



Legislation Text

File #: 19-1843, **Version:** 1

Resolution to Approve Fifth Amendment with Varnum LLP for Legal Services to Contest the National Pollutant Discharge Elimination System (NPDES) Permit for the Wastewater Treatment Plant (\$90,000.00)

Your approval is requested for the fifth amendment to the professional services agreement with Varnum LLP (Varnum) in the amount of \$90,000.00 for legal services to contest the National Pollutant Discharge Elimination System (NPDES) permit issued by the Michigan Department of Environmental Quality (MDEQ) to the City's Wastewater Treatment Plant (WWTP).

The lengthy history of the City's contest of its NPDES permit, including its collaboration with the Chelsea, Dexter, and Loch Alpine WWTPs, was set out in detail in the cover memorandum for the resolution for the fourth amendment to the legal services agreement with Varnum LLP, a copy of which is attached.

The fourth amendment was intended to cover the contested case hearing and potential follow up activities that might be needed thereafter. Unfortunately, the follow up activities have become more extensive than anticipated.

The contested case resulted in a denial of the relief requested by the City and the other three WWTPs. The WWTPs had argued, and presented testimony to support their arguments, that the science on which the phosphorous limits in their NPDES permits and the TMDL on which they were based were flawed. The WWTPs appealed that decision to the Washtenaw County Circuit Court, which rejected the MDEQ's decision, and in lieu of reversal and remand, ordered MDEQ (now EGLE) to re-evaluate the Total Maximum Daily Load (TMDL) calculations for phosphorous.

The TMDL now proposed by EGLE is more stringent than the one that was the subject of the contested case, and its scientific basis is equally flawed. The proposed TMDL is currently subject to public comment. Unless EGLE revises it after comments, the City and the other WWTPs will need to consider options to challenge the TMDL, either at the USEPA, in court, or both.

The total amount of the agreement with Varnum LLP after the fourth amendment was \$435,500.00, including some funds for expert witness services. The firm's work, including the contested case, the appeal to the Circuit Court after the contested case, and follow up actions after the Court's decision, have exhausted that amount. To cover the firm's legal services to assist with comments to EGLE on the proposed TMDL, and to cover its legal services on the chosen course of action after EGLE makes its final decision on the TMDL to present to the USEPA, a fifth amendment to the legal services contract with Varnum LLP is needed. To cover those services, a fifth amendment of \$90,000.00 is recommended, for a total contract amount of \$525,500.00. This amendment amount is for legal services only; expert consultant and witness services will be contracted for separately.

The City anticipates it will continue to carry 75% of these legal services costs, with the other three WWTPs sharing the remainder.

Varnum LLP complies with the City's living wage and nondiscrimination ordinances.

Budget/Finance Impact: Funds to finance this amendment are included in the approved FY20 WWTP Operation and Maintenance Budget for the Sewage Disposal System.

Prepared by: Abigail Elias, Assistant City Attorney

Earl J. Kenzie, P.E., WWTSU Manager

Reviewed by: Stephen K. Postema, City Attorney

Craig A. Hupy, Public Services Area Administrator

Approved by: Howard S. Lazarus, City Administrator

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Whereas, The City's Wastewater Treatment Plant (WWTP) contested the NPDES permit issued to it by the Michigan Department of Environmental Quality (MDEQ), due to the inclusion of revised discharge limits for phosphorus in the permit;

Whereas, In response to the WWTP's need for supplemental services from outside legal counsel in relation to this matter since November 2000, the City Administrator approved an initial professional services agreement with Varnum LLP, and City Council subsequently approved four amendments to the agreement with Varnum LLP;

Whereas, Although the WWTP and other wastewater treatment plants did not prevail at the contested case, on appeal the Washtenaw County Circuit Court ordered the MDEQ (now EGLE) to re-evaluate the Total Maximum Daily Load (TMDL) calculations for phosphorous, which would result in revised NPDES permit discharge limits for phosphorous;

Whereas, Because the TMDL for phosphorous now proposed by EGLE is more stringent than the prior TMDL and is equally flawed, additional legal services are needed from Varnum LLP to assist with comments on the proposed TMDL and to take whatever other legal actions are necessary thereafter;

Whereas, Varnum LLP complies with the City's living wage and nondiscrimination ordinances; and

Whereas, Sufficient funds have been budgeted in the approved FY20 WWTP Operation and Maintenance Budget for the Sewage Disposal System;

RESOLVED, That Council approve a fifth amendment to the professional services agreement with Varnum LLP in the amount of \$90,000.00 for additional legal services, for a total amended agreement amount of \$525,500.00, for legal and expert witness services;

RESOLVED, That the funds for the professional services agreement with Varnum LLP, as amended be made available without regard to fiscal year; and

RESOLVED, That the Mayor and City Clerk be authorized to execute the fifth amendment to the professional services agreement with Varnum LLP, after approval as to substance by the City Administrator and approval as to form by the City Attorney.