



Item 5C.
BCWMC 11-18-20
(Item 5D from Oct meeting)

Bassett Creek Watershed Management

MEMO

To: BCWMC Commissioners and Alternate Commissioners
From: Laura Jester, Administrator
Reviewed by Commission attorney
Date: October 8, 2020

RE: Addressing Potential Conflicts of Interest of Commission Engineer

This memo serves to outline the State of Minnesota's professional rules pertaining to conflicts of interest (COI) for licensed engineers, provide information on recent examples of potential conflicts and how the BCWMC dealt with those instances, and lay out recommendations to address future instances of potential COI. In the past, BCWMC has assessed conflicts of interest and perceived conflicts that have arisen when the Commission engineer was asked to undertake work within the watershed that related to BCWMC's authority.

Definition and Rules of Professional Conduct for Engineers

Minnesota Administrative Rules Chapter 1805 provides the rules of professional conduct for licensed engineers. Specifically, Minn. R. 1805.0300, subp. 1 prohibits a licensed engineer from accepting a project where a duty to the client or the public would conflict with the personal interest of the licensee or the interest of another client.

Subpart 2 of the same rule further stipulates that a licensed engineer shall not accept compensation for services relating or pertaining to the same project from more than one party unless:

- A. there is a unity of interest between or among the parties to the project;
- B. the licensee or certificate holder makes full disclosure; and
- C. the licensee or certificate holder obtains the express consent of all parties from whom compensation will be received.

BCWMC Examples and Actions

Transparency and disclosure are critical to ensuring that a perceived or actual conflict does not negatively affect or influence Commission decision-making. The above Rule prohibits an engineer from proceeding unless each of the rule criteria are met. That is why, as a general rule, Barr Engineering Co. (Barr) does not accept work in the Bassett Creek watershed that will require review by its own personnel on behalf of the Commission. In my experience, Barr staff takes potential conflicts very seriously and operates consistent with their professional duties, including the above rules. Below are a few examples of when COI or potential COI were addressed:

- In early September, the Commission Engineer called me to describe a potential conflict. They were asked by the City of Golden Valley to model proposed temporary emergency repairs to an equalizer

pipe between East and West Ring Ponds because of a recent pipe failure. I did not object to Barr providing modeling assistance to Golden Valley, as all three requirements in Minn. R. 1805.0300, subp. 2 (A, B, and C above) were met. The City contracted directly with Barr for the work. This type of activity (modeling assistance) is sometimes performed by the Commission, at the Commission's expense, for work in individual cities. In this case, however, the city was willing to pay Barr without Commission funding to expedite the work in the emergency situation. In hindsight, I should have informed the commissioners about this work at a Commission meeting.

- In late June, Minneapolis city staff contacted me requesting authorization to retain Barr to perform the floodplain modeling along Bassett Creek to evaluate the impact of the Irving Avenue bridge removal and streambed fill proposed as part of the Irving Avenue sanitary sewer replacement project. This was a slightly different situation because the Commission requested the City to evaluate any changes to flows and water surface elevations due to removal of the Irving Avenue bridge and abutments in its June 23, 2020 letter and would then be reviewing the modeling results as part of its review of the project (which the Commission approved at their August meeting). I approved the work as there appeared to be a "unity of interest" because the result of the modeling work was not subjective (the model outcome is the model outcome). Also, Barr developed the model, so they can most efficiently and effectively run it, which in my opinion was in the best interest for both the Commission and the City. Although I mentioned this situation verbally during the Commission meeting, it could have been more fully explained by me and within the Commission Engineer's project review memo.
- For many years, Barr has performed environmental services for the City of Minneapolis in multiple areas around the city, including the city impound lot on the south side of Bassett Creek, Bryn Mawr Meadows Park, and other areas in the Bassett Creek Valley. This work included preparation of the Response Action Plan (RAP) for the Irving Avenue sanitary sewer replacement project for the City. These environmental services do not trigger BCWMC review and therefore do not constitute any inherent conflict. Even so, Barr disclosed its involvement in the Irving Avenue sanitary sewer replacement RAP in its project review memo to the Commission.
- Golden Valley and Minnetonka hired Barr to prepare their surface water management plans. In 2017, the Commission elected to hire an independent consultant to review these surface water management plans to remove a potential conflict of interest if Barr were to also review the plans as the Commission Engineer. This process was coordinated with the Commission.

Recommendations for Future Potential COI

The following proposed framework for addressing conflicts of interest are in keeping with the practice I and the Commission Engineer have followed in the past. These recommendations, modified as the Commission wishes, should be the subject of a formal motion to direct and authorize the administrator as the Commission sees fit and appropriate. The goal is to clarify the process for addressing potential Commission Engineer COI so that staff has clear direction and staff and commissioners have congruent expectations.

Barr will continue to operate within the provisions of MN Administrative Rule 1805.0300. In all cases of actual or potential conflicts, transparency about the situation and reporting by and to all parties is of utmost importance.

Administrative Review (no approval needed)

- Projects in the Bassett Creek watershed that may be related to water or natural resources but do not require Commission Engineer review (such as natural resources protection plans, environmental impact statements, response action plans, etc.)
 - a. This is for scenarios where the above-described provisions in Minn. R. 1805.0300 do not apply because there is no actual conflict, nor is the Commission Engineer being compensated by more than one party for the same project

Administrative Approval (Administrator and Attorney):

- Projects where there is a clear unity of interest (i.e., modeling assistance); and the timeframe of the work is either emergency in nature or requires an expedited timeline such that there is not time for Commission approval; and the administrative approval is disclosed at the next Commission meeting

Commission Action Required:

- Projects that have a unity of interest but where there is time for Commission approval
- Projects that require Commission Engineer review, e.g. an actual conflict exists (such as preparation of local water management plans)
 - a. In these scenarios, the Commission will consider contracting with an outside firm for review or other remedies deemed appropriate