

Management Committee

Business Item
Item: 2010-336 SW

Meeting date: September 22, 2010

ADVISORY INFORMATION

Date: September 14, 2010

Subject: Request for Waiver of Conflict – Barnes & Thornburg LLP

District(s), Member(s):

Policy/Legal Reference: Minnesota Statute § 473.129, subd. 3

Staff Prepared/Presented: Donald Mueting 651.602.1463

Division/Department: Office of General Counsel

Proposed Action

That the Metropolitan Council waive any actual and potential conflicts of interest and consent to Barnes & Thornburg LLP in representing and advising the 3M Company in its dealings with the Minnesota Pollution Control Agency on alleged natural resource damages as a result of PFC releases to the environment. This waiver is granted on the condition that Barnes & Thornburg's representation of 3M not include litigation against the Metropolitan Council and that the Barnes & Thornburg attorneys advising 3M and those advising the Metropolitan Council have no communications with regard to their actions or advice for their respective clients. The Council authorizes the General Counsel to execute any documents necessary to effectuate such waiver.

Background

The law firm of Barnes & Thornburg LLP represents and advises the Metropolitan Council's Division of Environmental Services regarding the proposed permit conditions that may be required by the Minnesota Pollution Control Agency (MPCA) limiting the discharge of constituents related to perfluorinated chemicals (PFCs) including perfluorooctane sulfonate (PFOS) through the Total Maximum Daily Load (TMDL) process. The same law firm, but different lawyers, represents 3M in its dealings with the MPCA in connection with the alleged damage to the environment as a result of PFC releases. 3M may be asked by MPCA to fund the TMDL process and those negotiations may include PFC contamination and water system development issues in a portion of the Metropolitan Area that is served by Environmental Services.

Rationale

See attached letter from Barnes & Thornburg LLP.

Funding

No funding implications or impacts.

Known Support / Opposition

None. 3M has already waived any conflict with Barnes & Thornburg's representation of the Metropolitan Council.

September 9, 2010

Donald J. Muetting
General Counsel
Metropolitan Council
390 North Robert Street
St. Paul, Minnesota 55101

Re: The 3M Company (3M) Negotiations with State of Minnesota (State) Concerning Alleged Natural Resource Damages Related to Perfluorinated Chemicals (PFCs) and Metropolitan Council's Combined Sewer Overflow and Wastewater Treatment Plant Permits (Permits)

Dear Mr. Muetting:

As you know, the Metropolitan Council (Met Council) engaged Barnes & Thornburg LLP in February 2010 to represent the Met Council in several matters, including with respect to its negotiations with the State concerning the renewal of its Permits. As part of this representation, the Met Council recently requested our advice with respect to new conditions that the State may require in the Permits. One of the new conditions relates to potential allocations and discharge limits that may be imposed for Met Council's Metro Wastewater Plant limiting the discharge of constituents related to perfluorinated chemicals (PFCs), including perfluorooctane sulfonate (PFOS), in the Mississippi River. If deemed to be necessary for inclusion the Permits, the PFC allocations and discharge limits for the Metro Plant will be determined pursuant to a Total Maximum Daily Load (TMDL) process, which is a standard regulatory process conducted by the State to achieve water quality standards. It is our understanding that Met Council will seek assistance from Barnes & Thornburg attorneys, particularly Fred Andes and Erika Powers, with respect to the Permits' PFC limits and the TMDL process (Permit/TMDL Project).

In a separate and unrelated matter, we represent 3M in connection with its negotiations with the State concerning alleged natural resource damages as a result of PFC releases to the environment (NRD Negotiations). As part of the NRD Negotiations, the State may request that 3M fund or otherwise contribute to the TMDL process. Further, the NRD Negotiations may include issues involving responsibility for contribution to PFC contamination and water system development issues in a portion of the Twin Cities Metropolitan Area, which Met Council serves or may serve in the future.

If we undertake to represent Met Council in the Permit/TMDL Project, it will only be on the express understanding that we will not and cannot represent either Met Council or 3M should either assert a legal claim against the other in connection with matters relating to the Permit/TMDL Project or the NRD Negotiations or should a controversy otherwise develop between the two parties. We have informed 3M of our current representation of Met Council in unrelated matters. We have also informed 3M that our representations of it will only be on the express understanding that we will not and cannot represent either 3M or Met Council should either party assert a legal claim against the other in connection with matters relating to the Permit/TMDL Project, NRD Negotiations or should a controversy otherwise develop between the two parties in that regard.

Under Rule 1.7 of the Minnesota Rules of Professional Conduct, we are precluded from representing a client if the representation of that client involves a concurrent conflict of interest; that is, where representation of one client will be directly adverse to another client, or where there is a significant risk that representation of one or more clients will be materially limited by our responsibilities to another client, a former client or third person, or by our personal interest. Despite that standard preclusion, we may nonetheless represent a client where there is a concurrent conflict of

interest if (1) we reasonably believe we will be able to provide competent and diligent representation to each affected client, (2) the representation is not prohibited by law, (3) the representation does not involve the assertion of a claim by one client against another client represented by us in the same litigation or other proceeding before a tribunal, and (4) each client gives informed consent, confirmed in writing.

Loyalty is an essential element in the lawyer's relationship to a client. As a general proposition, loyalty to a client prohibits undertaking representations directly adverse to that client without that client's consent. Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests; the conflict in effect forecloses alternatives that would otherwise be available to the client.

In the present circumstances, we believe that our representation of Met Council with respect to the Permit/TMDL Project will not adversely affect our representation of 3M in unrelated matters or our relationship with 3M, and that our representation of 3M in the NRD Negotiations or other unrelated matters will not adversely affect our representation of Met Council in its Permit/TMDL Project or our relationship with them, and we have so informed them. 3M, after consultation with us, has consented to allow us to represent Met Council in unrelated matters concurrently with our representation of them.

We will institute internal screening procedures to ensure that none of our Firm's lawyers that currently represent Met Council with respect to its Permit/TMDL Project will work on the 3M NRD Negotiations; however, other Firm attorneys that may have knowledge with respect to Met Council's Permits or other issues may be involved in the NRD Negotiations.

If you are willing to consent to our representation of 3M in its negotiations with the State and any other existing or future matters not directly related to our representation of you, concurrently with our representation of Met Council in the unrelated matters described in this letter, please indicate your consent by executing the enclosed copy of this letter in the space provided below and return the executed copy to me.

You acknowledge and agree that, in our Firm's undertaking to represent 3M in the NRD Negotiations, we and 3M are relying on your consent. Should you at some later time wish to revoke your consent, you agree the method for doing so will be by terminating our representation of you at that time, and that such revocation will not require us to discontinue our representation of 3M.

Very truly yours,

Erika K. Powers

cc: Michael A. Nash, Esq., 3M Company
Thomas A. Boardman, Esq., Barnes & Thornburg LLP

CONSENT GIVEN:

METROPOLITAN COUNCIL

By: _____

Its: _____