



TOWN OF SIDNEY

REPORT TO COUNCIL

13b

TO: Mayor and Council
FROM: Jenn Clary, Director of Engineering
DATE: February 4, 2020 **FILE NO.:** 5240-20
SUBJECT: License and Access Agreement for Reay Creek Pond Remediation

PURPOSE:

To seek Council approval for the License and Access Agreement between the Town of Sidney and Transport Canada for Transport Canada's Reay Creek Pond remediation work.

BACKGROUND:

Transport Canada (TC) has accepted responsibility for the clean-up of contaminated sediments in Reay Creek Pond and is planning to complete the remediation in the 2020 budget year.

Prior to issuing tender documents for the Reay Creek Pond remediation work, TC requires an executed License and Access Agreement ("the Agreement") with the Town of Sidney. This is because the Reay Creek Pond is located within a Town-owned park.

DISCUSSION:

Staff have been working with TC on this Agreement for several months. The term of the Agreement will be from April 1, 2020 to December 31, 2020 to allow TC to complete the pond remediation work. Although monitoring will continue for two to three years after the termination of the Agreement, TC does not require an agreement for this monitoring work.

According to the Agreement, TC is required to notify impacted residents, and obtain necessary permits and approvals prior to performing the work. The Agreement also requires that TC remove the contaminated material from the License Area prior to refilling the pond.

Provisions have been made to allow the Town access to renovate the dam during the term of the agreement, providing it does not impact TC's remediation work. Staff is still in discussions with TC regarding the feasibility of completing the dam work and remediation work in 2020. The potential for this to occur is somewhat contingent on the TC's tender process and the capacity for the selected contractor to complete both projects concurrently. This may require the the Town enter into a sole source contract with the contractor who was awarded TC's work.

Staff requested a full legal review of the Agreement in March 2019, and have received advice on some individual changes since then.

RECOMMENDATION:

That the License and Access Agreement between the Town and Transport Canada, for Transport Canada's remediation work on Reay Creek Pond, be approved as presented.

Respectfully submitted:



Jenn Clary
Director of Engineering

I concur:



Randy Humble
Chief Administrative Officer

Appendix A: License and Access Agreement for Reay Creek Pond Remediation

Items 2b and 9 to be revised.
See attached email.

LICENSE AND ACCESS AGREEMENT

THIS AGREEMENT dated for reference the first day of February 1, 2020.

BETWEEN:

THE TOWN OF SIDNEY, a municipal corporation pursuant to the *Local Government Act* (British Columbia) and having its offices at 2440 Sidney Avenue, Sidney, B.C. V8L 1Y7

(the "Licensor")

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by the **Minister of Transport**, having an office at 620-800 Burrard Street, Vancouver, B.C. V6Z 2J8

(the "Licensee")

WHEREAS:

- A. The Licensor is the registered owner of the lands and premises situate in the Town of Sidney within the Province of British Columbia and outlined in bold black ink on the plan attached as **Schedule "A"** to this License and Access Agreement (the "**License Area**");
- B. The Licensee requires, and the Licensor has agreed to provide access to the License Area for the Licensee to undertake extensive remediation of Reay Creek Pond located on the License Area. The remediation work will generally involve removing sediment and material under Reay Creek Pond and vegetation above Reay Creek Pond on the License Area to allow for access and work area. No soil above the limits of Reay Creek Pond will be removed unless it is required for access, work area, maintaining a stable embankment, or remediating additional contaminated material.
- C. At the completion of the sediment removal activities, the bottom of Reay Creek Pond (i.e. the centerline) will be left as deep and wide as possible while maintaining stable slopes up to the former limits of Reay Creek Pond. The Licensee will replace material taken from the License Area with clean material that meets or exceeds existing habitat conditions in the pond, under direction of an environmental professional, and slope the bottom up to the previous natural boundary. The Licensee will replant and landscape in a fashion consistent with the current landscape or as agreed by the Licensor, and (non-invasive) types of vegetation.

NOW THEREFORE in consideration of the mutual covenants and agreements in this License and Access Agreement and other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the parties hereto covenant, promise and agree with each other as follows:

1. Unless otherwise defined in this License and Access Agreement, the following terms shall have the following prescribed meanings:

“Contaminants” means all pollutants, contaminants, wastes, special wastes, hazardous or toxic substances or materials (including, without limitation, asbestos, coal, tar, polyaromatic hydrocarbons, ammonia, metals and other hydrocarbons, or any related or associated substances), and those defined, judicially interpreted or identified in any Environmental Laws or required to be remediated pursuant to Environmental Laws and the storage, handling, transport, treatment, disposal, use, manufacture or release of which into the environment is prohibited, controlled or regulated by Environmental Laws, and the presence of which, in quantities or concentrations above or equal to prescribed standards, or numerical criteria, standards or conditions may require a Government Authority to order remedial or investigatory action under any Environmental Laws;

“Environmental Laws” means any applicable government laws, rules, ordinances, statutes, regulations, orders, bylaws, or codes having the force of law, now or hereafter in force whether federal, provincial, municipal or otherwise relating to the environment or to the environmental conditions in, on, or over land or water in the Province of British Columbia;

“Government Authority” means any applicable federal, provincial, state, municipal, regional or local government or government authority, and includes any department, commission, bureau, board, administrative agency, regulatory body, minister, director, approving officer, manager, or other person of similar authority of any of the foregoing having jurisdiction or legislative authority;

“Monitoring Works” means accessing, drilling and constructing monitoring wells, undertaking environmental testing, and conducting any other post remediation monitoring through, over and on the License Area for the purpose of ensuring the Licensee has remediated the License Area in accordance with Environmental Laws;

“Permitted Work” means Monitoring Works and Remediation Work

“Remediation Work” means:

- i. the movement of vehicles and equipment;
- ii. the removal of vegetation, trees and fish from the License Area;
- iii. the excavation and removal of sediment and other materials under or surrounding Reay Creek Pond located on the License Area;
- iv. the diversion of Reay Creek to facilitate access to the sediments in, under and surrounding Reay Creek Pond;
- v. the transport and short term storage of soils, which must be removed prior to refilling the pond, ground water, vegetation, debris, and other materials containing Contaminants from the License Area;
- vi. the short term storage of supplies, including imported soil stockpiles, shoring materials, vehicles, trailers and equipment;

- vii. site restoration activities including backfilling and compaction of soil, placing sod, planting vegetation and other landscaping;
- viii. miscellaneous construction activities such as placing of fences and gates, traffic control (including but not limited to directing vehicle and pedestrian traffic), installation of lights and signage;
- ix. temporary, partial closures of roads adjacent to Reay Creek Pond to allow movement, storage and construction activities; and
- x. any other activities or actions required to eliminate Contaminants from the License Area

through, over and on the License Area for the purposes of supporting the Licensee's remedial work on the License Area, all subject to and in accordance with Environmental Laws.

2. The Licensor hereby grants to the Licensee, its employees, agents and contractors, the exclusive right and license to at all times, by day and by night, enter, pass and repass upon, over, under, across and through, and to be upon, the License Area, for and during the Term, for the purpose of carrying out the Permitted Work and any and all other matters related to or incidental to the Licensee's environmental remediation activities and environmental monitoring on the License Area, and for no other purpose unless agreed to in writing by the Licensor. Notwithstanding the foregoing, the Licensee acknowledges that:
 - a. the Licensee's rights under this License are at all time subject to the rights of the Licensor as owner of the road and park that form the License Area;
 - b. the Licensee will work with the Licensor, its employees, agents and contractors, to allow access for dam renovation and construction, as well as construction of a fish ladder, within the License Area during the term of this License agreement; and
 - c. upon notice to the Licensee and provided it does not interfere with the Permitted Work being conducted by the Licensee, the Licensor may access the License Area in an emergency for the purpose of construction, operation, maintenance, repair and replacement to the Licensor's works and facilities within the License Area or on adjacent lands.
3. This License and Access Agreement shall come into force on April 1, 2020 for a period of nine months (the "Term") until December 31, 2020 and may be extended, as is reasonably required, upon prior notice to and approval by the Licensor.
4. The Licensor acknowledges that anything left on the surface of the License Area in the vicinity of the Reay Creek Pond will likely be removed and destroyed as part of the Licensee's remediation works.
5. The Licensee is responsible for notifying impacted residents prior to performing the

remediation works.

6. The Licensee covenants and agrees with the Licensor that the Licensee shall:
- (a) only use and occupy the License Area in accordance with the terms and conditions set out in this License and Access Agreement;
 - (b) efficiently fence and secure, light and watch all materials or other obstructions located on the License Area or any part thereof, and shall take all reasonable and necessary precautions to ensure the safety of the public and prevent public access at all times;
 - (c) prior to closing any roads as part of the Permitted Works, provide a traffic management plan to the Licensor for review and approval;
 - (d) obtain approval from the Licensor prior to removing any trees from the License Area;
 - (e) obtain all required approvals, pursuant to the *Water Sustainability Act* (British Columbia) or any other Environmental Laws, prior to diverting the flow of Reay Creek;
 - (f) obtain all required approvals, pursuant to the *Fisheries Act* (Canada) or any other Environmental Laws, prior to removing any fish from Reay Creek;
 - (g) if any legal survey posts placed by the Licensor on the License Area are removed, moved or damaged by the Licensee or by any person for whom it is responsible at law, ensure that they are properly replaced by a registered BC Land Surveyor, at the sole expense of the Licensee;
 - (h) to transport all soils, ground water, vegetation, debris or other materials containing Contaminants off of the License Area prior to the pond being refilled;
 - (i) promptly notify the Licensor of any spill or release of any Contaminants that occurs on, or may migrate to or away from, the License Area as a result of the Permitted Work, or otherwise as a result of the action or inaction of the Licensee or those for whom it is responsible in law, and shall repair such damage and remediate such Contaminants in a good and workmanlike manner, and to the standards required by the applicable Environmental Laws;
 - (j) upon the completion of the Permitted Work, revegetate and landscape the License Area in a fashion consistent with Environmental Effects Determination application submitted to Fisheries and Oceans Canada;
 - (k) promptly repair or replace any public or private infrastructure, including but not limited to roadways, boulevards, curbs, retaining walls, and walkways, damaged

as a result of the performance of the work contemplated by this License and Access Agreement; and

- (l) comply with all Licensor bylaws, regulations, policies and permits applicable to the Permitted Activities.
7. The Licensor or persons appointed by the Licensor shall have access to all parts of the License Area if they have undergone the required safety orientation and have notified the Prime Contractor on site, and the Prime Contractor has agreed that the visit does not pose any safety concerns, to examine the License Area and to determine the Licensee's compliance with the provisions contained in this License and Access Agreement. The Licensor covenants and agrees with the Licensee to take reasonable steps to minimize any disruption of the Licensee's operation under this License and Access Agreement in the conduct of the inspection of the License Area. The Licensor will also notify the Licensee prior to going onto the License Area, and provide a day's notice if possible.
 8. The Licensee shall be responsible for conducting all Monitoring Works on the License Area, which monitoring shall last for 2 or 3 years after the termination of this License Agreement.
 9. The Licensee shall be responsible for preparing and filing a notice of independent remediation, and dealing with any other responsibilities related to the License Area pursuant to the BC Contaminated Sites Regulation.
 10. The Licensor shall not alter the post-remediation restoration of the Reay Creek Pond License Area until the Monitoring Works are completed, excluding dam construction and maintenance and park enhancements and maintenance, as required in an emergency, or as approved by the Licensee. The Licensor shall be responsible for any such enhancements or maintenance works in the License Area.
 11. It is mutually covenanted and agreed by and between the parties hereto that:
 - (a) the Licensee acknowledges that the rights granted by this License and Access Agreement are contractual rights only and do not create or grant to the Licensee any interest in land. Neither the Licensee, nor anyone on its behalf, will register this License and Access Agreement or any other document evidencing any interest herein against the whole or any part of the License Area or any other Licensor lands;
 - (b) the Licensee will not assign this License and Access Agreement (whether by mortgage, transfer, sale of its shares if the Licensee is a corporation, or otherwise) or otherwise part or permit any parting with possession of all or any part of the License Area or grant or permit the granting of any concession, license or other right to all or any part of the License Area without the prior consent of the Licensor, in its sole discretion;

- (c) the Licensee's use and enjoyment of the License Area will be at the Licensee's sole risk, cost and expense unless otherwise expressly provided herein; and
- (d) subject to the *Crown Liability and Proceedings Act* (Canada), the Licensee covenants with the Licensor to indemnify and save harmless the Licensor against all losses, damages, costs and liabilities arising out of:
 - (i) any breach of this License and Access Agreement by the Licensee; and
 - (ii) any personal injury, death or property damage due to the Licensee's occupation and use of the License Area or due to the negligence or intentional acts or omissions of the Licensee or any of its employees, agents, servants or any other representatives.

The obligation of the Licensee to indemnify the Licensor hereunder shall survive any expiry or termination of this License and Access Agreement, anything in this License and Access Agreement to the contrary notwithstanding.

12. This License and Access Agreement sets out all the covenants, agreements and understandings between the Licensor and the Licensee concerning the License Area and the Licensee's rights with respect thereto and may only be amended by written agreement duly executed by the Licensor and the Licensee.
13. This License and Access Agreement will be binding on and enure to the benefit of the heirs, executors, administrators, successors and permitted assigns of each of the Licensor and Licensee.
14. If any part of this License and Access Agreement is determined by a court of competent jurisdiction to be illegal or unenforceable, then such part will be considered separate and severable from this License and Access Agreement and the remainder of this License and Access Agreement will remain in full force and effect and will be binding on the parties as though such illegal or unenforceable part had never been included.
15. The Licensor and the Licensee each represent and warrant that they have the necessary authority to enter into this License and Access Agreement and to perform their obligations under this License and Access Agreement.
16. This License and Access Agreement and all documents entered into or granted hereunder set out all the covenants, agreements and understandings between the Licensor and the Licensee concerning the License Area and the Licensee's rights with respect thereto and may only be amended by written agreement duly executed by the Licensor and the Licensee.
17. All notices which may be or are required to be given pursuant to this License and Access Agreement shall be in writing and shall be given to the party for whom it is intended either by personal delivery or by double registered mail, addressed as follows:

New versions of 2b and 9

Jenn Clary

From: Uyeda, Eddie <eddie.uyeda@tc.gc.ca>
Sent: Tuesday, February 04, 2020 10:25 AM
To: 'Robin, Sandra'
Cc: Jenn Clary; 'Clark, John'; Orlinska, Katarzyna; Wensauer, Danielle
Subject: FW: Revision of the Reay Creek Pond License and Access Agreement

Hello Sandra,

Would you please insert the revised wording into the Reay Creek agreement:

Clause 2b:

2b. upon notice to the Licensee and provided that the Licensee determines that it does not interfere with the Remediation Work being conducted by the Licensee, the Licensor, its employees, agents and contractors, may access the License Area for dam renovation and construction, as well as construction of a fish ladder, within the License Area during the term of this License agreement; and

Clause 9:

9. The Licensee shall be responsible for providing notification similar to, but not strictly, a notice of independent remediation pursuant to the BC Contaminated Sites Regulation and will deal with other provincial requirements related to the License Area in a similar way.

And then forward onto John for his review.

Thanks very much.

Eddie
Cell: 604-992-2231

From: Uyeda, Eddie
Sent: Tuesday, February 04, 2020 10:14 AM
To: 'Jenn Clary' <jclary@sidney.ca>
Cc: 'Clark, John' <John.Clark@justice.gc.ca>
Subject: RE: Revision of the Reay Creek Pond License and Access Agreement

Hello Jenn,

The revised wording is fine with me. I'll forward it onto John's staff. John can look at it upon his return this week and send a revised copy of the license agreement to you.

Regards

Eddie Uyeda
Transport Canada, Environmental Services - Contaminated Sites
Cell: 604-992-2231