



Midpeninsula Regional  
Open Space District

R-13-59  
Meeting 13-14  
June 12, 2013

## AGENDA ITEM 7

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Authorization to Expend \$113,000 in Additional Monies for Legal Services by the Law Firm Shute, Mihaly & Weinberger LLP on the Lehigh Quarry California Environmental Quality Act (CEQA) Litigation, for a Total Authorized Amount of \$263,000, and Increase the Operating Budget by \$41,000.

### GENERAL MANAGER'S RECOMMENDATION

A handwritten signature in black ink, appearing to be "JLQ", written over the end of the "GENERAL MANAGER'S RECOMMENDATION" header.

Increase the authorization for the General Counsel for litigation services by Shute, Mihaly & Weinberger LLP, regarding the challenge to the County of Santa Clara's ("County") approval of the Environmental Impact Report ("EIR") on the Lehigh Permanente Quarry Reclamation Plan Amendment ("Project"), as follows:

1. Increase the total amount authorized by \$113,000 from the previously approved amount of \$150,000, to a total not to exceed amount of \$263,000 for unanticipated additional services relating to legal and subject-matter expert support of pre-litigation settlement efforts, coordination with fellow plaintiffs, air quality monitoring project work, and other unanticipated issues of legal complexity;
2. Increase the Natural Resources Department's Fiscal Year 2013-14 operating budget by \$41,000 to cover the additional contract costs.

### SUMMARY

The District has a contract with Shute, Mihaly & Weinberger LLP to represent the District in its challenge to the County's EIR on the Project. The original estimate for litigation costs was \$150,000, which the Board approved on July 11, 2012. Due to additional service requests and issues not anticipated at that time, an additional \$113,000 is required to pursue the litigation through the trial court phase, for a total not to exceed amount of \$263,000.

### DISCUSSION

The District entered into a Legal Retainer Agreement with Shute, Mihaly & Weinberger LLP on July 6, 2012, to review the Draft and Final EIR for the Lehigh Permanente Quarry Reclamation Plan Amendment ("Project") and related documents as necessary to provide the District with an evaluation of a potential challenge under the California Environmental Quality Act to the County of Santa Clara's certification of the EIR and approval of the Project.

On July 11, 2012, the Board met in closed session regarding the Lehigh quarry operations and approved outside legal services with Shute, Mihaly & Weinberger LLP approving the expenditure of the estimated litigation costs of up to \$150,000.

As the Board is aware, however, before the litigation was filed on November 29, 2012, the District engaged in extensive settlement efforts with the County and Lehigh. Many technical issues were raised and explored in those efforts at resolution, requiring support from the Shute, Mihaly & Weinberger law firm and related air quality and mining experts retained under that litigation contract. As previously reported to the Board, these costs were absorbed by the litigation budget, though they were not included in the original \$150,000 litigation cost estimate. There was also a separate related lawsuit filed by the group Bay Area Clean Environment Inc., challenging the same Project under CEQA. This created an additional need for litigation counsel review and coordination of our case with the filings, record preparation, briefing, and issues that were developing separately in that case. Like the negotiation support work, this too involved using litigation counsel funds for tasks not included in the original estimate. These additional sources of demand for litigation counsel services, as well as other legal issues encountered and discussed in closed session, all combined to drive up the costs for this litigation to a revised estimated total of \$263,000 to get through the hearing on the merits, which is now scheduled for September 13, 2013.

Prior to the completion of the litigation record and first round of briefing, staff had allocated \$80,000 in the current fiscal year budget which, combined with last year's \$150,000 (only \$142,000 actually used) budget, was thought to contain enough to support both the litigation and the above-described related additional contract tasks. Cost estimates from the law firm are now more exact as the litigation moves to the final stages of briefing and oral argument (the final task prior to a ruling from the court on the case). Thus, to support the increased contract work with the necessary budget for the remainder of this fiscal year requires an additional \$41,000.

### **FISCAL IMPACT**

The FY2013-14 Natural Resources Department budget will require an increase of \$41,000, which will cause the operating budget to exceed the OpEx Guideline of 55%. However, the General Manager proposes to cover these additional costs with funds from the fees paid to the District by Santa Clara County Parks for the District's management of the County's facilities at Rancho San Antonio Open Space Preserve, as are all of the costs for the Lehigh litigation and air monitoring program. This use of Rancho Agreement funds will offset the \$41,000 increase, enabling the District to remain within its OpEx Guideline.

### **BOARD COMMITTEE REVIEW**

No Board Committee review is required for this portion of the Project.

### **PUBLIC NOTICE**

Public notice of this Agenda Item was provided per the Brown Act. No additional notice is required.

**CEQA COMPLIANCE**

The proposed action is not a project under CEQA and no environmental review is required.

**NEXT STEPS**

Upon Board authorization, the General Manager and General Counsel will amend the contract with Shute, Mihaly & Weinberger LLP to reflect the additional \$113,000 of anticipated costs, and prepare a \$41,000 budget adjustment for the same purpose.

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