



## CITY OF MILPITAS AGENDA REPORT (AR)

<b>Item Title:</b>	<b>Approve and Authorize the City Manager to Execute Amendment No. 5 to the Cost-Sharing Agreement Among West Valley Sanitation District, Cupertino Sanitary District, County Sanitation District No. 2-3 of Santa Clara County, Burbank Sanitary District, and the City of Milpitas</b>
<b>Category:</b>	Consent Calendar-Leadership and Support Services
<b>Meeting Date:</b>	6/1/2021-
<b>Staff Contacts:</b>	<b>Christopher J. Diaz, City Attorney (408) 586-3040</b>
<b>Recommendation:</b>	Approve and authorize the City Manager to execute Amendment No. 5 to the Cost Sharing Agreement among West Valley Sanitation District, Cupertino Sanitary District, County Sanitation District No. 2-3 of Santa Clara County, Burbank Sanitary District, and the City of Milpitas

### **Background:**

In 2015, the various agencies that treat their wastewater at the San Jose Santa Clara Regional Wastewater Facility (RWF) began discussions regarding their existing contractual arrangement with San Jose and Santa Clara as co-owners of the RWF. In particular, the agencies, including the City of Milpitas, West Valley Sanitation District, Cupertino Sanitary District, County Sanitation District No. 2-3 of Santa Clara County, and Burbank Sanitary District, worked together to discuss concerns regarding increased costs associated with continuing to treat their wastewater at the RWF and the need for amendments to the Master Agreements that control the relationship each agency has with San Jose and Santa Clara as owners of the RWF. The costs associated with the RWF ultimately impact the City's managing and operating of the sewer enterprise.

Shortly after beginning these discussions, on August 25, 2015, the agencies formed a Common Interest Group pursuant to a Common Interest, Privilege, and Confidentiality Agreement ("Common Interest Agreement"), in order to exchange privileged and confidential information among themselves to advance their common interests in negotiating amendments to their respective Master Agreements for wastewater treatment with the cities of San José and Santa Clara.

In March of 2016, the Common Interest Group also entered into a Cost-Sharing Agreement to share costs when authorized by each party. Both the Common Interest Agreement and Cost Sharing Agreement have been amended over the years.

In 2018, the Common Interest Group filed a lawsuit against the cities of San Jose and Santa Clara regarding the above issues after exhausting all efforts to resolve the dispute. In particular, the Common Interest Group participated in a year-and-a-half administrative claims process, four all-day mediation sessions spanning a six-month period before a retired judge, the filing of two substantial administrative complaints, and two hearings before the Treatment Plant Advisory Committee ("TPAC") in order to encourage the cities of San Jose and Santa Clara to resolve the dispute. Despite that effort, the most critical issues and concerns of the Common Interest Group remain unresolved and the Master Agreements have not been amended to date.

After the filing of the lawsuit, the City of Milpitas opted to be represented by the City Attorney's office in the litigation, while the remaining Common Interest Group members opted to be represented by an outside private law firm. At the time, the remaining Common Interest Group members took the position that the City of Milpitas was also responsible for the costs associated with the outside private law firm, while Milpitas disagreed.

Representation by the City Attorney's office was important at the time, as the City of Milpitas attempted to work with San Jose and Santa Clara to resolve the dispute. Despite its best efforts, the City of Milpitas on one side, and the other cities of San Jose and Santa Clara on the other side, were unable to resolve their dispute.

**Analysis:**

In an effort to continue with the litigation against San Jose and Santa Clara and in order to resolve the dispute with the remaining Common Interest Group members regarding the outstanding legal expenses, the City of Milpitas has opted to rejoin the Common Interest Group with one legal team representing all Common Interest Group members. Currently, the Common Interest Group is represented by the law firms of Hunton Andrews Kurth, LLP and Hogan Lovells LLP. In order to re-join the Common Interest Group and resolve the dispute with the remaining Common Interest Group members, the City of Milpitas will be agreeing to pay \$350,000 of past legal expenses. In addition, the City of Milpitas will agree to pay all legal costs moving forward at 40% of all legal costs incurred by the Common Interest Group beginning June 1, 2021. The 40% share represents Milpitas capacity to use the RWF in comparison to the other Common Interest Group members. The on-going legal services will be provided by Hunton Andrews Kurth, LLP and Hogan Lovells LLP.

**POLICY ALTERNATIVES:**

*Alternative 1: Do not approve or authorize the City Manager to execute Amendment No. 5 to the Cost-Sharing Agreement*

Pros: Will maintain status quo.

Cons: Will not allow the City of Milpitas to rejoin the Common Interest Group with one legal team representing all Common Interest Group members and it will not resolve the dispute with the Common Interest Group regarding past legal expenses.

Reason for not Recommending: The City will not be able to resolve the dispute with the Common Interest Group even if the City does not agree with their legal position.

**Fiscal Impact:**

The cost for past legal expenses associated with legal services provided to the Common Interest Group is recommended to be paid with current year savings generated in the Sewer Operating Fund. Further, the City would be agreeing to pay for 40% of all legal costs incurred by the Common Interest Group for expenses associated with the litigation moving forward. Any such legal expenses would require an appropriation action approved by the Council using reserves anticipated for future capital investments. As discussed at the May 18, 2021 City Council meeting as part of the draft sewer master plan, the anticipated expenditures for infrastructure improvements and rehabilitation of the City's sewer collection system for the next 20 years are estimated at \$54 million. This amount does not include capital contributions to the RWF. Per the most recent capital contributions for the next 10 years as approved by TPAC on May 17, 2021 for the City of Milpitas is \$68 million. The additional legal costs may lead to increased costs to the rate payers. A 1% increase in sewer rate generates approximately \$207,000 in additional revenue to the Sewer Operating Fund and translates to an increase of \$1.18 bi-monthly charge for an average single family residential household.

**California Environmental Quality Act:**

Not applicable

**Recommendation:**

Approve and authorize the City Manager to execute Amendment No. 5 to the Cost Sharing Agreement among West Valley Sanitation District, Cupertino Sanitary District, County Sanitation District No. 2-3 of Santa Clara County, Burbank Sanitary District, and the City of Milpitas

**Attachment:**

Amendment No. 5 to the Cost-Sharing Agreement  
Cost-Sharing Agreement