



Midpeninsula Regional  
Open Space District

R-14-42  
Meeting 14-07  
February 26, 2014

### AGENDA ITEM 3

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Authorization to Expend \$27,000 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 \$290,000

#### GENERAL MANAGER'S RECOMMENDATIONS

A handwritten signature in black ink, appearing to be "JLW".

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:

Increase the total amount authorized by \$27,000 from the previously approved amount of \$263,000, to a total not to exceed amount of \$290,000 for unanticipated additional services relating to legal and subject-matter expert support of settlement efforts, coordination with fellow plaintiffs, air quality monitoring project work, disputes over the record preparation, late-arising case law, and other unanticipated issues of legal complexity;

#### 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 previously authorized amount for litigation costs is \$263,000, as approved by the Board approved on July 11, 2012 and on June 26, 2013. Due to additional work required to address related case law as it developed during the briefing phase, and issues not anticipated at that time in order to pursue the litigation through the trial court phase, an additional \$27,000 is required, for a total not to exceed amount of \$290,000. These additional expenses will be covered by savings in the District's FY2013-14 operating budget.

#### 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, over a period of several months, 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 the consultant costs 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, resolving disputes over the record, 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.

Recognizing our concern about the escalating litigation costs, Shute, Mihaly and Weinberger have “written down” (not billed) approximately \$30,000 in attorney time working on this matter. Nevertheless, toward the conclusion of the matter, due to the fact-intensive nature of the arguments, and the need to carefully coordinate with the related lawsuit as it was folded in with ours, the costs have still exceeded the amended estimate by another \$27,000.

The Superior Court case has now been fully briefed, the matter heard, and a judgment has been entered. As directed by the Board in the closed session on February 12, 2014, we are preparing a Notice of Intent to Appeal the ruling to the Court of Appeal, and that will be filed no later than February 28, 2014.

Since the February 12<sup>th</sup> Board meeting, an additional dispute has arisen, concerning the assessment of excessive costs by Lehigh and the County against the District. The amount requested for amendment of the contract therefore includes a small amount allocated to challenging those costs in the trial court.

### **FISCAL IMPACT**

These additional costs will be absorbed through expenditure savings in the District’s FY2013-14 Services and Supplies budget. Therefore, no budget adjustment will be required.

### **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 \$27,000 of anticipated costs.

Responsible Department Head:  
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