

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KALAMAZOO

AUDREY N. GRAY,

Plaintiff/Counter Defendant,

File No. B04000367-CH

v

THE MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY, STATE OF
MICHIGAN,

Defendant/Counter-Plaintiff and
Cross-Plaintiff,

JAMES P. and KAREN L. McDONALD,

Defendants/Cross-Defendants.

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OCT 29 2004

NATURAL RESOURCES
DIVISION

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**CONSENT JUDGMENT FOR PAYMENT OF
PAST AND FUTURE RESPONSE ACTIVITY COSTS AND REMOVAL OF LIEN**

The Plaintiff/Counter-Defendant is Audrey N. Gray.

The Defendant/Counter-Plaintiff is the Michigan Department of Environmental Quality (MDEQ).

The Consent Judgment concerns the settlement of the Complaint and Counter-Complaint between Audrey N. Gray and MDEQ which involves the removal of a lien filed by MDEQ pursuant to MCL 324.20138 on the property and for the payment by Audrey N. Gray of past and future response activity costs incurred by the State of Michigan (the State) at the facility which includes the property located at 1517 South Westnedge, Kalamazoo, Michigan (hereinafter Property). Pursuant to Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), the State incurred response activity costs in responding to a release or threat of release of hazardous substances at the facility. The Parties agree not to contest (a) the authority or jurisdiction of the Court to enter this Consent Judgment or (b) any terms or conditions of this Consent Judgment.

Neither the entering into by the Parties nor the entry of this Consent Judgment by the Court is an admission or denial of any factual allegations or legal conclusions stated or implied in this Consent Judgment.

The Parties agree, and the Court by entering this Consent Judgment finds, that the terms and conditions of the Consent Judgment are fair, reasonable, and consistent with the public interest and the doctrines of applicable law.

NOW, THEREFORE, before the taking of any testimony, and without this Consent Judgment constituting an admission of any of the allegations in the Complaint or Counter-

Complaint, and upon the consent of the Parties and their attorneys, it is hereby ORDERED,
ADJUDGED AND DECREED:

I. JURISDICTION

1.1 This Court has jurisdiction over the subject matter of this action pursuant to MCL 324.20137. This Court also has personal jurisdiction over the Parties. The Parties waive all objections and defenses that they may have to the jurisdiction of this Court or to venue in this Circuit Court.

1.2 The Court shall retain jurisdiction over the Parties and subject matter of this action to enforce this Consent Judgment.

II. PARTIES BOUND

2.1 This Consent Judgment shall apply to and be binding upon the Parties and their successors and assigns. No change or changes in the ownership or corporate status of the Plaintiff/Counter-Defendant shall in any way alter the Parties' responsibilities under this Consent Judgment.

2.2 Audrey N. Gray is liable for the payment specified in this Consent Judgment and MDEQ is liable for the removal of its lien from the Property upon payment by Audrey N. Gray as specified. The signatories to this Consent Judgment certify that they are authorized to execute this Consent Judgment and to legally bind the Parties they represent.

III. STATEMENT OF PURPOSE

3.1 In entering into this Consent Judgment, the mutual objective of the Parties is to resolve, without further litigation, the mutual claims between them for the recovery of past and future response activity costs that the State has incurred at the Facility which includes the Property and the removal of MDEQ's lien from the Property.

IV. DEFINITIONS

4.1 "Consent Judgment" means this Consent Judgment and any attachment.

4.2 "Defendant/Counter-Plaintiff" means the Michigan Department of Environmental Quality.

4.3 "Facility" means the property located at 1517 South Westnedge, Kalamazoo, Michigan, and any area, place, or property where a hazardous substance, which originated at and emanates from the Property and is present at concentrations that exceed the requirements of Section 20120a(1)(a) or (17) of the NREPA, MCL 324.20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under Part 213 of the NREPA, has been released, deposited, or disposed of, or otherwise has come to be located.

4.4 "Plaintiff/Counter-Defendant" means Audrey N. Gray.

4.5 "Parties" means the Plaintiff/Counter-Defendant and Defendant/Counter-Plaintiff only.

4.6 All other terms used in this Consent Judgment, which are defined in Part 201 of NREPA, MCL 324.20101 *et seq*, or the Part 201 Administrative Rules, 1990 AACS, R 299.5101 *et seq*, shall have the same meaning in the Consent Judgment as in Part 201 and its rules.

4.7 "State" means Michigan Department of Environmental Quality and the Attorney General of the State of Michigan.

V. REIMBURSEMENT OF PAST AND FUTURE RESPONSE ACTIVITY COSTS

5.1 Within thirty (30) days of the effective date of this Consent Judgment, the Plaintiff/Counter-Defendant shall pay to the MDEQ the sum of \$50,000.00 to resolve all claims for past and future response activity costs incurred by the MDEQ. For purposes of this Consent Judgment, the term "past and future response activity costs" shall mean those costs that the State has incurred or will incur in performing response activities at the Facility related to the release or threat of release that existed at the Facility as of the effective date of this Consent Judgment.

Payment is to be made by check payable to the "State of Michigan - Environmental Response Fund" and sent to:

Revenue Control Unit
Michigan Department of Environmental Quality
Constitution Hall, 5th Floor, South Tower
P.O. Box 30657
Lansing, Michigan 48909-8157

To ensure proper credit, payments made pursuant to this Consent Judgment must be made by check referencing Audrey N. Gray, Kalamazoo County Circuit Court No. B04000367-CH, and the Remediation and Redevelopment Division, Account No. – RRD2191.

5.2 Within thirty (30) days of receiving payment as provided in Paragraph 5.1, MDEQ will provide Plaintiff/Counter-Defendant a release of lien for the Property in a form that can be filed with the Register of Deeds for Kalamazoo County.

5.3 If the Plaintiff/Counter-Defendant fails to pay the amount indicated in Paragraph 5.1 within the time frame set forth therein, Plaintiff/Counter-Defendant shall pay MDEQ interest

on those unreimbursed costs at the rate provided in Section 20126a(3) of the NREPA. For any payment that is more than thirty (30) days past due, the Plaintiff/Counter-Defendant shall also pay the MDEQ stipulated penalties of \$500.00 per day for every day of noncompliance with Paragraph 5.1.

5.4 Costs recovered pursuant to this Consent Judgment shall be deposited in the Environmental Response Fund in accordance with the provisions of Section 20108(3) of the NREPA, MCL 324.20108(3).

**VI. COVENANT NOT TO SUE AND
RESERVATION OF RIGHTS BY PLAINTIFFS**

6.1 In consideration of the payments to be made by the Plaintiff/Counter-Defendant as provided in this Consent Judgment, except as specifically provided in this Section, MDEQ covenants not to sue or to take administrative action against the Plaintiff/Counter-Defendant for the matters addressed in Paragraphs 5.1 and 5.3. This covenant not to sue shall take effect upon the MDEQ's receipt of the payments required by Paragraph 5.1 and any associated interest and penalties that may have accrued pursuant to Paragraph 5.3. This covenant not to sue applies only to past and future response activity costs relating to the release or threat of release that existed at the Facility on the effective date of this Consent Judgment and shall not be construed as a covenant not to sue for any other liability that the Plaintiff/Counter-Defendant may have to the State for the Facility. This covenant not to sue extends only to the Plaintiff/Counter-Defendant and does not extend to any other person including, but not limited to, Defendants/Cross-Defendants James P. and Karen L. McDonald.

6.2 The covenant not to sue applies only to those matters specified in Paragraphs 5.1 and 5.3. MDEQ reserves the right to bring an action against the Plaintiff/Counter-Defendant under state laws for any matters that are not set forth in Paragraph 6.1. MDEQ reserves, and this Consent Judgment is without prejudice to, all rights to take administrative action or to file a new action pursuant to any applicable authority against Plaintiff/Counter-Defendant with respect to all other matters.

6.3 MDEQ expressly reserves all of its rights and defenses pursuant to any available legal authority to enforce this Consent Judgment.

6.4 In addition to, and not as a limitation of, any other provision of this Consent Judgment, MDEQ retains all authority and reserves all rights to perform, or to contract to have performed, any response activities that the MDEQ determines are necessary and to seek to recover response activity costs as authorized by law.

6.5 Nothing in this Consent Judgment shall limit the power and authority of the MDEQ or the State of Michigan to take, direct or order all appropriate action to protect the public health, safety, or welfare, or the environment; or to prevent, abate or minimize a release or threatened release of hazardous substances, pollutants or contaminants on, at or from the Facility.

**VII. COVENANT NOT TO SUE AND RESERVATION
OF RIGHT BY PLAINTIFF/COUNTER-DEFENDANT**

7.1 The Plaintiff/Counter-Defendant hereby covenants not to sue and agrees not to assert any claim or cause of action against the State of Michigan with respect to the Facility for matters arising from this Consent Judgment, including, but not limited to, any direct or indirect claim for reimbursement from the Environmental Response Fund pursuant to Section 20119(5) of the NREPA, MCL 324.20119(5), or any other provision of law.

7.2 The Plaintiff/Counter-Defendant hereby reserves the right to enforce MDEQ's obligation as set forth in Paragraph 5.2.

7.3 In any subsequent administrative or judicial proceeding initiated by the Attorney General for injunctive relief, recovery of response activity costs, or other appropriate relief relating to the Facility, Plaintiff/Counter-Defendant agrees not to assert, and may not and shall not maintain any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by Defendant/Counter-Plaintiff in the subsequent proceeding were or should have been brought in this case; provided, however, that nothing in this paragraph affects the enforceability of the covenants not to sue set forth in Section VI (Covenant Not to Sue and Reservation of Rights by MDEQ) and Section VII (Covenant Not to Sue and Reservation of Rights by Plaintiff/Counter-Defendant).

VIII. CONTRIBUTION PROTECTION

Pursuant to Section 113(f)(2) of CERCLA, 42 USC § 9613(f)(2), and Section 20129(5) of NREPA, MCL 324.20129(5) and to the extent provided in Section VI (Covenant Not to Sue and Reservation of Rights), Plaintiff/Counter-Defendant shall not be liable for claims for contribution regarding matters addressed in this Consent Judgment. Entry of this Consent Judgment does not discharge the liability of any other person or persons liable under Section 107 of CERCLA, 42 USC § 9607, or Section 20126 of NREPA, MCL 324.20126. Pursuant to Section 20129(9) of the NREPA, MCL 324.20129(9), any action by the Plaintiff/Counter-Defendant for contribution from any person not a party to this Consent Judgment shall be

subordinate to the rights of the State if the State files an action pursuant to the NREPA or other applicable federal or state law.

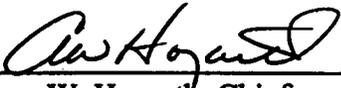
IX. SEPARATE DOCUMENTS

This Consent Judgment may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

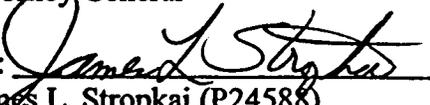
X. EFFECTIVE DATE

This Consent Judgment shall be effective upon the date that this Consent Judgment is entered with the Court. All dates for performance of activities under this Consent Judgment shall be calculated from the effective date of this Consent Judgment. For the purposes of this Consent Judgment, the term "day" shall mean a calendar day unless otherwise noted.

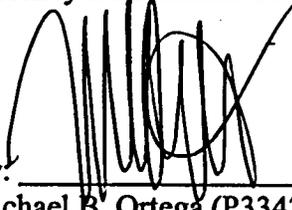
IT IS SO AGREED BY:

By: 
Andrew W. Hogarth, Chief
Remediation and Redevelopment Division
Department of Environmental Quality
525 W. Allegan, Constitution Hall
Lansing, MI 48913
Dated: 10/8/04

Attorney for Defendant/Counter-Plaintiff

Michael A. Cox
Attorney General
By: 
James L. Stropkai (P24588)
Assistant Attorney General
Attorney for State Defendant/
Counter-Plaintiff MDEQ
Environment, Natural Resources,
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P.O. Box 30755
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(517) 373-7540
Dated: 10/8/04

Attorney for Plaintiff/Counter-Defendant


By: _____
Michael B. Ortega (P33423)
Lewis, Reed & Allen, P.C.
Attorney for Plaintiff/
Counter-Defendant Audrey N. Gray
136 E. Michigan Avenue, Suite 800
Kalamazoo, MI 49007
(269) 388-7600
Dated: 10.5.04

IT IS SO ORDERED, ADJUDGED AND DECREED THIS 25th day of ~~October~~, 2004.



Honorable Allen L. Garbrecht

S/NR/AC/2004Cases/Gray 2004014358/Consent Judgment

