

TO: Mayor Savage and Members of Halifax Regional Council

SUBMITTED BY: Original Signed by 
Jacques Dubé, Chief Administrative Officer

DATE: November 1, 2021

SUBJECT: Otter Lake Contract Amendment (FEP/WSF)

ORIGIN

July 20, 2021 Halifax Regional Council meeting, Item 14.2:

MOVED by Councillor Lovelace, seconded by Councillor Blackburn

THAT Halifax Regional Council direct the Chief Administrative Officer:

...

2. To negotiate an extension to contract timelines with Mirror Nova Scotia Limited as outlined in the Discussion Section (Next Steps) of the staff report dated June 18, 2021 and return to Council with a recommendation.

MOTION PUT AND PASSED

LEGISLATIVE AUTHORITY

Halifax Regional Municipality Charter

79A (1) Subject to subsections (2) to (4), the Municipality may only spend money for municipal purposes if (a) the expenditure is included in the Municipality's operating budget or capital budget or is otherwise authorized by the Municipality; (b) the expenditure is in respect of an emergency under the Emergency Management Act; or (c) the expenditure is legally required to be paid....

HRM Procurement Administrative Order (2020-004-ADM)

32(7) The approval and signing authority limits for cumulative contract amendments are as follows:

Position	Approval Authority
CAO	(a) \$20,000 or (b) a 20% increase to the originally approved contract amount, whichever is greater.
Council	Any amount

RECOMMENDATION

It is recommended that Halifax Regional Council direct the Chief Administrative Officer to execute the Supplementary Agreement set out in Attachment A of this report to extend certain contract timelines in the Operating Agreement with Mirror Nova Scotia Limited.

BACKGROUND

HRM-Mirror Agreements

In 1997, HRM entered into an agreement with Mirror Nova Scotia Limited (Mirror) for the design, construction, and operation of the Otter Lake facility (1997 Agreement). The agreement provided a framework for operations at Otter Lake for a period of twenty-five years, with Mirror being responsible for compliance with all applicable laws, insurance, and bonding, inclusive of environmental impairment for thirty years post closure of the site.

Under the 1997 Agreement, Mirror was compensated at a cost-plus model. In 1999, Otter Lake, including the FEP/WSF, were commissioned and began accepting waste materials.

On December 23, 2015 HRM and Mirror renegotiated and executed a 20-year agreement for the continued operation of the Municipality's solid waste facilities at Otter Lake (2016 Agreement), which commenced January 1, 2016. As part of the 2016 Agreement, HRM agreed to pay an all-inclusive processing fee of \$125¹ per tonne to Mirror for solid waste received, processed, and disposed of at Otter Lake. The all-inclusive processing fee includes the construction and closure of landfill cells. Between January 1, 2018 and December 31, 2021, pursuant to the 2016 Agreement, Mirror has the option to provide notice of early termination in the event that the legal entitlements have not been amended to remove the obligation to operate the Front End Processor (FEP) / Waste Stabilization Facility (WSF). Should Mirror decide to provide notice of early termination, the all-inclusive processing fee would be increased to \$170 per tonne, with the contract expiring on December 31, 2023.

Effectiveness of the Front End Processor (FEP) and Waste Stabilization Facility (WSF)

On July 20, 2021 staff presented a report on the effectiveness of the FEP/WSF. Regional Council approved the following staff recommendations in the report:

It is recommended that Halifax Regional Council direct the Chief Administrative Officer:

1. *To work with Mirror Nova Scotia Limited to submit a joint application to Nova Scotia Environment to deactivate the operation of the Front End Processor (FEP) and Waste Stabilization Facility (WSF) at the Otter Lake Waste Processing and Disposal Facility (Otter Lake) on the condition that:*
 - a. *The FEP/WSF be maintained in standby mode (i.e., operable state);*
 - b. *Industrial, Commercial, and Institutional (ICI) waste continue to not be landfilled at Otter Lake and continue to be processed through the transfer station and exported to other licensed landfills; and*
 - c. *The Community Monitoring Committee be consulted on any further proposed changes to the operations at Otter Lake.*
2. *To negotiate an extension to contract timelines with Mirror Nova Scotia Limited as outlined in the Discussion Section (Next Steps) of this report and return to Council with a recommendation.*

With regards to recommendation #2, the Discussion Section (Next Steps) included the following:

¹ Adjusted for inflation annually ² The year noted should have been 2022

Next Steps

Should Regional Council approve pursuing deactivating the FEP/WSF and placing in standby mode, staff will work with the Otter Lake operator, Mirror, to submit a joint application to NS Environment to amend the operating approval. It is anticipated that the review of an application will likely take in the order of 2 to 3 months, acknowledging that additional information or public engagement may be requested by NS Environment which may extend this timeline.

If it appears that a decision from NS Environment will not be provided before December 31, 2021 staff plan on negotiating with Mirror extending the timelines in the 2016 Agreement as follows:

- *Extending the notice of early termination date of December 31, 2021, related to the legal entitlement to remove the obligation to operate the FEP/WSF, by a maximum of one year.*
- *In the event that Mirror decides to provide a notice of early termination (i.e., post December 31, 2021), extend the contract expiration date of December 31, 2023, by a maximum of one year.*
- *Increase the processing fee, commencing January 1, 2021² from \$130.79 per tonne³ to \$170 per tonne. Once NS Environment provides its findings (e.g., approves, rejects) on deactivating the FEP/WSF, the processing fee will be reduced to \$130.79 per tonne adjusted for inflation.*

Arbitration on Application of Inflation on Processing Fee

HRM and Mirror recently conducted arbitration with regards to the calculation of inflation on the processing fee. The arbiter's ruling on September 23, 2021 was in favour of Mirror's interpretation and as such, the current processing fee for 2021 (calendar year) was increased from \$130.79 to \$134.69 per tonne.

Current Status

An application to deactivate the FEP/WSF was jointly submitted by HRM and Mirror on August 26, 2021. NS Environment responded on September 12, 2021 requesting public consultation with residents within five kilometers of the facility on the proposed site activities pertaining to the application, including allowing for a 30-day comment period. HRM and Mirror are currently planning to conduct public consultation during October (latter part)/November 2021, and to submit a consultation report to NS Environment before the end of December 2021.

Staff anticipate that NS Environment will also submit technical questions for HRM/Mirror to address. As such, it is clear that the regulatory process to review the application to deactivate the FEP/WSF will extend into 2022 and there is a need to extend timelines in the 2016 Agreement.

DISCUSSION

Attachment A provides the proposed contract amendments that address the following:

- Extending the notice of early termination date of December 31, 2021, related to the legal entitlement to remove the obligation to operate the FEP/WSF, to December 31, 2022.
- In the event that Mirror decides to provide a notice of early termination, extending the contract expiration date of December 31, 2023 to December 31, 2024.
- Increase the processing fee, commencing January 1, 2022 from \$134.69 per tonne, adjusted for inflation, to \$170 per tonne. If NS Environment approves deactivating the FEP/WSF, the processing fee will be reduced to \$134.69 per tonne adjusted for inflation, subject to the negotiation of

² The year noted should have been 2022

³ The original processing fee in 2016 was \$125 per tonne and is adjusted annually for inflation. In 2021 the processing fee was \$130.79 per tonne, however, due to the recent arbitration decision was increased to \$134.69 per tonne

additional fees depending on the costs of maintaining the FEP/WSF in standby mode. If NS Environmental does not approve deactivation of the FEP/WSF, Mirror may elect to early terminate the contract.

FINANCIAL IMPLICATIONS

The following financial impacts will be incurred as a result of the processing fee increasing to \$170 per tonne commencing January 1, 2022 as part of the contract amendment:

- Fiscal Year 2021/2022 – it is projected that the increase in the processing fee for the last three months of the fiscal year, will result in an increase of \$360,500. The original budget for contract costs for Otter Lake (R320, 6399) for fiscal year 2021/2022 was \$6,280,000 with the most current forecast showing a projection of \$7,330,500 as a result of higher residential tonnages than anticipated and due to the arbitration ruling noted in the Background Section. As a result of the processing fee increase, this forecast would increase to \$7,691,000.
- Fiscal Year 2022/2023 – it is projected that the increase in processing fee will increase the contract costs for Otter Lake in the order of \$1.260 million for the first 9 months of the fiscal year (i.e., April 1, 2022 to December 31, 2023). The budget for Otter Lake contract costs will be developed and submitted for review to Halifax Regional Council as part of business planning activities for fiscal year 2022/2023.

All estimated amounts noted above include net HST. All Otter Lake contracting costs are charged against R320, 6399.

RISK CONSIDERATION

The proposed contract amendment provides additional time to allow for the regulatory review of the application to deactivate the FEP/WSF. If NS Environment rejects the application or Regional Council declines approving the contract amendment, Mirror will likely provide a notice to early terminate the 2016 Agreement resulting in HRM having to re-tender a long-term contract to design-build-operate Otter Lake.

COMMUNITY ENGAGEMENT

The proposed contract amendments (Attachment A) were provided to the Chair of the Community Monitoring Committee (CMC) in accordance with the agreement between HRM and the Halifax Waste Resource Society. The CMC submitted a letter in response to the proposed contract amendments that is included as Attachment B.

ENVIRONMENTAL IMPLICATIONS

No environmental implications were identified.

ALTERNATIVES

Regional Council could decline to approve the proposed amendments to the operating agreement, in which case Mirror would have to elect by December 31, 2021 whether to early terminate the operating agreement. This is not recommended as the application to deactivate the FEP/WSF is still pending and a decision is unlikely to be rendered by NS Environment prior to December 31, 2021.

ATTACHMENTS

Attachment A – Proposed Supplementary Agreement with Mirror Nova Scotia Limited to amend the 2016 Operating Agreement at the Otter Lake Landfill

Attachment B – Letter from CMC Chair, Scott Guthrie, dated October 29, 2021

If the report is released to the public, a copy can be obtained by contacting the Office of the Municipal Clerk at 902.490.4210, or Fax 902.490.4208.

Report Prepared by: Andrew Philopoulos, Director Solid Waste Resources, 902.864.6833

THIS SUPPLEMENTARY AGREEMENT is made effective as of _____, 2021.

BETWEEN:

HALIFAX REGIONAL MUNICIPALITY ("HRM")

- and -

MIRROR NOVA SCOTIA LIMITED ("Mirror")

WHEREAS:

- A. HRM and Mirror entered into an agreement dated the 23rd day of December, 2015 for the Operation of Halifax Regional Municipality's Solid Waste Facilities at Otter Lake (hereinafter referred to as the "Operating Agreement").
- B. At the July 20, 2021 session of Halifax Regional Council, HRM directed its Chief Administrative Officer to work with Mirror to submit a joint application to Nova Scotia Environment to deactivate the operation of the Front-End Processor and Waste Stabilization Facility at Otter Lake (subject to certain conditions); and to negotiate an extension to certain contract timelines with Mirror in order to accommodate the application process.

THEREFORE HRM and Mirror covenant and agree with the other, as follows:

1. INTERPRETATION

1.1 Definitions - Words & Phrases

In this Supplementary Agreement, any capitalized words or phrases that are used herein and are defined in the Operating Agreement shall have the same meaning as contained in the Operating Agreement except where specified otherwise and the following words and phrases shall have the meaning hereinafter set out, namely:

- (a) "Supplementary Agreement" means this Supplementary Agreement, including the recitals, appendices, schedules and any documents incorporated herein by reference.

2. EXTENSION OF CERTAIN TIMELINES AND FEE ADJUSTMENT

2.1 Early Termination Deadline

Article 22.3 of the Operating Agreement is hereby deleted and replaced with the following:

Mirror may elect, at any time after January 1, 2018 and before December 31, 2022, to terminate this Agreement in the event that the Legal Entitlements have not been amended to remove the obligation to operate the FEP/WSF Facilities. The effective date of such termination shall be end of day, December 31, 2024.

During the notice period preceding the Termination Date, notwithstanding any other provision of this Agreement HRM shall be free to make plans and tender for the continuation of operations after the Termination Date and access the Site for these purposes. Mirror shall comply with its obligations under Article 15.8.

2.2 Appendix A - Fees

Appendix A of the Operating Agreement is hereby amended by adding the following provision as section 1(f):

- f. Notwithstanding 1(a), 1(c) and 1(d) the Disposal Tipping Fee shall be \$170.00 per tonne (and an inflation adjustment shall not be applied) during the period commencing January 1, 2022 and ending on the earlier of:
 - i. December 31, 2022;
 - ii. the date that the Province provides approval to deactivate the FEP/WSF; or
 - iii. the date that Mirror provides HRM with Notice of Early Termination in accordance with Article 22.3 of the Agreement.

2.3 Clarification Regarding Inflation

The parties acknowledge and agree that in scenario 1(f)(i), the Disposal Tipping Fee commencing January 1, 2023 shall be \$134.69 (being the Disposal Tipping Fee in effect on December 31, 2021), adjusted to reflect inflation for 2021 (as calculated on January 1, 2022) and for 2022 (as calculated on January 1, 2023). On January 1st of each year thereafter, the Disposal Tipping Fee shall continue to be adjusted for inflation in accordance with section 1(d).

3. **GENERAL**

3.1 Entire Agreement

The provisions contained in this Supplementary Agreement modify the Operating Agreement to the extent necessary to give full and complete effect to the provisions herein

contained. The Operating Agreement together with this Supplementary Agreement, comprise the entire agreement between the parties with respect to the matters herein contained.

3.2 Amendment

This Supplementary Agreement may not be amended or modified in any respect except by written instrument signed by the parties.

[signature page to follow]

IN WITNESS WHEREOF the parties have executed this Supplementary Agreement as of the date first above written.

HALIFAX REGIONAL MUNICIPALITY

Witness

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Witness

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MIRROR NOVA SCOTIA LIMITED

Witness

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Witness

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October 29, 2021

To: Regional Council, Halifax Regional Municipality

Re: Otter Lake Supplementary Agreement

Dear Mayor and Councillors:

I write on behalf of the Executive Committee for the Otter Lake Community Monitoring Committee (CMC), in response to the proposed amendments to HRM's operating agreement with Mirror for the Otter Lake facility.

Under the 1999 Agreement between HRM and the Halifax Waste Resource Society that created the CMC, the Chair of the CMC is given the opportunity to provide comments to Council on these changes. I hope that you will consider our submissions carefully.

We have reviewed the draft Supplementary Agreement. As we understand the proposed changes, they would do three things:

- Extend the notice of early termination date of December 31, 2021 under Article 22.3 by one year to December 31, 2022;
- Extend the corresponding early termination contract expiration date also found in Article 22.3 by one year to December 31, 2024; and
- Increase the processing fee paid to Mirror for 2022, or until such time as Nova Scotia Environment provides approval to deactivate the FEP/WSF, or until Mirror provides HRM with notice of early termination.

The CMC opposes the removal of the FEP/WSF, as has previously been stated to Council. The CMC presented its position to Council Committee of the Whole on July 20, 2021, and this position has not changed.

In this letter, we would like to again highlight that, in CMC's opinion, the removal of the FEP/WSF would be a violation of the existing 1999 Agreement between HRM and the Halifax Waste Resource Society. Therefore, even if Nova Scotia Environment were to approve HRM's application to deactivate (i.e., removal) the FEP/WSF, which application CMC opposes, that approval is not sufficient to proceed.

The 1999 Agreement was premised on specific fundamental undertakings agreed by HRM with respect to delivering 'Acceptable Waste' to the landfill. Removal of the FEP/WSF without an effective alternative process to produce Acceptable Waste to the Landfill is not acceptable to CMC.

In our view, the draft Supplementary Agreement would need to be amended to include not only a reference to Provincial approval, but also an amendment to the 1999 Agreement,

before Mirror may cease operating the FEP/WSF for HRM at Otter Lake. This was the commitment made by HRM to the local community and we are asking once again that it be honoured.

The CMC has not yet had a chance to meet as a whole to review the draft Supplementary Agreement. If further comments are raised at our next meeting, I will also pass these on for Council's consideration.

I would be pleased to respond to any questions from Council on this topic.

Yours truly,

Scott Guthrie
Chair, Otter Lake Community Monitoring Committee