

Meeting Date: 12/07/2010

Agenda Item:

5.d)

City Council Agenda Report

City of Scandia

14727 209th St. North
Scandia, MN 55073 (651) 433-2274

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- Action Requested:** Approve an amendment to the consulting agreement with AECOM Technical Services, Inc. (AECOM) for preparation of the Zavoral Mining and Reclamation Project EIS (Environmental Impact Statement.)
- Deadline/ Timeline:** N/A
- Background:**
- At its November 16, 2010 meeting, the City Council postponed action on a proposed amendment to the city's agreement with AECOM. The amendment would add \$59,331 to the project cost, bringing the total contract to \$377,725. The payment and reimbursement agreement between the City of Scandia and Tiller Corporation requires Tiller to pay the full cost of preparation of the EIS.
 - Action was postponed so that the city could respond to comments made by Attorney Kieran Dwyer on behalf of Take Action – Conserve our Scandia (TA-COS). Mr. Dwyer's remarks are summarized in his letter submitted after the Council meeting (attached.)
 - The City Attorney reviewed the applicable statutes and discussed the matter with the City Planner and Environmental Quality Board staff, and prepared the attached letter in response.
- Recommendation:** Staff recommends that the Council approve the amendment, and that the City continue with the process of developing the EIS.
- Attachments/
Materials provided:**
- Letter dated November 23, 2010 from Kieran Dwyer, Dorsey & Whitney LLP
 - Letter dated December 2, 2010 from David Hebert, City Attorney
 - Proposed Amendment No. 1
 - Letter dated December 2, 2010 from Edmund Summersby
 - E-mail dated December 2, 2010 from Lisa Philippi/ TA-COS
 - E-mail dated December 2, 2010 from Greg Korstad to David Hebert
 - E-mail dated December 3, 2010 from Louie DiBerardini
 - Letter dated December 3, 2010 from St. Croix River Association
 - Letter dated December 3, 2010 from Tiller Corporation
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Contact(s): David Hebert, City Attorney (651 464-3397
Leslie Knapp, PG—Senior Associate
AECOM (763 551-2441)

Prepared by: Anne Hurlburt, Administrator

KIERAN P. DWYER
Associate
(612) 492-6536
FAX (612) 677-3254
dwyer.kieran@dorsey.com

November 23, 2010

Via Electronic Mail and Postal Service

Mayor Dennis Seefeldt
Council Member Connie Amos
Council Member Pete Crum
Council Member Delores Peterson
Council Member Chris Ness
City of Scandia
14727 209th St. N.
Scandia, MN 55073

Re: Amendment to Consulting Agreement with AECOM Technical Services, Inc. for preparation of the Zavoral Mining and Reclamation Project Environmental Impact Statement ("EIS")

Dear Mayor Seefeldt and Council Members:

During the recent Council meeting on November 16, I appeared on behalf of Take Action – Conserve Our Scandia ("TA-COS") to request that you deny the proposed amendment to the consulting agreement with AECOM Technical Services, Inc. ("AECOM") to provide additional payments for preparation of the Zavoral Mining and Reclamation Project EIS, and also deny Tiller Corporation's request for a conditional use permit ("CUP"). As you requested, I am submitting this written summary of my comments.

TA-COS is a group of concerned residents from Scandia and the surrounding area opposed to the development of the gravel mine at the Zavoral property proposed by Tiller Corporation. TA-COS believes the development of the Tiller gravel pit is incompatible with current land use and will have a number of significant and adverse environmental, safety, and welfare impacts, including development incompatible with the Comprehensive Plan, hazardous and increased traffic, damage to the scenic value of the area including the St. Croix River, and a negative effect on the value of surrounding properties.

As a matter of law, the Council must deny the current proposed amendment to the consulting agreement with AECOM. Under the Minnesota Environmental Policy Act ("MEPA"), the Environmental Impact Statement must be prepared by AECOM and its adequacy determined by the Council within 280 days after notice of its preparation. Minn. Stat. § 116D.04, subd. 2A(h). Since the revised notice of the EIS for the proposed Tiller gravel pit was published on February 8, 2010, the 280-day period to complete the EIS expired on November 15, 2010. Tiller Corporation has not requested an extension, and the granting of additional time would not be justified because, according to the City's staff, the reason for the delay is Tiller's lack of cooperation in providing the information necessary to complete the EIS.

Mayor Dennis Seefeldt
and Council Members
November 23, 2010
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If the Council denies the proposed amendment to allow payment for the cost of the extended time to prepare the EIS, this action will not interfere with the approval of payments of AECOM for services already provided or excuse Tiller from being obligated to pay those costs. Article 14 in the revised consulting agreement with AECOM provides the City with the option to suspend or terminate preparation of the EIS. By agreement with the City, Tiller is also obligated by contract to pay the full cost of preparation of the EIS. Tiller Corporation's duty to pay for all costs is further required by state law. See Minn. R. § 4410.6500 (MEPA regulation).

In addition to denying the proposed amendment to the consulting agreement with AECOM, the Council is required as a matter of law to deny Tiller Corporation's CUP application. The proposed Tiller gravel pit does not comply with Scandia's current Comprehensive Plan, which now prohibits the development and operation of gravel mines in this area. See City of Scandia, Map 27 Future Land Use Areas, Comprehensive Plan 106 (designating only the three areas where mining operations currently exist for mining land use). In addition, Minnesota Statute § 15.99 places a 60-day deadline on a City's decision to approve or deny a permit application. It has now been more than two years since Tiller submitted its application, and there is no reason why the Council should tolerate further delay.

For these reasons, TA-COS requests the Council deny the proposed amendment to extend the time to prepare the EIS and also deny Tiller Corporation's CUP application.

Thank you for hearing our concerns.

Sincerely,

DORSEY & WHITNEY LLP


Kieran P. Dwyer

KPD/aj

cc: Ms. Anne Hurlburt, City Administrator
Mr. David Hebert, City Attorney
Ms. Kristin Tuenge, TA-COS
Ms. Laurie Allmann, TA-COS

HEBERT AND WELCH, P.A.
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DAVID K. HEBERT
MICHAEL A. WELCH

November 24, 2010

Mayor and City Council
City of Scandia
14727 – 209th Street North
Scandia, MN 55073

Re: *EIS for Zavoral Mining and Reclamation Project*

Dear Sir/Madam:

At the City Council meeting held on November 16, 2010 you were presented with a proposed amendment to the AECOM Technical Services Inc. contract with the City for the preparation of the EIS for the proposed Zavoral mine and reclamation project.

The current contract, approved in March 2010, was entered into after the original proposal was changed to eliminate certain operational activities on the Zavoral site.

The amendment is necessary to address additional consultant costs incurred or to be incurred by the City in connection with the EIS preparation.

At the same Council meeting, Kieran Dwyer, an attorney representing TA-COS, appeared and argued that the amendment should not be allowed and that Tiller's application for a CUP should be denied on the following grounds:

1. Minnesota Statutes requires that an EIS and its adequacy be determined within 280 days after notice of its preparation;
2. The City is required to deny Tiller's CUP application because the proposed use does not comply with the City's current Comprehensive Plan; and
3. A CUP must be approved or denied within 60 days of submission of an application.

This letter addresses each of the issues raised by Mr. Dwyer on November 16.

EIS Time Limits

Minnesota Statutes §116D.04 Subd. 2a(h) does state that an environmental impact statement shall be prepared and its adequacy determined within 280 days after notice of its preparation is filed unless the time is extended by consent of the parties or by the governor for good cause.

The City Planner contacted the EQB staff to discuss the EIS time limit, and how it has been applied based on the statute and state rules. Gregg Downing, the EQB's Director of Environmental Review, indicated that the statute is written for the benefit of a project proposer, and is designed to insure that Responsible Governmental Units (RGU's) such as the City act in a timely manner to complete environmental reviews. This is similar to the statute requiring a City to act on an application for a CUP within 60 days (subject to certain extensions allowed by statute) or have the application be automatically approved. Mr. Downing also indicated the following:

- The 280-day time limit is frequently exceeded. Many EIS's are not completed within the time limit identified in the statute.
- Exceeding the time limit does not stop the EIS process. Nothing happens automatically when the 280-day schedule is exceeded. An EIS process can only be terminated by using the process outlined in Minnesota Rules 4410.2100, Subpart 11. This would require that the project be modified to the degree that it no longer requires an EIS.
- The time limit may be extended by consent of the proposer and the RGU. If the proposer (Tiller Corporation) and City agree that the process should continue past the 280-day time period, Tiller should send a letter to the City requesting that the process continue, and the City should approve the contract extension.

Mr. Downing indicated that the TA-COS group could go to District Court to object to the extension of the time limit. He indicated that he knows of only one example where the time limit was taken to court. In that case, the proposer brought a court action to enforce the time limitation, and the court's response was to set a new time limit for the RGU to complete the EIS.

There is no statutory penalty imposed on the City or the proposer for failure to abide by the time limitation either by way of automatic approval of the project or otherwise. Up to this point, it could be argued that the City and the applicant have, by their mutual actions, consented to the extension of time to complete the EIS.

CUP Application

The City Council has previously determined that the application for the CUP is governed by the Comprehensive Plan and Development Code in effect at the time the application was submitted just as it is required to do for any development request. Applicants are clearly entitled to rely on the rules and regulations in effect at the time their applications are submitted.

As indicated above, municipalities are generally required to rule on a "complete" application for a CUP within 60 days of its receipt subject to a number of statutorily allowed or required extensions. One such required extension is set forth in M.S. §116D.04 Subd.2b which requires, inter alia, that for a project that requires environmental review a permit or other authorization cannot be granted until a negative declaration on the need for an EIS is made or the EIS is determined to be adequate. Obviously, this is one of those cases. The City is prohibited from granting or approving a CUP until the environmental study is complete. The 60 day rule does not apply while the EIS is in process.

Based on my review of the applicable statutes, discussions with the City Planner and EQB staff, and the entire factual and procedural history of this matter, it is my opinion that the amendment to the AECOM agreement should be approved. The City should carefully proceed to a conclusion of the EIS, following all applicable statutes and rules, in order to furnish the Council with all of the facts necessary to fully inform it in making its decision on the granting of the CUP. Making a decision based on the results of the study is much to be preferred to short circuiting the process and leaving the City open to a variety of legal claims.

Sincerely yours,

HEBERT AND WELCH, P. A.

David K. Hebert
DKH:lp
Enclosures



AECOM 763.852.4200 tel
 161 Cheshire Lane North, Suite 500 763.473.0400 fax
 Minneapolis, MN
 www.aecom.com

November 10, 2010

Anne Hurlburt
 Administrator
 City of Scandia
 14727 209th Street North
 Scandia, Minnesota 55073

**Re: Project Name: Zavoral Mine and Reclamation Project Environmental Impact
 Statement
 AECOM Project No.: 910095.02
 Amendment No.: 1**

Dear Ms. Hurlburt,

This modification letter amends and modifies the Agreement entered into between the City of Scandia and AECOM Technical Services, Inc. ("AECOM"), formerly EDAW, Inc., with an effective date of March 2010.

It is understood and agreed that performance of the Basic Services identified under *Appendix A* to the Agreement will require an additional fee to be charged to the Client. Therefore, the contract budget as described in *Appendix B* is hereby increased by the amount of *fifty nine thousand three hundred and thirty one dollars (\$59,331)* so that the new not-to-exceed amount shall be *three hundred and seventy seven thousand seven hundred and twenty five dollars (\$377,725)*. By execution hereof, AECOM agrees that the basic services can be (barring unforeseen events or occurrences) performed for this amount.

The foregoing is the sole modification or amendment to the Agreement, and no other express or implied modification or amendment is intended or shall be construed herefrom. All other provisions, prior amendments [if any] and obligations of the Agreement shall continue in full force and effect.

AGREEMENT AND ACCEPTANCE:

Signed, this ____ Day of _____, 20__

AECOM Technical Services, Inc.

Client:

By: _____

By: _____

Print: _____

Print: _____

Title: Vice President

Title: _____

ZAVORAL MINING AND RECLAMATION PLAN EIS

CONTRACT MODIFICATION

November 10, 2010

The following describes and quantifies the requested contract modification. In summary, the request is related to:

- Extended project life
- Project inefficiencies and related meetings due to multiple starts and stops
- Additional wetland support to address and attend Technical Evaluation Panel review of delineation of seep wetland conducted by Tiller's consultant
- Extensive coordination and modification of the pump test conducted to assess potential impacts of Tiller's proposed water use.

The request is broken down by task and then totaled.

1. Task 1 Project Management

Due to Extended Contract Life

Anticipate approximately 6 months in additional time for project management originally based on approximately 10-12 months and related contract modifications. Also reflects inefficiencies due to multiple starts and stops on project work.

Estimated at Completion: \$ 26,700

Budget: \$ 20,700

Task Modification Increase: **\$ 6,000**

2. Task 2 Internal and External Communications

Due to Multiple Project Starts and Stops

Ongoing generation of data needs lists and holding multiple meetings to obtain data. Also reflects inefficiencies due to multiple starts and stops on project work.

Estimate at Completion: \$66,142

Budget: \$58,142

Task Modification Increase: **\$8,000**

3. Task 7.5 Cover Types

Additional Wetland Support

Site visits with agencies regarding seep wetland. Attending site review with the Technical Evaluation Panel (TEP) reviewing seep wetland mapping conducted by Tiller's consultant and related early agency coordination not in contract scope.

Estimated at Completion: \$5,500

Budget: \$2,720

Task Modification Increase: \$ 2,780

Task 7.8 Water Use

Pump Test Scope Coordination and Modifications

- **Contract Scope**

The contracted scope of work was developed to address Tiller's revised water use plan. Tiller's revised water use projection was to pump at a rate of less than 10,000 gallons per day (gpd) at a rate of up to 1,200 gallons per minute (gpm) for a few minutes a couple of times a day, or at a lesser rate for up to eight minutes a day during periods of operation.

- Zavoral Cabin Well - about 1,300 ft east of Zavoral Site Well;

- Trail's End Bar & Grill 1 - about 1,700 ft west of Zavoral Site Well;

- Zavoral Creek at culvert.

Coordination, AECOM and the City coordinated with several interested parties. The time spent in coordination and site visits and evaluations to refine the pump test was significant. In addition, the pump test timeframe was extended by several orders of magnitude, with the pre- through monitoring period from a little over a day to more than a week. This is reflected in increased monitoring equipment, and driller costs.

Coordination

A DNR permit would be required for the level of water use proposed by Tiller, AECOM (as represented by City staff) coordinated with the DNR regarding the pump test to facilitate the agency's agreement with the EIS process. The DNR agreed that the proposed pump test technically addressed water use scenarios, but suggested considering a longer test to help address public perceptions related to water use. AECOM, in agreement with the City and Tiller, accordingly extended the pump test timeframe.

Upon project initiation, in conducting the pump test, in addition, the pump test post pump test monitoring increased labor,

- **Additional C**

Although no DNR permit was agreed upon with the DNR, ongoing involvement and represented public perceptions related to the pump test time

The DNR also suggested that the pumps be pulled from wells that were planned as monitoring points and that tests be conducted on the wells to ensure that they were in good hydrologic connection with the aquifers and not plugged. These tests were conducted and resulted in additional time and drilling subcontractor costs due to multiple mobilizations to pull and restore pumps in wells.

- **Citizen and PAC input**

AECOM and City staff also held discussions with local citizens and received input from the PAC developed for the project. As a result the pump test timeframe was extended (ran for 4 hours, which was determined to be sufficient for analyzing potential impacts). This included pre- and post-monitoring of all monitoring sites that amounted to several days of additional work. AECOM also met with local citizens, reviewed their suggested monitoring sites, evaluated them for applicability, and gained access to the sites that were determined to be suitable monitoring sites.

The purpose of this monitoring was to verify if pumping had any detectable effect on water levels in the nearby creeks, wells, and other monitored surface water features. The following additional sites were monitored:

- Zavoral Creek close to the Crystal Springs, about 1,100 feet northwest of the Zavoral Creek’s culvert.
- Unnamed creek – next creek south of Zavoral Creek, about 500 feet south of the Zavoral Creek’s culvert.
- Unnamed creek at the north end of culvert below Quint Avenue North, west of railroad tracks, short distance down-gradient from spring box, about 2,800 feet south of the Zavoral Creek’s culvert.
- Water discharge point.
- Water discharge basin.

After measuring the depth of and testing the Trails End Well, AECOM determined that it may not intercept the targeted aquifer. As a result, AECOM, in agreement with City staff and Tiller, added the Magnuson well that intercepted the targeted aquifer to the monitoring network, and obtained an access agreement.

AECOM also worked with the Watershed District and they installed monitoring equipment at this location that was used during the pump test and can be left in place as a long term monitoring point.

The level of effort for this task was in a state of continuous modification to provide a product that was most acceptable to all involved parties. The scope was expanded, resulting in the following:

Actual Cost to date:	\$53,718
Estimated at Completion:	<u>\$60,000</u>
Budget:	\$17,449
Task Modification Increase:	\$42,551
Total Requested Contract Modification Increase:	\$59,331

Edmund K. Summersby
20457 Quinnell Avenue
Scandia, MN 55073

2 December 2010

Mr. Dennis Seefeldt, Mayor
City of Scandia
14727 209th Street N.
Scandia, MN 55073

Subject: Proposed Tiller-Zavoral Gravel Mine

Dear Mayor Seefeldt,

I write in support of the actions that will be proposed by representatives of TA-COS at the December 7th City Council meeting concerning the Tiller-Zavoral mine project, specifically:

1. That the City of Scandia deny Tiller's request for a time extension for preparation of the EIS. There is no justification for extending the 280-day statutory limitation on EIS preparation per the Minnesota Environmental Policy Act. Tiller's non-compliance and failure to provide information necessary for the EIS in a timely manner should not be rewarded with a further time extension.
2. The City of Scandia, in view of the above, should terminate further preparation of the EIS, and any further consideration of this project.
3. The City of Scandia should deny Tiller a conditional use permit because, simply stated, a gravel mine on the Zavoral property is against the law. As you know, the current City Zoning Ordinance, passed into law on November 3, 2010 prohibits gravel mining on the Zavoral property. It would be a highly improper act to allow mining on this site based on the now-outdated former zoning. Such action would instantly create a non-conforming land use, which would then be "grandfathered" for the foreseeable future. To create a "grandfather" condition after the fact defies logic and common sense, and establishes a most unwelcome precedent that Scandia will surely regret in years to come.

Thank you for your consideration; I trust the City of Scandia will do the right thing.

Yours sincerely,

Edmund K. Summersby