visitors provided that they wear appropriate PPE (provided by the contractor), participated in a H&S orientation, and followed all required H&S related instructions. At the same time, City staff continued to work towards establishing agreements with the Indigenous Nations for Environmental Monitors to participate in the project.

In an effort to be inclusive with its indigenous community, the City's consultant was instructed to reach out to the Mississaugas of the Credit First Nation (MCFN), the Huron-Wendat Nation (HWN), and the Six Nations of the Grand River (SNGR) regarding their interest in agreements for Environmental Monitors to participate in the project. The MCFN were interested and forwarded the City a template agreement for consideration and the City has submitted a revised agreement to the MCFN for review. The HWN and SNGR have both indicated interest, but they do not have template agreements available and it is expected that the template agreement that is being worked on with the MCFN will be used to support discussions with the HWN and the SNGR.

Unfortunately, there has been no progress with the HDI regarding any agreement, and HDI representatives continue to interfere with the Chedoke Creek site works. The HDI representatives refuse to follow the process put in place by the City's contractor to have them safely attend the site, they continue to access areas that are under active construction while claiming to exercise their treaty rights, they piloted a watercraft within the creek disrupting work to prepare the dredgate pipeline, and most recently, they removed part of the security fencing that encloses the contractor's laydown area to build an encampment within the delineated construction area and blocked the contractor's access to the dredging machine (including erecting a tent, building a bonfire, and parking various vehicles within the delineated construction area).

Continued and Escalating Interference

The City's contractor has repeatedly asked the HDI representatives to follow the established processes to have them safely attend the site, but they continue to refuse. They have been advised repeatedly that they are putting themselves at risk, and that work cannot proceed due to concerns for their safety. They have been asked repeatedly to leave the active construction area to exercise their treaty rights from a safe location, and they continue to refuse. The Hamilton Police Service has been engaged and have had similar conversations with the HDI representatives, including advising them that their actions may cross the lines of criminal behaviour, but they continue to obstruct the work. More recently, there have been escalations of the behaviour by the HDI representatives, aimed at intimidating the City's contractor and their subcontractors and the City was advised by the contractor that, at some point between the evening of October 3, 2022, and the morning of October 4, 2022, someone broke into the dredging barge and stole various tools and equipment, but they were not able to identify those responsible.

The City has made every reasonable effort to respond to changing demands from the HDI. Initially, they wanted an agreement in place for Environmental Monitors, and the City quickly established a process

to make that happen. The HDI then required that consent be sought from the HDI for the project, that the agreement for environmental monitoring be directly with the City and that, further, consent be required from the HDI for every project that occurs within municipal boundaries (with various fees paid and capacity funding provided to the HDI). After these demands were rejected by the City, HDI demanded compensation in the amount of \$40,000 in unspecified legal fees, and also demanded unspecified capacity funding to support the review of various project documents and compensate HDI Environmental Monitors. When this was rejected, a new list of demands was submitted (which included many of the previous requests), but now amounting to \$350,000.

The City has also engaged in discussions with the Hamilton Police regarding this matter and received a communication from them this morning, indicating as follows:

“One of the most challenging aspects of this file is understanding who is complaining about the actions of the protestors on scene and who has rights to the property in question. What we know is that the Royal Botanical Gardens owns the property occupied by the protestors and to date we have no complaint from them seeking to have the protestors removed. We have attempted to reach the CEO and have yet to receive a response. It is my understanding that you have also tried to connect with their CEO with negative results.

We also know that the City of Hamilton has contracted work out to Milestone to complete the dredging. The dredging is work the City of Hamilton is being ordered to complete by the Ministry and this work is being negatively impacted by the actions of the protestors. The protestors action make it impossible and unsafe for the contractors to carry out their duties and adhere to workplace safety legislation. Lastly and effective today, that a subcontractor of Milestones is now refusing work at the location, "Until they can be granted safe and unimpeded access to the project zone".

As a result of all of the above, it is the position of Hamilton Police Service that the City of Hamilton seek a court imposed emergency injunction to remove the protestors and any future protestors from the property to allow the City to continue with this important work. Our criminal investigation into the actions of the protestors to date is continuing.”

The City has given thought to the position of Hamilton Police and believe that an emergency injunction is a remedy of last resort that would create significant challenges from several perspectives including impacting our relationships with our local indigenous communities. We believe that there is a more appropriate and expeditious mechanism (outlined below) to provide an instrument with legal force and effect to the Hamilton Police and that they could rely on to facilitate our contractor's access to the work site to complete the work required under the Director's Order.

Contractor has Now Refused to Continue Work

The City, our contractor, and our consultant have been responding regularly, if not daily, to new complications, changing demands from the HDI, and the requirement to review and respond to various communications. All of this has resulted in significant delays to the Chedoke Creek Workplan and an estimated \$466,000 (as of October 3rd) in additional costs to the community, which costs continue to increase by \$10,000-\$15,000 on a daily basis, while the project is paused and the City's contractor remains on standby.

Yesterday, the City received a letter from the contractor, stating that:

“... the situation has now proven to be unmanageable and unsafe. The City cannot reasonably expect Milestone to police the jobsite in the manner necessary to prevent HDI members from accessing the site when they are intent on doing so. Milestone also cannot be responsible to forcibly remove individuals from the jobsite. Interacting with these individuals in that way has the potential to become unsafe. The drawn-out nature of the situation has created psychologically unsafe work conditions. This is a further concern for Milestone.

Also, members of HDI are being exposed to unsafe conditions as a result of their entry onto the Project site without permission and without proper safety precautions. One recent example is a member of HDI tying up a boat to the dredge pipeline. This is not only unsafe but is hindering the installation of the pipeline and could result in serious damage to the critically important equipment for the project, which is on the critical path of the Project's schedule. This is only one example of recent interactions with HDI members."

The contractor included a letter from a key subcontractor refusing to continue to work due to "dangerous and intimidating behaviour" from HDI representatives and concerns for safety and concluded by advising the City that it would be demobilizing from the work site until uninterrupted and unimpeded access to the work site is available, at which time the contractor would provide a revised schedule for completion of the work, along with an accounting of the additional costs and expenses incurred by Milestone and its subcontractors.

Request for Intervention by MECP

It is clear that, despite all of the efforts and costs expended by the City, the City cannot proceed with the work under the Director's Order, and will be unable to achieve the MECP deadline of December 31, 2022 for all in-water works.

The City is therefore formally requesting that the MECP exercise its authority under its legislation to assist and enable the City to complete the work required under the Director's Order as follows:

1. Immediately issue an order to the HDI under Subsection 196(2) of the *Environmental Protection Act* and Subsection 104(3) of the *Ontario Water Resources Act*, requiring that they permit the City to have access to the work area. While the HDI is asserting treaty rights over the area in question, there is no doubt that HDI has been occupying the area and taken charge and control over the area and is interfering with access, so much so that our contractors and subcontractors have now refused to continue with the work. These provisions of the legislation were intended to be used precisely in a situation such as this one, where the MECP has ordered one party to complete work but that party is unable to do so without the cooperation of another party that is refusing access. Unless and until the MECP issues such an order, there is no reasonable and timely means by which the City can continue with and complete the work; and
2. Immediately extend the deadlines in the Director's Order to, at a minimum, December 31, 2023. Given the delays in commencement of the work, uncertainty regarding when work can continue, restrictions on times during the year when work can be done (including complications with timelines for associated permits from various agencies, and potentially with fish spawning periods during which no in-water works are permitted) and other logistical considerations, it is clear that the deadlines prescribed in the Director's Order are unachievable.

Sincerely,



Nick Winters
Director - Hamilton Water
City of Hamilton

Copy to: Lubna Hussain – Director, West Central Region, MECP
Elizabeth Chee Sing – Water Compliance Supervisor, West Central Region, MECP
Sarah Day – Issues Project Coordinator, Hamilton District Office, MECP
Shelley Yeudall – Wastewater Inspector, Hamilton District Office, MECP
Cari Vanderperk – Director, Watershed Management, Hamilton Water

Mark Bainbridge – Director, Planning & Capital, Hamilton Water
John Helka – Director, Woodward Upgrades Program, Hamilton Water
Shane McCauley – Acting Director, Water & Wastewater Operations, Hamilton Water
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Ron Scheckenberger – Principal Water Resources, Wood Environment & Infrastructure Solutions
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