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Report on the Comprehensive Review of the
***Events Leading to the Discharge of Untreated
Wastewater into the St. Lawrence River*** by the
City of Montreal in November 2015

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Environment and Climate Change Canada
Public Inquiries Centre
7th Floor, Fontaine Building
200 Sacré Cœur Blvd
Gatineau, Quebec K1A 0H3
Telephone: 819-997-2800
Toll free: 1-800-668-6767 (in Canada only)
Email: ec.enviroinfo.ec@canada.ca

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Executive summary

This report is the final step in the comprehensive review process of the events leading to the discharge of untreated wastewater into the St. Lawrence River by the City of Montreal between November 11 and 14, 2015. This review is one of the four conditions imposed on the City of Montreal in the order issued by the Minister of Environment and Climate Change Canada (ECCC) under subsection 37(2) of the *Fisheries Act* on November 9, 2015.

The purpose of the comprehensive review conducted by ECCC was to look at intergovernmental communications, particularly the information shared and exchanged between the City of Montreal, the ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC), and ECCC before the events took place. Engagement and consultation with the Mohawk and Abenaki Indigenous communities were also examined as part of the review.

The review process took place between December 15, 2015 and March 31, 2016. The process began with preliminary information meetings for Indigenous communities, followed by bilateral meetings between representatives of ECCC, the City of Montreal, MDDELCC, and the Indigenous communities concerned. It ended with a workshop attended by most of the participants involved in the review process.

During the process, the City of Montreal indicated there was still some confusion regarding the federal regulatory regime governing the planned discharge of untreated wastewater in the context of major maintenance work on wastewater treatment systems. For their part, the Indigenous communities' representatives pointed out that their communities had not been properly consulted before the discharge occurred.

The participants in the review process suggested that the authorities involved in such projects, in this case the City of Montreal, MDDELCC, and ECCC, should make better use of existing communications mechanisms to share information on similar situations in the future. The participants also felt that these authorities should pay special attention to the timely dissemination of relevant information to Indigenous communities so the communities can determine whether a project would adversely affect their ancestral or treaty rights.

The comprehensive review process has identified eight recommendations. ECCC is responsible for carrying out all the recommendations, some of which will require the collaboration of the Quebec government and the City of Montreal:

Intergovernmental communications

- Put in place a new collaborative structure between ECCC and MDDELCC to facilitate discussions surrounding major projects.

- Strengthen the use of existing communications mechanisms between the various orders of government.
- Share scientific expertise and involve other partners where possible.
- Clarify the scope and application of the *Wastewater Systems Effluent Regulations* and the *Fisheries Act* with regard to planned discharges of untreated wastewater by municipalities.

Engagement and consultation of Indigenous groups

- Initiate discussions between ECCC and the Secrétariat aux affaires autochtones du Québec (SAA) to better understand what, in this instance, led to differing approaches on the duty to consult, to identify common observations with regard to this duty.
- Require the production of an Indigenous community consultation plan when section 37 of the *Fisheries Act* is invoked with respect to maintenance projects on wastewater treatment systems.
- Commit to paying special attention to the dissemination of information to Indigenous communities.
- Ensure that the governments share, where possible, information at their disposal on Indigenous ancestral and treaty rights (established or potential) and, in keeping with the Crown's legal duty, the findings of their analyses on the need to consult Indigenous communities.

1 – Introduction

This report is the final step in the comprehensive review process of the events leading to the discharge of untreated wastewater into the St. Lawrence River by the City of Montreal between November 11 and 14, 2015. The review is one of the conditions contained in paragraph four (4) of the Ministerial Order of November 9, 2015, issued pursuant to subsection 37(2) of the *Fisheries Act*, by the Minister of ECCC:

“The City of Montreal must participate in a comprehensive review of the events leading to the occurrence of the deposit, which will be led by the Department of the Environment. Affected First Nations, the province and the other parties involved will be invited to participate in this review, an important objective of which is to ensure that appropriate consultations are held. The review will reflect the objective that such a discharge does not reoccur in the future. The review will also reflect the commitment of the Minister of the Environment to establish respectful relations with First Nations based on mutual recognition. It will also be grounded in the principles of openness, respect and transparency which will include timely exchange of information to ensure the full and meaningful participation of all interested parties.”

The scope of this report is limited to the objectives set out in the Ministerial Order. The report will not address other aspects that were raised during the review process, such as official communications with the general public, public perception and expectations with respect to the municipal wastewater treatment systems as well as the current state, shortcomings, and funding of these infrastructures. Moreover, data from the scientific monitoring of the discharge described in the Ministerial Order are not part of the report because the monitoring was set to continue beyond this review.

The main findings of this report deal with intergovernmental communications and the engagement and consultation of Indigenous communities in connection with the present file. It sets out the different observations of the stakeholders before, during, and after the City of Montreal discharged the untreated wastewater.

There was a lack of consensus on some specific aspects of the report among the participants of the review. All the participants had an opportunity to provide comments while the final report was being written, and the recommendations made by ECCC take into account all of the information and comments received.

2 – Methodology

This review was led by ECCC in collaboration with the City of Montreal. The MDDELCC, the Mohawks Councils of Kahnawake, Akwesasne, and Kanesatake, and the Grand Conseil de la Nation Waban-Aki voluntarily agreed to participate in the comprehensive review process. A list of the participants can be found in Annex 2.

The three-phase review process took place from December 15, 2015 to March 31, 2016, as follows:

1. Preliminary information meetings for Indigenous communities

Two preliminary information meetings for Indigenous communities affected by the discharge were held on December 15 and 16, 2015. During the meetings, representatives of ECCC and the City of Montreal presented basic information on the St. Lawrence ecosystem, Montreal's wastewater treatment system, the November 2015 discharge, and how the comprehensive review of the events would be carried out. The purpose of these meetings was to explain in detail the work carried out, share scientific data on the potential impacts, and listen to the Indigenous communities' perspectives.

2. Bilateral meetings between representatives of ECCC and those of the City of Montreal, MDDELCC and Indigenous communities

ECCC held a series of bilateral meetings between February 2 and 18, 2016 with the aim of establishing the chronology of events that led to the discharge, and identifying the intergovernmental communications channels used. At these meetings, the parties were also asked to comment on the process that ECCC proposed for the comprehensive review and on Indigenous consultations and engagement. In addition, the parties had an opportunity to discuss the comprehensive review of the discharge, identify the lessons learned from the events, and formulate recommendations.

3. Workshop for the parties involved in the comprehensive review

A workshop attended by the majority of the parties was held on March 8, 2016 in Montreal to finalize the recommendations arising from the analysis of the information gathered at the previous meetings. No MDDELCC representatives attended as the department preferred to send its comments to ECCC in writing.

3 – Review of events

The first step in the comprehensive review was to go over the events with all participants to establish an accurate chronology of the steps that led to the November 2015 discharge of untreated wastewater by the City of Montreal. This exercise resulted in a shared understanding of the sequence of events.

ECCC took into account all of the comments and the additional information provided throughout the process by the participants while maintaining the essential aspects of the analysis presented in the report.

Generally, all of the parties confirmed that they considered that the chronology established by ECCC matched the sequence of events. This detailed chronology is presented in Annex 3.

3.1 – Highlights

From November 11 to 14, 2015, the City of Montreal discharged untreated wastewater into the St. Lawrence River so that the City could undertake major maintenance and construction work on its main sewer system. The temporary closure of the southeast interceptor was necessary to carry out maintenance on the interceptor and build a snow chute.

In order to decrease the volume of wastewater discharged and reduce the impact on the St. Lawrence River, the City of Montreal planned to carry out this work in such a way that there would only be one discharge of untreated wastewater. The City also ensured that the discharge took place at a time of year offering the most favourable hydraulic and environmental conditions, before the snow chutes were put in use, namely when the discharge would have the least impact on fish in the St. Lawrence and the people who use the river.

For the work carried out in fall 2015, the City of Montreal obtained a certificate of authorization from MDDELCC, as it had done for previous discharges. The City informed ECCC in advance of the planned work. Federal regulations do not provide for the authorization or issuance of a permit by the Department for a planned discharge of untreated municipal wastewater water of the type envisaged by the City of Montreal.

On October 16, 2015, the Minister of Environment Canada intervened by issuing a Ministerial Order under the *Fisheries Act*. The order delayed the work until November 2015 to give a group of independent experts the time to evaluate the City of Montreal's plans.

On November 9, 2015, the Minister of ECCC issued a Ministerial Order based on the recommendations contained in the independent experts' report. The order

required the City of Montreal to make changes to the work and the monitoring procedures.

These conditions included monitoring measures and the participation of the City of Montreal in a comprehensive review process on the events that led to the discharge of untreated wastewater into the St. Lawrence River.

4 – The parties' viewpoints and possible solutions

This section analyzes the main findings of the ECCC representatives based on the information gathered from representatives of the City of Montreal, MDDELCC, the Mohawks of Kahnawake, Akwesasne and Kanesatake, and the Grand Conseil de la Nation Waban-Aki.

The main findings contained in this section deal with intergovernmental communications mechanisms between the City of Montreal and the governments of Quebec and Canada before, during, and after the discharge; in particular, the sharing of expertise, the dissemination and exchange of information, the availability and relevance of the information communicated, and the timeframes for communications. Communications as well as engagement and consultation of Indigenous communities are also discussed.

These findings led ECCC to identify some possible solutions that could improve intergovernmental communications, and the engagement and consultation of Indigenous communities during similar circumstances in the future.

During the comprehensive review process, all of the participants acknowledged that it would be preferable to avoid further discharges of untreated wastewater into the St. Lawrence because of the environmental impacts. The Indigenous communities' representatives pointed out that the November 2015 events made the Canadian public aware that discharging untreated wastewater is a practice done in many Canadian cities. The representatives made a point of insisting that every effort be made to put an end to this practice in Canada.

In the opinion of the representatives of the First Nations, wastewater is an issue of national magnitude. They believe that ECCC should develop a plan setting out concrete and measurable actions, in collaboration with provincial and territorial governments as well as with all the wastewater treatment system operators in the country, particularly municipalities, to avoid the discharge of untreated wastewater in the future.

4.1 – Intergovernmental communication

4.1.1 – Perspectives of the parties

On February 27, 2015, the City of Montreal obtained a certificate of authorization from MDDELCC. The City also notified the Environmental Enforcement Division of ECCC in September 2014 and September 2015 by email, as had been done in the past, because the City considered that no prior authorization from the federal department was required in such a situation.

Since the City of Montreal followed the same authorization procedure as for previous discharges, the City feels that ECCC's intervention through the ministerial

orders made under the *Fisheries Act* created a lot of confusion about the roles and responsibilities of each level of government in the matter, and is of the view that ECCC should not undertake exceptional legislative measures for planned wastewater discharges. According to the City of Montreal, the current state of the treatment systems in Canada's large cities means that maintenance work will be required in the future and this could lead to other planned discharges of untreated wastewater.

The City of Montreal claims that it did not receive the necessary information from ECCC concerning the obligations to be fulfilled under the *Wastewater Systems Effluent Regulations* and the *Fisheries Act*. According to ECCC, the City of Montreal has received, since 2013, general information from the Department about the *Wastewater Systems Effluent Regulations* and the *Fisheries Act*.

MDDELCC maintains that responsibility for obtaining all the information and the necessary authorizations required to properly carry out the project, and to comply with the other applicable acts and regulations rested with the proponent, namely the City of Montreal. Before issuing a certificate of authorization, MDDELCC must ensure that the applicant has provided documents from other organizations in support of its application. This applies to certifications from municipalities indicating that the proposed project complies with municipal bylaws. According to the City of Montreal representatives, the process set out by the provincial department was clear and was respected.

4.1.2 – Communication mechanisms

The parties involved in the Montreal wastewater discharge file regularly collaborate on a number of major files. A lot of communications and information sharing mechanisms are already in place at various operational levels between the governments of Canada and Quebec, the City of Montreal, and Indigenous communities.

For example, the City of Montreal has a standing committee on wastewater monitoring. It is composed of representatives of the City of Montreal, MDDELCC and some areas of prime concern committees¹.

In addition, representatives of a majority of federal and provincial departments with responsibilities that relate to the St. Lawrence ecosystem are part of the governance structure of the Canada-Quebec Agreement on the St. Lawrence.

The participants indicated that these structures were not used in the discharge matter.

¹ These committees are local organizations with the mandate of bringing together the main users of a particular area of the St. Lawrence and facilitating concerted action amongst them to resolve local and regional problems regarding the ecosystem of the St. Lawrence River.

4.1.3 – Availability and sharing of expertise

The City of Montreal, the Government of Quebec, and the Government of Canada have and produce large amounts of scientific data on the state of the St. Lawrence River. In general, the data are made available to the public, for example, through the *Overview of the State of the St. Lawrence* report, which was developed under the Canada-Quebec Agreement on the St. Lawrence. A number of studies on the effects of wastewater on the aquatic plants and animals found in the waters of the St. Lawrence are also available from a variety of government sources.

Despite this, as was stressed in the report mandated by ECCC and produced by the group of independent experts, “[t]he lack of information on the effects of discharging untreated wastewater into the St. Lawrence River must be addressed in order to avoid continual questions from the public and the scientific community regarding the risks that such discharges may have on aquatic plants and wildlife.”² According to some participants in the review process, the scientific monitoring measures for the November 2015 discharge will address this shortcoming to a certain extent.

4.1.4 – Possible solutions with respect to intergovernmental communications

The November 2015 discharge demonstrated the importance of establishing clearer communications channels between the City of Montreal, MDDELCC, and ECCC. Preferably, this should be done through existing structures of collaboration between the different levels of government.

The environmental monitoring carried out by the governments should be independent of that done by the City of Montreal. However, better coordination between the teams responsible for the monitoring of the St. Lawrence River before, during, and after the discharge could have facilitated some complementary activities.

4.2 – Engagement and consultation of Indigenous communities

4.2.1 – Perspectives of the Indigenous communities

Prior to the November 2015 discharge, little information was provided to Indigenous communities by the City of Montreal, MDDELCC, or ECCC. At the time when the First Nation communities concerned learned of the discharge project through the media in fall 2015, representatives of the City of Montreal, MDDELCC, or ECCC had not yet contacted them on this matter.

² <https://www.ec.gc.ca/eau-water/default.asp?lang=En&n=9FF2FE18-1#general>

The representatives of the Mohawk Councils of Kahnawake, Akwesasne, and Kanésatake, and the Grand Conseil de la Nation Waban-Aki consider that all the criteria established by the Supreme Court of Canada that would trigger the Crown's duty to consult and accommodate Indigenous communities were present during the events that led to the discharge of wastewater by the City of Montreal in the fall of 2015. They feel that MDDELCC and ECCC failed in their duty and honour of the Crown by not consulting them properly.

The information that Indigenous authorities needed prior to the discharge to answer questions from their community members, and to assess the impact on their ancestral or treaty rights, was only provided after the discharge.

Some Indigenous representatives feel that their communities should have been more involved in the monitoring measures before, during, and after the discharge. They deplore the governments' lack of awareness of the environmental work that their organizations are already doing, and of the scientific resources at their disposal.

4.2.2 – Consultation of Indigenous communities

According to the case law established by the Supreme Court of Canada, the Crown has a duty to consult and, where appropriate, accommodate when it contemplates conduct that may adversely affect potential or established ancestral or treaty rights. This obligation applies equally to the federal government, and to the provincial and territorial governments.

To help government officials fulfill this duty, the Government of Canada developed the *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), and the Government of Quebec published the *Interim Guide for Consulting the Aboriginal Communities* (updated in 2008).

The Mohawk and Abenaki representatives feel that MDDELCC's decision to issue a certificate of authorization to the City of Montreal, and the Minister of ECCC's decision to make a Ministerial Order under the *Fisheries Act*, triggered the Crown's legal duty to consult and, where appropriate, accommodate them. According to the Mohawk and Abenaki representatives, based on the information they had, these two decisions allowing the City of Montreal to proceed with the discharge constituted conduct by the Crown that might adversely affect potential or established ancestral or treaty rights. For example, the representatives of these communities mentioned the potential impacts on traditional activities of fishing, waterfowl hunting, and harvesting medicinal plants carried out at that time of year.

In view of the information disseminated in the media and their community members' growing concern about the future discharge, some Indigenous representatives took the initiative to write to the City of Montreal, MDDELCC, and ECCC. This was to express concern, to remind them of the importance of fulfilling

the legal duty to consult, and to request the necessary information to properly understand the potential impact of the planned discharge on their ancestral and treaty rights. The City of Montreal and MDDELCC did not respond to the letters.

Although ECCC did respond, according to the Indigenous representatives, the information provided by the Department was insufficient. They feel that the time frame set by ECCC to reply to their correspondence was unrealistic. Some of ECCC's requests and invitations to the Indigenous representatives, sometimes sent on the weekend, had time frames of barely 24 hours.

Before the discharge, ECCC invited the Indigenous representatives to participate in a meeting with the Department's mandated group of independent scientific experts (October 29, 2015), and to participate in a second meeting with the representatives of the City of Montreal and MDDELCC, where the conclusions of the final report by the group of experts were to be presented (November 6, 2015).

The Indigenous communities' representatives feel that these two meetings did not enable them to obtain the information required to properly assess the impacts that the discharge could have on their ancestral and treaty rights. They also consider that notification timelines for these meetings were inappropriate and disrespectful.

Lastly, the Indigenous representatives deplored the fact that several weeks after the discharge of untreated wastewater, ECCC provided them with important information that they felt should have been provided before the discharge event. This information was conveyed at two information meetings organized by ECCC in collaboration with the Water Service of the City of Montreal on December 15, 2015, in Odanak, and on December 16, 2015, in Montreal.

MDDELCC indicated that it complied with the parameters established by the *Interim Guide for Consulting the Aboriginal Communities* (updated in 2008) throughout the process, leading to the issuance of the certificate of authorization for the discharge to the City of Montreal. According to MDDELCC, there was no requirement to trigger consultations with Indigenous communities. First, this is due to the fact that the potential environmental impacts, including the effects on fish, according to MDDELCC, were minor and limited to a specific area. For the Department, this meant that there was little possibility that traditional activities would be adversely affected, if any such activities took place in that area. Second, according to MDDELCC, there was no alternative to the planned work, which limited the possibility of amending the project to meet Indigenous communities' concerns. However, MDDELCC does acknowledge that outside the framework of the legal duty to consult, information on the project could have been sent to Indigenous communities.

The representatives of the First Nations pointed out that there was no interaction between them and the Government of Quebec before, during, or after the discharge took place in November 2015. They deplore the fact that no Quebec

government representative participated in the March 8, 2016 workshop organized by ECCC in conjunction with the comprehensive review. According to these representatives, this absence prevented an open, transparent and respectful dialogue with the Government of Quebec on this file.

Although the City of Montreal does not have a direct duty to consult Indigenous communities, the Mohawk and Abenaki representatives consider that the City, as the project's proponent, could have provided them with more information before proceeding with the discharge. However, they acknowledge that the City made an effort to inform them of the progress of the work and of the monitoring of impacts after the discharge. The City of Montreal recognized, in its report on the work, that their communications plan "[translation] *did not contain any engagement measures, or any measures for explaining the technical aspects of the work in plain language in order to increase social acceptability.*"³

4.2.3 – Possible solutions with respect to the engagement and consultation of Indigenous communities

Better and more timely dissemination of the information available on the project would have alleviated some of the Indigenous communities' concerns about the project and its impacts. This information was not provided sufficiently in advance of the planned discharge event, thus preventing interested parties from responding to concerns of their community members.

According to the representatives of the First Nations, if a similar situation arises in the future, the different levels of government should provide accurate and relevant information as soon as possible, particularly if the governments are contemplating making a decision that could adversely affect potential or established ancestral or treaty rights. However, the representatives reiterated that the consultation of Indigenous communities is not limited to exchanging information. In their opinion, this consultation should include true consideration of different viewpoints and significant discussions about potential impacts, as well as appropriate mitigation and accommodation measures.

For the First Nations representatives, the consultation of Indigenous communities by the Crown should not be limited to the legal duty to consult; instead, it should be included in the adoption of best practices by governments. Beyond the complex requirements arising from case law on consultation, one of the main objectives of the consultation process should always be to establish healthy working relationships between the governments and the Indigenous Peoples.

Furthermore, the representatives believe that all levels of government should give Indigenous communities enough time to review and to analyze the information that

³ Document submitted to the Executive Committee of the City of Montreal on February 3, 2016, p. 42.

is provided, and to communicate this information to their elected officials and community members. This should be done so their views can be sought, and a position regarding the issues raised can be developed.

To improve knowledge of a project's potential effects on Indigenous rights, the governments should communicate as soon as possible after being informed with the Indigenous communities potentially affected by a planned discharge requiring a decision on their part. This would enable them to verify what Indigenous rights and interests are in the project area, what potential negative repercussions the project might have on those rights, and, if the project is undertaken, what measures could be put in place to mitigate negative repercussions.

5 – Recommendations

5.1 – Intergovernmental communication

5.1.1 – Put in place a new collaborative structure between ECCC and MDDELCC to facilitate discussion surrounding major projects

The November 2015 discharge demonstrated that it would be advantageous for the Governments of Canada and Quebec to establish a clear structure for sharing available information through their organizations. This structure would permit effective collaboration and timely dissemination of information through specific contacts with widespread knowledge of the files. Representatives of ECCC and MDDELCC will soon begin discussions to formalize such a structure.

With this formal structure in place for sharing information about major projects or key files, such as the November 2015 discharge, the governments will be able to discuss the sharing of expertise and scientific data, enforcement approaches, regulations in force, engagement with partners, and consultations with Indigenous communities.

The discussions held in conjunction with the comprehensive review revealed that the governments deal with varied and complex environmental files. Shared jurisdiction in environmental protection means that the Governments of Canada and Quebec do complementary work in a number of sectors. This has led their representatives to establish working relationships at various operational levels, generally in specific areas and fields of expertise. Developing an overarching vision of how to handle major files, supported by a defined structure, will facilitate decision making.

The departmental structures and administrative organization of ECCC and MDDELCC, while related, have specific characteristics that could limit the effective flow of information produced or managed by these organizations, and result in the multiplication of points of contact at different operational levels. A dedicated structure would serve to strengthen all of these contacts while allowing information to flow beyond the front-line administrative units.

5.1.2 – Strengthen the use of existing communication mechanisms between the various orders of government

Governance structures are already in place to encourage information sharing among stakeholders on issues related to the St. Lawrence river ecosystem, such as the City of Montreal wastewater file. A standing committee on wastewater monitoring composed of representatives of Montreal, MDDELCC, and certain areas of prime concern committees serves as a forum for discussing matters such

as the November 2015 wastewater discharge. Had representatives of the various relevant groups been serving on the committee, this would probably have helped to clarify the position of all of the stakeholders long before fall 2015, and thus ensured that more cohesive information about Montreal's project was available.

A majority of departments and agencies of the Governments of Canada and Quebec with responsibilities or interests related to the St. Lawrence river ecosystem are involved in the Canada-Quebec Agreement on the St. Lawrence. This structure permits provincial and federal departments to pool their expertise, competencies, and resources to work collaboratively to conserve the St. Lawrence river ecosystem. Steps are being taken to make the Canada-Quebec Agreement on the St. Lawrence Steering Committee a designated forum for the exchange of information on all government initiatives and concerns related to the St. Lawrence ecosystem and, where appropriate, make recommendations to the Co-chairs concerning the measures to be taken in these projects.

By using the existing structures, the governments can benefit from existing relationships to ensure that information and knowledge are shared at all levels of the organizations involved.

In order to maximize co-operation, and to ensure the effective management of regional issues, ECCC, MDDELCC, and the City of Montreal should seek to increase awareness of their respective structures. This could help to better identify the designated resource persons for the files in each organization.

5.1.3 – Share scientific expertise and involve other partners where possible

When it comes to information sharing, the expectations of the public and of the governments' partners are higher today than ever. Sharing scientific expertise is crucial to enable a sound understanding of complex files, as is often the case in the environmental field.

In a complementary manner, consistent with their respective jurisdictions, ECCC and MDDELCC should systematically promote the upstream sharing of scientific expertise on projects that could potentially have significant environmental effects. This approach would ensure that appropriate strategic communications plans are developed, improved coordination of environmental monitoring programs, and the fostering of informed, science-based decision making.

A number of stakeholders and partners of government organizations have scientific resources that could have been used in this matter, particularly for environmental monitoring during and after the discharge. Making use of the expertise of these groups, including Indigenous groups, could improve the social acceptability of certain projects.

5.1.4 – Clarify the scope and application of the *Wastewater Systems Effluent Regulations* and the *Fisheries Act* with regard to planned discharges of untreated wastewater by municipalities

According to the representatives of the City of Montreal and the Government of Quebec, considerable confusion was created by the issuance of Ministerial Orders, pursuant to section 37 of the *Fisheries Act*, to temporarily prevent the discharge and to impose conditions on the City of Montreal. ECCC believes that it is important to fully understand the applicable regulatory regime, including the Minister's discretionary powers and recourse, to adequately plan major maintenance projects on municipal wastewater systems.

Consequently, ECCC will strengthen existing channels of communication between ECCC and the MDDELCC to ensure that this information is communicated effectively, including through the new proposed collaborative structure (5.1.1). ECCC will arrange a regular annual meeting, to obtain information from the MDDELCC on the planned upgrades and maintenance of the municipal wastewater systems in the province. This information will then be shared and coordinated within ECCC such that any issues that may arise are well managed. ECCC will also use the information to have annual and structured discussions with potentially affected Indigenous communities. This information sharing will not have the effect of exempting municipalities of their legal obligations under the *Fisheries Act*, including that of notification before a spill [art. 38 (5)] and report after each event [art. 38 (7)].

The discharge of untreated wastewater in Montreal in November 2015 drew attention to certain elements that should be adjusted by ECCC, such as the administration of the *Fisheries Act*. An internal exercise was initiated for that purpose and completed in 2016.

To clarify the regulatory regime surrounding wastewater systems maintenance projects, a point raised by the participants during the course of the review, the governments of Canada and Quebec will pursue their discussions to finalize an equivalency agreement under the WSER. Under an equivalency agreement, all or parts of federal regulation 'stand down' when the provincial or territorial regulatory regime is equivalent in effect to the federal regulation. Discharges such as the November 2015 discharge in Montreal (a form of discharge not authorized under the *Fisheries Act* or the *WSER*) would however continue to be subject to the prohibition in the *Fisheries Act*. In other words, had an equivalency agreement been in place at the time of the Montreal discharge, the Minister's authorities and constraints would have been the same.

The Mohawk Council of Kahnawake (MCK) has expressed reservations about an equivalency agreement on the wastewater systems effluents regulations between the Governments of Canada and Quebec. The MCK believes that Canada would see this agreement as a means of discharging its duty to consult based on the honor of the Crown. The MCK also believes that such an agreement would be

counter to the fundamental principles of openness, transparency, and respect, cited in the November 9, 2015 Ministerial Order.

ECCC will engage with Indigenous communities through an engagement and consultation plan before concluding an equivalency agreement between the Governments of Canada and Quebec on the *Wastewater Systems Effluent Regulations*.

5.2 – Engagement and consultation with Indigenous communities

5.2.1 – Initiate discussions between ECCC and the Secrétariat aux affaires autochtones du Québec (SAA) to better understand what, in this case, led to differing approaches on the duty to consult, to identify common observations with regard to this duty

The document *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* states: “In the *Haida* and *Taku River* decisions in 2004, and the *Mikisew Cree* decision in 2005, the Supreme Court of Canada (SCC) held that the Crown has a duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. This duty has been applied to an array of Crown actions and in relation to a variety of potential or established Aboriginal or Treaty rights. In these decisions, the SCC determined that the duty to consult stems from the Honour of the Crown and the Crown’s unique relationship with Aboriginal peoples.”⁴

To fulfill this duty, the governments of Canada and Quebec have developed guidelines to help their officials with its interpretation. Despite the existence of these frameworks, certain differences in approaches have been observed, as in the case of the November 2015 discharge.

To improve collaboration in this subject area, representatives of ECCC and the SAA will hold discussions on this topic to share the thinking and the analyses that led to their respective decisions on the duty to consult in this case. These discussions may yield common observations to improve the predictability of each organization’s analyses.

Although the case of the November 2015 discharge specifically involved ECCC and MDDELCC, it may be advisable for the Governments of Canada and Quebec to hold similar government-wide discussions on the duty to consult to promote the exchange of information on this subject. These discussions may require the

⁴. *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf

involvement of the Department of Indigenous and Northern Affairs Canada (INAC) as the federal coordinator and advisory department in this area.

5.2.2 – Require the production of an Indigenous community consultation plan when section 37 of the *Fisheries Act* is invoked with respect to maintenance projects on wastewater treatment systems

To improve the dissemination of information to Indigenous communities in matters involving the discharge of untreated wastewater, ECCC undertakes to put in place a consultation plan for Indigenous groups when it invokes section 37 of the *Fisheries Act*. This plan may include, but is not limited to, analysis of when the duty to consult is triggered.

The comprehensive review of the events that led to the November 2015 discharge clearly demonstrated that the timely dissemination of relevant information to Indigenous communities would have improved the overall management of this matter and, incidentally, would have strengthened ties between the representatives of these communities and those of the Governments of Canada and Quebec.

By implementing such plans, ECCC will be able to share relevant information with Indigenous groups on the projects, thereby allowing them to inform their members, and do required follow ups, as needed.

5.2.3 – Commit to the dissemination of information to Indigenous communities

Although the certificate of authorization issued by MDDELCC for the discharge of untreated wastewater required the implementation of a communications and information plan by the City of Montreal, communications plans targeting Indigenous communities and a broader audience would have been desirable.

In its report on the work, the City of Montreal noted: [translation] “*The communication plan produced for this project was for information purposes, similar to those produced for more common operations; this plan did not contain any measures for concerted actions, nor any measures for explaining the technical aspects of the work in plain language in order to increase social acceptability.*”⁵

Greater coordination between the levels of government on the production of the communications plan would have helped limit confusion about the roles and responsibilities of each government. If the development of the plan had been better coordinated, ECCC could have helped the City of Montreal identify key stakeholders in Indigenous communities, and thus helped facilitate communications with them.

⁵. Document submitted to the Executive Committee of the City of Montreal on February 3, 2016, p. 42.

5.2.4 – Ensure that the governments share, where possible, the information at their disposal on Indigenous ancestral and treaty rights (established or potential) and the findings of their analyses on the need to consult Indigenous groups in keeping with the Crown’s legal duty

For major projects like the November 2015 discharge, ECCC undertakes to contact the representatives of the Quebec government to share information on Indigenous treaty rights (established or potential) in a timely manner, whether through a new structure (recommendation 5.1.1) or through the ties established between representatives of the Governments of Canada and Quebec.

These rights, and the exercise of these rights, are complex matters. The Governments of Canada and Quebec would benefit from sharing the information they have on these rights and their analyses of the need to consult Indigenous communities in keeping with the Crown’s legal duty.

Greater collaboration between the Indigenous affairs specialists in the Governments of Canada and Quebec could make it possible to more accurately define the scope of the rights of the Indigenous communities concerned and the anticipated impacts of certain projects. To this end, INAC already provides general access to the Aboriginal and Treaty Rights Information System (ATRIS) that offers real-time information on indigenous rights (http://sidait-atris.aadnc-aandc.gc.ca/atris_online/).

In similar circumstances, ECCC believes that the federal government’s expertise in Indigenous affairs could be made available to the City of Montreal to facilitate communications and engagement with Indigenous communities.

6 – Conclusion

The comprehensive review of the events leading to the discharge of untreated wastewater into the St. Lawrence River by the City of Montreal in November 2015 made it possible to develop a detailed timeline of the incident, and to analyze intergovernmental communications and efforts to engage and consult with Indigenous communities. The review also gave the impacted Indigenous communities an opportunity to express their views on how events unfolded before, during, and after the discharge. The analysis of the information gathered throughout the review process allowed ECCC to develop certain recommendations and to prepare this report. ECCC is responsible for carrying out all the recommendations, some of which will require the collaboration of the Quebec government and the City of Montreal. Some work has already been done to address key findings and recommendations of the comprehensive review.

Concerning intergovernmental communications, ECCC recommends putting in place a new collaborative structure with MDDELCC, strengthening the use of existing communications mechanisms already in place, to evaluate the possibility of sharing scientific expertise, and to involve other partners in monitoring efforts. Furthermore, ECCC should also clarify the scope and application of the *Wastewater Systems Effluent Regulations* and the *Fisheries Act* with regard to planned discharges of untreated wastewater by municipalities.

With regard to the engagement and consultation with Indigenous communities, the representatives of the First Nations find it unacceptable that they were not adequately consulted by MDDELCC and ECCC. In this matter, the Governments of Canada and Quebec separately analyzed their duty to consult Indigenous communities and these analyses produced different results. ECCC therefore recommends that discussions be held between the two governments to discuss these differences and to identify common observations on the duty to consult. For ECCC, it is important to pay special attention to the timely dissemination of information to Indigenous communities. In the opinion of the Department, it is crucial to rapidly communicate information in situations that could have adverse effects on established or potential Indigenous or treaty rights and to engage with Indigenous communities so that they in turn can effectively communicate the information to their communities.

The observations, findings, and recommendations set out in this report were used in an internal review at ECCC on the administration of the *Fisheries Act*. In addition to the recommendations that have been made, ECCC believes that the comprehensive review confirms the importance of ensuring that municipal, Indigenous, provincial, territorial, and federal partners develop and maintain effective working relationships. As it pledged to do throughout the comprehensive review process, ECCC will continue the dialogue with its partners to follow up on the recommendations of this report in the spirit of respect, transparency, and openness.

Annex 1 – List of participants in the review process

City of Montreal

Richard Fontaine
Alain Charron
Michel Malo
Guy Deschamps
Carole Fleury
Tony Di Fruscia
Roger Lachance
Paula Urra

Grand Conseil de la Nation Waban-Aki (Odanak and Wôlinak)

Suzie O'Bomsawin

Mohawk Council of Kahnawake

Chief Clinton Phillips
Chief Christine Zachary-Deom
Patrick Ragaz
Francis Walsh

Mohawk Council of Kanesatake

Grand Chief Serge Simon

Mohawk Council of Akwesasne

Chief Troy Thompson
Peggy Pyke-Thompson
Curtis Lazar

Ministère du Développement, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC)

Hélène Proteau
Luc St-Martin
Pascale Labbé

Environment and Climate Change Canada (ECCC)

Geoff Mercer
Nathalie Turgeon
Jean Picard
Alexandre-Guy Côté
Caroline Blais
James Arnott
Isabelle Mayr
Hélène Bouchard
Marc-Antoine Giroux

Annex 2 – Chronology of events that led to the discharge of untreated wastewater in the St. Lawrence River by the City of Montreal in November 2015

- September 3, 2014: As required by the *Fisheries Act*, the City of Montreal informs Environment Canada (EC) of its plan to discharge eight billion litres of untreated wastewater in the St. Lawrence River in October 2015; in order to do maintenance and construction work.
- February 27, 2015: The ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC) issues a certificate of authorization for the proposed work and the temporary closing of the southeast interceptor.
- September 16, 2015: The City of Montreal sends an email to the province of Quebec, advising them of the City's planned discharge. EC Enforcement is copied on the email.
- September 28, 2015: The Environmental Enforcement Division (EED) of EC informs the City of Montreal that its wastewater treatment system is subject to WSER and that the City must speak to the Wastewater Program about applying for a Temporary Authorization to Bypass under the WSER.
 - September 29, 2015: City of Montreal officials contact the Environmental Stewardship Branch Wastewater Program about the WSER and provide information about the project.
 - On October 2, 2015, the Environmental Stewardship Branch Wastewater Program official informs City of Montreal officials in writing that WSER does not include a mechanism to authorize the type of project being proposed.
- October 8, 2015: The Grand Conseil de la Nation Waban-Aki (GCNWA) writes to the ECCC Minister to express its concern about the untreated wastewater discharge planned by the City of Montreal. The GCNWA considers that the duty to consult Indigenous communities is triggered and that the Governments of Quebec and Canada have to consult the Abenaki before authorizing the discharge.
- October 8, 2015: The EC Minister asks the City of Montreal to provide information invoking subsection 37(2) of the *Fisheries Act*; and representatives from EC meet with the City of Montreal, and the Government of Quebec to review the information.

- October 8, 2015: The MDDELCC publishes a document online called “Travaux prévus à l’intercepteur sud-est du réseau d’égout de Montréal en 2015 : considérations environnementales”. This document presents the technical, regulatory, and environmental outline of the project.
- October 14, 2015: The Mohawk Council of Kahnawake (MCK) writes to the Minister of EC to express its concerns about the City of Montreal’s planned discharge of untreated wastewater. The MCK believes that the legal duty to consult Indigenous groups has been triggered and that the Governments of Quebec and Canada must consult the Mohawk people before authorizing the discharge.
- October 14, 2015: The EC Minister notifies the City of Montreal that she is planning to issue an interim Ministerial Order under subsection 37(2) of the *Fisheries Act*.
 - The City of Montreal has until October 16 to make representations to the Minister.
- October 16, 2015: The Mayor of Montreal responds to the EC Minister, expressing concerns about the interim Ministerial Order.
 - The EC Minister issues an interim Ministerial Order to prevent the City of Montreal from carrying out the planned discharge, pending the results of an independent scientific review.
- October 18, 2015: The EC Minister mandates an independent scientific panel to review the City of Montreal’s planned discharge of eight (8) billion litres of untreated wastewater into the St. Lawrence River.
- October 19, 2015: Representatives of EC meet with the panel to begin the review of the City of Montreal’s plan.
- October 19, 2015: Federal election.
- October 23, 2015: Representatives of the City of Montreal brief the panel on the project, with EC representatives in attendance.
- October 28, 2015: The outgoing EC Minister delegates the decision on this file to the future Minister of the Environment.
- October 29, 2015: The interim Ministerial Order is extended to November 9, 2015.

- October 29, 2015: Representatives of the Mohawk First Nations (Kahnawake, Akwesasne and Kanesatake) and Abenaki First Nations (Odanak, Wôlinak) meet with EC representatives and the panel.
- October 30, 2015: EC receives the panel's report.
 - The findings indicate that the planned discharge of untreated wastewater by the City of Montreal is not an ideal solution, but, that the possibility of an unanticipated discharge represents an even greater environmental risk.
 - Additional mitigation measures, as well as alternative measures for future incidents, are proposed.
- November 2, 2015: An amendment to the Ministerial Order is issued, extending the suspension of the discharge until the end of the day on November 9, 2015, to give EC time to conduct a comprehensive review of the panel's findings.
- November 4, 2015: Swearing-in of the new Ministry (Cabinet). Catherine McKenna is appointed Minister of Environment and Climate Change.
- November 6, 2015: Scientific experts from Environment and Climate Change Canada (ECCC) hold two technical briefings on the panel's findings: one for representatives of the Indigenous communities, the City of Montreal, and the Province, and the other for media representatives.
- November 6, 2015: The Minister of ECCC reaches out to Clinton Phillips, Chief of the Mohawk Council of Kahnawake; Denis Coderre, Mayor of Montreal; and her Quebec counterpart, David Heurtel, Minister of the MDDELCC.
- November 7, 2015: The Minister of ECCC writes to the Indigenous communities, requesting their comments on the draft Ministerial Order she is planning to issue under the *Fisheries Act*.
- November 9, 2015: Under subsection 37(2) of the *Fisheries Act*, the Minister issues a Ministerial Order requiring the City of Montreal to modify its plan to discharge untreated wastewater into the St. Lawrence River. The Order requires the City of Montreal to:
 - prepare and have in place a management plan with respect to unanticipated discharges from large industrial, institutional or commercial facilities to the City of Montreal's sewers during the construction period;
 - carry out visual surveillance during the discharge and take all necessary actions to clean affected areas;

- increase monitoring of water quality, sediment and plants before, during and after the discharge and communicate the monitoring data to ECCC; and
 - participate in a comprehensive review of the events leading to the incident, which will be led by ECCC and will also include affected First Nations, the Province, the City and other parties involved, reflecting the commitment to establishing and maintaining respectful relations with First Nations.
- November 10, 2015: The Quebec government publishes its control and monitoring plan, the purpose of which is to ensure compliance with the conditions set out in the certificate of authorization issued to the City of Montreal to reduce the environmental impact of the work, and to protect the health and safety of residents. The plan will be implemented starting November 11, 2015.
 - November 10, 2015: The City of Montreal begins releasing untreated wastewater in order to start the repair work.
 - November 15, 2015: The City of Montreal announces that the work has been completed sooner than expected and that approximately five (5) billion litres have been discharged, less than initially estimated.
 - Water samples show that bacteriological levels remained within the anticipated range during the discharge.
 - December 15, 2015: The Minister of ECCC meets with the Mohawk Council of Kanesatake to discuss the file.
 - December 15 and 16, 2015: ECCC holds two briefings for the Mohawk and Abenaki First Nations. The City of Montreal presents its wastewater system and a summary of the work carried out in November 2015.