

..Title

Resolution to Approve Fourth Amendment with Varnum LLP for Legal Services to Contest the National Pollutant Discharge Elimination System (NPDES) Permit for the Wastewater Treatment Plant (\$50,000.00)

..Memorandum

Your approval is requested for the fourth amendment to the professional services agreement with Varnum LLP (Varnum) in the amount of \$50,000.00 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). This amount also includes amounts to reimburse for expert witness services.

The lengthy history of the City's contest of its NPDES permit, including its collaboration with the Chelsea, Dexter, and Loch Alpine WWTPs, is set out in detail below. Although the contested case has been pending for a long time, it finally went to a hearing before an MDEQ Administrative Law Judge (ALJ) near the end of 2016. This fourth amendment to the professional services agreement with Varnum is intended to cover the final briefing after the contested case hearing, as well as potential follow up activities that may be needed. The total amount of the agreement after the fourth amendment would be \$435,500.00. These amounts are the City's share of the contracted services, which is 75%.

MDEQ issues NPDES permits to treatment plants that define the conditions each plant must meet to operate and discharge treated water to surface waters of Michigan. Since December 2000, MDEQ has issued three NPDES permits to the WWTP. Each of these permits included discharge limits for phosphorus based on a total maximum daily load (TMDL) developed by MDEQ to address nuisance growths of aquatic vegetation in Ford and Belleville Lakes. The City has exercised its right to contest each of these NPDES permits with legal assistance from Varnum as described and for the reasons presented below.

During late 1994, the Middle Huron Initiative (MHI) was undertaken by representatives from the MDEQ, the Huron River Watershed Council (HRWC), the City and other stakeholders in the Middle Huron River Watershed. The purpose of the MHI was to establish a collaborative management process for addressing water quality issues in the Middle Huron River Watershed. As part of the MHI, MDEQ developed a TMDL for phosphorus in Ford and Belleville Lakes in response to nuisance growths of aquatic vegetation. The City raised concerns with MDEQ over the methodology used to develop the TMDL. However, MDEQ submitted the TMDL, without addressing the City's concerns, to United States Environmental Protection Agency (USEPA) Region 5 staff, which subsequently approved the TMDL. Waste load allocations for phosphorus, including daily allowable loadings from the City's WWTP and non-point sources within the City, were included in this TMDL.

During August 1999, the City agreed to participate in a voluntary agreement for point and non-point sources to reduce phosphorus discharges and try to achieve the loadings

identified in MDEQ's TMDL during the most critical time of the year, April through September. Participation in this voluntary agreement was viewed by the City as an alternative to having more restrictive limits for phosphorus placed in the NPDES permit for its WWTP. Throughout the development and implementation of the MDEQ's TMDL and the voluntary agreement, the City expressed serious concerns about the methodology used to develop the TMDL, the costs for its WWTP to achieve the phosphorus reduction goals at current and future flows and the expected impact the reductions would have on the growth of blue green algae in Ford and Belleville Lakes. When USEPA objected to the voluntary agreement as a means for managing phosphorus in the Middle Huron River Watershed, the City hired two professional consultants to assess its concerns about the costs to the City to achieve the phosphorus reductions at the WWTP and the effectiveness of these reductions in attaining the intended water quality objectives.

Malcolm Pirnie, Inc., a professional engineering firm, was hired to identify and evaluate the most feasible and economical alternative for the WWTP to achieve the proposed phosphorus limits at current and future flows. The results of its June 2000 study indicated the following:

- Chemical treatment is the recommended alternative.
- The capital cost for this alternative is \$1,500,000.00 and the annual operating cost is \$167,000.00.
- To determine whether chemical treatment will be adequate to reach the desired phosphorus reductions, it is recommended that plant scale testing be performed over a three-year period at an expected cost of \$520,000.00.

Dr. John T. Lehman, Professor of Biology at the University of Michigan, was hired to provide an expert evaluation of the scientific information used to develop the MDEQ's TMDL and forecast water quality in Ford and Belleville Lakes. In addition, Dr. Lehman assessed whether the TMDL and phosphorus limits in the City's proposed NPDES permit represent proper lake management strategy for eliminating the nuisance algae blooms in Ford and Belleville Lakes. The results of his July 2000 study indicated the following:

- Effluent from the Ann Arbor WWTP does not promote nuisance blue green algal blooms in Ford Lake.
- The MDEQ's TMDL does not represent proper lake management strategy for Ford and Belleville Lakes.
- It is unknown whether the water quality objectives for Ford and Belleville Lakes will be achieved by implementation of the phosphorus limits in the City's proposed NPDES permit.

Copies of Dr. Lehman's study were shared by the City with USEPA Region 5 and MDEQ, in the hope that the voluntary agreement approach would be an acceptable alternative to the restrictive permit limits. However, based on discussions with MDEQ staff, it became apparent to WWTP staff that actions to contest the pending NPDES permit would be necessary. In anticipation of the need for supplemental services from outside legal counsel in this matter, the City Administrator approved an initial

professional services agreement with Varnum in an amount not to exceed \$24,000. Subsequently, based on USEPA's objections to the voluntary agreement approach, MDEQ issued an NPDES permit to the City's WWTP on December 19, 2000, which included discharge limits for phosphorus based on the MDEQ's TMDL. The City and the other three point sources in the MHI (Chelsea, Dexter, and Loch Alpine WWTPs) filed petitions to contest their permits during February 2001 with assistance from Varnum. At the request of the MHI point sources, the MDEQ's ALJ consolidated the four cases into one.

Beginning in February 2001, extensive informal negotiations were conducted between Varnum and MDEQ staff in an attempt to reach a settlement to the contested case. Over the next year, the level of effort required from Varnum for legal services exceeded the original agreement amount. As a result, on April 1, 2002, City Council approved an amendment to the agreement with Varnum for legal services associated with the contested case in the amount of \$99,000.00, which increased the amended agreement amount to \$123,000.00.

During the preparation of the FY03 budget request, WWTP staff anticipated significant litigation activities would take place during that fiscal year and funds were included in the approved budget for that purpose. Informal negotiations between Varnum and MDEQ staff that continued throughout 2002 delayed the contested case proceedings. However, despite the best efforts of both parties, a settlement agreement to the contested case could not be negotiated. In preparation for a contested case hearing, both parties submitted legal motions to the MDEQ's ALJ in early 2003. On June 2, 2003, the ALJ dismissed the contested case without prejudice because the effective date for the phosphorus limit was beyond the expiration date of the permits, which nullified them as enforceable permit limits. This decision effectively deferred this issue to the next NPDES permit cycle.

To cover the cost of legal services to address the issue in the next NPDES permit cycle, on June 2, 2003, Council approved a second amendment to the agreement with Varnum in the amount of \$162,500.00, to be available until expended without regard to fiscal year, which increased the agreement amount to \$285,500.00 and allowed carryover of the funds intended for this purpose.

Upon the expiration of these permits, MDEQ issued NPDES permits to the four MHI WWTPs on October 5, 2004. These permits included discharge limits for phosphorus based on the MDEQ's TMDL, which were to take effect on September 1, 2009 (i.e., a month prior to their expiration). The City and the other three point sources in the MHI filed petitions to contest their permits during December 2004. After nearly two years of negotiations, a settlement agreement was reached and the contested cases were withdrawn. The basis for the settlement agreement was the inclusion of language in the permits that indicated the MDEQ "will propose revisions to the TMDL for approval by USEPA". Revising the TMDL would enable the City and other MHI stakeholders to challenge it based on technical concerns about the faulty scientific methodology used to develop it.

Upon the expiration of the permits for which a settlement agreement was reached, MDEQ issued the current NPDES permits to the four MHI WWTPs on August 3, 2009. These permits have mass based discharge limits for phosphorus that were to take effect on October 1, 2012, and identical language that the MDEQ “will propose revisions to the TMDL for approval by USEPA”. Although this condition was acceptable to the four MHI WWTP’s, they once again contested the new permits as a means of preserving their rights to challenge the TMDL and its use in establishing discharge limits, particularly if MDEQ did not propose revisions to the TMDL for approval by USEPA.

WWTP staff and the other point sources in the MHI made significant efforts without success to persuade the MDEQ to find an alternative to having phosphorus limits based on the TMDL in the new NPDES permits. Despite the settlement agreement for the previous contested case and the language included in the current NPDES permit, MDEQ indicated in a letter dated May 7, 2011, “it has been determined that the DNRE will not propose revisions to the current TMDL for Ford and Belleville Lakes.” Ongoing negotiations between the MHI point sources and MDEQ over the next few years were not successful and a new ALJ was assigned to the contested case after the previous ALJ retired in May 2014. On June 19, 2014, the new ALJ granted the MDEQ’s motion to dismiss the contested case, which was contrary to the findings of the two previous ALJ’s that had ruled on motions in this case since 2001. As a result, Varnum successfully appealed the dismissal in Washtenaw County Circuit Court on November 24, 2014, and the contested case was returned to the MDEQ’s ALJ for a hearing during October 2015. On November 16, 2015, City Council approved a third amount in the amount of \$100,000.00, which increased the agreement amount to \$385,500.00 and allowed carryover of the funds intended for this purpose. However, the duration of the hearing, the time to prepare for the hearing, the expert witness assistance needed, and the complexity of the briefing after the hearing have required more time than had been anticipated. The fourth amendment is necessary for the post hearing work, as well as the work required to respond to the ALJ’s decision and recommendation, and to respond to MDEQ’s response thereto. The decision and recommendation of the ALJ goes to the Director of MDEQ for final decision. If the City and the other WWTPs prevail in the final decision, the contested case will be over. If the MDEQ prevails, the City and the other WWTPs will have the right to appeal the decision to circuit court.

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

Funds to finance this amendment are included in the approved FY16 WWTP Operation and Maintenance Budget for the Sewage Disposal System.

..Staff

Prepared by: Abigail Elias, Chief Assistant City Attorney, and Earl J. Kenzie, P.E., WWTSU Manager

Reviewed by: Stephen K. Postema, City Attorney and Craig A. Hupy, Public Services Area Administrator

Approved by: Howard S. Lazarus, City Administrator

..Body

Whereas, The City's Wastewater Treatment Plant (WWTP) is contesting 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 two amendments to the agreement with Varnum LLP;

Whereas, Additional legal and expert witness services are needed from Varnum LLP following the contested case hearing before the MDEQ's Administrative Law Judge, including necessary and potential follow up activities;

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

Whereas, Sufficient funds have been budgeted in the approved FY16 WWTP Operation and Maintenance Budget for the Sewage Disposal System;

RESOLVED, That Council approve a fourth amendment to the professional services agreement with Varnum LLP in the amount of \$50,000.00, for a total amended agreement amount of \$435,500.00, 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 fourth 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.