STATE OF MICHIGAN

IN THE SUPREME COURT

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel.* MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES AND ENERGY,

Plaintiffs-Appellees,

and

THE CITY OF ANN ARBOR, WASHTENAW COUNTY, THE WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER JIMENA LOVELUCK, THE HURON RIVER WATERSHED COUNCIL, AND SCIO TOWNSHIP

Intervenors-Appellees,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant-Appellant.

Supreme Court Docket No. _____

Court of Appeals Docket No. 357598

Washtenaw County Circuit
Court Case No. 88-034734-CE

DEFENDANT-APPELLANT'S APPENDIX

VOLUME I

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DEFENDANT-APPELLANT'S APPENDIX.

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IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

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FRANK J. KELLEY, Attorney General
for the State of Michigan, ex rel.
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION,
AND MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs

v. No. 88-34734 CE

GELMAN SCIENCES, INC., OPINION AND ORDER
A Michigan corporation,

Defendant

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OPINION AND ORDER rendered by the HONORABLE PATRICK J. CONLIN, CIRCUIT JUDGE, at Ann Arbor, Michigan, on July 25, 1991.

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S T A T E O F M I C H I G A N

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

- - - - - - - - - - - - - - - - -

FRANK J. KELLEY, ATTORNEY GENERAL
FOR THE STATE OF MICHIGAN, EX REL.
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION
and MICHIGAN DEPARTMENT OF NATURAL
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GELMAN SCIENCES, INC., OPINION AND ORDER
A Michigan corporation,

Defendant

- - - - - - - - - - - - - - - - -

At a session of said Court held in
the City of Ann Arbor, Washtenaw
County, Michigan, on July 25, 1991.

PRESENT: HONORABLE PATRICK J. CONLIN, CIRCUIT JUDGE

FINDING OF FACT

This case involves the use by Gelman Sciences, hereinafter known as "Gelman" of 1,4-dioxane. This substance is one of the raw materials used in the production of cellulose triacetate membrane. Gelman began manufacturing the cellulose triacetate membrane in 1966. In October of 1965 Gelman submitted a statement on new or increased use of water of the state for waste disposal purposes to the Water Resources Commission in accordance with Sec. 8b, Act 245 of

Public Acts of 1929, as amended. In that statement Gelman stated that it was disposing of up to 9,000 gallons per day of processed waste water. In describing the expected characteristics of the waste to be discharged Gelman did not identify 1,4-dioxane by name, but did indicate that among the substances which Gelman proposed to discharge into its lagoon were ethelyne glycol ether. 1,4-dioxane is an ethelyne glycol ether. By submittal of the statement on new or increased water of the state for waste disposal purposes, dated October 26, 1965, Gelman applied for permission to discharge its processed waste water by discharge to the surface of the ground to soak in and evaporate. (Plaintiff's Exhibit 69)

By order of determination dated December 15, 1965, the Water Resources Commission, hereinafter known as the "WRC" authorized Gelman to discharge waste waters containing ethelyne glycol ethers to the ground. (Plaintiff's Exhibit 71)

Order 816 provides as follows:

"STATE OF MICHIGAN

WATER RESOURCES COMMISSION

Order No. 816

Statement of GELMAN INSTRUMENT COMPANY, a: Michigan Corporation, Regarding a New Use: of the GROUND WATERS near ANN ARBOR, : MICHIGAN

ORDER OF DETERMINATION

WHEREAS, Gelman Instrument Company, a Michigan Corporation

has filed with the Water Resources Commission a written statement dated October 17, 1965 for a prospective new use of the waters of the State for disposal of sewage and wastes from a proposed filter and instrument manufacturing business to be located at 600 South Wagner Road, Scio Township, Washtenaw County, Michigan; and

WHEREAS, the said written statement sets forth that Gelman Instrument Company proposes to dispose of approximately nine thousand (9,000) gallons per day of process wastes containing 0.5% ethylene glycol, 0.5% ethylene glycol ethers, 0.025% methyl pyrlidone, 0.005% dimethyl formamide and 2 milligrams per liter Triton X-100 and approximately three thousand (3,000) gallons per day of sanitary sewage into the ground, using certain described methods and facilities; and

WHEREAS, the Commission at its meeting on December 15, 1965, after giving due consideration to the statement and to investigations by its staff of the factors involved, is of the opinion and has determined that the restrictions and conditions as hereinafter set forth are necessary to protect the waters of the state against unlawful pollution;

NOW THEREFORE BE IT RESOLVED, that it is the order of the Commission that Gelman Instrument Company, a Corporation, their agents or successors, in disposing of sewage and wastes from a proposed filter and instrument manufacturing business to be located at 600 South Wagner Road, Scio Township, Washtenaw County, Michigan shall comply with the following restrictions and conditions:

1. No waste waters resulting from filter and instrument manufacturing process shall be discharged directly or indirectly into the surface waters of the state, but same shall be disposed of into the ground in such a manner and by means of such facilities and at such location that they shall not injuriously affect public health or commercial, industrial, and domestic water supply use.

2. No human sewage shall be discharged directly or indirectly into the surface waters of the state, but the same shall be disposed of into the ground by subsurface percolation methods.

3. No facilities necessary for compliance with restrictions and conditions set forth in this Order shall be constructed until plans for the

same have been submitted to and approved by the Chief Engineer of the Commission.

BE IT FURTHER RESOLVED, that the aforesaid restrictions and conditions set forth in this Order shall become effective at and from the time this Order becomes final as provided herein and shall remain in effect until further order of the Commission: PROVIDED HOWEVER, that all sewage and wastes from said Gelman Instrument Company shall be connected to any sanitary system, which may be provided by any governmental unit, within sixty (60) days from the date when said sewer becomes available. At that time any restrictions and conditions imposed by said governmental unit shall supersede the restrictions and conditions imposed by this Order and this Order shall then be terminated.

BE IT FURTHER RESOLVED, that this instrument does not obviate the necessity of obtaining such permits as may be required by law from other units of government.

This Order made this 15th day of December, 1965 by the Commission in accordance with Act 245, P. A. 1929, as amended, and shall be final in the absence of request for public hearing filed within 15 days after receipt hereof, on motion by Mr. Vogt, supported by Mr. Ball, and unanimously carried.

PRESENT AND VOTING:

Gerald E. Eddy, for Director of Conservation, Chairman
Lynn F. Baldwin, for Conservation Groups, Vice Chairman
John E. Vogt, for State Health Commissioner
James V. Murray, for State Highway Commission
B. Dale Ball, Director of Agriculture
Jim Gilmore, for Industrial Management Groups
George F. Liddle, for Municipal Groups."

Gelman used a series of three ponds for treatment of its processed waste water. These ponds have been referred to as ponds 1, 2 and 3. Pond 1 was constructed in the early 1960's to accept processed waste water from Gelman's manufacturing.

Pond 1 was used until approximately 1976, at which time

it was filled with dirt.

Pond 2 was located west of the Gelman Sciences plant and to the south of a marshy area. Gelman placed overflow water from pond 1 into pond 2. The water flowing into pond 2 was treated by using aerators and aerobic bacteria. For approximately two years in the late 1960's after water in pond 2 had reached a certain level, the water would overflow through a pipe into a marshy area. The rate of flow was between 5 to 10 gallons per minute. When the Water Resources Commission learned of this overflow in the late 1960's Gelman stopped the overflow from pond 2 by dredging out the bottom of pond 2 and letting the water seep into the ground. The order of determination of the WRC required seepage of the waste water from the bottom of pond 2 into the ground. This waste water did contain 1,4-dioxane. Thus, 1,4-dioxane was seeping into the ground with the approval of the DNR and WRC.

In March of 1970 in response to inquiries by the WRC concerning the status of Gelman's waste water system, Gelman affirmatively represented that the soluble organic solvents contained in the Gelman waste were not toxic or noxious per se.

The DNR had a toxic substance list. However, the substance 1,4-dioxane was not on the Michigan critical materials register at that time.

Pond 3 was constructed in approximately 1973 and continued in service until 1987. Pond 3 is located directly south of pond 2. Process waste water was deposited in pond 3

immediately after it was constructed. The sides of pond 3 were lined with a plastic polymer material. The base in pond 3 was clay.

In the fall of 1976 Gelman applied for a permit to discharge its processed waste water through spray irrigation. The application required Gelman to disclose whether substances listed on the Michigan critical materials register are to be present in the discharge. Again, 1,4-dioxane was not on the critical materials register in 1976. Gelman again reported the discharge would contain "organic solvents" from filter manufacturing.

The order of determination previously issued by the WRC remained in effect until the issuance by the WRC in 1977 of a permit authorizing spray irrigation of processed waste water.

In October of 1970 in response to further inquiries by the WRC, Gelman stated it was forced to originate a new method of treatment because of the waste that was unique to its process. Gelman further represented that they did not damage the environment. Gelman further reported on the status of the waste water treatment system stating that gas chromatography has shown that none of the solvents used were present in pond 2, the last stage in the treatment process except for possible doubtful traces of glycol in some determinations.

The DNR had knowledge in 1970 that Gelman had expanded its use beyond that allowed in the original application and

that there were "traces of glycol" in its discharge.

Gelman acknowledged that in an internal Gelman memorandum that in October of 1970 indicating that Gelman could not definitely, safely continue to drain pond 2 at the rate of 4,000 to 5,000 gallons per day as the waste might reach someone's well and any overflow would be in violation of the WRC order 816.

The WRC permit No. MOO337 superseded the Order of Determination 816 authorizing Gelman to discharge its treated waste waters to the groundwaters of the state in accordance with the conditions specified herein:

"MICHIGAN WATER RESOURCES COMMISSION

PERMIT TO DISCHARGE

In compliance with the provisions of the Michigan Water Resources Commission Act, as amended, (Act 245, Public Acts of 1929, as amended, the "Michigan Act),

GELMAN INSTRUMENT COMPANY
600 South Wagner Road
Ann Arbor, Michigan 48106

is authorized to discharge from a facility located at

600 South Wagner Road
Ann Arbor, Michigan 48106
Washtenaw County

to the ground waters in accordance with effluent limitations monitoring requirements and other conditions set forth in Parts I, II and III hereof.

This permit shall become effective on the date of issuance.

This permit and the authorization to discharge shall expire at midnight, April 30, 1982. In order to receive authorization to discharge beyond the date of expiration, the permittee shall submit such information and forms as are required by the Michigan Water Resources Commission no later than 180 days prior to the date of expiration.

This permit is based on the company's application dated

November 5, 1976, and shall supersede any and all Orders of Determination, Stipulation, or Final Orders of Determination previously adopted by the Michigan Water Resources Commission.

Issued this Twenty-seventh day of May, 1977, for the Michigan Water Resources Commission.

s/ Robert J. Courchaine
Robert J. Courchaine
Executive Secretary"

(See attached for complete Permit No. M 00337)

The permit in paragraph (a) clearly allowed Gelman to pump at 44,000 gallons per day on average with a daily maximum of 112,700 gallons per day disposed of by spray irrigation in such a manner that they will not injuriously affect the public health or welfare, or commercial, industrial, domestic, agricultural, recreational or other uses of the underground waters or surface waters of the state. This permit was issued after the DNR was notified of the overflow with possible traces of glycol.

Again, no one knew that 1,4-dioxane was a possible contaminant. It was not listed on the critical materials register in 1976 when the application was applied for.

It is clear that the overwhelming source of 1,4-dioxane contamination of the aquifers came from seepage by the ponds, specifically pond 2 and by spray irrigation. There were other minor sources.

Aside from the major elements of contamination there is evidence of some other contaminations. One is a 1980 overflow. There was evidence testified to by a DNR conservation officer, Robert McHolme, who testified that in

1980 he observed and photographed a pump located at pond 2 with one hose extending from the pump to a small quantity of liquid standing in the bottom of the pond and a second hose extending from the pump along the bank of the pond toward the fence located along the northern edge of pond 2. He observed that the hose from the pump had a little bit of liquid in it in which the snow had melted. Mr. McHolme gave his report to the DNR. One Sue Morton evidently made a report. For some unknown reason, the DNR, after reviewing his complaint in 1980, did nothing. He was told by his superiors that there was a permit to discharge water in 1980. It is very interesting that this evidence was presented to the Court when the DNR did not consider it to be worth anything in 1980. The DNR after receiving McHolme's whole report never contacted Gelman. The DNR evidently felt that Gelman was in compliance with its order.

There is further testimony regarding a burn pit that was utilized from 1966 to November of 1979. It was Gelman's regular business practice to dispose of scrap polymer and solvent waste used to clean manufacturing equipment by dumping it untreated into an open burn pit dug in the ground behind the Gelman plant building. Scrap and solvent waste generated in the manufacture of cellulose triacetate membranes during that period contained 1,4-dioxane. There were high concentrations of 1,4-dioxane in the burn pit.

Part of the testimony of James Marshall was that the pit had a clay bottom. Five-gallon buckets of scrap polymer were

taken to the pit and burned. In response to an inspection and request by the DNR, Gelman ceased using the burn pit and excavated materials from the burn pit in 1979. The soil from the burn pit was actually excavated and taken in to Wayne County to the Wayne County Waste Disposal Center.

There is further testimony that the lift station developed a crack and that there was leakage. That as soon as Gelman discovered the crack in the lift station this knowledge was disclosed to the DNR. However, testimony of Dr. Chalmer indicated very slow seepage from the lift station. Further, Gelman actually informed the DNR within 15 to 20 minutes after discovery of the crack that there was this leakage.

The DNR further claims that a lawn mower ran over and cut a hose used to transport the waste to pond 3 back to the plant to the deep well injection. Gelman immediately informed the DNR of this incident. The amount of water spilled from the cut line was approximately 18,000 gallons. The total amount of 1,4-dioxane eventually discharged from the cut was 4.8 ounces of 1,4-dioxane. This was testimony of Dr. Paul Chalmer, April 18, 1990.

Gelman has attempted to purge water taken from the wells on the Redskin property immediately north of Gelman's property. Testimony of Dr. Chalmer was that they took over 3800 pounds of 1,4-dioxane out of the aquifer. The most that could possibly have been put into the groundwater from the cut hose was 4.8 ounces of 1,4-dioxane.

There is no evidence of any amount of seepage in the McHolme incident. As to the crack in the lift station, the only evidence is that this leak was a very small amount and certainly the amount taken out by Gelman was more than adequate to account for any amount to this area. In the burn pit, the soil was excavated from the burn pit and taken to another area. The Court finds that the total amount of 1,4-dioxane that could possibly have seeped into the ground waters was, at most, a few pounds. Gelman has extracted 3,800 pounds already. Therefore, these claims by the DNR are insignificant.

Thus, we are back to the same two major areas of contamination: that is, the seepage and overflow from pond 2 and the spray irrigation.

CONTAMINATION

Both of the experts who have testified, Mr. Minning and Mr. Hayes, indicate that there is substantial contamination of the ground waters by the chemical 1,4-dioxane. Mr. Hayes believes there are at least three aquifers present, the shallow, intermediate and the deep. He believes that all three are contaminated and the contamination of all three originated at the Gelman site. He believes that the contamination that has occurred has occurred because of hydraulic communication between the aquifers. His only question is whether or not there is communication between the deepest aquifer to the west. Mr. Minning's testimony was similar. He also believes that the aquifers are

contaminated.

The highest concentrations of 1,4-dioxane have been found in the Redskin well located just north of the Gelman facility. The Redskin well is located in the C3 or intermediate aquifer. Contamination of the ground water with 1,4-dioxane in excess of 3.4 parts per million have been found only in the core area of contamination near the Redskin well. Ground water contaminated with low concentration of 1,4-dioxane has been found west of the Gelman facility extending out towards Park Road and east of the Gelman facility in the Westover Subdivision. Soil borings of the spray irrigation field and other site locations have shown the presence of 1,4-dioxane.

Both sides believe that the Third Sister Lake is contaminated by the intermediate aquifer and that there is a plume of 1,4-dioxane to the west and its extent can be defined. However, Mr. Minning believes that the extent to the north and the east is more difficult to define as it may have entered the 3 subzero aquifer which is in his determination the deepest aquifer.

CARCINOGENISTIC ATTRIBUTES

The evidence indicates that 1,4-dioxane causes cancer in animals, that is, it has caused liver cancer and nasal tumors in rats. Dr. Venman testified on May 9, 1990, that 1,4-dioxane is a possible human carcinogen. The United States Environmental Protection Agency and the International Agency for Research on Cancer have concluded that there is

sufficient evidence that 1,4-dioxane causes cancer in animal studies and have classified it as a probable human carcinogen. The biological mechanism by which 1,4-dioxane causes cancer is not yet known. The DNR has presented evidence that it should be treated as a non-threshold carcinogen, that is, that there is no established threshold level of exposure whereby there would be no increase in the risk of cancer.

The preponderance of the scientific evidence establishes that 1,4-dioxane acts as a promoter and not as an initiator of cancer. A carcinogen is classified as an initiator if it is capable of itself initiating the mutation of genetic material. A carcinogen is a promoter if it takes an existing change in genetic material and causes it to develop into a tumor or carcinogenic end point. There is evidence that 1,4-dioxane does cause cancer in livers and carcinogenetic nasal tumors in rats. This Court could easily infer and does infer that a tame rat is not much different than a wild rat or muskrat. Therefore, this Court does find that there is evidence in that 1,4-dioxane could cause injury to wild animals.

The DNR believes that there is not enough scientific information available concerning an acceptable level of 1,4-dioxane.

Dr. Hartung in his report indicated that the preponderance of scientific evidence establishes that concentrations of 1,4-dioxane below the level established in

his report of 3.4 parts per million do not present a significant health threat to humans (Defendant's exhibit 11, page 101.)

The DNR has presented no evidence on this record suggesting that the 1,4-dioxane concentration found in local surface waters has any adverse effect upon fish, wildlife or other biological material.

REMEDIATION

In 1987 Gelman reorganized technical work-group meetings in order to have discussions and information sharing regarding site conditions, investigation and remediation of the contamination. Representatives of the DNR, the Michigan Department of Public Health and the Washtenaw County Health Department were invited to attend and did attend. At the meetings available data, studies and information were exchanged. At the meetings representatives of the state worked with Gelman to design further investigation and approaches to the expansion of the hydrogeologic study. DNR representatives would not discuss remediation proposals at the site at the technical work meetings. In 1987 Gelman submitted to the DNR a preliminary clean-up program in which they proposed to purge ground water from the most contaminated area, the Redskin Industries, and inject the purged water into a deep well. The DNR refused to accept any remediation. Gelman proceeded on its own to purge ground water from the Redskin well. The purge well operated from July of 1987 to November of 1987, whereupon a change in

regulatory status of the deep well prohibited further use. During that period of time approximately 3,800 pounds of 1,4-dioxane was removed.

In 1987 Gelman submitted a plan to remediate the soil to the DNR. For the initial phases of the program Gelman requested the state to provide a person to attend the meetings to help in the remediation, but the DNR did not send any representative. Defendant's exhibit 7, a deposition exhibit, indicates that at one meeting a DNR agent was at the meeting and was instructed to neither approve nor disapprove the remediation.

Defendant's exhibit 8 was a clean-up proposal. Dr. Chalmer wrote most of it himself. He wanted to purge the most highly concentrated areas with monitoring wells which are called sentinels along the outer area. This would show how and where the 1,4-dioxane was migrating and if it was going in a particular direction. Then they could purge in that area. Further, they could use concentrated purges where the problem was most acute. This document was submitted to the DNR. Dr.Chalmer wanted to start immediately before getting to the other questions as this would stop further dispersal at the most highly concentrated sites. The DNR would not accept the proposal of Dr. Chalmer. However, Dr. Chalmer did attempt to carry out his work regardless of whether it was going to be approved. He sought and obtained permission from Redskin Industries to do this purging. The water from Redskin was to be piped to Gelman with a number of

fail-safe devices and the water was routed to injection wells. The purged water was injected into deep wells. The 1,4-dioxane concentration was 220 parts per million and in November 1987, after treatment, it was down to 60 parts per million. This continued until federal regulations prevented Gelman from continuing.

Dr. Chalmer further believed that most of the 1,4-dioxane in the bog was still on the surface and had not gotten very far into the bog and it could be cleaned out as soon as they cleaned the bog.

The DNR believed that neither the Water Resources Commission nor the DNR had the most complete knowledge of the chemical constituents and that they should therefore do nothing nor allow anything to be done to stem the flow. As Gelman represented the constituents as being not toxic, noxious or deleterious solvents, the DNR believed that Gelman should be held accountable.

WRC and the DNR were required by the Michigan Constitution and the Michigan Water Resources Commission Act to ensure that Gelman permitted discharges would not become injurious to the public health. The DNR employees should not have issued a permit or order of determination without making such a determination. These permits allowed the contamination of our aquifers.

CONCLUSION OF LAW

STANDARDS FOR INVOLUNTARY DISMISSAL

Gelman has moved this Court for involuntary dismissal of

the Plaintiff's complaint. Alternatively, Gelman has asked the Court to dismiss those portions of the complaint which the Plaintiff has failed to show a right to relief. The Michigan Court Rule 2.504(b)(2) provides as follows:

> "In an action tried without a jury, after the presentation of the plaintiff's evidence, the defendant without waiving the right to offer evidence if the motion is not granted may move for dismissal on the grounds that on the facts and the law the plaintiff has not shown the right to relief. The court may then determine the facts and render judgment against the plaintiff or may decline to render judgment until close of all the evidence. If the court renders judgment on the merits against the plaintiff the court shall make the findings provided in MCR 2.517. In a ruling on this motion the court may waive the evidence, pass on the credibility of the witnesses and select between conflicting inferences and make other factual determinations".

WATER RESOURCES COMMISSION ACT

A. Elements of Action Under the WRCA.

Plaintiffs allege that Gelman had violated Section 6(a) and Section 7 of the Water Resources Commission Act, MCLA Sec. 323.6, 323.7 ("WRCA) (Complaint Paragraphs 61-71) In order to establish a violation of Section 6(a), Plaintiffs must demonstrate that:

1. Gelman directly or indirectly discharged
2. into the waters of the state,
3. a substance or substances which is or may become:
    a. Injurious to the public health, safety or welfare; or
    b. Injurious to domestic, commercial, industrial, agricultural, recreational, or other uses which are being or may be made of such waters; or
    c. Injurious to the value or utility of riparian lands; or

d. Injurious to livestock, wild animals, birds, fish, aquatic life, or plants or the growth or propagation thereof be prevented or injuriously affected or whereby the value of fish and game is or may be destroyed or impaired.

See MCLA Sec. 323.6(a). In order to prove a violation of Section 7 of the WRCA, Plaintiffs must prove that Gelman:

1. discharged waste or waste effluent,

2. into the waters of the state,

3. without a valid permit therefor from the WRC.

See MCLA Sec. 323.7.

The evidence adduced during Plaintiffs' case shows that Defendant has been in substantial compliance with the permits issued to it. Further, the relevant regulatory agencies were informed of the nature of Gelman's process wastewater and, in particular, that 1,4-dioxane (ethylene glycol ethers) was being discharged. The permits issued by the WRC and the DNR authorized and instructed Gelman to discharge directly to the groundwaters.

A permit or Order of Determination issued pursuant to Section 7 of the WRCA provides a complete defense to claims that permitted discharges violated Sections 6(a) or 7. To find otherwise would mean that the WRC and the DNR could issue permits for discharges that violate the statute. Further, to hold otherwise would mean that a permit or Order of Determination does not, in actuality, provide any protection to a permittee for discharges in compliance with a permit.

The WRC and the DNR were required by the Michigan

Constitution and the WRCA to insure that Gelman's permitted discharges would not become injurious to the public health. The DNR employees could not issue a permit or Order of Determination pursuant to Sec. 7 of the WRCA without first making such a determination. Plaintiffs now seek to foist upon Gelman the responsibility for protecting the public welfare based on the following general prohibition contained in the permits issued to Gelman:

> No waste water resulting from filter and instrument manufacturing process shall be discharged directly or indirectly into the surface waters of the state, but the same shall be disposed of into the ground in such a manner and by means of such facilities and at such location that they shall not injuriously affect public health or commercial, industrial and domestic water supply use.

(Plaintiffs' Exhibit No. 71) (Order of Determination No. 816) The attempt by Plaintiffs to impose liability on Gelman based on the inclusion of such "boilerplate" language in the permits issued to Gelman is based upon the assertion that as Gelman had the most complete knowledge of the chemical constituents they were discharging, they should be held liable. This action is an attempt by the DNR and the WRC to absolve themselves of their duty to protect the environment and the public health. Having authorized Defendant's discharges, Plaintiffs cannot now impose liability on Gelman. Any threat to the public health would be the result of the failure of the WRC and the DNR to accurately evaluate the effects of the discharges they authorized. The WRC and/or the DNR are supposed to have people that know, study and test

these things. It certainly is an illogical conclusion to say that Gelman should be held responsible because they had more knowledge. If that is followed to its logical conclusion that would mean that in every instance, we are leaving the polluters in charge of determining whether or not they are polluting. That clearly is the "fox in the hen house" theory of control.

There can be no dispute that Order of Determination No. 816 expressly authorized Gelman to discharge its process wastewater containing ethylene glycol ethers directly to the ground. 1,4-dioxane is an ethylene glycol ether. In November, 1969, Pond 2 was deepened to enhance seepage of the wastewater to the ground, at the suggestion of the DNR. This authorized seepage from Pond 2 caused the most substantial amount of the off-site contamination.

A discharge that was permitted and in compliance with the WRCA when made is not converted to a violation of the WRCA by the subsequent discovery of groundwater contamination.

Notwithstanding that Gelman disclosed in its application that the water to be irrigated could contain organic solvents, the spray irrigation permit did not contain any specific discharge limitations for 1,4-dioxane, or any other organic solvents.

Plaintiffs contend that the spray irrigation permit did not authorize the discharge of 1,4-dioxane. The only evidence on record establishes that the DNR and/or WRC knew

that Gelman's process water could contain 1,4-dioxane going back to 1965. Plaintiffs did not offer a single witness who was familiar with the permit issued to Gelman and who could testify as to what it did, or did not, authorize. Similarly, Plaintiffs have presented no evidence or testimony establishing any spray permit violations by Gelman.

Plaintiffs have failed to demonstrate that the discharge of 1,4-dioxane through spray irrigation by Gelman violated the WRCA.

Defendant claims that alleged violations of Gelman's permits are barred by the applicable statute of limitations (either two years under MCLA Sec. 660.5809 for civil penalties or three years under MCLA Sec. 600.5805(8)) Specifically, Defendant claims that Plaintiffs' allegations under the WRCA regarding alleged violations of the Order of Determination are untimely. The Order of Determination was terminated in 1977 by issuance of the spray irrigation permit by the DNR. The spray irrigation permit expressly superseded the Order of Determination. The evidence shows that discharge pursuant to the Order terminated well beyond the applicable limitations period.

With respect to spray irrigation, the uncontroverted evidence introduced during presentation of Plaintiffs' case establishes that Gelman stopped spray irrigation in Fall, 1984. At that time, Plaintiffs knew that the irrigated wastewater contained 1,4-dioxane. Yet Plaintiffs failed to bring this action until December, 1988, more than four years

later. Accordingly, any claim that Gelman violated its spray irrigation permit is time-barred.

However, as there is evidence of unauthorized overflows from Pond 2 to the marshy area, beyond the permit, the Court will decline to enter judgment against Plaintiffs on this issue. Claims based on continuing harm are not barred by the applicable limitation period. Defnet v. City of Detroit, 327 Mich 254 (1950); Moore v. Pontiac, 143 Mich App 610 (1985). Judgment is rendered against Plaintiffs on all other issues.

MICHIGAN ENVIRONMENTAL PROTECTION ACT

Plaintiffs have brought a claim under MEPA seeking "equitable relief to protect the water and other natural resources, or the public trust therein."

A. Elements of the MEPA Action.

In order to sustain a claim under MEPA, Plaintiffs must make out a prima facie case. The elements to a prima facie case under MEPA are:

1. that air, water, or other natural resources are involved;

2. that Defendant's conduct is involved;

3. that such conduct has, or is likely to, pollute, impair, or destroy the natural resource involved.

MCLA Sec. 691.1203(1).

Consistent with a constitutional mandate, MEPA imposes a duty upon the government and the citizens of this State to prevent the pollution, impairment, or destruction of the natural resources of this State. MCLA Sec. 691.1202. From and after October 1, 1980, the effective date of MEPA,

in issuing wastewater discharge permits to Gelman, the State was required to make a determination that the proposed discharges would meet the mandates of the WRCA, the Constitution and MEPA. Having made such a finding, Plaintiffs now cannot challenge collaterally their own determination.

The proofs establish that the great majority of groundwater contamination was caused by Gelman's compliance with its wastewater discharge permits. Plaintiffs cannot seek to hold Gelman responsible for complying with permits issued by Plaintiffs, especially where, as here, Plaintiffs made the determination that issuance of said permits was consistent with protection of human health and the environment. However, in paragraph 76 of the Complaint, Plaintiffs state that:

> "Gelman's unauthorized release of wastewater into the ground and into a neighboring wetland violates MEPA Sec. 3(1), MCL 691.1203; MSA 14.528(203), in that its conduct has and is likely to pollute, impair, or destroy water or other natural resources, or the trust therein." (Emphasis added)

The Plaintiffs have shown that there were unauthorized releases of wastewater in a neighboring wetland. The Court, therefore, declines to render judgment on this issue, as 1,4-dioxane continues to leak and migrate from their unauthorized discharge, Hodgeson v. Drain Commissioner, 52 Mich App 411 (1974); Defnet v. City of Detroit, supra; Moore v. Pontiac, supra. However, judgment is rendered against Plaintiffs upon all other issues.

MICHIGAN ENVIRONMENTAL RESPONSE ACT

In Count III, Plaintiffs sought to recover $474,000.00 incurred under MEPA ("Act 307") for provision of bottled water, extension of the municipal water system, and other response activities. By Opinion and Order dated October 15, 1989, this Court granted Gelman's Motion for Partial Summary Disposition related to this Count of the Complaint. This Court determined that Gelman could not be responsible for any funds expended by State agencies when the DNR had ignored its legal duty to promulgate administrative rules necessary to carry out Act 307. This Court concluded:

> As the Department of Natural Resources has had since 1982 the obligation to promulgate rules necessary to carryout the requirements of MERA; and as they did not do it, Gelman cannot be held liable for any evaluation costs or response activity related to the site for which Gelman is responsible.

(Opinion and Order, p. 4) Plaintiffs cannot recover those costs incurred under Act 307 as alleged in the Complaint.

In response to Gelman's Motion in Limine, Plaintiffs have suggested that the costs may be recovered under alternative theories (i.e., Sec. 10 of the WRCA and public nuisance). At the hearing on November 22, 1989, this Court indicated that Plaintiffs may only obtain relief that has been specifically identified in the Complaint (If, of course, Plaintiffs carry their burden of proof).

Plaintiffs have not introduced any evidence regarding the amount allegedly expended at the Gelman site. There is not enough evidence on the record to even deduce the scope of activities of State agencies. Plaintiffs may be able to

recover some costs under MERA for the unauthorized discharge, however. The Court, therefore, refuses to enter judgment on this issue, but does on all other issues. Claims based on continuing harm are not barred by the statute of limitations. Hodgeson v. Genesee County Drain Commissioner, supra; Defnet v. City of Detroit, supra.

COMMON LAW PUBLIC NUISANCE

A. Elements of Claim for Public Nuisance.

To establish their claim regarding public nuisance, Plaintiffs must demonstrate that Defendant's discharges have unreasonably interfered with the public's use and enjoyment of its land. In the context of this case, Plaintiffs must establish that the alleged contamination poses a threat to the public health. Garfield Township v. Young, 348 Mich 337 (1957); McDonell v. Brozo, 285 Mich 39 (1938).

Toxicological studies and expert testimony regarding 1,4-dioxane demonstrate that, except for the "core" area, the levels of 1,4-dioxane found in the aquifers do not pose any threat to the public health and thus do not constitute a public nuisance. See Section II.B., supra. With respect to 1,4-dioxane found in the "core" area, no nuisance exists because there is no evidence that these waters are being used as a drinking water source or for any other purposes.

It is well established that the State cannot prosecute as a public nuisance activities which it has authorized. Rohan v. Detroit Racing Association, 314 Mich 326 (1946); Grand Rapids & I.R. Company v. Heisel, 39 Mich 62 (1878);

Chope v. Detroit and H. Plank Road Company, 37 Mich 195 (1877). As set forth above, Defendant's discharges which allegedly carried the groundwater contamination have, for the most part, been explicitly authorized by the WRC and the DNR pursuant to discharge permits.

However, again, this Court refuses to enter judgment against Plaintiffs because of the aforesaid unauthorized discharge, but does as to all other issues.

Therefore, the Court hereby dismisses all claims against Gelman under the WRCA, MEPA, MERA and for nuisance, except for those relating to the unpermitted discharge of processed wastewater in the late 1960s.

The Court may determine the percentage of cost of all the remediation attributable to Gelman, if such be necessary after the close of proofs. The WRCA does not contain a complete list of specific remedies that a trial court may order, Attorney General v Biewer, 140 Mich App 1 (1985). However, this Court will fashion a remedy

Regarding the DNR request for preliminary injunction, Bratton v DAIIE, 120 Mich App 73 (1982) sets forth the standards for reviewing the grant of a preliminary injunction:

> "The grant or denial of a preliminary injunction is within the sound discretion of the trial court. Grand Rapids v. Central Land Co., 294 Mich 103, 112; 292 NW 579 (1940); Michigan Consolidated Gas Co. v. Public Service Comm, 99 Mich App 470, 478; 297 NW2d 874 (1980). The object of a preliminary injunction is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either. Gates v. Detroit & M R Co. 151 Mich 548, 551; 115 NW 420 (1908). The status

quo which will be preserved by a preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy. Steggles v. National Discount Corp, 326 Mich 44,51; 39 NW2d 237 (1949); Van Buren School Dist v. Wayne Circuit Judge, 61 Mich App 6, 20; 232 NW2d 278 (1975). The injunction should not be issued if the party seeking it fails to show that it will suffer irreparable injury if the injunction is not issued. Niedzialek v. Barbers Union, 331 Mich 296, 300; 49 NW2d 273 (1951); Van Buren School Dist, supra, 16. Furthermore, a preliminary injunction will not be issued if it will grant one of the parties all the relief requested prior to a hearing on the merits. Epworth Assembly v. Ludington & N R Co. 223 Mich 589, 596; 194 NW 562 (1923). Finally, a preliminary injunction should not be issued where the party seeking it has an adequate remedy at law. Van Buren School Dist. supra, p 16." See also Council 25, AFSCME v. Wayne County, 136 Mich App 21, 25-26; 355 NW2d 624 (1984).

Gelman is the only party that has done anything to halt the plume of 1,4-dioxane. Of its own volition, without any assistance from the DNR, Gelman has made substantial efforts to remove the 1,4-dioxane from the aquifers. The DNR has done nothing, They have been at meetings wherein Gelman has tried to formulate a successful plan to halt and eliminate the plume of 1,4-dioxane. Yet, the DNR has done nothing. They, incredibly enough, would not allow their agents to either approve or disapprove any formulation of any plan to dissipate the plume. The DNR has, in fact, hindered Gelman from removing the contaminated 1,4-dioxane from the aquifers. As the DNR has done nothing to halt the onward movement of the plume of 1,4-dioxane and as they have permitted the contaminants to enter into the soil, the Court will not issue a preliminary injunction.

As the State is primarily at fault, the Court believes that the State would be much better off submitting a plan to

eliminate 1,4-dioxane from the aquifers to this Court rather than continuing extensive litigation. The people of Washtenaw County are not being well served by prolonged litigation while the plumes of 1,4-dioxane continue to expand to the west and north.

The Motion for Preliminary Injunction is denied.

Patrick J. Conlin (P12126)
Circuit Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

FRANK J. KELLEY, Attorney General
for the State of Michigan, ex rel,
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION,
and MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

v

GELMAN SCIENCES, INC.,
a Michigan corporation,

Defendant.

OCT 30 1992

File No. 88-34734-CE

Honorable Patrick J. Conlin

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CONSENT JUDGMENT

The Parties enter this Consent Judgment in recognition of, and with the intention of, furtherance of the public interest by (1) addressing environmental concerns raised in Plaintiffs' Complaint; (2) expediting remedial action at the Site; and (3) avoiding further litigation concerning matters covered by this Consent Judgment. The Parties agree to be bound by the terms of this Consent Judgment and stipulate to its entry by the Court.

EXHIBIT 136

The Parties recognize that this Consent Judgment is a compromise of disputed claims. By entering into this Consent Judgment, Defendant does not admit any of the allegations of the Complaint, does not admit any fault or liability under any statutory or common law, and does not waive any rights, claims, or defenses with respect to any person, including the State of Michigan, its agencies, and employees, except as otherwise provided herein. By entering into this Consent Judgment, Plaintiffs do not admit the validity or factual basis of any of the defenses asserted by Defendant, do not admit the validity of any factual or legal determinations previously made by the Court in this matter, and do not waive any rights with respect to any person, including Defendant, except as otherwise provided herein. The Parties agree, and the Court by entering this Judgment finds, that the terms and conditions of the Judgment are reasonable, adequately resolve the environmental issues covered by the Judgment, and properly protect the public interest.

NOW, THEREFORE, upon the consent of the Parties, by their attorneys, it is hereby ORDERED and ADJUDGED:

I. JURISDICTION

A. This Court has jurisdiction over the subject matter of this action. This Court also has personal jurisdiction over the Defendant.

B. This Court shall retain jurisdiction over the Parties and the subject matter of this action to enforce this Judgment and to resolve disputes arising under the Judgment.

II. PARTIES BOUND

This Consent Judgment applies to, is binding upon, and inures to the benefit of Plaintiffs, Defendant, and their successors and assigns.

III. DEFINITIONS

Whenever the terms listed below are used in this Consent Judgment or the Attachments which are appended hereto, the following definitions shall apply:

A. "Consent Judgment" or "Judgment" shall mean this Consent Judgment and all Attachments appended hereto. All Attachments to this Consent Judgment are incorporated herein and made enforceable parts of this Consent Judgment.

B. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday, or a State legal holiday. In computing any period of time under this Consent Judgment, where the last day would fall on a Saturday, Sunday, or State legal holiday, the period shall run until the end of the next working day.

C. "Defendant" shall mean Gelman Sciences, Inc.

D. "Evergreen Subdivision Area" shall mean the residential subdivision generally located north of I-94 and between Wagner and Maple Roads, bounded on the west by Rose Street, on the north by Dexter Road, and on the south and east by Valley Drive.

E. "Gelman" or "GSI" shall mean Gelman Sciences, Inc.

F. "GSI Property" shall mean the real property described in Attachment A, currently owned and operated by GSI in Scio Township, Michigan.

G. "Groundwater Contamination" or "Groundwater Contaminant" shall mean 1,4-dioxane in groundwater at a concentration in excess of 3 micrograms per liter ("ug/l") determined by the sampling and analytical method(s) described in Attachment B.

H. "MDNR" shall mean the Michigan Department of Natural Resources.

I. "Parties" shall mean Plaintiffs and Defendant.

J. "Plaintiffs" shall mean Frank J. Kelley, Attorney General of the State of Michigan, ex rel, Michigan Natural Resources Commission, Michigan Water Resources Commission, and Michigan Department of Natural Resources.

K. "Redskin Well" means the purge well currently located on the Redskin Industries property.

L. "Remedial Action" or "Remediation" shall mean removal, treatment, and proper disposal of groundwater and soil contaminants pursuant to the terms and conditions of this Consent Judgment and work plans approved by the MDNR under this Judgment.

M. "Site" shall mean the GSI Property and other areas affected by the migration of groundwater contamination emanating from the GSI Property.

N. "Soil Contamination" or "Soil Contaminant" shall mean 1,4-dioxane in soil at a concentration in excess of 60 ug/kg, as determined by the sampling and analytical method(s) described in Attachment C, or other higher concentration limit derived by means consistent with Mich Admin Code R 299.5711(2) or R 299.5717.

O. "Spray Irrigation Field" shall mean that area of the GSI site formerly used for spray irrigation of treated process wastewater, as depicted on the map included as Attachment D.

P. "Unit C3 Aquifer" means the aquifer identified as the C3 Unit in reports prepared for Defendant by Keck Consulting.

IV. IMPLEMENTATION OF REMEDIAL ACTION BY DEFENDANT

Defendant shall implement the Remedial Action to address groundwater and soil contamination at, and emanating from, the GSI Property in accordance with (1) the terms and conditions of this Consent Judgment; and (2) work plans approved by the MDNR pursuant to this Consent Judgment.

V. GROUNDWATER REMEDIATION

Defendant shall design, install, operate, and maintain the systems described below to remove, to treat (as required), and to dispose properly of contaminated groundwater. The objectives of these systems shall be to contain the plumes of groundwater contamination emanating from the GSI Property as described below and to extract the contaminated groundwater from the aquifers at designated locations for treatment (as required) and disposal. Defendant also shall implement a monitoring program to verify the effectiveness of these systems.

A. Evergreen Subdivision Area System (hereinafter "Evergreen System")

1. Objectives. The objectives of this system shall be: (a) to intercept and contain the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area; (b) to remove the contaminated

groundwater from the affected aquifer; and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that is not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section VI.

2. Investigation and Design of System.

a. Pump Test Report. Defendant has constructed a purge/test well in the Evergreen Subdivision and conducted a pump test. No later than five days after entry of this Consent Judgment, Defendant shall submit to MDNR a report showing the well construction details and containing pump test and aquifer performance data.

b. Treatment Equipment. Within five days after entry of this Consent Judgment, Defendant shall submit to MDNR specifications for equipment for the treatment of purged groundwater using ultraviolet light and oxidating agents sufficient to remove 1,4-dioxane from goundwater to levels of 3 ug/l or lower. Defendant shall order such equipment within ten days after receiving approval from MDNR.

c. Obtaining Authorization for Groundwater Reinjection. Within 90 days after entry of the Consent Judgment, Defendant shall do one of the following: (i) submit a complete application to the Water Resources Commission for a groundwater discharge permit or permit exemption to authorize the reinjection

of purged, treated groundwater from the Evergreen System; or (ii) submit a plan to MDNR for reinjection of purged, treated groundwater from the Evergreen System that will assure compliance with and be authorized by the generic Exemption for Groundwater Remediation Activites issued by the Water Resources Commission on August 20, 1992.

d. Work Plan. Within 90 days after entry of the Consent Judgment, Defendant shall submit to MDNR for its review and approval a work plan for continued investigation of the Evergreen Subdivision and design of the Evergreen System. At a minimum, the work plan shall include, without limitation, installation of at least one purge well and associated observation well(s) and a schedule for implementing the work plan. The work plan shall specify the treatment and disposal options to be used for the Evergreen System as described in Section V.A.5. The existing test/purge well can be incorporated into the work plan if appropriate.

3. Implementation. Within 14 days after receipt of the MDNR's written approval of the work plan described in Section V.A.2., Defendant shall implement the work plan. Defendant shall submit the following to MDNR according to the approved time schedule: (a) the completed Evergreen System design; (b) a schedule for implementing the design; (c) an operation and maintenance plan for the Evergreen System; and (d) an effectiveness monitoring plan.

4. Operation and Maintenance. Upon approval of the Evergreen System design by the MDNR, Defendant shall install the Evergreen System according to the approved schedule and thereafter, except for temporary shutdowns pursuant to Section V.A.6. of this Consent Judgement, continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate purge well operations pursuant to Section V.D.

5. Treatment and Disposal. Groundwater extracted by the purge well(s) in the Evergreen System shall be treated as necessary using ultraviolet light and oxidizing agents and disposed of in accordance with the Evergeen System design approved by the MDNR. The options for such disposal are the following:

a. Groundwater Discharge. The purged groundwater shall be treated to reduce 1,4-dioxane concentrations to the level required by the Water Resources Commission, and discharged to groundwaters in the vicinity of the Evergreen Subdivision in compliance with the permit or exemption authorizing such discharge referred to in Section V.A.2.c.

b. Sanitary Sewer Discharge. Use of the sanitary sewer leading to the Ann Arbor Wastewater Treatment Plant is conditioned upon approval of the City of Ann Arbor. If discharge is made to the sanitary sewer, the Evergreen System shall be operated and monitored in compliance with the terms

and conditions of the Industrial User's Permit to be issued by the City of Ann Arbor, a copy of which is attached hereto as Attachment G, and any subsequent written amendment of that Permit made by the City of Ann Arbor. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment.

c. Storm Drain Discharge. Use of the storm drain is conditioned upon approval of such use by the City of Ann Arbor and the Allen Creek Drainage District. Discharge to the Huron River via the Ann Arbor stormwater system shall be in accordance with NPDES Permit No. MI-008453 and conditions required by the City and the Drainage District. If the storm drain is to be used for disposal, no later than 21 days after permission is granted by the City and the Drainage District to use the storm drain for continuous disposal of purged groundwater, Defendant shall submit to MDNR, the City of Ann Arbor, and the Drainage District for their review and approval a protocol under which the purge system shall be temporarily shut down: (i) for maintenance of the storm drain; and (ii) during storm events to assure that the stormwater system retains adequate capacity to handle run-off created during such events. The purge system shall be operated in accordance with the approved protocol for temporary shutdown.

6. Monitoring Plan. Defendant shall implement the approved monitoring plan required by Section V.A.3.d. The monitoring plan shall include collection of data to measure the effectiveness of the System in: (a) hydraulically containing groundwater contamination; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring plan shall be continued until terminated pursuant to Section V.E.

B. Core Area System
(hereinafter "Core System")

1. Objectives. For purposes of the Consent Judgment, the "Core Area" means that portion of the Unit C3 aquifer containing 1,4-dioxane in a concentration exceeding 500 ug/l. The objectives of the Core System are to intercept and contain the migration of groundwater from the Core Area and remove contaminated groundwater from the Core Area until the termination criterion for the Core System in Section V.D.1. is satisfied. The Core System shall also prevent the discharge of contaminated groundwater into the Honey Creek Tributary in concentrations in excess of 100 ug/l or in excess of a concentration which would cause groundwater contamination at any location along or adjacent to the entire length of Honey Creek or the Honey Creek Tributary.

2. Evaluation of Groundwater Reinjection Alternative. No later than 35 days after entry of the Consent Judgment, Defendant will complete and submit to MDNR a report on a pilot test for the treatment system using ultraviolet light and oxidizing agent(s) to be used for treatment of extracted groundwater prior to reinjection. No later than 90 days after entry of this Consent Judgment, Defendant may apply to the Michigan Water Resources Commission for authorization for Defendant to reinject treated groundwater extracted from the Core Area. A reinjection program shall consist of the following: (a) installation of a series of purge wells that will control groundwater flow as described in Section V.B.1. and extract water from the Core Area to be treated and reinjected; (b) the system described in the application shall include a groundwater treatment system using ultraviolet light and oxidizing agent(s) to reduce 1,4-dioxane concentrations in the purged groundwater to the level required for a discharge by the Water Resources Commission; (c) the discharge level for 1,4-dioxane in groundwater to be reinjected in the Core Area shall be established based upon performance of further tests by Defendant on the treatment technology and shall in any event be less than 60 ug/l.

3. Groundwater Reinjection. Defendant shall, no later than 120 days after entry of this Consent Judgment: (a) select, verify, and calibrate a model for the groundwater reinjection system; (b) prepare a final report on the model;

and (c) submit to MDNR for review and approval the final report on the model, Defendant's proposed final design for the Core System, a schedule for implementing the design, an operation and maintenance plan for the system, and an effectiveness monitoring plan for the system.

The Groundwater Reinjection System, including the discharge level for 1,4-dioxane, shall be subject to the final approval of the Water Resources Commission and the MDNR. At a minimum, the System shall be designed and operated so as to ensure that: (a) the purged groundwater is reinjected only into portions of the aquifer(s) where groundwater contamination is already present; (b) the concentration of 1,4-dioxane in the aquifer(s) is not increased; and (c) the areal extent of groundwater contamination is not increased.

4. Surface Water Discharge Alternative. In the event that Defendant elects not to proceed with groundwater reinjection as provided in Section V.B.2., or in the event Defendant is denied permission to install such a system, no later than 90 days after the election or denial, Defendant shall submit to the MDNR for its review and approval Defendant's proposed final design of the Core System, a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan for the System. The Core System shall include groundwater purge wells as necessary to meet the

objectives described in Section V.B.1. The Core System also shall include a treatment system using ultraviolet light and oxidizing agent(s) to reduce 1,4-dioxane concentrations in the purged groundwater to the levels required for a discharge described below and facilities for discharging the treated water into local surface waters or sanitary sewer line(s). Discharge to local surface waters shall be in accordance with NPDES Permit No. MI-008453 and any subsequent amendment of that Permit. Use of the sanitary sewer is conditioned upon and subject to an Industrial Users Permit to be obtained from either the City of Ann Arbor or Scio Township, as required by law. If discharge is made to the sanitary sewer, the Core Treatment System shall be operated and monitored to assure compliance with the terms and conditions of the required Industrial User's Permit and any subsequent amendment of that permit. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment.

5. Implementation of Program. Upon approval by the MDNR, Defendant shall install the Core System according to the approved schedule and thereafter continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate operation pursuant to Section V.D. Defendant may, thereafter and at its option, continue purge operations as provided in this Section.

6. Monitoring Plan. Defendant shall implement the approved monitoring plan required by Section V.B. The monitoring plan shall include collection of data to demonstrate the effectiveness of the Core System in: (a) hydraulically containing the Core Area; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring plan shall be continued until terminated pursuant to Section V.E.

C. Western Plume System
(hereinafter "Western System")

1. Objectives. The objectives of the Western System are: (a) to contain downgradient migration of any plume(s) of groundwater contamination emanating from the GSI Property that are located outside the Core Area and to the northwest, west, or southwest of the GSI facility; (b) to remove groundwater contaminants from the affected aquifer(s); and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that are not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section IV.

2. Design of System. The Western System shall include a series of groundwater test/purge wells placed and operated so as to create overlapping capture zones preventing the downgradient migration of groundwater contaminants. The System

also may incorporate one or more existing artesian wells with overlapping capture zones preventing the downgradient migration of groundwater contaminants. The System also may incorporate one or more existing artesian wells with overlapping capture zones to prevent the downgradient migration of groundwater contaminated with 1,4-dioxane. Defendant shall apply for authorization to reinject purged groundwater or for a permit for discharge of the purged groundwater into the Honey Creek if facilities are constructed for such discharge as part of the Western System. The Western System shall also include facilities for treating purged groundwater as necessary to meet applicable permit requirements and facilities for monitoring the effectiveness of the System.

3. Remedial Investigation. No later than 60 days after the effective date of this Consent Judgment, Defendant shall submit to the MDNR for its review and approval a work plan for remedial investigation and design of the Western System and a schedule for implementing the work plan. The work plan shall include plans for installation of a series of test/purge wells, conduct of an aquifer performance test(s), groundwater monitoring operations and maintenance plan, and system design.

4. Implementation of Remedial Investigation. Defendant shall implement the approved work plan according to the approved schedule.

5. Installation of System. Upon approval by the MDNR, Defendant shall install the Western System and thereafter continuously operate and maintain the system according to the approved plans and schedules until Defendant is authorized to terminate operation pursuant to Section V.D. of this Consent Judgment.

6. Monitoring. Defendant shall implement the approved monitoring plan to verify the effectiveness of the Western System in meeting the objectives of Section V.C.1. The monitoring plan shall include collection of data to demonstrate the effectiveness of the Western System in: (a) hydraulically containing groundwater contamination; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring program shall be continued until terminated pursuant to Section V.E.

D. Termination Of Groundwater Purge Systems Operation

1. Evergreen System. Except as otherwise provided pursuant to Section V.D.2., Defendant shall continue to operate the Evergreen System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s), including all upgradient monitoring wells in the Core Area, fail to detect the presence

of 1,4-dioxane in groundwater at a concentration which exceeds 3 ug/l.

Western System. Except as otherwise provided pursuant to Section V.D.2., Defendant shall continue to operate the Western System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s), including all upgradient monitoring wells in the Core Area, fail to detect the presence of 1,4-dioxane in groundwater at a concentration which exceeds 3 ug/l.

Core System. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to operate the Core System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration which exceeds 60 ug/l if the Groundwater Reinjection Alternative is selected, or 500 ug/l if Surface Water Discharge Alternative is selected.

2. The termination criteria provided in Section V.D.1. may be modified as follows:

a. At any time two years after entry of this Consent Judgment, Defendant may propose to the MDNR that the termination criteria be modified based upon either or both of the following:

i. a change in legally applicable or relevant and appropriate regulatory criteria since the entry of this Consent Judgment; for purposes of this subparagraph, "regulatory criteria" shall mean any promulgated standard criterion or limitation under federal or state environmental law specifically applicable to 1,4-dioxane; or

ii. scientific evidence newly released since the entry of this Consent Judgment, which, in combination with the existing scientific evidence, establishes that different termination criteria for 1,4-dioxane are appropriate and will assure protection of public health, safety, welfare, the environment, and natural resources.

b. Defendant shall submit any such proposal in writing, together with supporting documentation, to the MDNR for review.

c. If the Parties agree to a proposed modification, the agreement shall be made by written Stipulation filed with the Court pursuant to Section XXIV of this Judgment.

d. If MDNR disapproves the proposed modification, Defendant may invoke the Dispute Resolution procedures contained in Section XVI of this Consent Judgment. Alternatively, if MDNR disapproves a

proposed modification, Defendant and Plaintiffs may agree to resolve the dispute pursuant to subparagraph V.D.3.

3. If the parties do not agree to a proposed modification, Defendant and Plaintiffs may prepare a list of the items of difference to be submitted to a scientific advisory panel for review and recommendations. The scientific advisory panel shall be comprised of three persons with scientific expertise in the discipline(s) relevant to the items of difference. No member of the panel may be a person who has been employed or retained by either party, except persons compensated solely for providing peer review of the Hartung Report, in connection with the subject of this litigation.

a. If this procedure is invoked, each party shall, within 14 days, select one member of the panel. Those two members of the panel shall select the third member. Defendant shall, within 28 days after this procedure is invoked, establish a fund of at least $10,000.00, from which each member of the panel shall be paid reasonable compensation for their services, including actual and necessary expenses. If the parties do not agree concerning the qualifications, eligibility, or compensation of panel members, they may invoke the Dispute Resolution procedures contained in Section XVI of this Consent Judgment.

b. Within a reasonable period of time after selection of all panel members, the panel shall confer and establish a schedule for acceptance of submissions from the parties completing review and making recommendations on the items of difference.

c. The scientific advisory panel shall make its recommendations concerning resolution of the items of difference to the parties. If both parties accept those recommendations, the termination criteria shall be modified in accordance with such recommendations. If the parties disagree with the recommendations, the MDNR's proposed resolution of the dispute shall be final unless Defendant invokes the procedures for judicial Dispute Resolution as provided in Section XVI of the Judgment. The recommendation of the scientific advisory panel and any related documents shall be submitted to the Court as part of the record to be considered by the Court in resolving the dispute.

4. Notification of Termination. At least 30 days prior to the date Defendant proposes to terminate operation of a purge well pursuant to the criteria established in subparagraph V.D.1., or a modified criterion established through subparagraph V.D.2., Defendant shall send written notice to the MDNR identifying the proposed action and the test data demonstrating compliance with the termination criterion.

5. Termination. Within 30 days after the MDNR's receipt of the notice and supporting documentation, the MDNR shall approve or disapprove the proposed termination in writing. Defendant may terminate operation of the well system(s) in question upon: (a) receipt of written notice of approval from the MDNR; or (b) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of the Consent Judgment.

E. Post-Termination Monitoring

1. For systems with a termination criterion of 3 ug/l, for a period of five years after cessation of operation of any purge well, Defendant shall continue monitoring of the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify the MDNR and shall collect a second sample within 14 days of such finding. If the second sample confirms the presence of 1,4-dioxane in excess of the termination criterion:

a. if the confirmed concentrations are in excess of 6 ug/l, Defendant shall restart the associated purge well system; or

b. if the confirmed concentrations are between 3 ug/l and 6 ug/l, Defendant may continue to monitor the well bi-weekly for two months without restart of the associated purge well. At the end of the monitoring period, if concentrations in the monitoring well meet the termination criterion of 3 ug/l, Defendant shall continue to monitor as required by the approved monitoring program; if concentrations do not meet the termination criterion, Defendant shall restart the associated purge well.

2. For all other groundwater systems, for a period of five years after ceasing operation of any purge well, Defendant shall continue monitoring of the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify MDNR and shall collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, Defendant shall immediately restart the purge well system.

VI. GSI PROPERTY REMEDIATION

Defendant shall design, install, operate, and maintain the systems described below to control, remove, and treat (as required) soil contamination at the GSI Property. The overall objective of these systems shall be to: (1) prevent the migration of 1,4-dioxane from contaminated soils into any aquifer in concentrations that cause groundwater contamination; (2) to prevent venting of groundwater contamination into Honey Creek Tributary; and (3) to prevent venting of groundwater contamination to Third Sister Lake. Defendant also shall implement a monitoring plan to verify the effectiveness of these systems.

A. Marshy Area System
(hereinafter "Marshy Area System")

1. Objectives. The objectives of this System are to: (a) remove contaminated groundwater from the Marshy Area located north of former Ponds I and II; (b) reduce the migration of contaminated groundwater from the Marshy Area into other aquifers; and (c) to prevent the discharge of contaminated groundwater from the Marshy Area into the Honey Creek Tributary in concentrations in excess of 100 ug/l or in excess of a concentration which would cause groundwater contamination along or adjacent to the entire length of Honey Creek or Honey Creek Tributary.

2. Design. No later than 150 days after the effective date, Defendant shall submit its proposed design of the Marshy Area System a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan to MDNR for its review and approval.

3. Treatment and Disposal. The Marshy Area System shall include: (a) facilities for the collection of contaminated groundwater (either an interceptor trench or sumps); (b) facilities for disposing of the contaminated groundwater (including disposal to local surface waters in accordance with NPDES Permit MI-008453, Defendant's deep well, or in any other manner approved by MDNR and/or the Water Resources Commission); and (c) if the water is to be discharged to the sanitary sewer for ultimate disposal at the City of Ann Arbor Wastewater Treatment Plant, treatment facilities to ensure that discharge to the sanitary sewer complies with the terms and conditions of the Industrial User's Permit authorizing such discharge, and any subsequent amendment to that Permit. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment. Use of the sanitary sewer is conditioned on approval of the City of Ann Arbor and Scio Township.

4. Installation and Operation. Upon approval by the MDNR, Defendant shall install the Marshy Area System and thereafter continuously operate and maintain the System according to the approved plans until it is authorized to shut down the System pursuant to Section VI.D. of this Consent Judgment.

5. Monitoring. Defendant shall implement the approved monitoring plan to verify the effectiveness of the Marshy Area System in meeting the requirements of this Remedial Action Consent Judgment. The monitoring plan shall be continued until terminated pursuant to Section VI.D. of this Consent Judgment.

B. Spray Irrigation Field

1. Objectives. The objectives of this program shall be to meet the overall objective of Section VI upon completion of the program and to prevent the discharge of groundwater contamination into Third Sister Lake.

2. Remedial Investigation. Defendant shall, no later than 180 days after the effective date, submit to MDNR for review and approval a work plan for determining the distribution of soil contamination in the former spray irrigation area. Soil characteristics for the area may be extrapolated from results of samples taken from representative spray head locations.

3. Soil Flushing System. Defendant shall, no later than 240 days after the effective date, submit to MDNR for review and approval a work plan for the installation of a system to flush the former spray irrigation field with clean water to enhance removal of 1,4-dioxane from contaminated soils. The work plan shall include Defendant's proposed design of the system, a time schedule for implementation of the system, an operating and maintenance plan, and effectiveness monitoring plan.

4. Structures in the Spray Field. The following structures have been constructed over portions of the former spray irrigation area: (a) the Defendant's warehouse; (b) the parking area south of the Defendant's warehouse; and (c) the parking lot between the Medical Device Division Building and the Defendant's warehouse. These structures are identified in Attachment D. With respect to these structures, during such time as they are kept in good maintenance and repair, the soils beneath such structures need not be sampled nor directly addressed in the soils systems remediation plan. In the event that the structures are not kept in good maintenance or repair, or are scheduled to be replaced or demolished, Defendant shall notify MDNR of such a circumstance, and take the following actions:

a. Defendant shall, within 21 days after notification, submit to MDNR for approval a work plan for investigating the extent of contamination (if any) of the soils beneath the structure, along with a schedule for implementation of the work plan.

b. Within 14 days after approval of the work plan by MDNR, Defendant shall implement the work plan and submit a report of the results to MDNR within the time specified in the approved schedule.

c. If soil contamination is identified in any of the areas investigated, Defendant shall submit, together with the report required in Section VI.B.4.b., a remediation plan for that area that provides for induced flushing of contaminants from the impacted soils. The plan shall include a proposed schedule for implementation. The remediation system shall be installed, operated, and terminated in accordance with the approved plan.

5. Installation, Operation, and Monitoring. Upon approval by MDNR, Defendant shall install, operate, maintain, and monitor the Spray Irrigation Field System in accordance with the approved plans and the termination criteria established in Section VI.D.

C. Soils System

1. Objectives. The objectives of this program are to: (a) evaluate the feasibility and effectiveness of available options for remediation of identified source areas; (b) design and implement remedial systems to achieve the overall objectives of Section VI; and (c) verify the effectiveness of those systems.

2. Soils Remediation Plan. Defendant shall, no later than 210 days after the effective date, submit to MDNR for review and approval a soils remediation plan for addressing identified areas of soil contamination. The areas to be addressed include the burn pit; the former Pond I area; the former Pond II area; the former Lift Station area; and Pond III. These areas are depicted on Attachment E. As part of the remediation plan, Defendant may make a demonstration that with respect to any of these areas, cleanup to a level established under Mich Adm Code R 299.5717 ("Type C") is appropriate by addressing the factors set forth in Mich Adm Code R 299.5717(3). Defendant's proposal for the preferred remedial alternative(s) to be implemented to address each area of soil contamination shall be identified in the soils remediation plan. The proposed remedial alternative(s) to be implemented must attain the overall objectives of Section VI. Based upon their review, the MDNR shall either: (a) approve Defendant's proposed remedial alternative(s); or (b) disapprove the proposed remedial

alternative(s) and select the other remedial alternative(s) to be implemented. A decision by MDNR to disapprove Defendant's remedial proposal is subject to Defendant's rights under the Dispute Resolution provisions of Section XVI of the Consent Judgment.

3. Design. Defendant shall, not later than 60 days after: (a) the MDNR's decision approving the proposed remedial alternative(s); or (b) the final decision in Dispute Resolution pursuant to Section XVI of the Consent Judgment, submit the following to the MDNR for review and approval: Defendant's proposed design of each selected remedial system, a time schedule for implementation of the system, an operating and maintenance plan, and effectiveness monitoring plan.

4. Installation, Operation, and Monitoring. Upon approval by MDNR, Defendant shall install, operate, maintain, and monitor the systems in accordance with the approved plans, and the termination criteria established in Section VI.D. of the Consent Judgment.

D. Termination Criteria for GSI Property Remediation

1. Remedial Systems Collecting or Extracting Contaminated Groundwater.

a. Except as otherwise provided pursuant to Section VI.D.3., Defendant shall continue to operate the Marshy Area System and any groundwater remediation program developed as part of the Soils System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. Notwithstanding this criterion, Defendant shall continue to operate the portions of the such systems necessary to assure that contaminated groundwater does not vent into surface waters in concentrations in excess of 100 ug/l until such time as Defendant demonstrates to Plaintiff that venting in excess of 100 ug/l is not occurring from the Marshy Areas or Soils Systems and Defendant demonstrates that venting into surface waters will not cause groundwater contamination along or adjacent to the entire length of Honey Creek or the Honey Creek Tributary. These Systems shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

b. Except as otherwise provided pursuant to Section VI.D.3., Defendant shall continue to operate the purge wells for the Spray Irrigation Field System until six consecutive monthly tests of samples from the purge well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. Notwithstanding this criterion, Defendant

shall continue to operate such purge wells as necessary to assure that contaminated groundwater does not vent into Third Sister Lake. These Systems shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

2. All Other GSI Property Remedial Systems. Except as provided in Section VI.D.3., each GSI Property Remedial System not subject to termination pursuant to Section VI.D.1. shall be operated until Defendant demonstrates, through representative soil sampling and analysis in accordance with the effectiveness monitoring plan approved by the MDNR, that the concentration of 1,4-dioxane in soils in the area in question does not exceed 60 ug/kg or other higher concentration derived by means consistent with Mich Admin Code R 299.5711(2) or R 299.5717.

3. The termination criteria provided in Section VI.D. may be modified in the same manner as specified in Sections V.D.2. and V.D.3.

4. At least 30 days prior to the date Defendant proposes to terminate operation of a system pursuant to Section VI.D., Defendant shall send a written notice to the MDNR identifying the proposed action and shall send test data demonstrating compliance with the termination criterion.

5. Within 30 days after the MDNR's receipt of the written notice and supporting documentation, the MDNR shall approve or disapprove the proposed termination in writing. Defendant may terminate operation of the system(s) in question upon: (a) receipt of written notice of approval from Plaintiffs; or (b) if the Dispute Resolution procedures of Section XVI are invoked, receipt of a final decision pursuant to that Section.

VII. COMPLIANCE WITH OTHER LAWS AND PERMITS

A. Defendant shall undertake all activities pursuant to this Consent Judgment in accordance with the requirements of all applicable laws, regulations, and permits.

B. Defendant shall apply for all permits necessary for implementation of the Consent Judgment including, without limitation, surface water discharge permit(s) and air discharge permit(s).

C. Defendant shall include in all contracts entered into by the Defendant for Remedial Action required under this Consent Judgment (and shall require that any contractor include in all subcontract(s), a provision stating that such contractors and subcontractors, including their agents and employees, shall perform all activities required by such contracts or subcontracts in compliance with and all applicable laws, regulations, and permits. Defendant shall provide a copy of relevant approved workplans to any such contractor or subcontractor.

D. The Parties agree to provide reasonable cooperation and assistance to the Defendant in obtaining necessary approvals and permits for Remedial Action. Plaintiffs shall not unreasonably withhold or delay any required approvals or permits for Defendant's performance of the Remedial Action. Plaintiffs expressly acknowledge that one or more of the following permits and approvals may be necessary for Remedial Action:

1. NPDES Permit No. MI-008453.
2. An Air Permit for discharges of contaminants to the atmosphere for vapor extraction systems, if such systems are part of the remedial design;
3. A Wetlands Permit if necessary for construction of the Marshy Area System or the construction of facilities as part of the Core or Western Systems;
4. An Industrial User's Permit to be issued by the City of Ann Arbor for use of the sewer to dispose of treated or untreated purged groundwater. Plaintiffs have no objection to receipt by the Ann Arbor Wastewater Treatment Plant of the purged groundwater extracted pursuant to the terms and conditions of this Judgment, and acknowledge that receipt of the purged groundwater would not necessitate any change in current and proposed residual management programs of the Ann Arbor Wastewater Treatment Plant;

5. Permit(s) or permit exemptions to be issued by the Water Resources Commission to authorize the reinjection of purged and treated groundwater in the Evergreen, Core, and Western System Areas;

6. Surface water discharge permit(s) for discharge into surface waters in the Western System area, if necessary;

7. Approval of the City of Ann Arbor and the Washtenaw County Drain Commissioner to use storm drains for the remedial programs; or

8. A permit for the use of Defendant's deep well for injection of purged groundwater from the remedial systems required under this Consent Judgment.

VIII. SAMPLING AND ANALYSIS

Defendant shall make available to Plaintiffs the results of all sampling, tests, and/or other data generated in the performance or monitoring of any requirement under this Consent Judgment. Sampling data generated consistent with this Consent Judgment shall be admissible in evidence in any proceeding related to enforcement of this Judgment without waiver by any Party of any objection as to weight or relevance. Plaintiffs and/or their authorized representatives, at their discretion, may

take split or duplicate samples and observe the sampling event. Plaintiffs shall make available to Defendant the results of all sampling, tests, and/or other data generated in the performance or monitoring of any requirement under this Consent Judgment. Defendant will provide Plaintiffs with reasonable notice of changes in the schedule of data collection activities included in the progress reports submitted pursuant to Section XII.

IX. ACCESS

A. From the effective date of this Consent Judgment, the Plaintiffs, their authorized employees, agents, representatives, contractors, and consultants, upon presentation of proper identification, shall have the right at all reasonable times to enter the Site and any property to which access is required for the implementation of this Consent Judgment, to the extent access to the property is owned, controlled by, or available to the Defendant, for the purpose of conducting any activity authorized by this Consent Judgment, including, but not limited to:

1. Monitoring of the Remedial Action or any other activities taking place pursuant to this Consent Judgment on the property;
2. Verification of any data or information submitted to the Plaintiffs;

3. Conduct of investigations related to contamination at the Site;

4. Collection of samples;

5. Assessment of the need for, or planning and implementing of, Response Actions at the Site; and

6. Inspection and copying of non-privileged documents including records, operating logs, contracts, or other documents required to assess Defendant's compliance with this Consent Judgment.

All Parties with access to the Site or other property pursuant to this paragraph shall comply with all applicable health and safety laws and regulations.

B. To the extent that the Site or any other area where Remedial Action is to be performed by the Defendant under this Consent Judgment is owned or controlled by persons other than the Defendant, Defendant shall use its best efforts to secure from such persons access for Defendant, Plaintiffs, and their authorized employees, agents, representatives, contractors, and consultants. Defendant shall provide Plaintiffs with a copy of each access agreement secured pursuant to this paragraph. For purposes of this Paragraph, "best efforts" includes, but is not limited to, seeking judicial assistance to secure such access. If access is not obtained within 30 days after the MDNR approves any work plan or design for which such access is necessary,

Defendant shall notify the Plaintiffs promptly. Plaintiffs thereafter shall assist Defendant in obtaining access. Plaintiffs agree to use appropriate authority available under state law, including authority provided under the Michigan Environmental Response Act, as amended, MCL 229.601 et seq, to obtain access to property on behalf of themselves and Defendant for the purpose of implementing Remedial Action under this Consent Judgment.

X. APPROVALS OF SUBMISSIONS

Upon receipt of any plan, report, or other item that is required to be submitted for approval pursuant to this Consent Judgment, as soon as practicable, but in no event later than 56 days after receipt of any such submission, the Plaintiffs will: (1) approve the submission; or (2) submit to Defendant changes in the submission that would result in approval of the submission. If Plaintiffs do not respond within 56 days after receipt of the submittal, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. Upon receipt of a notice of approval or changes from Plaintiffs, Defendant shall proceed to take any action required by the plan, report, or other item, as approved or as may be modified to address the deficiencies identified by Plaintiffs. If Defendant does not accept the changes proposed by Plaintiffs, Defendant may submit the matter to Dispute Resolution, Section XVI.

XI. PROJECT COORDINATORS

A. Plaintiffs designate Leonard Lipinski as Plaintiffs' Project Coordinator. Defendant designates James Fahrner, Vice President and Chief Financial Officer, as Defendant's Project Coordinator. Defendant's Project Coordinator shall have primary responsibility for implementation of the Remedial Action at the Site. Plaintiffs' Project Coordinator will be the primary designated representative for Plaintiffs with respect to implementation of the Remedial Action at the Site. All communication between Defendant and Plaintiffs, including all documents, reports, approvals, other submissions and correspondence concerning the activities performed pursuant to the terms and conditions of this Consent Judgment, shall be directed through the Project Coordinators. If any Party changes its designated Project Coordinator, that Party shall provide the name, address, and telephone number of the successor in writing to the other Party seven days prior to the date on which the change is to be effective. This paragraph does not relieve Defendant from other reporting obligations under the law.

B. Plaintiffs may designate other authorized representatives, employees, contractors, and consultants to observe and monitor the progress of any activity undertaken pursuant to this Consent Judgment. Plaintiffs' Project Coordinator shall provide Defendant's Project Coordinator

with the names, addresses, telephone numbers, positions, and responsibilities of any person designated pursuant to this section.

XII. PROGRESS REPORTS

Defendant shall provide to Plaintiffs written quarterly progress reports that shall: (1) describe the actions which have been taken toward achieving compliance with this Consent Judgment during the previous three months; (2) describe data collection and activities scheduled for the next three months; and (3) include all results of sampling and tests and other data received by the Defendant, its consultants, engineers, or agents during the previous three months relating to Remedial Action performed pursuant to this Consent Judgment. Defendant shall submit the first quarterly report to MDNR within 120 days after entry of this Consent Judgment, and by the 30th day of the month following each quarterly period thereafter, as feasible, until termination of this Consent Judgment as provided in Section XXV.

XIII. RESTRICTIONS ON ALIENATION

A. Defendant shall not sell, lease, or alienate the GSI Property unless the purchaser, lessee, or grantee provides prior written agreement with Plaintiffs that the purchaser, lessee, or grantee will not interfere with any term or condition of this

Consent Judgment. Notwithstanding any purchase, lease, or grant, Defendant shall remain obligated to comply with all terms and conditions of this Consent Judgment.

B. Any deed, title, or other instrument of conveyance regarding the GSI Property shall contain a notice that Defendant's Property is the subject of this Consent Judgment, setting forth the caption of the case, the case number, and the court having jurisdiction herein.

XIV. FORCE MAJEURE

Any delay attributable to a Force Majeure shall not be deemed a violation of Defendant's obligations under this Consent Judgment.

A. "Force Majeure" is defined as an occurrence or nonoccurrence arising from causes beyond the control of Defendant or of any entity controlled by the Defendant performing Remedial Action, such as Defendant's employees, contractors, and subcontractors. Such occurrence or nonoccurrence includes, but is not limited to: (1) an Act of God; (2) untimely review of permit applications or submissions; (3) acts or omissions of third parties for which Defendant is not responsible; (4) insolvency of any vendor, contractor, or subcontractor retained by Defendant as part of implementation of this Judgment; and (5) delay in obtaining necessary access agreements under Section IX

that could not have been avoided or overcome by due diligence. "Force Majeure" does not include unanticipated or increased costs, changed financial circumstances, or nonattainment of the treatment and termination standards set forth in Sections V and VI.

B. When circumstances occur that Defendant believes constitute Force Majeure, Defendant shall notify the MDNR by telephone of the circumstances within 48 hours after Defendant first believes those circumstances to apply. Within 14 working days after Defendant first believes those circumstances to apply, Defendant shall supply to the MDNR, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by Defendant to avoid, minimize, or overcome the delay, and the timetable for implementation of such measures. Failure of Defendant to comply with the written notice provisions of this paragraph shall constitute a waiver of Defendant's right to assert a claim of Force Majeure with respect to the circumstances in question.

C. A determination by the MDNR that an event does not constitute Majeure, that a delay was not caused by Force, or that the period of delay was not necessary to compensate for Force Majeure may be subject to Dispute Resolution under Section XVI of this Judgment.

D. The MDNR shall respond, in writing, to any request by Defendant for a Force Majeure extension within 30 days of receipt of the Defendant's request. If the MDNR does not respond within that time period, Defendant's request shall be deemed granted. If the MDNR agrees that a delay is or was caused by Force Majeure, Defendant's delays shall be excused, stipulated penalties shall not accrue, and the MDNR shall provide Defendant such additional time as may be necessary to compensate for the Force Majeure event.

E. Delay in achievement of any obligation established by the Consent Judgment shall not automatically justify or excuse delay in achievement of any subsequent obligation unless the subsequent obligation automatically follows from the delayed obligation.

XV. REVOCATION OR MODIFICATION OF LICENSES OR PERMITS

Any delay attributable to the revocation or modification of licenses or permits obtained by Defendant to implement remediation actions as set forth in this Consent Judgment shall not be deemed a violation of Defendant's obligations under this Consent Judgment, provided that such revocation or modification arises from causes beyond the control of Defendant or of any entity controlled by the Defendant performing Remedial Action, such as Defendant's employees, contractors, and subcontractors.

A. Licenses or permits that may need to be obtained or modified by Defendant to implement the Remedial Actions are those specified in Section VII.D. and licenses, easements, and other agreements for access to property or rights of way on property necessary for the installation of remedial systems required by this Consent Judgment.

B. A revocation or modification of a license or permit within the meaning of this section means withdrawal of permission, denial of permission, a limitation or a change in license or permit conditions that delays the implementation of all or part of a remedial system. Revocation or modification due to Defendant's violation of a license or permit (or any conditions of a license or permit) shall not constitute a revocation or modification covered by this section.

C. When circumstances occur that Defendant believes constitute revocation or modification of a license or permit, Defendant shall notify the MDNR by telephone of the circumstances within 48 hours after Defendant first believes those circumstances to apply. Within 14 working days after Defendant first believes those circumstances to apply, Defendant shall supply to the MDNR, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by Defendant to avoid, minimize, or overcome the delay, and the

timetable for implementation of such measures. Failure of Defendant to comply with the written notice provisions of this paragraph shall constitute a waiver of Defendant's right to assert a claim of revocation or modification of a license or permit with respect to the circumstances in question.

D. A determination by the MDNR that an event does not constitute revocation or modification of a license or permit, that a delay was not caused by revocation or modification of a license or permit, or that the period of delay was not necessary to compensate for revocation or modification of a license or permit may be subject to Dispute Resolution under Section XVI of this Consent Judgment.

E. The MDNR shall respond, in writing, to any request by Defendant for a revocation or modification of a license or permit extension within 30 days of receipt of the Defendant's request. If the MDNR does not respond within that time period, Defendant's request shall be deemed granted. If the MDNR agrees that a delay is or was caused by revocation or modification of a license or permit, Defendant's delays shall be excused, stipulated penalties shall not accrue, and the MDNR shall provide Defendant such additional time as may be necessary to compensate for the revocation or modification of a license or permit.

F. Delay in achievement of any obligation established by the Consent Judgment shall not automatically justify or excuse delay in achievement of any subsequent obligation unless the subsequent obligation automatically follows from the delayed obligation.

XVI. DISPUTE RESOLUTION

A. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under this Consent Judgment and shall apply to all provisions of this Consent Judgment, whether or not particular provisions of the Consent Judgment in question make reference to the dispute resolution provisions of this Section. Any dispute that arises under this Consent Judgment initially shall be the subject of informal negotiations between the Parties. The period of negotiations shall not exceed ten working days from the date of written notice by any Party that a dispute has arisen. This period may be extended or shortened by agreement of the Parties.

B. Immediately upon expiration of the informal negotiation period (or sooner if upon agreement of the parties), the MDNR shall provide to Defendant a written statement setting forth the MDNR's proposed resolution of the dispute. Such resolution shall be final unless, within 15 days after receipt of the MDNR's proposed resolution (clearly identified as such

under this Section), Defendant files a petition for resolution with the Washtenaw County Circuit Court setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Judgment.

C. Within ten days of the filing of the petition, Plaintiffs may file a response to the petition, and unless a dispute arises from the alleged failure of MDNR to timely make a decision, MDNR will submit to the Court all documents containing information related to the matters in dispute, including documents provided to MDNR by Defendant. In the event of a dispute arising from the alleged failure of MDNR to timely make a decision, within ten days of filing of the petition, each party shall submit to the Court correspondence, reports, affidavits, maps, diagrams, and other documents setting forth facts pertaining to the matters in dispute. Those documents and this Consent Judgment shall comprise the record upon which the Court shall resolve the dispute. Additional evidence may be taken by the Court on its own motion or at the request of either party if the Court finds that the record is incomplete or inadequate. Review of the petition shall be conducted by the Court and shall be confined to the record. The review shall be independent of any factual or legal conclusions made by the Court prior to the date of entry of the Consent Judgment.

D. The Court shall uphold the decision of MDNR on the issue in dispute unless the Court determines that the decision is any of the following:

1. Inconsistent with this Consent Judgment;
2. Not supported by competent, material, and substantial evidence on the whole record;
3. Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion; and
4. Affected by other substantial and material error of law;

E. The filing of a petition for resolution of a dispute shall not by itself extend or postpone any obligation of Defendant under this Consent Judgment, provided, however, that payment of stipulated penalties with respect to the disputed matter shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue as provided in Section XVII. Stipulated penalties that have accrued with respect to the matter in dispute shall not be assessed by the Court and shall be dissolved if Defendant prevails on the matter. The Court may also direct that stipulated penalties shall not be assessed and paid as provided in Section XVII upon a determination that there was a substantial basis for Defendant's position on the disputed matter.

XVII. STIPULATED PENALTIES

A. Except as otherwise provided, if Defendant fails or refuses to comply with any term or condition in Sections IV, V, VI, VII, or VIII, or with any plan, requirement, or schedule established pursuant to those Sections, then Defendant shall pay stipulated penalties in the following amounts for each working day for every failure or refusal to comply or conform:

Period of Delay	Penalty Per Violation Per Day
1st through 15th Day	$ 1,000
15th through 30th Day	$ 1,500
Beyond 30 Days	$ 2,000

B. Except as otherwise provided if Defendant fails or refuses to comply with any other term or condition of this Consent Judgment, Defendant shall pay to Plaintiffs stipulated penalties of $500.00 per working day for each and every failure to comply.

C. If Defendant is in violation of this Consent Judgment, Defendant shall notify Plaintiffs of any violation no later than five working days after first becoming aware of such violation, and shall describe the violation.

D. Stipulated penalties shall begin to accrue upon the next day after performance was due or other failure or refusal to comply occurred. Penalties shall continue to accrue until the final day of correction of the noncompliance. Separate penalties

shall accrue for each separate failure or refusal to comply with the terms and conditions of this Consent Judgment. Penalties may be waived in whole or in part by Plaintiffs or may be dissolved by the Court pursuant to Section XVII.

E. Stipulated penalties shall be paid no later than 14 working days after receipt by Defendant of a written demand from Plaintiffs. Defendant shall make payment by transmitting a check in the amount due, payable to the "State of Michigan", addressed to the Assistant Attorney General in Charge, Environmental Protection Division, P.O. Box 30212, Lansing, Michigan 48909.

F. Plaintiffs agree that, in the event that an act or omission of Defendant constitutes a violation of this Consent Judgment subject to stipulated penalties and a violation of other applicable law, Plaintiffs will not impose upon Defendant for that violation both the stipulated penalties provided under this Consent Judgment and the civil penalties permitted under other applicable laws. Plaintiffs reserve the right to pursue any other remedy or remedies to which they may be entitled under this Consent Judgment or any applicable law for any failure or refusal of the Defendant to comply with the requirements of this Consent Judgment.

XVIII. PLAINTIFFS' COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

A. Except as otherwise provided in this Consent Judgment, Plaintiffs covenant not to sue or take administrative action for Covered Matters against Defendant, its officers, employees, agents, directors, and any persons acting on its behalf or under its control.

B. "Covered Matters" shall mean any and all claims available to Plaintiffs under federal and state law arising out of the subject matter of the Plaintiffs' Complaint with respect to the following:

1. Claims for injunctive relief to address soil, groundwater, and surface water contamination at or emanating from the GSI Property;
2. Claims for civil penalties and costs;
3. Claims for natural resource damages;
4. Claims for reimbursement of response costs incurred prior to entry of this Consent Judgment or incurred by Plaintiffs for provision of alternative water supplies in the Evergreen Subdivision; and
5. Claims for reimbursement of costs incurred by Plaintiffs for overseeing the implementation of this Consent Judgment.

C. "Covered Matters" does not include:

1. Claims based upon a failure by Defendant to comply with the requirements of this Consent Judgment;
2. Liability for violations of federal or state law which occur during implementation of the Remedial Action; and
3. Liability arising from the disposal, treatment, or handling of any hazardous substance removed from the Site.

D. With respect to liability for alleged past violations of law, this covenant not to sue shall take effect on the effective date of this Consent Judgment. With respect to future liability for performance of response activities required to be performed under this Consent Judgment, the covenant not to sue shall take effect upon issuance by MDNR of the Certificate of Completion in accordance with Section XXV.

E. Notwithstanding any other provision in this Consent Judgment: (1) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to require Defendant to perform any additional response activity at the Site; and (2) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to reimburse Plaintiffs for response costs incurred by the State of Michigan relating to the Site. Plaintiffs' rights in D.1. and D.2. apply if and only

if the following conditions are met:

1. For proceedings prior to Plaintiffs' certification of completion of the Remedial Action concerning the Site,
   a. conditions at the Site, previously unknown to the Plaintiffs, are discovered after the entry of this Consent Judgment, or new information previously unknown to Plaintiffs is received after the effective date of the Consent Judgment; and
   b. these previously unknown conditions indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment; and
2. For proceedings subsequent to Plaintiffs' certification of completion of the Remedial Action concerning the Site,
   a. conditions at the Site, previously unknown to the Plaintiffs, are discovered or new information previously unknown to Plaintiffs is received after the certification of completion by Plaintiffs; and

b. these previously unknown conditions indicate that the remedial action is not protective of the public health, safety, welfare, and the environment.

F. Nothing in this Consent Judgment shall in any manner restrict or limit the nature or scope of response actions that may be taken by Plaintiffs in fulfilling their responsibilities under federal and state law, and this Consent Judgment does not release, waive, limit, or impair in any manner the claims, rights, remedies, or defenses of Plaintiffs against a person or entity not a party to this Consent Judgment.

G. Except as expressly provided in this Consent Judgment, Plaintiffs reserve all other rights and defenses that they may have, and this Consent Judgment is without prejudice, and shall not be construed to waive, estop, or otherwise diminish Plaintiffs' right to seek other relief with respect to all matters other than Covered Matters.

XIX. DEFENDANT'S COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

A. Defendant hereby covenants not to sue and agrees not to assert any claim or cause of action against Plaintiffs or any other agency of the State of Michigan with respect to environmental contamination at the Site or response activities relating to the Site arising from this Consent Judgment.

B. Notwithstanding any other provision in this Consent Judgment, for matters that are not Covered Matters as defined in Section XVIII.E., or in the event that Plaintiffs institute proceedings as allowed under Section XVIII.E., Defendant reserves all other rights, defenses, or counterclaims that it may have with respect to such matters and this Consent Judgment is without prejudice, and shall not be construed to waive, estop, or otherwise diminish Defendant's right to seek other relief and to assert any other rights and defenses with respect to such other matters.

C. Nothing in this Consent Judgment shall in any way impair Defendant's rights, claims, or defenses with respect to any person not a party to this Consent Judgment.

XX. INDEMNIFICATION AND INSURANCE

A. Defendant shall indemnify and save and hold harmless the State of Michigan and its departments, agencies, officials, agents, employees, contractors, and representatives from any and all claims or causes of action arising from, or on account of, acts or omissions of Defendant, its officers, employees, agents, and any persons acting on its behalf or under its control in carrying out Remedial Action pursuant to this Consent Judgment. Plaintiffs shall not be held out as a party to any contract entered into by or on behalf of Defendant in carrying out

activities pursuant to this Consent Judgment. Neither the Defendant nor any contractor shall be considered an agent of Plaintiffs. Defendant shall not indemnify or save and hold harmless Plaintiffs from their own negligence pursuant to this paragraph.

B. Prior to commencing any Remedial Action on the Gelman Property, Defendant shall secure, and shall maintain for the duration of the Remedial Action, comprehensive general liability insurance with limits of $1,000,000.00, combined single limit, naming as an additional insured the State of Michigan. If Defendant demonstrates by evidence satisfactory to Plaintiffs that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then with respect to that contractor or subcontractor, Defendant need provide only that portion, if any, of the insurance described above that is not maintained by the contractor or subcontractor.

XXI. RECORD RETENTION

Defendant, Plaintiffs, and their representatives, consultants, and contractors shall preserve and retain, during the pendency of this Consent Judgment and for a period of ten years after its termination, all records, sampling or test results, charts, and other documents that are maintained or

generated pursuant to any requirement of this Consent Judgment, including, but not limited to, documents reflecting the results of any sampling or tests or other data or information generated or acquired by Plaintiffs or Defendant, or on their behalf, with respect to the implementation of this Consent Judgment. After the ten year period of document retention, the Defendant and its successors shall notify Plaintiffs, in writing, at least 90 days prior to the destruction of such documents or records, and upon request, the Defendant and/or its successor shall relinquish custody of all records and documents to Plaintiffs.

XXII. ACCESS TO INFORMATION

Upon request, Plaintiffs and Defendant shall provide to the requesting Party copies of or access to all nonprivileged documents and information within their possession and/or control or that of their employees, contractors, agents, or representatives, relating to activities at the Site or to the implementation of this Consent Judgment, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Remedial Action. Upon request, Defendant shall also make available to Plaintiffs, their employees, contractors, agents, or representatives with knowledge of relevant facts concerning the performance of the Remedial Action. The

Plaintiffs shall treat as confidential all documents provided to Plaintiffs by the Defendant marked "confidential" or "proprietary."

XXIII. NOTICES

Whenever under the terms of this Consent Judgment notice is required to be given or a report, sampling data, analysis, or other document is required to be forwarded by one Party to the other, such notice or document shall be directed to the following individuals at the specified addresses or at such other address as may subsequently be designated in writing:

For Plaintiffs:

Leonard Lipinski
Project Manager
Michigan Deptartment
of Natural Resources
Environmental Response Division
301 East Louis Glick Highway
Jackson, MI 49201

For Defendants:

James Fahrner
Vice President
Gelman Sciences, Inc.
600 South Wagner Road
Ann Arbor, MI 48106

and

David H. Fink
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334

Any party may substitute for those designated to receive such notices by providing prior written notice to the other parties.

XXIV. MODIFICATION

This Consent Judgment may not be modified unless such modification is in writing, signed by all Parties, and approved and entered by the Court. Remedial Plans, work plans, or other submissions made pursuant to this Consent Judgment may be modified by mutual agreement of the Parties.

XXV. CERTIFICATION AND TERMINATION

A. When Defendant determines that it has completed all Remedial Action required by this Consent Judgment, Defendant shall submit to the MDNR a Notification of Completion and a draft final report. The draft final report must summarize all Remedial Action performed under this Consent Judgment and the performance levels achieved. The draft final report shall include or refer to any supporting documentation.

B. Upon receipt of the Notification of Completion, the MDNR will review the Notification of Completion and the accompanying draft final report, any supporting documentation, and the actual Remedial Action performed pursuant to this Consent Judgment. After conducting this review, and not later than three months after receipt of the Notification of Completion, the MDNR shall issue a Certificate of Completion upon a determination by the MDNR that Defendant has completed satisfactorily all requirements of this Consent Decree, including, but not limited

to, completion of all Remedial Action, achievement of all termination and treatment standards required by this Consent Judgment, compliance with all terms and conditions of this Consent Judgment, and payment of any and all stipulated penalties owed to Plaintiffs. If the MDNR does not respond to the Notification of Completion within three months after receipt of the Notification of Completion, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. This Consent Judgment shall terminate upon motion and order of this Court after issuance of the Certificate of Completion. Upon issuance, the Certificate of Completion may be recorded.

XXVI. RELATED SETTLEMENT

The Parties' agreement to be bound by this Consent Judgment is contingent upon the stipulation by the Parties to, and the entry by the Court of, the proposed Consent Judgment in the related case State of Michigan v Gelman Sciences, Inc. (E.D. Mich. No. 90-CV-72946-DT), a copy of which is attached hereto as Attachment F. In the event that the related Consent Judgment in Michigan v Gelman Sciences, Inc. is not entered, this Consent Judgment shall be without force and effect.

XXVII. EFFECTIVE DATE

The effective date of this Consent Judgment shall be the date upon which this Consent Judgment is entered by the Court.

XXVIII. SEVERABILITY

The provisions of this Consent Judgment shall be severable. Should any provision be declared by a court of competent jurisdiction to be inconsistent with federal or state law, and therefore unenforceable, the remaining provisions of this Consent Judgment shall remain in full force and effect.

XXIX. SIGNATORIES

Each undersigned representative of a Party to this Consent Judgment certifies that he or she is fully authorized by the Party to enter into this Consent Judgment and to legally bind such Party to the respective terms and conditions of this Consent Judgment.

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

FRANK J. KELLEY
Attorney General for
the State of Michigan
Attorney for Plaintiffs

Robert P. Reichel

A. Michael Leffler (P24254)
Robert P. Reichel (P31878)
Assistant Attorneys General
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-7780

Dated: 10/23/92

DEFENDANT

GELMAN SCIENCES, INC.

Approved as to form:
Cooper, Fink & Zausmer, P.C.
Attorneys for Defendant
Gelman Sciences, Inc.

David H. Fink (P28235)
Alan D. Wasserman (P39509)
Thomas A. Biscup (P40380)
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334

Dated: 10/16/92

IT IS SO ORDERED AND ADJUDGED this _____ day of OCT 26 1992, 1992.

HONORABLE PATRICK J. CONLIN
Circuit Court Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

FRANK J. KELLEY, Attorney General
for the State of Michigan, ex rel,
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION,
and MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

v

GELMAN SCIENCES, INC.,
a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable ~~Patrick J. Coa~~lin

Robert P. Reichel (P31878)
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300 South Washington
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Telephone: (313) 851-4111
Attorneys for Defendant

AMENDMENT TO CONSENT JUDGMENT

A Consent Judgment was entered in this case on October 26, 1992. The Consent Judgment requires Defendant, Gelman Sciences, Inc., to implement various remedial actions to address environmental contamination in the vicinity of Defendant's property in Scio Township, subject to the approval of the Michigan Department of Natural Resources ("MDNR").

Since the entry of the Consent Judgment, Executive Order 1995-18 reorganized the MDNR and transferred the MDNR functions relevant to this action to a new Michigan Department of Environmental Quality ("MDEQ").

Since the entry of the Consent Judgment, state environmental laws relevant to this action, including the former Michigan Environmental Response Act, 1982 PA 307, as amended, have been recodified and amended as Part 201 of the Natural Resources and Environmental Protection Act ("NREPA"), 1994 PA 451, as amended, MCL 324.20101 et seq. Those amendments have changed cleanup criteria, MCL 324.20120a, and, in MCL 324.20102a, required the MDEQ to approve requests by persons implementing response activities to change plans for such response activity to be consistent with the new cleanup criteria.

Defendant has requested the MDEQ to approve changes in the Remedial Action Plan attached to the Consent Judgment. The MDEQ has agreed that certain changes to the Remedial Action Plan are appropriate.

The Parties have agreed that it is appropriate to establish schedules for submittal and completion of certain remaining response activities at the site.

THEREFORE, the Parties agree to this Amendment to the Consent Judgment ("Amendment") and such Amendment is ordered, adjudged, and decreed as follows:

FIRST, modify Sections III.G, H, and N to read as follows:

G. "Groundwater Contamination" or "Groundwater Contaminant" shall mean 1,4-dioxane in groundwater at a concentration in excess of 77 micrograms per liter ("ug/l") as determined by the sampling and analytical method(s) described in Attachment B.

H. "MDEQ" shall mean the Michigan Department of Environmental Quality, the successor to the Michigan Department of Natural Resources ("MDNR") and to the Water Resources Commission. All references to the "MDNR" or to the "Water Resources Commission" in this Consent Judgment shall be deemed to refer to the MDEQ.

N. "Soil Contamination" or "Soil Contaminant" shall mean 1,4-dioxane in soil at a concentration in excess of 1500 ug/kg as determined by the sampling and analytical method(s) described in Attachment C or other higher concentration limit derived by means consistent with Mich Admin Code R 299.5711(2) or MCL 324.20120a.

SECOND, modify Section V.A.5 to read as follows:

5. Treatment and Disposal. Groundwater extracted by the purge wells(s) in the Evergreen System shall be treated as necessary using ultraviolet light and oxidizing agents or such other method as approved by the MDEQ and disposed of in accordance with the Evergreen System design approved by the MDNR or MDEQ. The options for such disposal are the following:

THIRD, insert new Section V.A.7 to read as follows:

7. On August 15, 1996, Defendant submitted to the MDEQ a written report based upon groundwater monitoring data and modeling, evaluating whether the existing Evergreen System is intercepting and containing the leading edge of the plume of groundwater contamination in the vicinity of the Evergreen Subdivision area. Unless that report demonstrates to the MDEQ's satisfaction that the existing Evergreen System is meeting that objective, Defendant shall, at MDEQ's written request, install additional monitoring and/or purge wells as needed to ensure that the objectives of the Evergreen System are achieved.

FOURTH, modify Section V.B.1 to read as follows:

1. Objectives. For purposes of the Consent Judgment, the "Core Area" means that portion of the Unit C_3 aquifer containing 1,4-dioxane in a concentration exceeding 500 ug/l. The objectives of the Core System are to intercept and contain the migration of groundwater from the Core Area and remove contaminated

groundwater from the Core Area until the termination criterion for the Core System in Section V.D.1 is satisfied.

FIFTH, modify the last clause of Section V.B.2 to read as follows:

(c) the discharge level for 1,4-dioxane in groundwater to be reinjected in the Core Area shall be established based upon performance of further tests by Defendant on the treatment technology and shall, in any event, be less than 77 ug/l.

SIXTH, modify Section V.B.4 to read as follows:

4. Surface Water Discharge Alternative. Defendant shall, not later than September 30, 1996, submit to MDEQ for review and approval Defendant's design for the Core System, a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan for the System. The Core System shall include groundwater purge wells as necessary to meet the objectives described in Section V.B.1. The design shall include, at a minimum, three purge wells.

Purged groundwater from the Core Area System shall be treated with ultraviolet light and oxidizing agent(s) or such other method approved by the MDEQ to reduce 1,4-dioxane concentrations to the level as required by NPDES Permit No. MI-008453, as amended or reissued. Discharge to the Honey Creek tributary shall be in accordance with NPDES Permit No. MI-008453, as amended or reissued.

SEVENTH, modify Section V.B.5 to read as follows:

5. Implementation of Program. Upon approval by the MDEQ, Defendant shall install the Core System according to the approved schedule and thereafter continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate operation pursuant to Section V.D. Defendant may thereafter, and at its option, continue purge operations as provided in this Section.

In any event, Defendant shall, beginning not later than December 28, 1996, continuously operate groundwater purge wells in the Core Area System at the rate of at least 65 gallons per minute until termination is authorized pursuant to this Judgment. This initial, minimum purging rate requirement is intended solely as a means of assuring progress toward remediation of the Core Area by a date certain and shall not be construed as an indication that the rate is sufficient to meet the objectives of the Core System.

EIGHTH, add a new Section V.B.7 to read as follows:

7. Modification of Program. Defendant may, at its option, propose to MDEQ for review and approval modification(s) to the Core System, provided such modification(s) will satisfy the objectives of the Consent Judgment as defined in Section V.B.1. Any proposed modification involving groundwater reinjection shall satisfy the requirements of Section V.B.3. If approved by the MDEQ, the modification(s) shall be implemented according to MDEQ approval plan(s) and schedule(s).

NINTH, modify Section V.C.3 to read as follows:

3. Remedial Investigation. No later than April 28, 1997, Defendant shall submit to the MDEQ for its review and approval a revised work plan for remedial investigation and design of the Western System and a schedule for implementing the revised work plan. The revised work plan shall include plans for installation of a series of test/purge wells, conduct of an aquifer performance test(s), groundwater monitoring, an operations and maintenance plan, and system design.

TENTH, modify Section V.D.1 as follows:

Change 3 ug/l to 77 ug/l and change 60 ug/l to 77 ug/l.

ELEVENTH, modify Section V.E.1 to read as follows:

1. For systems with a termination criterion of 77 ug/l, for a period of five (5) years after cessation of operation of any purge well, Defendant shall continue monitoring the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify MDEQ and shall collect a second sample within fourteen (14) days of such finding. If the second sample confirms the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall restart the associated purge well system.

TWELFTH, add a new Section V.F to read as follows:

F. Minimum Monitoring. In the event that any groundwater system provided for in Section V is not operating for any reason other than compliance with the termination criteria of Section V.D, Defendant shall, not later than November 30, 1996, and at least semi-annually thereafter, collect and analyze for 1,4-dioxane samples from groundwater monitoring wells designated MW-15D, MW-16, MW-21, MW-28, MW-40S, MW-40D, MW-41S, MW-41D, and MW-43, and report the results to MDEQ. Such minimum monitoring shall not obligate Defendant to duplicate monitoring required under any MDEQ-approved monitoring plan for a groundwater system.

THIRTEENTH, modify the first paragraph of Section VI to read as follows:

Defendant shall design, install, operate, and maintain the systems described below to control, remove, and treat (as required) soil contamination at the GSI Property. The overall objective of these systems shall be to: (a) prevent the migration of 1,4-dioxane from contaminated soils into any aquifer in concentrations that cause groundwater contamination; (b) prevent venting of groundwater contamination into Honey Creek Tributary of 1,4-dioxane in quantities which cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2000 ug/l; and (c) prevent venting of groundwater contamination to Third Sister Lake in quantities which cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Lake to exceed 2000 ug/l. Defendant also shall implement a monitoring plan to verify the effectiveness of these systems.

FOURTEENTH. modify Section VI.A.1 to read as follows:

1. Objectives. The objectives of this System are to: (a) remove contaminated groundwater from the Marshy Area located north of former Ponds I and II; (b) reduce the migration of contaminated groundwater from the Marshy Area into other aquifers; and (c) prevent the discharge of contaminated groundwater from the Marshy Area into the Honey Creek Tributary in quantities which cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2000 ug/l.

FIFTEENTH. modify Sections VI.A.2 and VI.A.4 to read as follows:

2. Pilot Test and Design. No later than December 28, 1996, Defendant shall begin the Extended Pilot Test according to the plan conditionally approved by MDEQ on July 26, 1995. No later than March 1, 1998, Defendant shall submit to MDEQ for review and approval the Pilot Test Report, final design, and effectiveness monitoring plan. No later than June 13, 1998, Defendant shall submit to MDEQ for review and approval the operation and maintenance plan.

4. Installation and Operation. Upon approval of the final design by MDEQ and in any event not later than September 27, 1998, Defendant shall complete installation of the system according to the approved design and begin operation. Defendant shall thereafter continuously operate the system according to the approved plans until it is authorized to shut down the system pursuant to Section VI.D of the Consent Judgment.

SIXTEENTH, modify Section VI.B.1 to read as follows:

1. Objectives. The objectives of this program shall be to meet the overall objective of Section VI upon completion of the program and to prevent the discharge of groundwater contamination into Third Sister Lake in quantities which cause the concentration of 1,4-dioxane at the groundwater-surface water interface of Third Sister Lake to exceed 2000 ug/l.

SEVENTEENTH, modify Section VI.B.3 by striking the paragraph.

EIGHTEENTH, modify Section VI.C.2 to read as follows:

2. Defendant shall, no later than November 30, 1996, submit to MDEQ for review and approval a revised soils remediation plan for addressing identified areas of soil contamination. The areas to be addressed include the burn pit; the former Pond I area; the former Pond II area; the form Lift Station area; and Pond III. The plan submitted by Defendant shall be consistent with cleanup criteria as provided in MCL 324.20120a.

The Defendant's proposal must attain the overall objectives of Section VI.

NINETEENTH, modify Section VI.D.1.a to read as follows:

(a) Except as otherwise provided pursuant to Section VI.D.3, Defendant shall continue to operate the Marshy Area System until six (6) consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the

presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. This System shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

TWENTIETH, modify Section VI.D.1.b by deleting the paragraph.

TWENTY-FIRST, modify the last clause of Section VI.D. 2 to read as follows:

2. ... that the concentration of 1,4-dioxane in soils in the area in question does not exceed 1500 ug/kg or other higher concentration derived by means consistent with Mich Admin Code R 299.5711(2) or MCL 324.20120a.

TWENTY-SECOND, modify Section IX.B as follows:

Modify the third sentence to read: "For purposes of this Paragraph, 'best efforts' includes, but is not limited to, seeking judicial assistance to secure such access pursuant to MCL 324.20135a." Delete the remainder of this subsection.

The Parties to the Amendment agree that no changes in the Consent Judgment other than those specified above are intended by this Amendment, that all provisions of the Consent Judgment remain in force to the extent they are not specifically and affirmatively altered by this Amendment, and that -- unless expressly stated otherwise -- all provisions of the Consent Judgment not altered by this Amendment apply to it.

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

Russell J. Harding
Director
Michigan Department of
Environmental Quality

Dated: 9/12/96

Robert P. Reichel

Dated: 8/30/96

A. Michael Leffler (P24254)
Robert P. Reichel (P31878)
Assistant Attorneys General
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Knapps Office Centre
300 South Washington
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Lansing, MI 48913
Telephone: (517) 335-1488
Attorneys for Plaintiffs

DEFENDANT

GELMAN SCIENCES, INC.

Approved as to form:
Cooper, Fink & Zausmer, P.C.
Attorneys for Defendant
Gelman Sciences, Inc.

Dated: September 3, 1996

David H. Fink (P28235)
Alan D. Wasserman (P39509)
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48018
Telephone: (313) 851-4111

IT IS SO ORDERED AND ADJUDGED this 23 day of September, 1996.

/S/ MELINDA MORRIS

HONORABLE PATRICK J. CONLIN
Circuit Court Judge

cases/9206322 amendment

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JENNIFER M. GRANHOLM, Attorney General for the State of Michigan, ex rel, MICHIGAN NATURAL RESOURCES COMMISSION, MICHIGAN WATER RESOURCES COMMISSION, and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs,

v

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable Melinda Morris

SECOND AMENDMENT TO CONSENT JUDGMENT

A Consent Judgment was entered in this case on October 26, 1992. The Consent Judgment requires Defendant, Gelman Sciences, Inc., to implement various remedial actions to address environmental contamination in the vicinity of Defendant's property in Scio Township, subject to the approval of the Michigan Department of Environmental Quality ("MDEQ").

The Consent Judgment was amended by stipulation of the parties and Order of the Court on September 23, 1996 ("First Amendment of Consent Judgment").

In February 1997, Defendant Gelman Sciences, Inc.'s assets and liabilities were purchased by Pall Acquisitions, Inc., and Defendant is now known as Pall/Gelman Sciences, Inc. ("Pall/Gelman").

Defendant has requested the MDEQ to approve two new alternative disposal methods for the purged groundwater from the Evergreen Subdivision Area System.

The first alternative would allow pumping of the purged groundwater from the Evergreen Subdivision Area through an underground pipeline to the Gelman facility at 600 Wagner Road for treatment in the Core Area Treatment System and disposal through the disposal method being employed by the Core Area System at that time. The second alternative would allow pumping water, already treated in the Evergreen Treatment System, to the Core for disposal through the disposal method being employed by the Core Area System at that time.

THEREFORE, the Parties agree to this Second Amendment to the Consent Judgment ("Second Amendment") and such Second Amendment is ordered, adjudged, and decreed as follows:

FIRST, modify Section V.A.5.c. to read as follows:

c. Storm Drain Discharge. Use of the storm drain is conditioned upon issuance of an NPDES permit and approval of such use by the City of Ann Arbor and the Allen Creek Drainage District. Discharge to the Huron River via the Ann Arbor stormwater system shall be in accordance with the NPDES permit and conditions required by the City and the Drainage District. If the storm drain is to be used for disposal, no later than twenty-one (21) days after permission is granted by the City and the Drainage District to use the storm drain for continuous disposal of purged groundwater, Defendant shall submit to MDEQ, the City of Ann Arbor, and the Drainage District for their review and approval a protocol under which the purge system shall be temporarily shut down: (i) for maintenance of the storm drain; and (ii) during storm events to assure that the stormwater system retains adequate capacity to handle run-off created during such events. The purge system shall be operated in accordance with the approved protocol for temporary shutdown.

SECOND, add a new Section V.A.5.d. to read as follows:

d. Pipeline To Core Area System.

(i) Installation of Pipeline. Installation of a pipeline to the Core Area

System is conditioned upon approval of such installation by the MDEQ. If the pipeline is proposed to be installed on public property, the pipeline installation is conditioned upon approval of such installation by the City of Ann Arbor, Scio Township, and the Washtenaw County Road Commission, if required by statute or ordinance, or by Order of the Court pursuant to the authority under MCLA §324.20135a. Defendant shall design the pipeline in compliance with all state requirements and install the pipeline with monitoring devices to detect any leaks. If leaks are detected, the system will automatically shut down and notify an operator of the condition. In the event that any leakage is detected, Defendant shall take any measures necessary to repair any leaks and perform any remediation that may be necessary. To reduce the possibility of accidental damage to the pipeline during any future construction, the location of the pipeline will be registered with MISS DIG System, Inc.

(ii) Transportation of Untreated Groundwater. Defendant's option to use a pipeline to transport untreated groundwater extracted from the Evergreen System well(s) to the Core Area System for treatment and disposal is also subject to the following conditions. Before using such a pipeline for that purpose, Defendant shall submit and receive MDEQ approval of a written demonstration that the Core Area System has continuously operated in full compliance with the requirements of this Consent Judgment and applicable permit(s) in the immediately preceding six (6) months and that the Core Area System has sufficient additional treatment capacity to reliably treat, in full compliance with this Consent Judgment and applicable permit(s), all the additional groundwater Defendant proposes to transmit from the Evergreen System through the pipeline. In addition, Defendant shall submit and receive MDEQ approval of a plan for this use of the pipeline.

(iii) Transportation of Treated Groundwater. Defendant's option to use a pipeline to transport groundwater, already treated by the Evergreen Treatment System, to the Core Area for disposal through the NPDES permit discharge point

into the Honey Creek, is subject to the following conditions. Before using such a pipeline for that purpose, Defendant shall submit and obtain MDEQ approval of a written demonstration that sufficient additional discharge capacity exists to handle the combined discharge flow from the Core Area System and the anticipated discharge flow from the Evergreen System. In addition, Defendant shall submit and obtain MDEQ approval of a plan for this use of the pipeline. Any treated flows from the Evergreen Treatment System being discharged at the Core System shall meet the current NPDES permit limits for the Honey Creek discharge.

(iv) Nothing in this subsection shall relieve Defendant of its obligations to: (a) continuously operate the Evergreen System and to properly treat and dispose of contaminated groundwater in compliance with the Consent Judgment and applicable permit(s), using one or more of the other options for disposal, as necessary; and (b) continuously operate the Core Area System to properly treat and dispose of contaminated groundwater in compliance with the Consent Judgment and applicable permit(s).

The Parties to the Second Amendment agree that no changes in the Consent Judgment other than those specified above are intended by this Second Amendment. The Parties further agree that entry of this Second Amendment shall not constitute a waiver by either party of its respective legal position regarding the applicability of the requirements of Part 201 of the Natural Resources and Environmental Protection Act to the MDEQ's review, consideration and approval of response activities to be performed by Defendant pursuant to the Consent Judgment.

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

Dated: 10/20/99

Russell J. Harding
Director
Michigan Department of
Environmental Quality

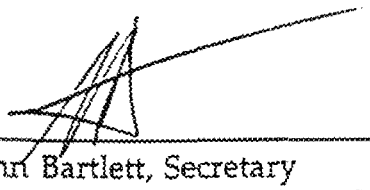
Approved as to form:
Assistant Attorneys General
Natural Resources Division
Attorneys for Plaintiff

Dated: 10-19-99

A. Michael Leffler (P24254)
Robert P. Reichel (P31878)
Assistant Attorneys General
Natural Resources Division
Knapp's Office Centre, Suite 530
300 South Washington Square
Lansing, MI 48913
(517) 335-1488
Attorneys for Plaintiffs

IT IS SO STIPULATED AND AGREED:

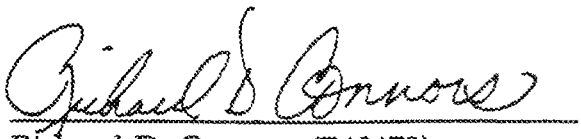
DEFENDANT



Dated: 9-13-99

Mary Ann Bartlett, Secretary
PALL/GELMAN SCIENCES, INC.

Approved as to form:
Plunkett & Cooney, P.C.
Attorneys for Defendant
Gelman Sciences, Inc.



Dated: 9-7-99

Richard D. Connors (P40479)
Dennis Cowan (P36184)
505 North Woodward, Suite 3000
Bloomfield Hills, MI 48304
(248) 901-4050

IT IS SO ORDERED AND ADJUDGED this 20 day of October 1999.

S/MELINDA MORRIS

HONORABLE MELINDA MORRIS
Circuit Court Judge

8901467/Gelman/Second Amend-clean

RELEASE OF CLAIMS AND SETTLEMENT AGREEMENT

This Release of Claims and Settlement Agreement ("Settlement Agreement" or "Agreement") is made and entered into this 20th day of November, 2006, between the City of Ann Arbor ("City"), a Michigan municipal corporation, with offices at 100 N. Fifth Ave, Ann Arbor, Michigan, 48104, and Gelman Sciences, Inc., a Michigan Corporation, d/b/a Pall Life Sciences ("PLS"), with offices at 600 South Wagner Road, Ann Arbor, Michigan, 48103.

I. GENERAL PROVISIONS

A. Proceedings. The City and PLS (collectively, the "Parties") acknowledge that this Settlement Agreement is a compromise of claims made in the following proceedings:

1. *City of Ann Arbor v. Gelman Sciences, Inc. d/b/a Pall Life Sciences,* Case No. 04-513-CF (Washtenaw Cty. Cir. Ct.) ("State Lawsuit");

2. *City of Ann Arbor v. Gelman Sciences, Inc. d/b/a Pall Life Sciences,* Case No. 05-73100 (U.S. Dist. Ct., E.D. Mich.) ("Federal Lawsuit"); and

3. *In Re Point Source Pollution Control National Pollution Discharge Elimination System (NPDES) Petition of the City of Ann Arbor on Permit NPDES No. MI 0048453 (Pall Life Sciences)* ("Contested Case").

B. Compromise of Claims. The Parties recognize that this Settlement Agreement is a compromise of disputed claims and defenses. By entering into this Settlement Agreement, neither Party admits any fault or liability under any statutory or common law, and does not waive any rights, claims, or defenses with respect to any person except as otherwise provided herein. By entering into this Settlement Agreement, neither Party admits the validity or factual basis of any of the positions or defenses asserted by the other Party. The Settlement Agreement and the compromises reflected therein shall have

no *res judicata* effect and shall not be admissible as evidence in any other proceeding, except in a proceeding between the Parties seeking enforcement of this Agreement.

C. Parties Bound. This Settlement Agreement applies to and is binding upon and inures to the benefit of the City, PLS, and their successors and assigns. This Settlement Agreement shall be binding upon the successors and assigns, if any, of PLS to its obligations and rights under the Consent Judgment entered into in *Attorney General v. Gelman Sciences,* Case No. 88-34734-CE (Washtenaw Cty. Cir. Ct.) (as modified by subsequent orders of the court) (the "Consent Judgment").

II. DEFINITIONS

The following terms, when capitalized in this Agreement, shall have the meanings specified in this Section II.

A. 1,4-Dioxane means the 1,4-dioxane present in surface water and the groundwater aquifers in the vicinity of the PLS Property, including the Unit E Aquifer, but this term as it is used in this Agreement shall not include any 1,4-dioxane that PLS establishes by a preponderance of the evidence to have originated from a release for which PLS is not legally responsible. For purposes of this Agreement only, "1,4-Dioxane" includes the 1,4-dioxane currently identified in the Unit E Aquifer, including but not limited to that which currently is below 85 ppb in concentration, which is located either (a) in the Prohibition Zone; or (b) at and in the vicinity of the Northwest Supply Well. PLS acknowledges that, as of the date of this Agreement, it is not aware of another source of the currently known 1,4-dioxane. Accordingly, the Parties agree that any 1,4-dioxane found in and near the Prohibition Zone or in and near the vicinity of the Northwest Supply Well shall be presumed to be within the above definition unless PLS can make

the proof stated above to the contrary. This definition shall not have any evidentiary effect in any future dispute or litigation between PLS and any person or entity other than the City.

B. Bromate means the bromate present in the surface water and the groundwater aquifers in the vicinity of the PLS Property, including the unnamed tributary to Honey Creek, which is the location of Outfall 001 under the NPDES Permit (the "Honey Creek Tributary"), Honey Creek and Unit E Aquifer, but this term as it is used in this Agreement shall not include any bromate that is established by PLS to have originated from a release or discharge for which PLS is not legally responsible.

C. City Property means property, buildings and facilities owned by the City.

D. Claims means any claim, allegation, demand, order, directive, action, suit, cause of action, counterclaim, cross-claim, third-party action, or arbitration or mediation demand, whether at law or in equity, and whether sounding in tort, equity, nuisance, trespass, negligence, strict liability or any other statutory, regulatory, administrative, or common law cause of action of any sort, asserted and unasserted, known and unknown, anticipated and unanticipated, past, present, and future of any nature whatsoever, including, without limitation, any and all claims for injunctive relief, declaratory relief, contribution, indemnification, reimbursement, Response Costs, Response Activity Costs, loss in the value of property, statutory relief, damages, expenses, penalties, costs, liens, or attorney fees.

E. Effective Date: The Effective Date of this Agreement shall be the latest date of the entry of the orders of dismissal specified in Section III. This Agreement shall be effective only if all of the orders of dismissal specified in Section III are entered.

F. Escalator Factor shall be calculated by as follows:

Escalator Index (Month of Trigger) - Escalator Index (November 2006)
Escalator Index (November 2006)

The percentage change from the November 2006 Index to the Index for the month during which the Contingent Payment is triggered under Section VI.B will be calculated to the second decimal place.

G. Escalator Amount shall be computed by multiplying the Escalator Factor by the Contingent Payment.

H. Escalator Index shall be the Engineering News Record Construction Cost Index, available at the www.enr.com web site. In the event the Escalator Index is no longer published by McGraw Hill or its successor, the Parties agree to establish an alternative method of determining the Escalator Amount based on a currently published and generally accepted construction cost index.

I. Federal Maximum Contaminant Level means the maximum contaminant level established by the Environmental Protection Agency under the Federal Safe Drinking Water Act. 42 U.S.C. 300f, et seq.

J. GCGI means the generic residential criterion for groundwater based on ingestion of groundwater developed by the MDEQ for 1,4-dioxane under Part 201 of the Michigan Natural Resources and Environmental Protection Act ("NREPA") MCL 324.20101 *et seq.*, and Mich. Admin. Code R. 299.710, as such criteria may be amended, adjusted or replaced.

K. Hazardous Substances has the same definition as that term in Section 20101(1) of NREPA, MCL 324.20101(1).

L. HCT Water Treatment System means the system used by PLS to treat water collected by the PLS remediation systems and to discharge that water to the Honey Creek Tributary at Outfall 001, as described in the NPDES Permit.

M. Major Reports means those reports that PLS is required to submit under the Consent Judgment or a MDEQ-approved work plan that address response activities affecting properties within the City or City Property, and any other final reports that PLS in good faith determines would be of significant interest to the City.

N. MDEQ means the State of Michigan Department of Environmental Quality, and its successor state agencies.

O. NPDES Permit means, unless specified otherwise, National Pollutant Discharge Elimination System Permit No. MI 0048453, as amended, renewed, or replaced, that authorizes PLS' discharge of treated water and effluent limits for such discharge.

P. Northwest Supply Well means the City's municipal water supply wells located on Montgomery Street in the City of Ann Arbor.

Q. Northwest Supply Wellfield means the municipal well field associated with the Northwest Supply Well.

R. Prohibition Zone means the area within which groundwater use is restricted pursuant to the Prohibition Zone Order, the boundaries of which are as depicted on the attached Figure 3, including a proposed expansion of the Prohibition Zone boundary that, as of the date of this Agreement, has not been approved by the MDEQ. The Prohibition Zone as that term is used in this Agreement shall include the proposed expansion as approved by the MDEQ. Upon MDEQ approval of the expansion, the document attached as Figure 3 and identified as "PROPOSED EXPANSION 4/18/06" will be replaced with a new Figure 3 showing the

expansion as approved by the MDEQ. The Prohibition Zone, as that term is used in this Agreement, shall not include any further expansion of the Prohibition Zone beyond the boundaries depicted on Figure 3.

S. Prohibition Zone Order means the May 17, 2005 Order Prohibiting Groundwater Use entered in *Attorney General, et al. v. Gelman Sciences, Inc.* Case No. 88-34734-CE (Washtenaw Cty. Cir. Ct.).

T. PLS Property means the PLS facility located at 600 S. Wagner Road, Ann Arbor, Michigan.

U. PLS Remediation means the response activities PLS is required to undertake by the Consent Judgment, associated court orders and MDEQ-approved workplans.

V. Response Activity Costs has the same meaning as the definition of that term in Section 20101(1)(ff) of NREPA, MCL 324.20101(1)(ff).

W. Response Costs has the same meaning as the definition of that term in 42 U.S.C. 9607(a).

X. State Maximum Contaminant Level means the maximum contaminant level established by the State under Michigan's Safe Drinking Water Act, MCL 325.1001, *et seq.*

Y. Trigger Level, as of the date of this Agreement, means the current GCGI for 1,4-dioxane of 85 parts per billion ("ppb"). If a new GCGI value is promulgated by the MDEQ, that value will become the Trigger Level from the time of promulgation forward, unless the new GCGI value is based on the development by the State of Michigan of a State Maximum Contaminant Level for 1,4-dioxane that is not a Federal Maximum Contaminant Level developed by USEPA. If, however, a Federal Maximum Containment Level is developed for 1,4-dioxane, a change in the GCGI value based on

that Federal Maximum Containment Level will become the new Trigger Level upon promulgation of the revised GCGI value by the MDEQ.

Z. Unit E Aquifer means the groundwater aquifer that is the subject of the Unit E Order.

AA. Unit E Order means the December 17, 2004 Order and Opinion Regarding Remediation of the Contamination of the "Unit E" Aquifer in *Attorney General, et al. v. Gelman Sciences, Inc.*, Case No. 88-34734-CE (Washtenaw Cty. Cir. Ct.), as may be amended.

BB. USEPA means the United States Environmental Protection Agency.

CC. Verified Monitoring Results shall be the results of the laboratory analysis of groundwater samples obtained from the Series A and Series B Wells described in Section VI, below, following completion of the Quality Assurance/Quality Control ("QA/QC") and verification procedures described in Appendix A.

DD. Well Information Database means the information PLS maintains with groundwater monitoring well information and outfall water quality information, including the following: well identification information (address, X and Y coordinates, top of casing and ground elevations, well and screen depths, survey information), dates of sampling, and sampling results.

III. SETTLEMENT PAYMENT AND DISMISSAL OF PROCEEDINGS.

A. Settlement Payment By PLS. Within Twenty-one (21) days after the Effective Date of this Agreement, PLS shall pay to the City the sum of Two Hundred Eighty Five Thousand Dollars ($285,000). The payment shall be made by check or draft payable to "The City of Ann Arbor" and be sent by overnight delivery to: Stephen K. Postema, City Attorney, 100 N. Fifth Avenue, Ann Arbor, Michigan 48104.

B. Dismissal of Proceedings. Upon execution of this Agreement, the City shall promptly dismiss with prejudice all Claims in the State Lawsuit, the Federal Lawsuit, and the Contested Case, with each Party to bear its own costs. Each Party shall, at its own expense, take whatever steps are necessary on its behalf to effectuate such dismissals.

IV. RELEASE OF CLAIMS AND RESERVATION OF RIGHTS

A. City Release. Except as provided in Paragraph IV.B, below, the City hereby irrevocably and unconditionally forever releases, discharges, and covenants not to sue, proceed against, or seek contribution from PLS, and any of its predecessors, successors, assigns, parents, subsidiaries, affiliates, officers, directors, employees, attorneys, agents, and/or representatives (the "Released Parties") and shall forever relinquish, remise, discharge, waive, and release any and all Claims that it may now or in the future have against the Released Parties in connection with the Covered Matters. Covered Matters are defined as:

1. All Claims arising directly or indirectly from Hazardous Substances in soil, groundwater, and surface water at or emanating, released, or discharged from the PLS Property (collectively "Contamination"), including, without limitation, all Claims that were or could have been asserted in the State Lawsuit, the Federal Lawsuit and/or the Contested Case.
2. All Claims, past, present and future, for civil fines, penalties and costs.
3. All Claims and rights under the Administrative Procedures Act to petition, challenge or contest any future NPDES permit issued to PLS that authorizes the discharge to the Honey Creek Tributary from PLS' groundwater treatment system(s).

B. Exceptions and Reservation of Rights. Notwithstanding Paragraph IV.A, above, the City reserves, and this Agreement is without prejudice to, its right to petition, challenge, sue, proceed against or otherwise seek reimbursement, contribution, indemnification and/or other remedy from PLS, with respect to:

1. Enforcement of this Agreement.

2. Any future necessary Response Activity Costs or Response Costs to address a new plume of Contamination or Contamination in a previously uncontaminated aquifer that is discovered after the date of this Agreement that could not have been brought in the State Lawsuit or Federal Lawsuit ("New Contamination"). This exception to the general release set forth in Paragraph IV.A shall not apply to:

   a. The future migration of Contamination within the Prohibition Zone;

   b. Contamination present in the groundwater at levels below the then applicable GCGI or State or Federal Maximum Contaminant Level, if any, that is associated with the plumes of Contamination known to exist as of the date of this Agreement ("Known Plumes") or;

   c. Contamination present at the Northwest Supply Wellfield or the property on which the Northwest Supply Well is located.

3. Claims that arise from the unforeseen change in the migration pathway of a Known Plume that: (a) Results in the presence of 1,4-Dioxane at levels above the then applicable GCGI or State or Federal Maximum Contaminant Level at locations where such concentrations are not present as of the date of this Agreement; and (b) causes a City Property to be considered a "facility" as defined under Part 201. This exception to the general release set forth in Paragraph IV.A shall not apply to any Claims associated with:

a. The migration of Contamination within the Prohibition Zone; or

b. The Northwest Supply Wellfield or the property on which the Northwest Supply Well is located.

4. The presence of Contamination at the Steere Farm Wellfield.

5. Necessary Response Costs and/or Response Activity Costs to extent the City may recover such costs under 42 U.S.C. 9607a and/or MCL 324.20126a that arise from the continued presence of 1,4-Dioxane at levels above the GCGI within the Prohibition Zone and one or more of the following:

a. Soil and/or water sampling and analysis from areas within the Prohibition Zone, to determine if 1,4-Dioxane is present in wells, excavations, and similar locations where groundwater is present or evident;

b. Dewatering costs and disposal costs, including permit costs, for soil and groundwater removed from the Prohibition Zone that is contaminated with 1,4-Dioxane if permits are required for such dewatering or disposal;

c. Worker training and use of protective gear;

d. Increased costs of contracting in areas affected by 1,4-Dioxane (e.g., need to use 40-hour OSHA hazardous substance/waste trained personnel rather than standard contractors; increased time for completion of projects and the like); and

e. The City's due care obligations under MCL 324.20107a and 42 U.S.C. 9607(q)(1)(A)(iii).

This exception to the general release set forth in Paragraph IV.A shall not apply to any Claims associated with the Northwest Supply Wellfield or the Northwest Supply Well itself.

6. The issuance of any future NPDES Permit or renewal of PLS' current NPDES Permit that authorizes PLS' discharge of treated groundwater to the Honey Creek Tributary, but only to the extent that a future proposed NPDES Permit/renewal:

a. Contains a new effluent limitation for a compound that is less restrictive than the effluent limitation in the current NPDES Permit;

b. Contains an effluent limitation for a compound that is not subject to an effluent limitation in the current NPDES Permit;

c. Allows the discharge of compounds that are not present in PLS' current effluent; or

d. Authorizes PLS to discharge a greater volume of treated water to the Honey Creek Tributary than the current NPDES Permit.

Unchanged portions of any future NPDES Permit shall not be subject to petition, challenge or contest.

7. The City's rights, if any, to take action to require the MDEQ to enforce violations of the NPDES Permit.

V. HONEY CREEK RESPONSE ACTIONS REGARDING BROMATE

A. Monitoring. Except as otherwise provided in this Agreement, monitoring for Bromate shall be accomplished at a single location. Sampling procedures and methods shall be as follows:

1. *Monitoring Location and Frequency:* PLS will sample surface water for Bromate on a daily basis, Monday through Friday, at the confluence of Honey Creek and the Huron River (hereinafter, "HC/HR"), as generally depicted in the diagram attached as Figure 1. The City may, at its discretion, collect samples on Saturday and Sunday of each week and is responsible for retaining any such samples. Except as provided below, PLS will only be responsible for analyzing one of the City's weekend samples (Saturday or Sunday) per month on the Monday following collection if and when the City collects such samples. PLS will also analyze the City's weekend samples if equipment malfunction or other

circumstance causing an "upset" condition occurs or is discovered on a Friday or Monday.

2. *Sampling Method and Transmission of Results*: Surface water will be collected as a grab sample. Samples will be collected between 7:00 a.m. and 10:00 a.m. or as soon as weather permits. For any samples PLS is required to obtain under this Section, the PLS analytical laboratory will analyze and report the results on the same day (for Monday through Friday samples) by email to the City's Environmental Coordinator and to the City's Water Quality Manager. Bromate analyses at PLS shall be conducted using USEPA Method 317 (or an equivalent, USEPA approved, method). The method detection limit (MDL) for Bromate using this method is currently 2 ppb, which constitutes the MDL that will be used with reference to determining action under this section. A lower MDL may be substituted for the agreed MDL if future changes in laboratory capabilities using acceptable methods allow.

3. *Split Sampling:* The City: (1) may split samples with PLS at any time, with 24 hours notice to PLS; (2) may collect samples at any time independent of the PLS sampling schedule; and (3) may utilize the PLS analytical laboratory as a backup laboratory for analyzing the City's split samples at a reasonable charge not to exceed PLS' costs.

B. Action Plan. If an analysis of a sample by PLS or the City indicates that the concentrations of Bromate at the HC/HR exceed 2 ppb, PLS will take the following actions:

1. PLS will perform a quality control and quality assurance review to determine if the monitoring result was due to an analytical or reporting error.

2. PLS will review the performance of its HCT Water Treatment System to determine if that system is operating properly, and, if it determines the functioning of the HCT Treatment System to be a possible cause of the monitoring result, PLS will make such adjustments as it deems necessary and collect an effluent sample shortly after those adjustments to determine system performance after such adjustments.

3. Within thirty-six (36) hours after completing the actions in subparagraphs 1 and 2, PLS will collect another surface water sample at HC/HR ("Confirming Sample"). PLS will collect another surface water sample at HC/HR on any Saturday following a Friday with a monitoring result in excess of 2 ppb. The City may collect a split sample of the Confirming Sample. If the Confirming Sample shows that Bromate at HC/HR is no longer present at concentrations in excess of 2 ppb, then monitoring shall resume as provided in this Section and no further action is necessary.

4. If the Confirming Sample shows the presence of Bromate in excess of 2 ppb, PLS will take actions as soon as practicable to reduce Bromate levels at HC/HR below 2 ppb. The initial actions may include, but are not limited to, the following:

   a. PLS may alter the flow composition into the HCT Water Treatment System so as to reduce the Bromate levels, but maintain the total flow of water treated and discharged by the system.

   b. PLS may reduce the total flow at the point of discharge to the Honey Creek Tributary (Outfall 001 in NPDES Permit MI 00 48453).

5. If the steps outlined in the previous subsections are not sufficient to reduce concentrations of Bromate to 2 ppb at the HC/HR within a reasonable time, PLS will take additional actions to achieve this reduction. Such actions may include, but are not limited to, the following:

a. PLS may replace the current HCT Water Treatment System technology (ozone and hydrogen peroxide) with a combination of ultraviolet light (UV) and ozone technologies or other technology.

b. PLS may install a pipeline to deliver treated water to a point along the Huron River downstream from the City's water intake.

C. Unavailability of PLS' Laboratory. In the event PLS' laboratory is no longer available, the Parties agree to negotiate in good faith to make appropriate adjustments, if any, to the laboratory turn around times set forth in this Section V. All commercially reasonable efforts will be made by PLS to identify and use a laboratory that will meet the turn around times set forth in this Section V.

D. Termination of Honey Creek Monitoring. PLS' obligations under this Section V shall terminate once PLS is no longer discharging treated groundwater to the Honey Creek Tributary or any other surface water body connected to Honey Creek or the Huron River or if PLS' HCT Water Treatment System is changed to a system that does not produce or otherwise cause Bromate to be present in the discharge.

VI. NORTHWEST SUPPLY WELL RESPONSE ACTIVITIES

A. Groundwater Monitoring Plan. PLS will undertake the following groundwater monitoring:

1. *Series A Well Location.* Within 90 days of the Effective Date of this Agreement, PLS will install a nested well configuration at the approximate location identified on the map attached hereto as Figure 2 (the "Series A Wells").

2. *Monitoring of Series A Wells.* PLS shall sample the Series A Wells for 1,4-Dioxane quarterly until termination using the procedures set forth in Appendix A.

3. *Series B Wells.* If the Verified Monitoring Result obtained from any Series A Well exceeds one-half (1/2) of the Trigger Level, PLS will install a nested well configuration at each of the locations described below within 90 days of obtaining access (the "Series B Wells"). One location will be in the general vicinity of Bemidji as shown on the map attached as Figure 2. The second well location will be determined by the Parties at the time the Verified Monitoring Result obtained from any Series A Well exceeds one-half (1/2) of the Trigger Level.

4. *Monitoring of Series B Wells.* PLS shall sample the Series B Wells for 1,4-Dioxane quarterly until termination as provided in Paragraph VI.A.6 using the procedures set forth in Appendix A.

5. *Well Installation.* Wells required under this Section VI are to be installed by PLS and shall follow the well construction procedures described in Appendix A.

6. *Termination.* PLS' obligations under this Section VI will continue until such time as the earliest of the following occurs:

   a. The MDEQ (or other regulatory body with oversight of the PLS Remediation) no longer requires groundwater monitoring in the Unit E Aquifer upgradient of the Northwest Supply Well;

   b. The Northwest Supply Wellfield is rendered unsuitable for drinking because of reasons other than the presence of 1,4-Dioxane;

   c. The Northwest Supply Well fails or becomes unusable and cannot legally be replaced for reasons other than the presence of 1,4-Dioxane; or

   d. By mutual agreement of the Parties.

B. Contingent Payment.

1. *Trigger of Contingent Payment.* In the event the Verified Monitoring Results indicate that the average concentration of 1,4-Dioxane in the nested wells at either Series B Well location exceeds the Trigger Level, then PLS shall make the payments described in Paragraphs VI.B.2 and 3. PLS' obligation to make such payments shall not be affected or reduced by the presence of 1,4-dioxane other than "1,4-Dioxane" (as defined in this Agreement) if the Trigger Level would have been exceeded even absent the presence of such 1,4-dioxane.

2. *Contingent Payment.* In the event the Contingent Payment is triggered, as described in Paragraph VI.B.1, PLS shall pay the City the sum of Four Million Dollars ($4,000,000) (the "Contingent Payment") within Sixty (60) days of receipt of the Verified Monitoring Results. The payment shall be made by check or draft payable to "The City of Ann Arbor" and be sent by overnight delivery to: Stephen K. Postema (or his successor), City Attorney, 100 N. Fifth Avenue, Ann Arbor, Michigan 48104.

3. *Escalator Payment.* In the event the Contingent Payment is triggered, as described in Paragraph VI.B.1, PLS shall, in addition to the Contingent Payment, pay the City the Escalator Payment within Sixty (60) days of the date the Escalator Index for the month during which the Contingent Payment is triggered becomes publicly available.

C. Additional Provisions

1. *Operation of Northwest Supply Wellfield.* The City shall only operate the Northwest Supply Wellfield in a manner that benefits the City's public water

supply system. The City shall not operate the Northwest Supply Well or install and operate a new well in the Northwest Supply Wellfield for the purpose of moving the plume of 1,4-Dioxane toward the Northwest Supply Well.

2. *Response Activities.* PLS may undertake additional response activities in the vicinity of the Northwest Supply Well to provide additional assurance that concentrations of 1,4-Dioxane in the monitoring wells do not reach the Trigger Level. If these additional response activities entail installation of infrastructure within the City, the City will cooperate with such activities in a manner consistent with Section IX of this Agreement.

VII. ADDITIONAL RESPONSE ACTIVITIES

A. PLS Performance of Future Laboratory Analyses.

1. *Analysis of City Samples.* PLS at its sole cost will perform laboratory analyses for 1,4-Dioxane, and provide the results of same and related laboratory QA/QC documentation to the City, with regard to samples the City obtains from the City's source waters. PLS' obligation to analyze such samples shall be limited to samples taken at the following frequencies and from the following locations:

   a. Quarterly groundwater samples from either the Northwest Supply Well or from the existing monitoring well located at the Northwest Supply Wellfield.

   b. Monthly groundwater samples from the transmission main from the Steere Farm Wellfield. If 1,4-dioxane is detected in a monthly sample from the transmission main, PLS will analyze monthly groundwater samples obtained by the City from the individual Steere Farm production wells.

   c. Monthly surface water samples from the Huron River and from Barton Pond.

2. *Split Sampling*. PLS agrees that, for quality control and quality assurance (QA/QC) purposes, on occasion the City may obtain duplicate (split) samples of water from the same sources or locations noted in Paragraph VII.A.1, above, and will cause those duplicate samples to be analyzed by a separate, independent laboratory. PLS will reimburse the City the amounts it pays in the future to obtain such independent laboratory analyses, provided that the number of such split samples is not greater than that reasonably required for appropriate QA/QC purposes.

3. *City Staff Time*. The City shall be responsible for obtaining the water samples from the locations described in Paragraph VII.A, above, and for following all appropriate sampling protocols and procedures. Except for Claims reserved in Section IV, above, PLS will not be required to reimburse the City for costs of obtaining such samples, including City staff time.

4. In the event PLS' laboratory is not available, PLS will be responsible for the cost of obtaining the laboratory analyses described in this Section VII.

VIII. TRANSPARENCY

A. Well Information Database. Within 30 days after the Effective Date, PLS shall transmit to the City its current Well Information Database as of the date of transmittal. This information shall be provided electronically in one or more Excel® files. Data to be provided in the Well Information Database will include at a minimum: the well or other sample location information (X and Y coordinates, top of casing and ground elevations, well and screen depths, address, etc.); sampling results for 1,4-Dioxane and/or Bromate; and other water quality data from the analysis. Submittals from PLS may also include

other fields of data mutually agreed upon by the City and PLS. Thereafter, no later than the 20th day of the first full month following the initial submittal, and continuing monthly thereafter, PLS will provide to the City an update to the Well Information Database ("Update") in Excel® format. Each Update shall include dates and sample results for the previous month and any new well information developed and entered into the Well Information Database by PLS after the last submittal.

B. Major Reports. PLS will provide the City with copies of final versions of Major Reports submitted to the MDEQ at the same time and in the same format they are submitted to the MDEQ, provided that the City can request any Major Report, or portion thereof, in electronic form, and PLS will then provide the requested material in electronic form when reasonable. PLS shall also provide copies of additional reports reasonably requested by the City. PLS shall also provide copies of requests by PLS to the MDEQ for permit modifications and copies of reports showing trend analysis of 1,4-Dioxane or Bromate concentrations in surface or groundwater. If any of the foregoing reports or documents is in paper format, the City may request that the report or document or portion(s) thereof be provided electronically, and PLS will cooperate to the extent practicable. Except as explicitly modified above, PLS will continue to provide to the City all data and reports that it is otherwise required to provide and/or which it already is providing to the City. The data and reports addressed in this Section VIII are in addition to or are modifications of those data and reports.

C. Use of Information and Data. The City may manipulate data and information provided under this Section in any manner it chooses and understands. The City may release the data and any reports the City creates, in either paper or electronic format, provided,

however, that any such document or electronic file shall clearly state on its face that it has been created by the City. The City will provide PLS with copies of all reports that are released or that are subject to release to the public. The City shall not release any of the reports or data provided by PLS pursuant to this Section VIII in the form provided by PLS in either paper or electronic format except in response to a Freedom of Information Act ("FOIA") request. The City shall not publish any of the reports or data PLS provides to the City on the Internet in the form provided by PLS. PLS is responsible for marking each document that PLS asserts is protected by copyright.

D. Data Gaps. The City may review the Well Information Database and Updates and identify any perceived data gaps to PLS. After the City identifies such a gap, PLS will fill in the field(s) with information, if it is available, with the next Update. PLS will identify those gaps for which there is no information. To the extent practical, within 90 days after the City identifies a data gap to PLS, PLS will complete the dataset(s) or document why data are incomplete. The Parties acknowledge that the PLS Remediation has been ongoing for many years, and, in some cases, information regarding wells may not have been collected or may be missing or lost.

E. Provision of Reports from the City to PLS. The City will provide PLS with any final reports that the City in good faith determines would be of significant interest to PLS. The City shall also provide copies of additional reports reasonably requested by PLS. If any of the foregoing reports is in paper format, PLS may request that the report or portion(s) thereof be provided electronically, and the City will cooperate to the extent practical.

F. Disputes. Any issue arising under this Section which cannot be resolved quickly at a staff level shall be referred to the Coordination Committee for discussion and resolution.

IX. COOPERATION AND COORDINATION

A. Access. The City shall provide access to City Property and rights of way to facilitate the installation of monitoring wells PLS is required to install under MDEQ-approved work plans at appropriate locations and pursuant to mutually acceptable license agreements. The City shall process PLS' access requests in an expeditious manner. The City has the right to discuss the proposed location with PLS and to recommend an alternate location(s) for the well prior to submittal of sites to the MDEQ. PLS will submit to the City an application for a license for a monitoring well at that location, subject to approval by the MDEQ. PLS will endeavor to provide both the City and property owners on the same and intersecting street(s) within 200 feet of the well location with a minimum of seventy-two (72) hours notice prior to the installation date for any such well(s).

B. Master Bond. PLS will provide a "Master Bond" in the form attached hereto as Appendix B. The Master Bond will satisfy the surety bonding requirements of all current license agreements between the City and PLS for existing monitoring wells on City Property or rights of way and up to an additional ten (10) monitoring wells that may be installed by PLS on City Property or rights of way in the future.

C. Communication.

1. *Communications from PLS.* PLS will use reasonable efforts to inform the City contemporaneous with the MDEQ of any unexpected findings regarding conditions on City Property and property within the City limits, conditions both inside or outside City boundaries that may or do affect property within the City limits, City-owned facilities or City-provided services, and any other findings PLS in good faith deems to be of significant concern to the City. PLS will copy

the City (if in writing) on any communications with the MDEQ and will use reasonable efforts to inform the City of other communications from PLS regarding the foregoing. To the extent possible, Mr. Fotouhi will contact Ms. McCormick and/or Mr. Naud by telephone, facsimile, or email to communicate the relevant information.

PLS will copy the City (if in writing) on any communications with the MDEQ and will use reasonable efforts to inform the City of other communications from PLS regarding the promulgation of a maximum contaminant level ("MCL") for 1,4-dioxane. To the extent possible, Mr. Fotouhi will contact Ms. McCormick and/or Mr. Naud by telephone, facsimile, or email to communicate the relevant information.

2. *Communications from the City*. The City will copy PLS (if in writing) on any communications with the MDEQ and will use reasonable efforts to inform PLS of other communications from the City regarding City comments on PLS' cleanup efforts or regarding the promulgation of a maximum contaminant level ("MCL") for 1,4-Dioxane. To the extent possible, Mr. Naud and/or Ms. McCormick will contact Mr. Fotouhi by telephone, facsimile, or email to communicate the relevant information.

D. Meetings.

1. *City Council Meetings*. In the event that City Council intends to consider an issue that the City in good faith deems to be a significant concern to PLS, the City will use reasonable efforts to provide PLS with advance notice and the opportunity to make a written or oral presentation to City Council. To the extent possible, Mr.

Naud or Ms. McCormick will contact Mr. Fotouhi by telephone, facsimile, or email to communicate the relevant information.

2. *Public Meetings*. In the event the City intends to hold or co-sponsor a public meeting related to PLS, the City will provide PLS with advance notice and the opportunity to participate in the meeting. PLS will use reasonable efforts to participate in any such public meeting. The City agrees that its participation in any such meeting shall be consistent with its agreement to cooperate with PLS' implementation of the Unit E Order and all MDEQ-approved plans entered under the Unit E Order.

3. *Intergovernmental or Citizen/Governmental Coalitions and Organizations*. In the event the City participates in any intergovernmental coalitions or citizen/governmental coalitions or organizations regarding the PLS Remediation, the City's participation shall be consistent with its agreement to cooperate with PLS' implementation of the Unit E Order and all MDEQ-approved plans entered under that Order. The City will use reasonable efforts to have a PLS representative included in any such coalition or organization. The City will copy PLS (if in writing) on any communications to such groups and will use reasonable efforts to inform PLS of other communications that the City in good faith determines would be of interest to PLS.

4. *Quarterly/Semiannual Meetings of Coordination Committee*. The City and PLS shall meet on a regular basis to discuss issues of interest to the City and/or to PLS related to the PLS Remediation. Issues of interest to the City and/or to PLS are issues related to conditions on City Property, to conditions on property within the

City limits, and to conditions both within and outside the City boundaries that may or do affect City-owned facilities or City-provided services and any other topics mutually agreed upon by the Parties. The meetings will take place quarterly for the first two years, followed by semiannual meetings thereafter, unless a different schedule is mutually agreed upon by the Parties. The participants shall be Mr. Fotouhi, Mr. Naud, and Ms. McCormick. Ms. Bartlett will participate in such meetings by telephone. Members of City Council also may participate. This group shall be referred to as the Coordination Committee. At least one week prior to each meeting, Mr. Naud and/or Ms. McCormick will notify Mr. Fotouhi of any questions or topics they wish Mr. Fotouhi to answer or address at the meeting, and Ms. Bartlett and/or Mr. Fotouhi will notify Mr. Naud and Ms. McCormick of any questions or topics they wish Mr. Naud and/or Ms. McCormick to answer or address at the meeting.

E. Use of City Utilities. The City shall evaluate any application by PLS to use the City sanitary sewer system in accordance with the provisions of Chapter 28 of the Ann Arbor City Code. PLS understands that sanitary sewer services may be extended to a property outside the City under only certain, limited circumstances, that a service connection to the sanitary sewer within the City may only be made by agreement with the owner of the property that is serviced, and that Chapter 28 requires users of the sanitary sewer system to comply with specified pretreatment standards. If PLS requires use of the City's sanitary or storm water sewer systems in the future as a short-term method of disposing of purged groundwater, the City will consider such requests on a case-by-case basis in accordance with the provisions of Chapters 28 and 33 of the Ann Arbor City Code.

F. City Resolution. To the extent it is inconsistent, City Council Resolution No. R-583-12-96, entitled Resolution Regarding the Immediate Cleanup of Gelman Sciences' Groundwater Contamination, is superseded by the provisions of this Agreement.

G. Cooperation with Implementation of Unit E Order. The City shall cooperate with PLS' implementation of the Unit E Order and all MDEQ-approved plans entered under the Unit E Order. The City's cooperation shall include, but is not limited to, maintaining the Prohibition Zone Order and the attached map that depicts the Prohibition Zone established by the Prohibition Zone Order, as amended, in the same manner as the City already has done pursuant to the Prohibition Zone Order.

H. *Successor Responsibilities.* All references to specific persons in this Section IX also include the individual's successor in the event he or she leaves the employ of the respective Party.

X. FORCE MAJEURE

A. Force Majeure. Any delay attributable to a Force Majeure shall not be deemed a violation of a Party's obligations under this Agreement. "Force Majeure" is defined as an occurrence or nonoccurrence arising from causes beyond the control of a Party or of any entity controlled by the Party. Such occurrence or nonoccurrence includes, but is not limited to: (1) an Act of God; (2) acts or omissions of third parties for which the Party is not responsible; (3) insolvency of any vendor, contractor, or subcontractor retained by a Party as part of implementation of this Agreement; and (4) delay in obtaining necessary access agreements that could not have been avoided or overcome by due diligence. "Force Majeure" does not include unanticipated or increased costs or changed financial circumstances.

B. When circumstances occur that a Party believes constitute Force Majeure, the Party shall notify the other Party by telephone, facsimile, or email of the circumstances within 48 hours after the Party first believes those circumstances to apply. Within 14 working days after the Party first believes those circumstances to apply, the Party shall supply to the other Party, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by the Party to avoid, minimize, or overcome the delay, and the timetable for implementation of such measures.

XI. TERMINATION OF AGREEMENT

The Parties' obligations under this Agreement shall terminate upon PLS' receipt of the Certificate of Completion from the MDEQ confirming that PLS has completed satisfactorily all requirements of the Consent Judgment, as provided in Section XXV of the Consent Judgment, or after the MDEQ determines that 1,4-Dioxane within the Prohibition Zone does not exceed the applicable GCGI, whichever is later. Notwithstanding the foregoing, Section IV shall survive the termination of this Agreement.

XII. MISCELLANEOUS

A. Severability. The provisions of this Agreement shall be severable. Should any provision be declared by a court of competent jurisdiction to be inconsistent with federal or state law, and therefore unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.

B. Warranties. The Parties each represent and warrant that:

1. The execution and delivery of this Agreement has been duly and validly authorized and approved by all requisite action required under applicable law and that no further action is necessary to make this Agreement valid and binding.

2. Each is fully authorized to enter into this Agreement and is duly organized and validly existing in good standing under the laws of one of the states of the United States of America.

3. Each has taken all necessary governmental, corporate and internal legal actions to duly approve the making and performance of this Agreement and that no further corporate or other internal approval is necessary.

4. The making and performance of this Agreement will not, to the knowledge of either of the Parties, violate any provision of law or of their respective articles of incorporation, charter or by-laws.

5. Knowledgeable officials, officers, employees and/or agents of each Party have read this entire Agreement and know the contents hereof and that the terms of the Agreement are contractual and not merely recitals. Each Party has authorized this Agreement to be signed of its own free act, and, in making this Agreement, each has obtained the advice of legal counsel.

C. Signatories. Each person executing this Agreement warrants that he or she has the authority and power to execute this Agreement from the Party on whose behalf he or she is executing.

D. Change of Circumstances. Each Party to this Agreement acknowledges that it may hereafter discover facts in addition to or different from those which it now knows or believes to be true with respect to the subject matter of this Agreement. The Parties each expressly accept

and assume the risk of such possible difference in facts and agree that this Agreement shall be and remain effective notwithstanding such difference in facts.

E. No Rights to Non-Parties. Except as expressly provided herein, this Agreement is intended to confer rights and benefits only upon the City and PLS, and is not intended to confer any right or benefit upon any other person or entity. Except as expressly provided herein, no person or entity other than PLS and the City shall have any legally enforceable right under this Agreement.

F. Arms-Length Negotiations. This Agreement is the product of arms-length negotiation, and the language in all parts of this Agreement shall be construed as a whole according to its meaning, and not strictly for or against any Party. The Parties hereto agree that this Agreement shall not be construed according to any special rules of construction applicable to contracts of adhesion and/or insurance contracts.

G. Modification. This Agreement may not be modified in whole or in part except by written agreement signed by the City and PLS.

H. Headings. The headings used in this Agreement are for convenience only and shall not be used to construe the provisions of this Agreement.

I. Cooperation. The City and PLS shall execute promptly any and all voluntary dismissals, stipulations, supplemental agreements, releases, affidavits, waivers and other documents of any nature or kind which the other Party may reasonably require in order to implement the provisions or objectives of this Agreement.

J. No Representations. The Parties represent and agree that in executing this Agreement they do not rely and have not relied upon any representation or statement made by any other Party or by any other person or entity released herein with regard to the subject

matter, basis, or effect of this Agreement, or otherwise, which is not specifically set forth herein.

K. Entire Agreement. This Agreement represents the entire understanding of the City and PLS, and this Agreement shall supersede and control any and all prior communications, correspondence, and memorialization of agreement or prior communication between the City and PLS or their representatives relative to the matters contained herein.

L. Counterpart Signatures. This Agreement may be executed in multiple counterparts, each of which, when so executed and delivered, shall be an original, but such counterparts shall together constitute one and the same instrument and agreement.

M. Governing Law. This Agreement shall in all respects be interpreted, enforced, and governed under the law of the State of Michigan and the law of the United States without regard to Michigan's conflict of laws principles.

N. No Waiver. The failure of any of the Parties to exercise any power given such Party hereunder or to insist upon strict compliance by any Party with its obligations under this Agreement, and no custom or practice of the Parties at variance with the terms of this Agreement shall constitute a waiver of the Parties' right to demand exact compliance with the terms hereof.

O. Enforcement. The Parties agree that the Washtenaw County Circuit Court and the United States District Court for the Eastern District of Michigan each may retain jurisdiction to enforce the terms of this Agreement as appropriate.

****SIGNATURE PAGE FOLLOWS****

IN WITNESS WHEREOF, the Parties have executed this Agreement, consisting of Thirty (30) pages plus Appendices A and B and Figures 1 – 3, by their duly authorized representatives as set forth below.

City of Ann Arbor

By: John Hieftje,
Its: Mayor

By: Jacqueline Beaudry,
Its: City Clerk

Roger W. Fraser,
City Administrator

Sue F. McCormick, Public Services Administrator

Stephen K. Postema,
City Attorney
Counsel for the City of Ann Arbor

Fredrick J. Dindoffer,
Bodman, LLP
Counsel for the City of Ann Arbor

Gelman Sciences, Inc., d/b/a Pall Life Sciences

By: Mary Ann Bartlett
Its: Secretary and Director

Michael L. Caldwell,
Zausmer, Kaufman, August & Caldwell, PC
Counsel for Gelman Sciences, Inc. d/b/a Pall Life Sciences

Alan D. Wasserman,
Williams, Acosta, PLLC
Counsel for Gelman Sciences, Inc. d/b/a Pall Life Sciences

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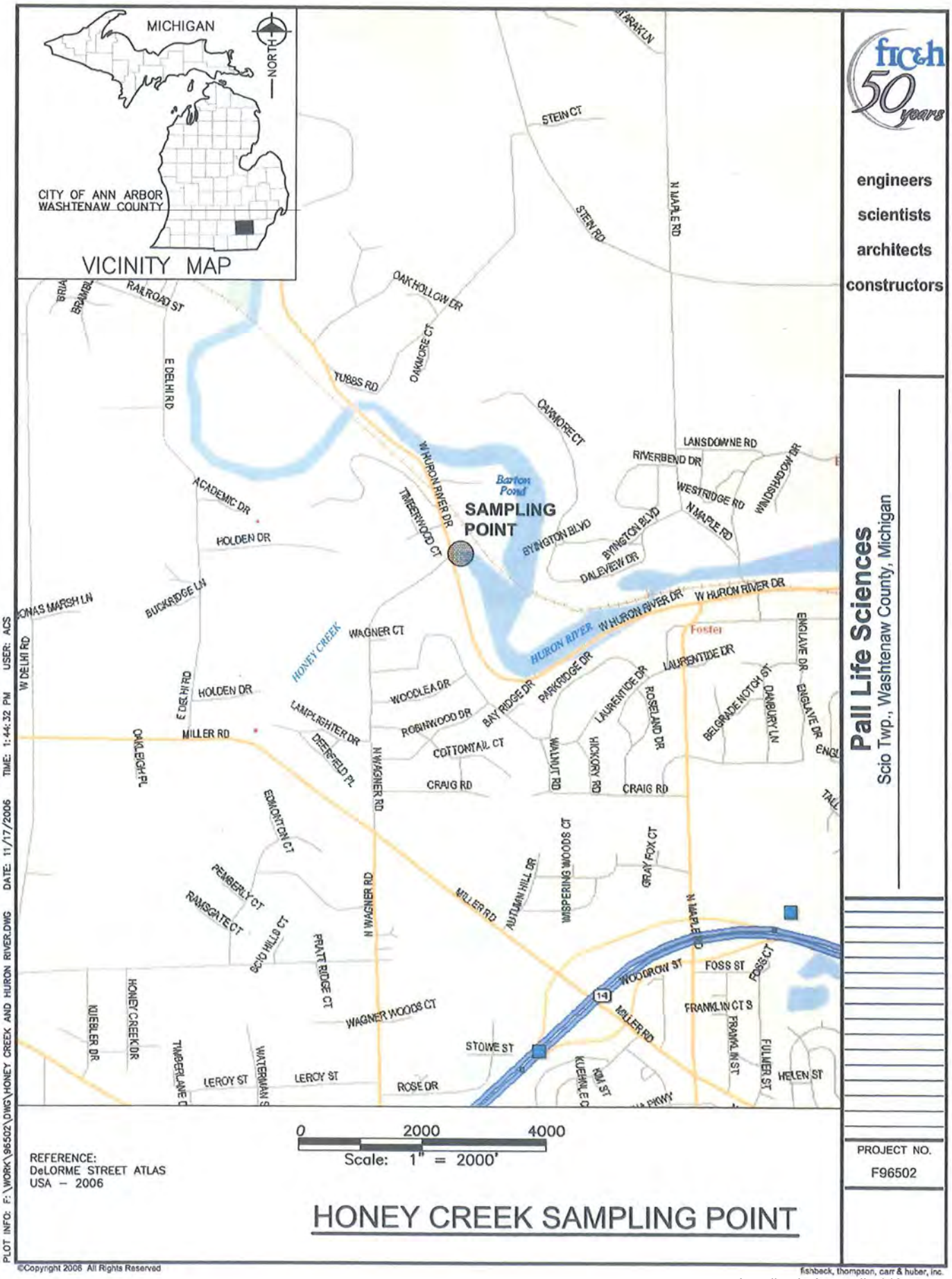
Counsel for Gelman Sciences, Inc. d/b/a Pall Life Sciences

Alan D. Wasserman,
Williams, Acosta, PLLC
Counsel for Gelman Sciences, Inc. d/b/a Pall Life Sciences

Figure 1



fish 50 years

engineers
scientists
architects
constructors

Pall Life Sciences
Scio Twp., Washtenaw County, Michigan

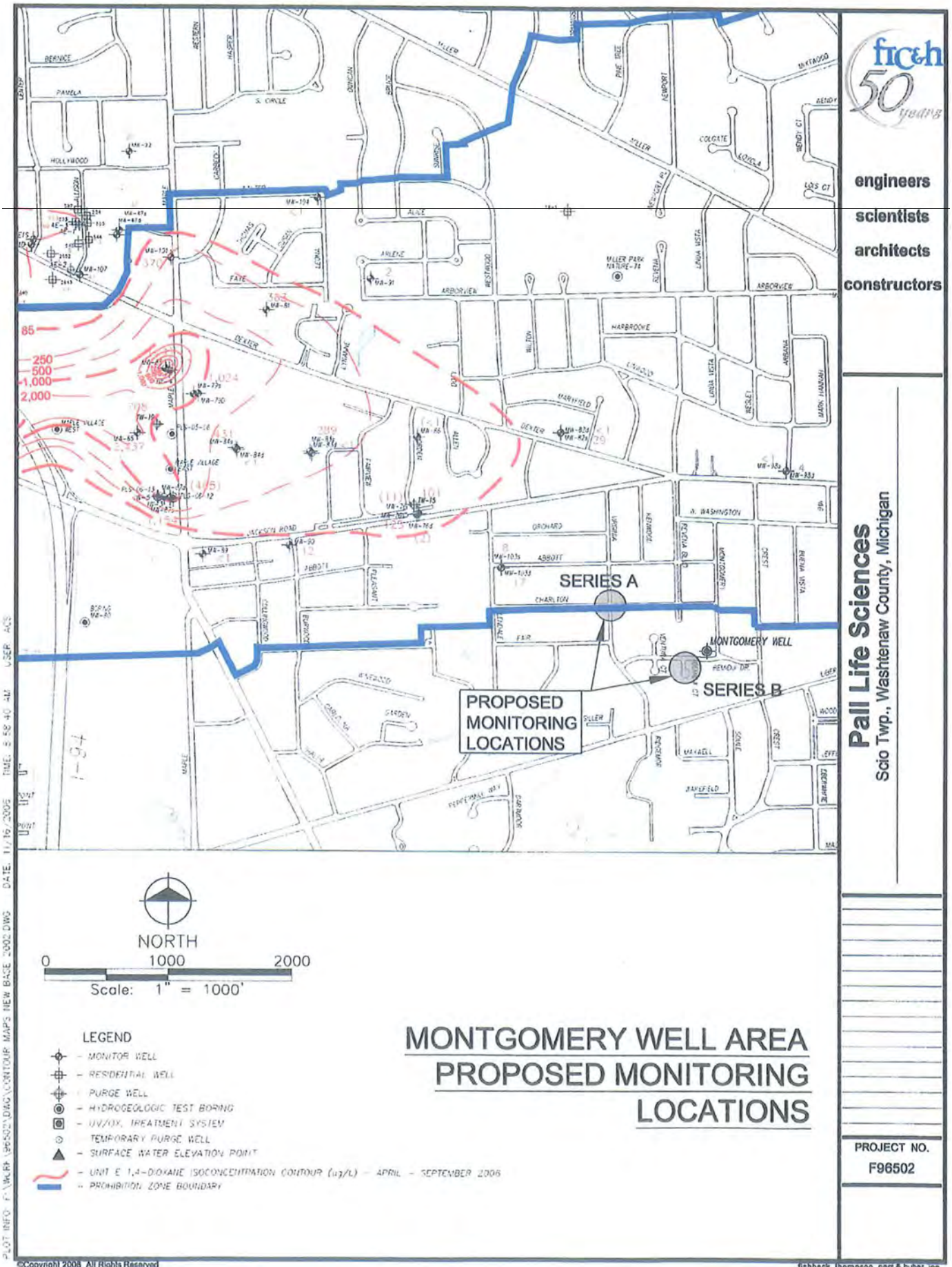
PROJECT NO.
F96502

HONEY CREEK SAMPLING POINT

PLOT INFO: F:\WORK\96502\DWG\HONEY CREEK AND HURON RIVER.DWG DATE: 11/17/2006 TIME: 1:44:32 PM USER: ACS
M:\CUSTOM\ACAD2005\SYMBOLS\B-85X11.DWG

fishback, thompson, carr & huber, inc.

Figure 2



Gelman Sciences Inc. Prohibition Zone Boundary

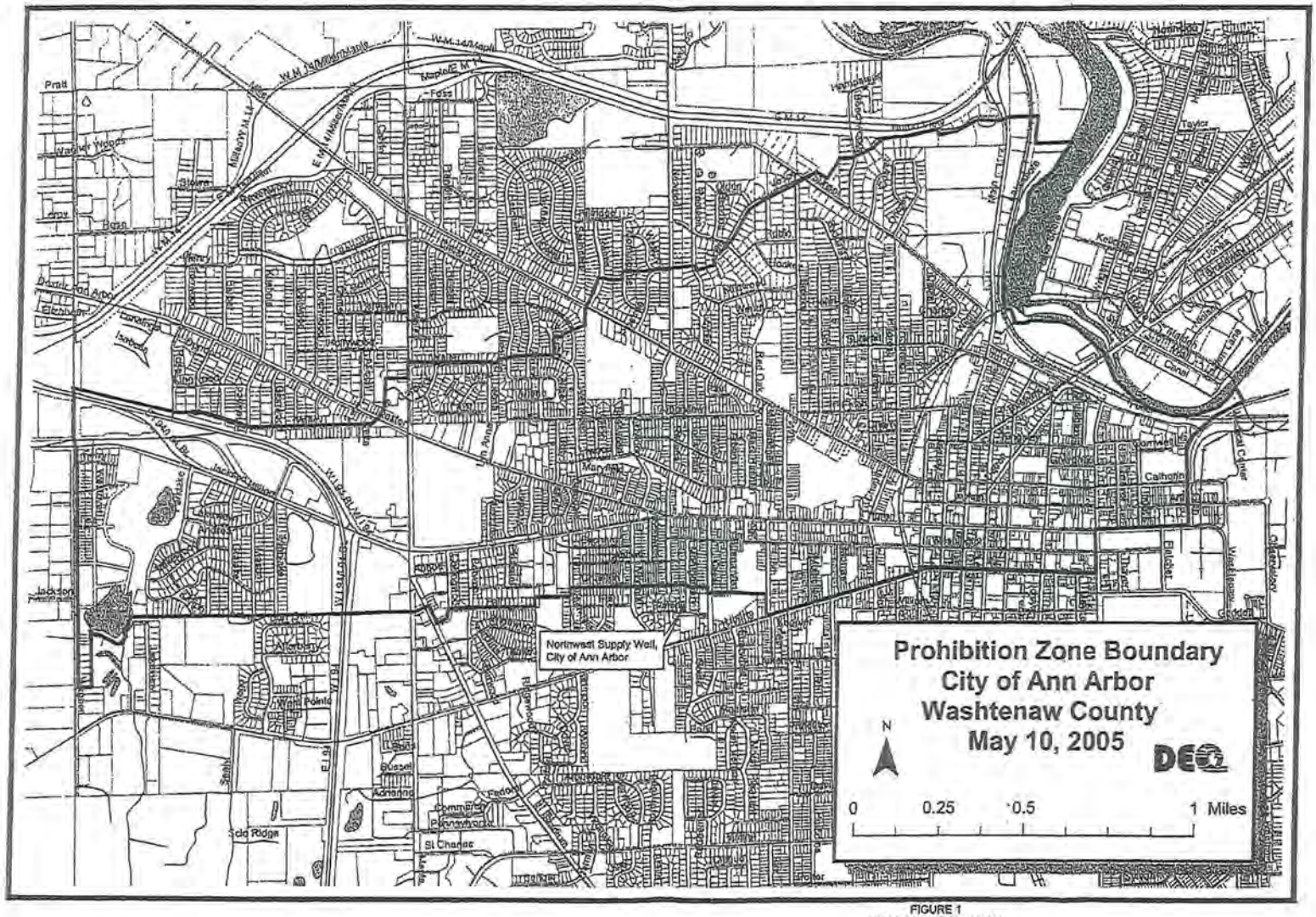


FIGURE 1
PROPOSED EXPANSION
4/18/06

Figure 3

APPENDIX A

NORTHWEST SUPPLY WELL
GROUNDWATER MONITORING PROTOCOL

WELL INSTALLATION METHODS

Test boring(s) will be drilled at each monitoring well nest location using the hollow-stem auger method. The proposed sampling methods are split-spoon and Simulprobe for collection of soil and soil/groundwater samples, respectively. Split-spoon sampling will be performed at a frequency of 10 feet, starting at approximately 10 feet below ground surface and continuing to the bedrock surface. In water-bearing units, Simulprobe sampling will be performed at a maximum frequency of every 10 feet. The groundwater samples will be delivered to PLS for analysis of 1,4-dioxane.

Upon reaching the bedrock surface, the boring will be logged using geophysical methods (gamma logging). The data gathered from the geophysical log, as well as the groundwater analytical data, and the soil sampling will be analyzed for ideal placement of the monitoring well screens. It is anticipated that each monitoring well nest will consist of three monitoring wells (to monitor multiple portions of the aquifer). One well screen will be positioned at a depth corresponding to the highest detected concentration of 1,4-dioxane encountered during vertical aquifer sampling. The screen intervals of the other wells will be based on a review of water chemistry and geological data obtained from the test boring. The screen depths will be selected consistent with PLS' past MDEQ-approved well installation practices and will be designed to detect the possible migration of contamination toward the Northwest Supply Wellfield. At least one well screen will be completed in the deposits best correlated to those associated with the deposits the Northwest Supply Wells screens are completed in.

Each monitoring well will consist of a 2-inch-inside-diameter galvanized well casing, equipped with a 5-foot-long stainless-steel screen. A sand pack will be placed around the screen annulus, and the well casing annulus will be sealed with a bentonite grout (pumped into the well casing annulus through tremie pipe). The wells will be developed to hydraulically couple the screens with the subsurface formation. Soil cuttings, derived from the drilling, and development water will be transported to PLS.

PLS will survey the x and y coordinates and the top-of-casing and ground elevations for the wells. The top-of-casing and ground elevations for the new wells were referenced to NAVD88 and x, y coordinates were referenced to Michigan State Plane Coordinate System, Michigan South (NAD83).

GROUNDWATER SAMPLING

Sample Collection Methods and Analytical

PLS will use 3-5 casing volume groundwater sampling method consistent with the technique it uses for all other routine groundwater sampling. In the future, should studies show there are other more representative sampling methods for 1,4-dioxane, the City or PLS may mutually consider such methods for the monitoring wells installed as part of this monitoring plan.

All samples will be analyzed by PLS for 1,4-dioxane using USEPA Method 1624 (or another equivalent, USEPA-approved method). The Target Detection Limit (TDL) for the analysis will be 1 ug/L, which is the TDL established by MDEQ (RRD Operational Memo 2, October 22, 2004). If MDEQ establishes a new TDL for 1,4-dioxane, PLS will adopt the new TDL. PLS will follow all appropriate sampling and laboratory QA/QC procedures, which may be reviewed by the City upon request along with related documentation.

Sample Collection Frequency

PLS will collect samples from monitoring wells within two weeks after installation, then once every quarter thereafter, until it is mutually determined by PLS and the City that such monitoring is no longer necessary, or as provided in Section XI of the Settlement Agreement. Should it be confirmed that the "Trigger Level" is exceeded at one of the monitoring wells installed under Section VI of the Settlement Agreement, an alternative sampling frequency agreed to by PLS and the City may be considered.

The City can split samples with PLS at any time ("City Split Sample"). The City will promptly provide the results of such sampling to PLS and will, upon request, cause its laboratory to allow PLS to review related QA/QC documentation. PLS will not be responsible for the costs incurred by the City in connection with such split sampling, except as set forth in the Settlement Agreement.

Verification Procedures

A. Monitoring Results. Upon confirmation that all sampling and laboratory QA/QC procedures were followed, monitoring results that PLS obtains from the Series A and Series B Well shall be considered Verified Monitoring Results under the Settlement Agreement, except as provided in Paragraphs B and C, below.

B. Elevated Monitoring Result. If a sample result from an individual well at one or more of the monitoring locations is 10 times higher than the highest previous monitoring result from that well (the "Elevated Monitoring Result"), the result will not be considered a Verified Monitoring Result under the Settlement Agreement. In such an event, the following verification procedures will be followed to ensure that the monitoring result from the well at issue is representative of aquifer conditions:

1. QA/QC. PLS will confirm that proper laboratory and sampling QA/QC procedures were followed and that any equipment used was properly calibrated to the manufacturer's standard.
2. Duplicate Sample. PLS will analyze the duplicate sample, if available, to assist in the evaluation of PLS' QA/QC procedures and equipment calibration.
3. Resampling of Well. PLS will resample the monitoring well from which the Elevated Monitoring Result was obtained within five days of the date the Elevated Monitoring Result was obtained and analyze the sample following all proper laboratory and sampling QA/QC and equipment calibration procedures (the "Verification Sample Result").

Upon confirmation that all proper laboratory and sampling QA/QC procedures were followed and that the equipment was calibrated, the Verification Sample Result shall be considered a Verified Monitoring Result under the Settlement Agreement.

C. Split Sample Discrepancy. In the event that the monitoring result obtained from a City Split Sample differs from the corresponding PLS result, neither result shall be considered a Verified Monitoring Result under the Settlement Agreement unless otherwise agreed (e.g. if the difference is insignificant). In the event of a discrepancy: (a) The Parties shall have the right to review the QA/QC procedures followed by the other Party's laboratory and related documentation to identify the source of the discrepancy; and (b) unless otherwise agreed, the Parties will jointly resample the well location and repeat the analysis with the new split sample. This will eliminate any possibility of sampling error. If the 2nd round of sampling is inconclusive, then the parties shall collect a 3rd round of sample and submit the samples for analysis at a mutually agreeable laboratory that is neither the PLS laboratory nor the laboratory that analyzed the original City Split Sample. The results of this analysis shall be considered the Verified Monitoring Result, upon confirmation that proper laboratory and sampling QA/QC procedures were followed.

Appendix B

SURETY BOND

Bond No._____

We, _____, hereinafter referred to as the Principal, and _____, a corporation organized and existing under the laws of the State of _____ and duly authorized to do business in the State of Michigan, as Surety, are held and firmly bound unto the City of Ann Arbor, Michigan, hereinafter referred to as Obligee, in the sum of Two Hundred Thousand Dollars ($200,000.00), lawful money of the United States of America, to the payment of which sum well and truly to be made, we bind ourselves, our executors, administrators, successors, and assigns, firmly by this bond.

THE CONDITION OF THIS OBLIGATION IS SUCH that whereas the Obligee has issued to the Principal certain Licenses for Groundwater Monitoring Wells, and Obligee will issue to the Principal additional Licenses for Groundwater Monitoring Wells, each of which Licenses is hereinafter referred to as Permit, each of which grants to the Principal certain rights and commits the Principal to certain obligations related to the installation and maintenance of a monitoring well or wells within the public rights-of-way or other property of Obligee; and

WHEREAS, each of the Licenses for Groundwater Monitoring Wells in Road Right-of-Way that Obligee already has issued is listed in the attached Exhibit 1 and Exhibit 1 will be amended from time to time to add the additional Licenses for Groundwater Monitoring Wells issued to the Principal, not to exceed ten (10) in number;

NOW, THEREFORE, if the Principal shall faithfully comply with all terms and conditions of each Permit and with all applicable laws, ordinances, rules and regulations which have been or may hereafter be in force affecting said Permit, and shall save and keep harmless the Obligee from all loss, damage or expense which it may sustain or for which it may become liable on account of the issuance of each Permit to the Principal, including but not limited to expenses incurred to restore the public rights-of-way or other property during and after use of same by the Principal, then this obligation shall be void; otherwise, to remain in full force and effect.

This bond may be canceled by the Surety by sending advanced written notice, certified mail, to the Obligee stating when, not less than 60 days thereafter, such cancellation shall be effective, after which the liability of the Surety shall cease except for claims made upon the Surety prior to the effective date of such cancellation. It is understood that the full penalty of this bond shall be available during its effective period to secure, cover and extend to any and all obligations of the Principal to the Obligee under the Permits, past, present and potential. It is understood that if this bond is canceled by the Surety, the Principal is obligated to provide the Obligee a substitute bond or letter of credit acceptable to the Obligee. If the Principal fails to deliver a substitute bond or letter of credit acceptable to the Obligee prior to the effective date of such cancellation, then the Obligee may claim the full penalty of this bond.

Signed and sealed this _____ day of _____, 200__.

_____
(Name of Surety Company)

_____
(Name of Principal)

By: _____
(Signature)

By: _____
(Signature)

Typed Name: _____

Typed Name: _____

Its: _____
(Title of Office)

Its: _____
(Title of Office)

Name and address of agent:

_____

_____

Approved as to form:

_____
Stephen K. Postema, City Attorney

Exhibit 1
Licenses for Groundwater Monitoring Wells Covered by this Surety Bond

List of 18 Licenses for Groundwater Monitoring Wells granted to Principal by the City of Ann Arbor as of November 1, 2006. This list is subject to amendment to add up to ten (10) additional Licenses for Groundwater Monitoring Wells.

Well I.D.	Location	License End Date
MW-71	Park Lake & Lakeview Dr.	June 30, 2011
MW-76	Worden & Jackson	March 14, 2012
MW-79	Veterans Memorial Park*	June 25, 2012
MW-83	Veterans Memorial Park*	June 25, 2012
MW-84s&d	Veterans Memorial Park*	June 25, 2012
MW-97	Fountain & Summit	December 31, 2015
MW-98	Huron & Arbana	December 31, 2015
MW-99	Maple Ridge (on traffic island)	December 31, 2015
MW-102	City Hall*	December 31, 2015
MW-79d	Veteran's Park*	June 30, 2016
MW-101	501 N. Maple	June 30, 2016
MW-103	Glendale & Abbott	June 30, 2016
MW-104	Leona & Walter	June 30, 2016
MW-105	Dolph Park*	June 30, 2016
MW-106	Rhea St. r-o-w	June 30, 2016
MW-107	near 2612 Dexter - r-o-w	June 30, 2016
MW-108	Park Lake Ave r-o-w	June 30, 2016

* Wells located on City property. All other wells are in City rights-of-way.

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

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, ex rel, MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

v

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable Donald E. Shelton

Celeste R. Gill (P52484)
Assistant Attorney General
Environment, Natural Resources and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorney for Plaintiffs

Michael L. Caldwell (P40554)
Zausmer, Kaufman, August, Caldwell & Tayler, P.C.
31700 Middlebelt Road, Suite 150
Farmington Hills, MI 48334
(248) 851-4111

Alan D. Wasserman (P39509)
Williams Acosta, PLLC
535 Griswold St. Suite 1000
Detroit, MI 48226
(313) 963-3873
Attorneys for Defendant

THIRD AMENDMENT TO CONSENT JUDGMENT

A Consent Judgment was entered in this case on October 26, 1992. The Consent Judgment requires Defendant, Gelman Sciences, Inc., to implement various response activities to address environmental contamination in the vicinity of Defendant's property in Scio Township, subject to the approval of the Michigan Department of Environmental Quality ("MDEQ").

The Consent Judgment was amended by stipulation of the parties and Order of the Court on September 23, 1996 ("Amendment to Consent Judgment") and October 20, 1999 ("Second Amendment to Consent Judgment").

The Court has also supplemented the Consent Judgment with several cleanup related orders, based on information about the nature and extent of contamination acquired after the Consent Judgment and the Amendments were entered, including, Remediation and Enforcement Order (REO) dated July 17, 2000, the Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer ("Unit E Order"), dated December 17, 2004, and the Order Prohibiting Groundwater Use, dated May 17, 2005.

Since entry of the Second Amendment to Consent Judgment, Executive Order No. 2009-45 was signed and effective January 2010, the MDEQ was abolished as an agency of the State, the Michigan Department of Natural Resources (MDNRE) was created, and all of the authority, powers, duties, functions, responsibilities, and personnel relevant to this action were transferred to the MDNRE.

THEREFORE, the Parties agree to this Third Amendment to the Consent Judgment ("Third Amendment") and such Third Amendment is ordered, adjudged, and decreed as follows:

FIRST, modify Sections III.F G, H, J, and N to read as follows:

F. "GSI Property" shall mean the real property described in Attachment A, currently owned and operated by Defendant in Scio Township, Michigan.

G. "Groundwater Contamination" or "Groundwater Contaminant" shall mean 1,4-dioxane in groundwater at a concentration in excess of 85 micrograms per liter ("ug/l") (subject to approval by the Court of the application of a new criteria) determined by the sampling and

analytical method(s) described in Attachment B to this Consent Judgment, subject to review and approval by MDNRE.

H. "MDNRE" shall mean the Michigan Department of Natural Resources and Environment, the successor to the Michigan Department of Environmental Quality ("MDEQ"), the Michigan Department of Natural Resources ("MDNR"), and to the Water Resources Commission. All references to the "MDEQ," "MDNR," or to the "Water Resources Commission" in this Consent Judgment, as amended, shall be deemed to refer to the MDNRE or any successor agency.

J. "Plaintiffs" shall mean the Attorney General of the State of Michigan, ex rel, Michigan Department of Natural Resources and Environment.

N. "Soil Contamination" or "Soil Contaminant" shall mean 1,4-dioxane in soil at a concentration in excess of 1700 ug/kg as determined by the sampling and analytical method(s) described in Attachment C, or other higher concentration limit derived by means consistent with Mich Admin Code R 299.5718 or MCL 324.20120a.

SECOND, delete Section III.P and insert new Sections III.P., Q., R., S., T, and U.:

P. "Prohibition Zone Order" shall mean the Court's Order Prohibiting Groundwater Use, dated May 17, 2005, which established a judicial institutional control.

Q. "Prohibition Zone" shall mean the area that is subject to the institutional control established by the Prohibition Zone Order.

R. "Expanded Prohibition Zone" shall mean the area that shall be subject to the institutional control established by the Prohibition Zone Order pursuant to this Third Amendment to the Consent Judgment. A map depicting the Prohibition Zone and the Expanded Prohibition Zone is attached as Attachment E.

S. "Unit E Order" shall mean the Court's Opinion and Order Regarding Remediation of the Contamination of the Unit E Aquifer dated December 17, 2004.

T. "Eastern Area" shall mean the part of the Site that is located east of Wagner Road and the areas encompassed by the Prohibition Zone and Expanded Prohibition Zone.

U. "Western Area" shall mean that part of the Site located west of Wagner Road, excepting the Little Lake Area System described in Section V.C.

THIRD, modify the first paragraph of Section V to read as follows:

Defendant shall design, install, operate, and maintain the systems described below. The objectives of these systems shall be to extract the contaminated groundwater from the aquifers at designated locations for treatment (as required) and proper disposal to the extent necessary to prevent the plumes of groundwater contamination emanating from the GSI Property from expanding beyond the current boundaries of such plumes, except into and within the Prohibition Zone and Expanded Prohibition Zone (subject to paragraph 9 of the Prohibition Zone Order, as modified by Section V.A.2.b., of this Consent Judgment with regard to the northern boundaries of the Prohibition Zone and Expanded Prohibition Zone), as described below. Defendant also shall implement a monitoring program to verify the effectiveness of these systems.

FOURTH, modify Section V.A. to read as follows:

A. Eastern Area System

1. Objectives. The remedial objectives of the Eastern Area System ("Eastern Area Objectives") shall be:

a. Maple Road Containment Objective. The current Unit E objective set forth in the Unit E Order of preventing contaminant concentrations above the groundwater-surface water interface criterion of 2,800 ug/l (subject to approval by the Court of

the application of a new criteria) from migrating east of Maple Road shall apply to the Eastern Area System, regardless of the aquifer designation, or depth of groundwater or groundwater contamination.

b. Prohibition Zone Containment Objective. Use of groundwater in the Prohibition Zone and Expanded Prohibition Zone will be governed by the Prohibition Zone Order regardless of the aquifer designation or the depth of the groundwater or groundwater contamination. MDNRE-approved legal notice of the proposed Prohibition Zone expansion shall be provided at Defendant's sole expense.

2. Eastern Area Response Activities. The following response actions shall be implemented:

a. Maple Road Extraction. Defendant shall continue to operate TW-19 as necessary to meet the Maple Road containment objective.

b. Verification Plan. Defendant shall implement its June 3, 2009 Plan for Verifying the Effectiveness of Proposed Remedial Obligations ("Verification Plan"), as modified by this Sections V.A.2.b. and c., to ensure that any potential migration of groundwater contamination outside of the Expanded Prohibition Zone is detected before such migration occurs. Defendant shall install four additional monitoring well clusters in the Evergreen Subdivision area at the approximate locations indicated on the map attached as Attachment F. If concentrations of 1,4-dioxane in one or more of the three new monitoring wells installed at the perimeter of the Expanded Prohibition Zone or the existing MW-120s, MW-120d, MW-121s, and MW-121d exceed 20 ug/l, Defendant shall conduct a hydrogeological investigation to determine the fate of any groundwater contamination in this area as described in the Verification Plan. This investigation will be conducted pursuant to a MDNRE-approved work plan. The

work plan shall be submitted within 45 days after the first exceedence. If concentrations in any of the perimeter wells exceed 85 ug/l (or any other criteria approved by the Court) or if the Defendant's investigation or monitoring indicates that the plume of groundwater contamination will migrate outside of the Prohibition Zone or Expanded Prohibition Zone, Defendant shall conduct a Feasibility Study of available options for addressing the situation pursuant to a MDNRE-approved format. The Feasibility Study shall be submitted within 90 days after a determination by the Defendant or a written notification by the MDNRE that one is required. This Feasibility Study shall include options other than simply expanding the Prohibition Zone or Expanded Prohibition Zone, although that option may be included in the analysis. The parties agree that any further expansion of the northern boundaries of the Prohibition Zone or Expanded Prohibition Zone to address migration of groundwater contamination outside of the Prohibition Zone or Expanded Prohibition Zone should be avoided, unless there are compelling reasons to do so. The Defendant's Feasibility Study shall identify a preferred alternative. The MDNRE shall review the Feasibility Study and either approve the Defendant's preferred alternative or submit changes as provided in Section X of the Consent Judgment. The Defendant shall implement the approved alternative, or any changes submitted by the MDNRE unless the Defendant initiates Dispute Resolution under Section XVI of the Consent Judgment.

c. Additional Evergreen Monitoring Wells. Defendant shall install the new well clusters described in Section V.A.2.b. according to a schedule to be approved by the MDNRE . Each of the new well clusters will include two to three additional monitoring wells, and the determination of the number of wells shall be based on the Parties' evaluation of the geologic conditions present at each location, consistent with past practice. The easternmost of these well clusters shall be installed last and the data obtained from the other newly installed

well clusters and existing wells will be used to determine the location of the easternmost well cluster. The easternmost well cluster will be installed approximately one year after the other well clusters are installed and after the Parties have been able to evaluate at least four quarters of data from the new wells and existing well, unless the Parties agree that it should be installed sooner.

d. Drilling Techniques. Borings for new wells installed pursuant to Section V.A.2. shall be drilled to bedrock unless a different depth is approved by MDNRE or if conditions make such installation impracticable. The MDNRE reserves the right to require alternate drilling techniques to reach bedrock if standard methods are not able to do so. If the Defendant believes that drilling one or more of these wells to bedrock is not practical due to the geologic conditions encountered and/or that such conditions do not warrant the alternative drilling technique required by the MDNRE, Defendant may initiate dispute resolution under Section XVI of the Consent Judgment. The wells shall be installed using Defendant's current vertical profiling techniques, which are designed to minimize the amount of water introduced during drilling, unless the MDNRE agrees to alternate techniques.

e. Downgradient Investigation. The Defendant shall continue to implement its Downgradient Investigation Work Plan as approved by the MDNRE on February 4, 2005, to track the groundwater contamination as it migrates to ensure any potential migration of groundwater contamination outside of the Prohibition Zone or Expanded Prohibition Zone is detected before such migration occurs.

f. Continued Evergreen Subdivision area Groundwater Extraction as Necessary. The Defendant shall continue to operate the Evergreen Subdivision area extraction wells LB-1 and LB-3 (the "LB Wells") at a combined purge rate of 100 gallons per minute

(gpm), in order to reduce the migration of 1,4-dioxane, until such time as it determines that the Eastern Area cleanup objectives will be met at a reduced extraction rate or without the need to operate these extraction wells. Before significantly reducing or terminating extraction from the LB Wells, the Defendant shall consult with Plaintiffs and provide a written analysis, together with the data that supports its conclusion. MDNRE will review the analysis and data and provide a written response to Defendants within 56 days after receiving Defendant's written analysis and data. If the MDNRE disagrees with the Defendant's decision to reduce or terminate extraction, it may dispute the decision in Court within 15 days of its written response. Within 15 days of the filing of MDNRE's dispute, Defendant may file a response to the petition. The Parties may agree to extend these time frames to facilitate resolution of the dispute. The Defendant shall not significantly reduce or terminate extraction from the LB Wells while MDNRE is reviewing or disputing the Defendant's determination. MDNRE will make all reasonable efforts to have the motion resolved in a reasonable timeframe. If extraction from the LB Wells is terminated either by the agreement of the Parties or an order of the Court, the Defendant shall continue to maintain the LB Wells in an operable condition until such time as the Parties agree (or the Court decides) that the well(s) may be abandoned. Defendant shall abandon the Allison Street (AE-3) extraction well operation upon entry of this Third Amendment.

g. Well Identification. Defendant shall implement the Expanded Prohibition Zone Well Identification Work Plan as approved by MDNRE on February 4, 2011, pursuant to the approved schedule, unless Defendant files a Petition with the Court by March 16, 2011, seeking clarification of the scope of this Court's Prohibition Zone Order.

h. Plugging of Private Water Supply Wells. The Prohibition Zone Order's requirement that Defendant plug and replace any private drinking water wells by connecting those properties to municipal water shall apply to the Expanded Prohibition Zone. Defendant shall also properly plug non-drinking water wells in the Expanded Prohibition Zone unless it petitions the Court to clarify whether the Prohibition Zone Order requires Defendant to plug such wells and the Court determines it does not.

3. Future Inclusion of Triangle Property in the Expanded Prohibition Zone. MDNRE may request that the triangle piece of property located along Dexter/M-14 (Triangle Property) be included in the Expanded Prohibition Zone if the data obtained from the monitoring wells installed pursuant to Section V.A.2.c., above, (specifically, the Wagner Road and Ironwood/Henry monitoring wells) and other nearby wells indicate that the chemical and hydraulic data does not support Defendant's conceptual model regarding groundwater and contaminant flow in the area. Defendant may dispute such request pursuant to Section XVI of this Consent Judgment.

a. If the Triangle Property is later included in the Expanded Prohibition Zone, any further expansion beyond the Triangle Property shall be subject the same Feasibility Study requirements of Section V.A.2.b.

b. If a drinking water supply well is installed on the Triangle Property in the future, Defendant shall take the necessary steps to obtain permission to sample the well on a schedule approved by the MDNRE. Defendant shall monitor such wells on the MDNRE-approved schedule unless or until that property is included in the Expanded Prohibition Zone, at which time, the water supply well(s) shall be addressed as part of the well identification process.

4. Operation and Maintenance. Subject to Section V.A.2.f and V.A.7., Defendant shall operate and maintain the Eastern Area System as necessary to meet the Eastern Area Objectives. Defendant shall continuously operate, as necessary, and maintain the Eastern Area System according to MDNRE-approved operation and maintenance plans until Defendant is authorized to terminate extraction well operations pursuant to SectionV.D.1.a.

5. Treatment and Disposal. Groundwater extracted by the extraction well(s) in the Eastern Area System shall be treated (as necessary) using methods approved by the MDNRE and disposed of using methods approved by the MDNRE, including, but not limited to, the following options:

a. Groundwater Discharge. The purged groundwater shall be treated to reduce 1,4-dioxane concentrations to the level required by the MDNRE, and discharged to groundwaters at locations approved by MDNRE in compliance with a permit or exemption authorizing such discharge.

b. Sanitary Sewer Discharge. Use of the sanitary sewer leading to the Ann Arbor Wastewater Treatment Plant is conditioned upon approval of the City of Ann Arbor. If discharge is made to the sanitary sewer, the Eastern Area System shall be operated and monitored in compliance with the terms and conditions of an Industrial User's Permit from the City of Ann Arbor, and any subsequent written amendment of that permit made by the City of Ann Arbor. The terms and conditions of any such permit and any subsequent amendment shall be directly enforceable by the MDNRE against Defendant as requirements of this Consent Judgment.

c. Storm Drain Discharge. Use of the storm drain is conditioned upon issuance of an NPDES permit and approval of such use by the City of Ann Arbor and the

Allen Creek Drainage District. Discharge to the Huron River via the Ann Arbor stormwater system shall be in accordance with the NPDES Permit and conditions required by the City and the Drainage District. If the storm drain is to be used for disposal, no later than twenty-one (21) days after permission is granted by the City and the Drainage District to use the storm drain for disposal of purged groundwater, Defendant shall submit to MDNRE, the City of Ann Arbor, and the Drainage District for their review and approval, a protocol under which the purge system shall be temporarily shut down: (i) for maintenance of the storm drain and (ii) during storm events to assure that the stormwater system retains adequate capacity to handle run-off created during such events. The purge system shall be operated in accordance with the approved protocol for temporary shutdown.

d. Existing or Additional/Replacement Pipeline to Wagner Road Treatment Facility. Installation of an additional pipeline or a pipeline replacing the existing pipeline to the Wagner Road Treatment Facility is conditioned upon approval of such installation by the MDNRE. If the pipeline is proposed to be installed on public property, the pipeline installation is conditioned upon approval of such installation by the City of Ann Arbor, Scio Township, and the Washtenaw County Road Commission, if required by statute or ordinance, or by Order of the Court pursuant to the authority under MCL 324.20135a. Defendant shall design the pipeline in compliance with all state requirements and install the pipeline with monitoring devices to detect any leaks. If leaks are detected, the system will automatically shut down and notify an operator of the condition. In the event that any leakage is detected, Defendant shall take any measures necessary to repair any leaks and perform any remediation that may be necessary. To reduce the possibility of accidental damage to the pipeline during any future construction, the location of the pipeline will be registered with MISS DIG System, Inc. Nothing

in this subsection shall relieve Defendant of its obligations to properly treat and dispose of contaminated groundwater in compliance with the Consent Judgment and applicable permit(s), using one or more of the other options for disposal, as necessary.

e. Additional Pipeline from Maple Road Extraction Well(s). Installation and operation of a proposed pipeline from the Maple Road Area to Evergreen area is conditioned upon approval of such installation and operation by the MDNRE. If the pipeline is proposed to be installed on public property, the pipeline installation is conditioned upon approval of such installation by the appropriate local authorities, if required by statute or ordinance, or Order of the Court pursuant to the authority under MCL 324.20135a. Defendant shall design any such pipeline in compliance with all state requirements and install it with monitoring devices to detect any leaks. In the event any leakage is detected, Defendant shall take any measures necessary to repair any leaks and perform any remediation that may be necessary. The pipeline shall be registered with the MISS DIG System, Inc., to reduce the possibility of accidental damage to the pipeline. Defendant may operate such pipeline to, among other things, convey groundwater extracted from TW-19 to the Wagner Road treatment systems, where it can be treated and disposed via the Defendant's permitted surface water discharge (capacity permitting).

6. Monitoring Plans. Defendant shall implement a MDNRE-approved monitoring plan for the Eastern Area. The monitoring plans shall include the collection of data to measure the effectiveness of the System in (a) ensuring that any potential migration of groundwater contamination outside of the Prohibition Zone or Expanded Prohibition Zone is detected before such migration occurs; (b) tracking the migration of the groundwater contamination to determine the need for additional investigation to ensure that there are adequate monitoring points to meet objective in Subsection (a) of this Section, including the determination

of the fate of groundwater contamination when and if it reaches the portion of the Huron River that is the easternmost extent of the Prohibition Zone; (c) verifying that concentrations of 1,4-dioxane greater than the groundwater-surface water interface criterion of 2800 ug/l (or any other criterion approved by the Court) does not migrate east of Maple Road; (d) complying with the applicable limitations on the discharge of the purged groundwater; and (e) evaluating capture areas for extraction wells and potential changes in groundwater flow from changes in extraction rates and locations.

To satisfy the objectives of this Section V.A.6, Defendant shall implement the following monitoring plans:

a. The portion of Defendant's Comprehensive Groundwater Monitoring Plan, May 4, 2009, amended June 2, 2009 (ACGMP), relevant to the Eastern Area, upon approval of the MDNRE as provided in Section X. Defendant shall continue to implement the currently approved monitoring plan until MDNRE approves the final ACGMP for the Eastern Area.

b. Defendant's Performance Monitoring Plan for Maple Road, which shall include the existing MW-84d as a monitoring point in lieu of the previously requested additional monitoring well closer to Maple Road, which shall be incorporated into the ACGMP for the Eastern Area.

The monitoring plans shall be continued until terminated pursuant to Section V.E.

7. Wagner Road Extraction. TW-18 and TW-21 (the "Wagner Road Wells") shall be considered part of the Eastern Area System even though they are located just West of Wagner Road. The Defendant shall initially operate the Wagner Road Wells at a combined 200 gallons per minute (gpm) extraction rate (with a minimum extraction rate of 50 gpm for each of

the wells). The Defendant shall continue to operate its Wagner Road Wells in order to reduce the migration of 1,4-dioxane east of Wagner Road at this rate until such time as it determines that the Eastern Area cleanup objectives will be met with a lower combined extraction rate or without the need to operate these wells. Before significantly reducing or terminating extraction from the Wagner Road Wells, Defendant shall consult with Plaintiffs and provide a written analysis, together with the data that supports its conclusion. MDNRE will review the analysis and data and provide a written response to Defendants within 56 days after receiving Defendant's written analysis and data. If the MDNRE disagrees with the Defendant's decision to reduce or terminate extraction, it may dispute the decision in Court within 15 days of the date of its written response. Within 15 days of the filing of MDNRE's dispute, Defendant may file a response to the petition. The Parties may agree to extend these time frames to facilitate resolution of the dispute. The Defendant shall not significantly reduce or terminate the Wagner Road extraction while MDNRE is reviewing or disputing the Defendant's determination. MDNRE will make all reasonable efforts to have the motion resolved in a reasonable timeframe.

8. Options Array for Transmission Line Failure/Inadequate Capacity.

The Defendant has provided the MDNRE with documentation regarding the life expectancy of the deep transmission line and an Options Array (attached as Attachment G). The Options Array describes the various options that may be available if the deep transmission line fails or the 200 gpm capacity of the existing deep transmission line that transports groundwater from the Eastern Area System to the treatment system located on the GSI Property proves to be insufficient to meet the Eastern Area Objectives.

FIFTH, delete the existing Section V.B. and replace with the following:

B. Western Area System

1. Western Area System Non-Expansion Cleanup Objective. The Defendant shall prevent the horizontal extent of the groundwater contamination in the Western Area from expanding. The horizontal extent shall be the maximum horizontal areal extent of groundwater contamination regardless of the depth of the groundwater contamination (as established under Section V.B.2.c. of this Consent Judgment). Continued migration of groundwater contamination into the Prohibition Zone or Expanded Prohibition Zone shall not be considered expansion and is allowed. A change in the horizontal extent of groundwater contamination resulting solely from the Court's application of a new cleanup criterion shall not constitute expansion. Nothing in this Section prohibits the Plaintiffs from seeking additional response activities pursuant to Section XVIII.E of this Consent Judgment. Compliance with the Non-Expansion Cleanup Objective shall be established and verified by the Compliance Well Network to be developed by the Parties as provided in Sections V.B.2.c and d., below ("Compliance Well Network"). There is no independent mass removal requirement or a requirement that the Defendant operate any particular extraction well(s) at any particular rate beyond what is necessary to prevent the prohibited expansion, provided that Defendant's ability to terminate all groundwater extraction in the Western Area is subject to Section V.D.1.c. and the establishment of property use restrictions as required by Section V.B.2.e. If prohibited expansion occurs, Defendant shall undertake additional response activities to return the groundwater contamination to the boundary established by the Compliance Well Network (such response activities may include recommencement of extraction at particular locations).

Plaintiffs agree to modify the remedial objective for the Western Area as provided herein to a no expansion performance objective in reliance on Defendant's agreement to comply with a no expansion performance objective for the Western Area. To ensure compliance with this

objective, Defendant acknowledges that in addition to taking further response action to return the horizontal extent of groundwater contamination to the boundary established by the Compliance Well Network, Defendant shall be subject to stipulated penalties for violation of the objective as provided in Section XVII. Nothing in this paragraph shall limit Defendant's ability to contest the assessment of such stipulated penalties as provided in this Consent Judgment.

2. Western Area Response Activities. The following response activities shall be implemented:

a. Extraction Wells. The Western Area response activities shall include the operation of groundwater extraction wells as necessary to meet the objective described in Section V.B.1. Purged groundwater from the Western Area System shall be treated with ozone/hydrogen peroxide or ultraviolet light and oxidizing agent(s), or such other method approved by the MDNRE to reduce 1,4-dioxane concentrations to the level as required by NPDES Permit No. MI-0048453, as amended or reissued. Discharge to the Honey Creek tributary shall be in accordance with NPDES Permit No. MI-0048453, as amended or reissued.

b. Decommissioning Extraction Wells. Within 14 days after entry of this Third Amendment, Defendant shall submit to MDNRE a list of Western Area extraction wells that it intends to decommission (take out-of-service) in 2011. The MDNRE has the right to petition the Court to stop the Defendant from taking such extraction well(s) out-of-service within 60 days of receiving the list identifying such extraction well(s). The Defendant shall maintain all other extraction wells, including, but not limited to, TW-2 (Dolph Park) and TW-12, in operable condition even if it subsequently terminates extraction from the well(s) until such time as the Parties agree (or the Court decides) that the well(s) may be abandoned.

c. Western Area Delineation Investigation. Defendant shall complete the following investigation, as may be amended by agreement of the Parties to reflect data obtained during the investigation, to address gaps in the current definition of the plume and to further define the horizontal extent of groundwater contamination in the Western Area:

i. Install monitoring wells screened to monitor the intermediate (Unit D2) and deep (Unit E) zones at/near the existing MW-20. An additional monitoring well at or near existing MW-36 will not be necessary unless the results from the wells installed at/near MW-20 are inconsistent with the Defendant's conceptual flow model (that the contamination in the shallower unit does not continue migrating to the west, but instead drops into the deeper unit and flows east into the Prohibition Zone or Expanded Prohibition Zone).

ii. Install a monitoring well cluster just west of Wagner Road and South of I-94.

iii. Install a monitoring well cluster in the Nancy Drive/MW-14d area, to define the extent of groundwater contamination from surface to bedrock, with final placement of the cluster to be determined after the Wagner Road/I-94 well cluster is installed or as otherwise agreed.

iv. Install a monitoring well screened to monitor the deep (Unit E) zone near/at MW-125, with location to be approved by MDNRE. PLS will vertically profile every ten feet throughout the deep (Unit E) saturated interval.

Defendant shall promptly provide the data/results from the investigation to the MDNRE so that the MDNRE receives them prior to Defendant's submission of the Monitoring Plan described in Subsection V.B.2.d, below. MDNRE reserves the right to request the installation of additional borings/monitoring wells, if the totality of the data from the wells to be installed indicate that the horizontal extent of groundwater contamination has not been completely defined.

d. Compliance Monitoring Well Network/Performance Monitoring Plan. Within 15 days of completing the investigation described in Subsection V.B.2.c , above, Defendant shall submit a Monitoring Plan, including Defendant's analysis of the data obtained during the investigation for review and approval by the MDNRE. The Monitoring Plan shall include the collection of data from a compliance monitoring well network sufficient to verify the

effectiveness of the Western Area System in meeting the Western Area objective set forth in Section V.B.1. The locations and/or number of the compliance monitoring wells for the Monitoring Plan will be determined based on the data obtained from the investigation Defendant shall conduct pursuant to Section V.B.2.c. The MDNRE shall approve the Monitoring Plan, submit to Defendant changes in the Monitoring Plan that would result in approval, or deny the Monitoring Plan within 35 days of receiving the Monitoring Plan. Defendant shall either implement the MDNRE-approved Monitoring Plan, including any changes required by MDNRE, or initiate dispute resolution pursuant to Section XVI of this Consent Judgment. Defendant shall implement the MDNRE (or Court)-approved Monitoring Plan to verify the effectiveness of the Western Area System in meeting the Western Area objective. Defendant shall continue to implement the current MDNRE-approved monitoring plan(s) until MDNRE approves the Monitoring Plan required by this Section. The monitoring program shall be continued until terminated pursuant to Section V.E.

e. Property Restrictions. The Defendant shall have property use restrictions that are sufficient to prevent unacceptable exposures in place for any properties affected by Soil Contamination or Groundwater Contamination before completely terminating extraction in the Western Area.

3. Internal Plume Characterization. Additional definition within the plume and/or characterization of source areas, except as may be required under Section VI of this Consent Judgment, is not necessary based on the additional monitoring wells to be installed as provided in Section V.B.2.c. MDNRE reserves the right to petition the Court to require such work if there are unexpected findings that MDNRE determines warrants additional characterization.

SIXTH, modify Section V.C. to read as follows:

C. Little Lake Area System

1. Little Lake Area System Non-Expansion Objective. The objective of the Little Lake Area System is to prevent expansion of the horizontal extent of any groundwater contamination located in this area.

2. Response Activities. Defendant shall implement some form of active remediation in this area until the termination criterion is reached under Section V.D.1.d. or appropriate land or resource use restrictions on the affected property(ies) approved by the MDNRE are in place. Defendant shall continue its batch purging program from the extraction well located on the Ann Arbor Cleaning Supply property pursuant to MDNRE-approved plans unless some other form of active remediation is approved by the MDNRE. Defendant may resubmit a proposal to temporarily reduce the frequency of the batch purging of this well so that the effects of batch purging can be evaluated. Defendant shall also have the option of obtaining appropriate land use or resource use restrictions on the affected property(ies) as an alternative to active remediation in this area, conditioned on MDNRE's approval.

3. Monitoring Plan. Within 45 days of entry of this Third Amendment, Defendant shall submit to the MDNRE for approval under Section X of this Consent Judgment a revised Monitoring Plan that identifies which of the existing monitoring wells will be used as compliance wells to verify the effectiveness of the Little Lake Area System in meeting the non-expansion objective of Section V.C.1. Defendant shall continue to implement the current MDNRE-approved monitoring plan until MDNRE approves the Monitoring Plan required by this Section. If a form of active remediation other than batch purging or land use or resource use

restrictions are approved by the MDNRE, Defendant shall submit a revised monitoring plan, modified as necessary to verify the effectiveness of such response activities.

The monitoring plan shall be continued until terminated pursuant to Section V.E.

SEVENTH, modify Section V.D.1 to read as follows:

D. Termination of Groundwater Extraction Systems

1. Defendant may only terminate the Groundwater Extraction Systems listed below as provided below:

a. Termination Criteria for LB Wells/Wagner Road Wells. Except as otherwise provided pursuant to Section V.D.2, Defendant may only significantly reduce or terminate operation of the LB Wells and the Wagner Road Wells as provided in Sections V.A.2.f. and V.A.7., respectively.

b. Termination Criteria for TW-19. Except as otherwise provided pursuant to Section V.D.2, Defendant shall maintain TW-19 in an operable condition and operate as needed to meet the groundwater-surface water interface criterion containment objective until all approved monitoring wells upgradient of Maple Road are below the groundwater surface water interface criterion for six consecutive months or until Defendant can establish to the satisfaction of MDNRE that additional purging from TW-19 is no longer necessary to satisfy the containment objective at this location. If Defendant requests to decommission TW-19, Defendant's request must be made in writing for review and approval pursuant to Section X of the Consent Judgment. The request must include all supporting documentation demonstrating compliance with the termination criteria. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if the DNRE does not approve Defendant's request. Defendant may decommission TW-19 upon: (i) receipt of notice of approval from MDNRE; or

(ii) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of this Consent Judgment. Defendant shall not permanently plug TW-19 until completion of the post-termination monitoring pursuant to Section V.E.1.b.

c. Termination Criteria for Non-Expansion Objective for Western Area. Except as otherwise provided pursuant to Section V.D.2, and subject to Section V.B.1., Defendant shall not terminate all groundwater extraction in the Western Area until:

i. Defendant can establish to Plaintiffs' satisfaction that groundwater extraction is no longer necessary to prevent the expansion of groundwater contamination prohibited under Section V.B.1. Defendant's demonstration shall also establish that any remaining 1,4-dioxane contamination in the Marshy and Soil Systems will not cause any prohibited expansion of groundwater contamination; and

ii. Defendant has the land use or resource use restrictions described in Section V.B.2.e. in place.

Defendant's request to terminate extraction in the Western Area must be made in writing for review and approval pursuant to Section X of the Consent Judgment. The request must include all supporting documentation demonstrating compliance with the termination criteria. Defendant may initiate dispute resolution pursuant to Section XVI of the Consent Judgment if the MDNRE does not approve the Defendant's request/demonstration. Defendant may terminate Western Area groundwater extraction upon: (i) receipt of notice of approval from MDNRE; or (ii) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of this Consent Judgment.

d. Termination Criteria for Little Lake Area Well (a/ k/a Ann Arbor Cleaning Supply Well). Except as otherwise provided pursuant to Section V.D.2., Defendant

shall continue to operate the Ann Arbor Supply Well on a batch purging basis (or implement another form of MDNRE-approved active remediation) until six consecutive monthly tests of samples from the extraction well and associated monitoring wells, fail to detect the presence of groundwater contamination or until appropriate land use restrictions are placed on the affected property(ies).

EIGHTH, delete Sections V.D.4 and V.D.5 .

NINTH, modify Section V.E. to read as follows:

E. Post-Termination Monitoring

1. Eastern Area

a. Prohibition Zone Containment Objective. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to monitor the groundwater contamination as it migrates within the Prohibition Zone and Expanded Prohibition Zone until all approved monitoring wells are below 85 ug/l or such other applicable criterion for 1,4-dioxane for six consecutive months, or Defendant can establish to MDNRE's satisfaction that continued monitoring is not necessary to satisfy the Prohibition Zone containment objective. Defendant's request to terminate monitoring must be made in writing for review and approval pursuant to Section X of the Consent Judgment. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if the MDNRE does not approve its termination request.

b. Groundwater/Surface Water Containment Objective. Except as provided in Section V.E.1.a., for Prohibition Zone monitoring wells, post-termination monitoring is required for Eastern Area wells for a minimum of 10 years after purging is terminated under Section V.D.1.b. with cessation subject to MDNRE approval. Defendant's request to terminate monitoring must be made in writing for review and approval pursuant to

Section X of the Consent Judgment. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if the MDNRE does not approve its termination request.

c. Maple Road Extraction. If Defendant has decommissioned TW-19 based on monitoring well results showing that upgradient monitoring wells are below the groundwater/surface water interface criterion (rather than a demonstration) as provided in Section V.D.1.b and the monitoring conducted pursuant to Section V.E.1.b. reveal that the termination criterion is no longer being met, Defendant shall immediately notify MDNRE and collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, then Defendant shall take the steps necessary to put TW-19 in an operable condition and operate the well as necessary to satisfy the groundwater/surface interface water containment objective unless it can establish to Plaintiffs' satisfaction that such actions are not necessary to meet the groundwater/surface water interface containment objective.

2. Western Area. Post-termination monitoring will be required for a minimum of ten years after termination of extraction with cessation subject to MDNRE approval. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to monitor the groundwater in accordance with approved monitoring plan(s), to verify that it remains in compliance with the no expansion performance objective set forth in Section V.B.1. If any violation is detected, Defendant shall immediately notify MDNRE and take whatever steps are necessary to comply with the requirements of Section V.B.1.

3. Little Lake Area System. Post-termination monitoring will be required for a minimum of ten years after termination of active remediation in the Little Lake Area with cessation subject to MDNRE approval. Defendant shall continue to monitor the Ann Arbor

Cleaning Supply extraction well and/or associated monitoring wells, in accordance with approved monitoring plans to verify that:

a. the concentration of 1.4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify MDNRE and shall collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, Defendant shall immediately restart the previously-approved method of active remediation, unless Defendant has obtained appropriate land use or resource use restrictions on the affected property(ies) pursuant to Section V.C.2, (in which case subsection b, below shall apply); or

b. 1,4-dioxane in excess of the termination criterion is not migrating outside the MDNRE-approved area of land use or resource use restrictions.

TENTH, delete Section V.F.

ELEVENTH, modify the first paragraph of Section VI to read as follows:

Defendant shall design, install, operate, and maintain the systems described below to control, remove, and treat Soil Contamination at the GSI Property and remove and treat groundwater from the Marshy Area located north of former Ponds I and II as necessary to: (a) prevent the migration of 1,4-dioxane from contaminated soils into any aquifer in concentrations that cause the expansion of groundwater contamination in violation of Section V.B.1 of this Consent Judgment; (b) prevent venting of groundwater into Honey Creek Tributary with 1,4-dioxane in quantities that cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2800 ug/l; and (c) prevent venting of groundwater to Third Sister Lake with 1,4-dioxane in quantities that cause of the concentration of 1,4-dioxane at

the groundwater-surface water interface of the Lake to exceed 2800 ug/l. Defendant also shall implement a monitoring plan to verify the effectiveness of these systems.

TWELTH, modify Section VI.A. to read as follows:

1. Objectives. The objectives of this System are to: (a) prevent expansion of groundwater contamination prohibited under Section V.B.1.; and (b) prevent the discharge of contaminated groundwater from the Marshy Area into the Honey Creek Tributary in quantities that cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2800 ug/1.

2. Response Activities. Defendant shall operate the Marshy Area System described in Defendant's May 5, 2000 Final Design and Effectiveness Monitoring Plan, as subsequently modified and approved by the MDNRE as necessary to meet the objectives of the Marshy Area System until its operation may be terminated under Section VI.D. of this Consent Judgment.

3. Monitoring. Defendant shall implement the MDNRE-approved monitoring plan to verify the effectiveness of the Marshy Area System in meeting the requirements of this Consent Judgment. The monitoring plan shall be continued until terminated pursuant to Section VI.D. of this Consent Judgment.

THIRTEENTH, modify Section VI.B.1 by replacing "2000 ug/l" with "2800 ug/l".

FOURTEENTH, renumber Sections VI.B.4 and VI.B.5 to VI.B.3 and VI.B.4, respectively, and modify new Section VI.B.3.c. to read as follows:

c. If Soil Contamination is identified in any of the areas investigated, Defendant shall submit, together with the report required in Section VI.B.3.b., an analysis of whether such Soil Contamination will cause the expansion of Groundwater Contamination prohibited under Section V.B.1. or venting of groundwater to Third Sister Lake with 1,4-dioxane

in quantities that cause of the concentration of 1,4-dioxane at the groundwater-surface water interface of the Lake to exceed 2800 ug/l. If either will occur, Defendant shall submit a remediation plan for that area that achieves the overall objectives of Section VI. The plan shall include a proposed schedule for implementation. The remediation system shall be installed, operated, and terminated in accordance with the approved plan.

FIFTEENTH, modify Section VI.C.1. to read as follows:

1. Objectives. The objectives of this program are to: (a) evaluate the necessity, feasibility and effectiveness of available options for remediation of identified source areas; (b) design and implement remedial systems, if necessary, to achieve the overall objectives of Section VI; and (c) verify the effectiveness of those systems.

SIXTEENTH, modify Section VI.C.2. to read as follows:

2. Soils Remediation Plan. Defendant shall, no later than November 30, 1996 submit to MDEQ for review and approval a revised soils remediation plan for addressing identified areas of soil contamination. The areas to be addressed include the burn pit; the former Pond I area; the former Pond II area; the former Lift Station Area; and Pond III.

The Defendant's proposal must attain the overall objectives of Section VI.

SEVENTEENTH, modify Section VI.D.1 to read as follows:

1. Termination Criteria for GSI Property Remediation. Defendant shall continue to operate each of the GSI Property Remedial Systems, including the Marshy Area System until Defendant can make a demonstration to Plaintiffs' satisfaction that 1,4-dioxane remaining in any of the areas addressed would not cause: a) any expansion of groundwater

contamination in the Western Area as prohibited in Section V.B.1; or b) venting of groundwater into the Honey Creek Tributary or to the Third Sister Lake in quantities that cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary or Lake to exceed 2800 ug/l. The demonstration described in this Section must be made in writing for review and approval by MDNRE pursuant to Section X of the Consent Judgment, and approved by MDNRE before Defendant terminates all groundwater extraction in the Western Area. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if MDNRE does not approve Defendant's demonstration. These Systems shall also be subject to the same post-termination monitoring as the Western Area System, described in Section V.E.2.

EIGHTEENTH, delete Sections VI.D.2., 4., and 5, and renumber VI.D.3 as VI.D.2

NINTEENTH, modify Section VII.D.1 by replacing "MI-008453" with MI-0048453"

TWENTIETH, modify Sections VII.D.5. and 6. to read as follows:

5. Permit(s) or permit exemptions to be issued by the MDNRE to authorize the reinjection of purged and treated groundwater in the Eastern Area, Western Area, and Little Lake Area;

6. Surface water discharge permit(s) for discharge into surface waters in the Little Lake System Area, if necessary;

TWENTY-FIRST, modify Section X to read as follows:

Upon receipt of any plan, report, or other items that is required to be submitted for approval pursuant to this Consent Judgment, as soon as practicable, but in no event later than 56 days after receipt of such submission, except for a feasibility analysis or plan that proposes a risk based cleanup or requires public comment submitted pursuant to Section V.A.2.b., of this Consent Judgment, the Plaintiff will: (1) approve the submission; or (2) submit to Defendant changes in the submission that would result in approval of the submission. Plaintiff will (1) approve a Feasibility Study or plan that proposes a risk based cleanup or a remedy that requires public comment; or (2) submit to Defendant changes in such submittal that would result in approval in the time provided under Part 201 of the Natural Resources and Environmental Protection Act, as amended, [MCL 324.20101 *et seq.*]. If Plaintiffs do not respond within 56 days, or 180 days, respectively, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. Upon receipt of a notice of approval or changes from the Plaintiffs, Defendant shall proceed to take any action required by the plan, report or other item, as approved or as may be modified to address the deficiencies identified by Plaintiffs. If Defendant does not accept the changes proposed by Plaintiffs, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI.

TWENTY-SECOND, modify the first two sentences of Section XI.A., to read as follows:

A. Plaintiffs designate Sybil Kolon as Plaintiffs' Project Coordinator. Defendant designates Farsad Fotouhi, Vice President of Corporate Environmental Engineering, as Defendant's Project Coordinator.

TWENTY-THIRD, modify Section XIII.A. as follows:

A. Defendant shall not sell, lease, or alienate the GSI Property until: (1) it places an MDNRE approved land use or resource use restrictions on the affected portion(s) of the GSI

Property; and (2) any purchaser, lessee, or grantee provides to Plaintiffs its written agreement providing that the purchaser, lessee, or grantee will not interfere with any term or condition of this Consent Judgment. Notwithstanding any purchase, lease, or grant, Defendant shall remain obligated to comply with all terms and conditions of this Consent Judgment.

TWENTY-FORTH, modify Section XVI.A. by adding the following clause to the beginning of the section:

A. Except as provided in Sections V.A.2.f., V.A.7., and V.D.1.a., the dispute resolution procedures of this Section shall …

TWENTY-FIFTH, modify Section XVII.E as follows:

E. Stipulated penalties shall be paid no later than 14 working days after receipt by Defendant of a written demand from Plaintiffs. Defendant shall make payment by transmitting a check in the amount due, payable to the "State of Michigan", addressed to the Revenue Control Unit; Finance Section, Administration Division; Michigan Department of Natural Resources and Environment; P.O. Box 30657; Lansing, MI 48909-8157. Via Courier to the Revenue Control Unit; Finance Section, Administration Division; Michigan Department of Natural Resources and Environment; Constitution Hall, 5th Floor South Tower; 525 West Allegan Street; Lansing, MI 48933-2125. To ensure proper credit, include the settlement ID - ERD1902 on the payment.

TWENTY-SIXTH, modify Section XVIII.E to read as follows:

E. Notwithstanding any other provision in this Consent Judgment: (1) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to require Defendant to perform any additional response activity at the Site; and (2) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to reimburse Plaintiffs for

response costs incurred by the State of Michigan relating to the Site. Plaintiffs' rights in E.1. and E.2. apply if the following conditions are met:

1. For proceedings prior to Plaintiffs' certification of completion of the Remedial Action concerning the Site,

a. (i) conditions at the Site, previously unknown to the Plaintiffs, are discovered after entry of this Consent Judgment, (ii) new information previously unknown to Plaintiffs is received after entry of the Consent Judgment, or (iii) MDNRE adopts one or more new, more restrictive cleanup criteria for 1,4-dioxane pursuant to Part 201 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 et seq., after entry of the Consent Judgment; and

b. these previously unknown conditions, new information, and/or change in criteria indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment; and

2. For proceedings subsequent to Plaintiffs' certification of completion of the Remedial Action concerning the Site,

a. (i) conditions at the Site, previously unknown to the Plaintiffs, are discovered after certification of completion by Plaintiffs, (ii) new information previously unknown to Plaintiffs is received after certification of completion by Plaintiffs, or (iii) MDNRE adopts one or more new, more restrictive cleanup criteria for 1,4-dioxane pursuant to Part 201 of NREPA, after certification of completion by Plaintiffs; and

b. these previously unknown conditions, new information, and/or change in criteria indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment.

If Plaintiffs adopt one of more new, more restrictive, cleanup criteria, Plaintiffs' rights in E.1. and E.2. shall also be subject to Defendant's right to seek another site specific criterion(ia) that is protective of public health, safety, welfare, and the environment and/or to argue that Plaintiffs have not made the demonstration(s) required under this Section.

TWENTY-SEVENTH, modify Section XX by changing the heading and adding new subsection C, as follows:

XX. INDEMNIFICATION, INSURANCE, AND FINANCIAL ASSURANCE

C. Financial Assurance

1. Defendant shall be responsible for providing and maintaining financial assurance in a mechanism approved by MDNRE in an amount sufficient to cover the estimated cost to assure performance of the response activities required, to meet, the remedial objectives of this Consent Judgment including, but not limited to investigation, monitoring, operation and maintenance, and other costs (collectively referred to as "Long-Term Costs"). Defendant shall continuously maintain a financial assurance mechanism (FAM) until MDNRE's Remediation Division (RD) Chief or his or her authorized representative notifies it in writing that it is no longer required to maintain a FAM. Defendant shall provide a FAM for MDNRE's approval within 45 days of entry of this Third Amendment.

2. Defendant may satisfy the FAM requirement set forth in this Section by satisfying the requirements of the financial test and/or corporate guarantee, attached as Attachment H, as may be amended by the Parties or by the Court upon the motion of either Party (Financial Test). Defendant shall be responsible for providing to the MDNRE financial information sufficient to demonstrate that Defendant satisfies the Financial Test. If Defendant utilizes the Financial Test to satisfy the financial assurance requirement of this Consent

Judgment, Long-Term Costs shall be documented, at Defendant's discretion, on the basis of either: a) an annual estimate of maximum costs for the response activities required by the Consent Judgment as if they were to be conducted by a person under contract to the MDNRE (MDNRE-Contractor Costs); or b) an annual estimate of maximum costs for the response activities required by the Consent Judgment as if they were to be conducted by employees of Defendant and/or contractors hired by Defendant, as applicable (Defendant's Internal Costs). In addition, Defendant shall resubmit the Financial Test and the associated required documents annually within 90 days of the end of its fiscal year or any Guarantor's fiscal year, subject to Section XX.C.4. Defendant is not required to provide another type of FAM so long as Defendant continues to meet the requirements for the Financial Test.

3. Ninety (90) days prior to the five (5)-year anniversary of the effective date of this Third Amendment to Consent Judgment, and each subsequent five (5)-year anniversary, Defendant shall provide to the MDNRE for its approval, a report (Long-Term Cost Report) containing the following:

a. If Defendant is required to provide a FAM other than the Financial Test or if Defendant's estimate of the long term costs for the Financial Test is based on Defendant's Internal Costs, then the Long-Term Cost Report shall contain the actual costs of the response activities required to meet the remedial objectives of this Consent Judgment at the Site for the previous five-year period and an estimate of the amount of funds necessary to assure the performance of the response activities required to meet the remedial objectives of this Consent Judgment at the Site for the following thirty (30)-year period given the financial trends in existence at the time of preparation of the report (Long-Term Cost Report). The Long-Term Cost Report shall also include all assumptions and calculations used in preparing the necessary

cost estimate and be signed by an authorized representative of Defendant who shall confirm the estimate is based upon actual costs. Defendant may only use a present worth analysis if an interest accruing FAM is selected; or

b. If Defendant's estimate of the Long Term Costs for the Financial Test is based on MDNRE-Contractor Costs, and the actual costs are less than the estimate, the Long-Term Cost Report shall contain a certification from Defendant that the total actual costs Defendant incurred to implement the required response activities for the previous five-year period was less than the previously provided cost estimate based on MDNRE-Contractor Costs. If actual costs are more than the estimate, then Defendant shall provide the actual cost incurred to meet the remedial objectives of this Consent Judgment for the previous five years. The Long-Term Cost Report shall also include an estimate of the amount of funds necessary to assure the performance of the response activities required to meet the remedial objectives of this Consent Judgment at the Site for the following thirty (30)-year period given the financial trends in existence at the time of preparation of the Long-Term Cost Report. The Long-Term Cost Report shall also include all assumptions and calculations used in preparing the necessary cost estimate and be signed by an authorized representative of Defendant.

4. Within 30 days of receiving MDNRE's approval of the Long-Term Cost Report, or within 90 days of the end of Defendant's (or any Guarantor's) fiscal year, whichever is later, Defendant shall resubmit its Financial Test, which shall reflect Defendant's (or, at its option, its parent corporation, Pall Corporation's) current financial information and the current estimate of the costs of the response activities required by the Consent Judgment. If this or any Financial Test indicates that Defendant (and its parent corporation, Pall Corporation if Defendant chooses to include Pall Corporation as a corporate guarantor) no longer satisfies the Financial

Test, Defendant will be required to provide to MDNRE for its approval a revised current estimate of the costs of the response activities required by the Consent Judgment to reflect the costs needed for the MDNRE to perform the necessary work using MDNRE contractors. The Parties shall negotiate a mutually acceptable alternative FAM. If the Parties are unable to reach an agreement, Plaintiffs shall provide Defendant with the FAM that will be required, which Defendant must provide unless Defendant initiates dispute resolution pursuant to Section XVI of the Consent Judgment, however during the dispute resolution process, Defendant may not challenge the underlying requirement that some type of FAM is required.

TWENTY-EIGHTH, modify Section XXIII by replacing the individual representatives of the Parties with the following individuals:

For Plaintiffs:

Sybil Kolon
Project Coordinator
Michigan Department
of Natural Resources
and Environment
Remediation Division
301 East Louis Glick Highway
Jackson, MI 49201

For Defendants:

Farsad Fotouhi
Vice President of Corporate Environmental
Engineering
Gelman Sciences, Inc.
600 South Wagner Road
Ann Arbor, MI 48106

and

Michael L. Caldwell
Zausmer, Kaufman, August, Caldwell & Tayler,
P.C.
31700 Middlebelt Road, Ste. 150
Farmington Hills, MI 48334

TWENTY-NINTH, modify Section XXVI by replacing "Attachment F" in the fourth line of that Section with "Attachment I".

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

Dan Wyant, Director
Michigan Department of Natural
Resources and Environment

Dated: 3.4.11

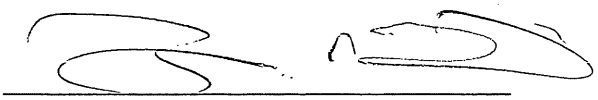
Approved as to form:

Celeste R. Gill (P52484)
Assistant Attorney General
Environment, Natural Resources and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorney for Plaintiffs

Dated: 3-4-11

IT IS SO STIPULATED AND AGREED:

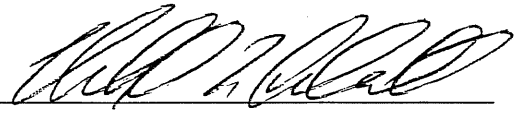
DEFENDANT



Dated: 3/3/11

Roberto Perez
President
Gelman Sciences, Inc.

Approved as to form:



Dated: 3/3/11

Michael L. Caldwell (P40554)
Zausmer, Kaufman, August,
Caldwell & Taylor, P.C.
31700 Middlebelt Road, Suite 150
Farmington Hills, MI 48334
(248) 851-4111

Alan D. Wasserman (P39509)
Williams Acosta, PLLC
535 Griswold St. Suite 1000
Detroit, MI 48226
(313) 963-3873
Attorneys for Defendant

IT IS SO ORDERED AND ADJUDGED this ____ day of MAR - 8 2011.

/S/DONALD E. SHELTON

HONORABLE DONALD E. SHELTON
Circuit Court Judge

LF/Gelman/88-34734-CE/Third Amendments to Consent Judgment

Gelman Sciences, Inc.
City of Ann Arbor
Washtenaw County
March 2011
Attachment E

Michigan DNRE

Legend

- Original Prohibition Zone
- Expanded Prohibition Zone

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

-v-

File No. 88-34734-CE
Honorable Timothy P. Connors

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

ORDER GRANTING MOTIONS TO INTERVENE OF THE CITY OF ANN ARBOR, WASHTENAW COUNTY, AND THE HURON RIVER WATERSHED COUNCIL

At a session of said Court
held in the City of Ann Arbor, County of Washtenaw,
State of Michigan on 1/18/2017

PRESENT: Hon. Timothy P. Connors

Washtenaw County, the Washtenaw County Health Department, Washtenaw County Health Officer Ellen Rabinowitz (collectively, the "Washtenaw County Parties"), the City of Ann Arbor, and the Huron River Watershed Council ("HRWC") having filed motions to intervene in this matter, the parties having submitted briefs and appeared for oral argument, and the Court being fully advised on the premises, it is hereby ORDERED that:

1. The motions to intervene filed by the City of Ann Arbor, the Washtenaw County Parties, and the HRWC are granted, pursuant to MCR 2.209(B) and for the reasons stated on the record, provided that;

   a. The City of Ann Arbor, the Washtenaw County Parties, and the HRWC (the "Intervenors") shall refrain from filing their proposed complaints at

this time. Should any of the Intervenors, after participating in negotiations on a proposed Fourth Amended Consent Judgement, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, they may file their complaint(s) after providing notice to the other parties.

b. The City of Ann Arbor, the Washtenaw County Parties, and the HRWC are entitled to participate in negotiations concerning the proposed Fourth Amended Consent Judgment to be presented to the Court in this matter.

c. Any party may request a status conference with the Court if that party is unsatisfied with the progress being made in the negotiations, or if they believe that the participation of the court may aid the parties in reaching an agreement.

d. The intervention of the HRWC is limited to any claim or issue that pertains to the surface waters of the Huron River and its tributaries.

e. Any applicable statute of limitations or doctrine of laches that may apply to any of the claims of the City of Ann Arbor, the Washtenaw County Parties, and/or the HRWC are tolled as of December 15, 2016, until such time as a Proposed Fourth Amended Consent Judgment is agreed upon by all the parties and presented to the Court, or until such time as an Intervenor files a complaint.

f. Parties shall work in good faith to promptly schedule meetings and/or conference calls to negotiate a final Proposed Fourth Amended Consent Judgment.

IT IS SO ORDERED.

This is not a final order and does not close this case.

Tim Connors

HON. TIMOTHY P. CONNORS
CIRCUIT COURT JUDGE

APPROVED AS TO FORM ONLY

Brian J. Negele /w/p

BRIAN J. NEGELE (P41846)
Attorney for Plaintiffs

MICHAEL L. CALDWELL (P40554)
Attorney for Defendant

Thomas P. Bruetsch /w/p

THOMAS P. BRUETSCH (P57473)
FREDERICK J. DINDOFFER (P31398)
Attorneys for City of Ann Arbor

Robert C. Davis /w/p

ROBERT C. DAVIS (P40155)
Attorney for Washtenaw County

Oday Salim /w/p

ODAY SALIM (P80897)
Attorney for Huron River Watershed Council

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

-v-

File No. 88-34734-CE
Honorable Timothy P. Connors

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

ORDER GRANTING SCIO TOWNSHIP'S MOTION TO INTERVENE

At a session of said Court
held in the City of Ann Arbor, County of Washtenaw,
State of Michigan on 2-6-2017

PRESENT: Hon. Timothy P. Connors

Scio Township having filed its motion to intervene in this matter, the parties having submitted briefs and appeared for oral argument, and the Court being fully advised on the premises, it is hereby ORDERED that:

1. The motion to intervene filed by Scio Township is granted, pursuant to MCR 2.209(B) and for the reasons stated on the record, provided that;

   a. Scio Township shall refrain from filing its proposed complaint at this time. Should Scio Township, after participating in negotiations on a proposed Fourth Amended Consent Judgement, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, Scio Township may file its complaint after providing notice to the other parties.

b. Scio Township is entitled to participate in negotiations concerning the proposed Fourth Amended Consent Judgment to be presented to the Court in this matter.

c. Any party may request a status conference with the Court if that party is unsatisfied with the progress being made in the negotiations, or if they believe that the participation of the court may aid the parties in reaching an agreement.

d. Any applicable statute of limitations or doctrine of laches that may apply to any of the claims of Scio Township are tolled as of January 26, 2017, until such time as a Proposed Fourth Amended Consent Judgment is agreed upon by all the parties and presented to the Court, or until such time as Scio Township files a complaint.

f. Parties shall work in good faith to promptly schedule meetings and/or conference calls to negotiate a final Proposed Fourth Amended Consent Judgment.

IT IS SO ORDERED.

This is not a final order and does not close this case.

Tim Connors

HON. TIMOTHY P. CONNORS
CIRCUIT COURT JUDGE

APPROVED AS TO FORM ONLY

Brian J. Negele (w/permission)
BRIAN J. NEGELE (P41846)
Attorney for Plaintiffs

Michael L. Caldwell
MICHAEL L. CALDWELL (P40554)
Attorney for Defendant

Thomas P. Bruetsch (w/permission)
THOMAS P. BRUETSCH (P57473)
FREDERICK J. DINDOFFER (P31398)
Attorneys for City of Ann Arbor

Robert C. Davis (w/permission)
ROBERT C. DAVIS (P40155)
Attorney for Washtenaw County

Oday Salim (w/permission)
ODAY SALIM (P80897)
Attorney for Huron River Watershed Council

William J. Stapleton (w/permission)
WILLIAM J. STAPLETON (P38339)
Attorney for Scio Township

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

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel.* MICHIGAN DEP'T OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR,

Intervenor-Plaintiff,

and

WASHTENAW COUNTY,

Intervenor-Plaintiff,

and

THE WASHTENAW COUNTY HEALTH DEP'T,

Intervenor-Plaintiff,

and

WASHTENAW COUNTY HEALTH OFFICER ELLEN RABINOWITZ,

Intervenor-Plaintiff,

and

THE HURON RIVER WATERSHED COUNCIL,

Intervenor-Plaintiff,

and

Washtenaw County Case No. 88-34734-CE
Honorable Timothy P. Connors

STIPULATED SETTLEMENT NEGOTIATION AND CONFIDENTIALITY ORDER

SCIO TOWNSHIP,
Intervenor-Plaintiff,

-v-

GELMAN SCIENCES, INC.,
a Michigan Corporation,

Defendant.

STIPULATED SETTLEMENT NEGOTIATION AND CONFIDENTIALITY ORDER

At a session of said Court
held in the City of Ann Arbor, County of Washtenaw
on 3/23/2017
PRESENT Hon. Timothy P. Connors
Circuit Court Judge

The parties desiring to promote productive settlement negotiations regarding the requirements of a revised Consent Judgment and/or resolution of the claims and defenses asserted in this matter, (collectively, "Settlement Negotiations"); and the parties having stipulated and agreed to entry of this Order; and the Court being fully advised in the premises:

IT IS THEREFORE ORDERED as follows:

1. All discussions, statements, positions taken, and any documents, data or other information exchanged among the parties, collectively and between any subset of the parties during the Settlement Negotiations, shall be considered conduct or statements made in compromise negotiations covered by Michigan Law, the Michigan Rules of Evidence, including, but not limited to, MRE 408, and Michigan Rules of Court, including, but not limited to, MCR 2.412 (regardless if taken in a formal mediation process or exchanged between the parties). Except as set out herein or as may be required under Michigan law, none of the following that occurs during the Settlement Negotiations shall be disclosed, described characterized or disseminated by any party to anyone who is not a party to this case (a "third party"): (i) Any statements made or positions expressed by any party on any topic; (ii) any documents, data or other information disclosed by any other party; or (iii) the fact that such documents, data or other information was exchanged during the Settlement Negations by any party. To be clear, nothing in this order shall preclude any party from disclosing to any third party at any time any documents, data, or other information that the party created or that the party came to possess outside of the Settlement Negotiations, or the positions that the party may have on any topic, as long as there is no indication given to such third party that such documents, data, or other information was disclosed/exchanged or that such statements regarding positions were made during the Settlement Negotiations themselves.

2. None of the statements made and none of the documents, data, or other information disclosed by one party to the case during the Settlement Negotiations may be filed, or placed in evidence by a different party to the case for any purpose, including impeachment, in any legal or administrative proceeding whatsoever. However, notwithstanding the preceding sentence, documents, data, or other evidence that was disclosed during the Settlement Negotiations by a party that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its disclosure or use during the Settlement Negotiations and any such evidence may be sought in discovery and shall be produced and disclosed in response to such discovery requests (subject to any otherwise applicable privileges or other exemptions from discovery), following which such evidence may be admitted into evidence.

3. All statements made during the course of the Settlement Negotiations are made without prejudice to any of the parties' legal positions.

4. The disclosure during the Settlement Negotiations of any documents, data or other information, and any statements made by individuals during the Settlement Negotiations, that are exempt from discovery or disclosure by virtue of an applicable privilege, attorney work product, or other exemption from discovery or disclosure, shall not (i) operate as a waiver of any claim of privilege, attorney work product, or other exemption from discovery or disclosure, or (ii) change in any way the protected (or unprotected) character of any such materials.

5. All statements made during the Settlement Negotiations and any documents, data or other information disclosed during such Settlement Negotiations by a different party may be disclosed or made available only to the receiving Parties' employees, elected officials, officers, directors and advisors (including without limitation, attorneys and technical consultants) (collectively "**Agents**") who have a need to know such information for the purpose of negotiating a revised Consent Judgment and/or resolving the claims and the defenses asserted in this matter. All Agents must be informed of the confidential nature of such information and agree to be bound by the terms of this Order. Each Party will be responsible for any breach of this Order by any of its Agents.

6. To the extent any of the statements made during the Settlement Negotiations or any documents, data or other information disclosed during such Settlement Negotiations is discussed or reviewed with any of the municipal parties' elected officials or with any employees of the municipality, such municipal party(ies), their elected officials, and their employees shall maintain the privileged and confidential status of such information. Such communications, if oral, shall not be made during an open session of the governing body of the municipality, but may take place during a session of the body that is properly closed in accordance with the Michigan Open Meetings Act. Such communications, if written, shall be identified clearly as privileged and confidential and not subject to disclosure under the Freedom of Information Act (FOIA). If a Governmental Party receives a FOIA or similar request for documents that covers Settlement Negotiations or any related information exchanges, the Governmental Party receiving the request shall, in good faith, assert appropriate grounds for exempting from disclosure the Settlement Negotiations and related information exchanges. The Parties agree that the grounds for exemption may include the terms of this Order, Section 13(1)(f), (g), (h), (m) and (v) of the Michigan Freedom of Information Act, MCL 15.243(1)(f), (g), (h), (m) and (v), and any other applicable exemptions under Michigan law. If a Governmental Party receives a FOIA request or subpoena for Settlement

Negotiations or any related data, documents, or information exchanges, it shall give prompt notice to the other parties and, if the response will include disclosure of any information, data, or documents exchanged during the Settlement Negotiations, including any notes or summaries of the Settlement Negotiations, such notice shall be provided by electronic mail to counsel listed below a minimum of five business days before the Governmental Party responds to the request. The Governmental Party shall also give prompt notice to the other parties if the requesting party appeals the Governmental Party's denial of the request for disclosure. If necessary, any Party may act, and may request that the Court act to maintain the confidentiality of Settlement Negotiations and related information exchanges as set forth in this Order and applicable Michigan law.

7. Any violation of this Order will cause irreparable injury and monetary damages will be an inadequate remedy because the parties are relying on this Order and applicable limits of admissibility under the court rules in disclosing sensitive information. Consequently, any party may obtain an injunction to prevent disclosure of any such confidential information in violation of this Order. Any party violating this Order shall be liable for and shall indemnify the non-breaching parties, for all costs, expenses, liabilities, and fees, including attorney's fees that may be incurred in seeking an injunction, resulting from such violation.

8. Entry of this order does not resolve all claims between all parties and does not close the case.

IT IS SO ORDERED

Dated: 3/23/2017

Tim Connors

Hon. Timothy P. Connors

STIPULATED TO AND APPROVED BY

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

FRANK J. KELLEY,

Plaintiff,

vs. Case No. 8834734-CE

Hon. Timothy P. Connors

GELMAN SCIENCES, INC.,

Defendant.

_____/

STATUS CONFERENCE

BEFORE THE HON. TIMOTHY P. CONNORS

Ann Arbor, Michigan

Thursday, November 19, 2020

9:00 a.m.

Transcribed by: Janice P. Yates

CER-9181

APPEARANCES (All parties appearing via teleconference)

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ROBERT DAVIS, Washtenaw County
STEPHEN POSTEMA, City of Ann Arbor
ABIGAIL ELIAS, City of Ann Arbor
WILLIAM STAPLETON, Scio Township
RAY LASHEFSKI, Gelman Sciences
ERIN METTE, Huron River Watershed Council

Status Conference
Thursday, November 19, 2020
9:00 a.m.

(Hearing called to order.)

CLERK: Now on record, Frank Kelley vs. Gelman Sciences, Case No. 8834734-CE. This is set for a status conference.

THE COURT: Good morning, this is Judge Connors. Can we have appearances on the record, please.

MR. DINDOFFER: Your Honor, Frederick Dindoffer, outside counsel for the city of Ann Arbor.

MR. DAVIS: Your Honor, Robert Davis for Washtenaw County.

MR. POSTEMA: Stephen Postema, city attorney for the city of Ann Arbor. I also have Abigail Elias with me who retired a year and a half ago, but is still special counsel on this case, Judge.

(Crosstalk.)

MR. NEGELE: Brian Negele, appearing on behalf the state, the Michigan Department of Environment, Great Lakes, and Energy.

REF. SULLIAN: So, we didn't get those appearances, Mr. Stapleton.

THE COURT: Right.

REF. SULLIVAN: You were putting your appearance on at the same time --

MR. STAPLETON: Sorry.

REF. SULLIAN: -- as Brian was putting his on.

MR. STAPLETON: William Stapleton for Scio Township.

MR. CALDWELL: Mike Caldwell for Gelman Sciences, and with me is Ray Lashefski.

MS. METTE: Erin Mette with the Huron River Watershed Council.

THE COURT: I think that's everyone, is it not, Referee Sullivan, or are we still waiting?

REF. SULLIAN: I think we've got everybody, Your Honor.

THE COURT: All right, thank you. So, good morning. I have two questions for you, and the first is, where do we stand; and secondly, where are we going? And I don't care who goes first, but if we could mute ourselves when we're not speaking, because I'm already getting quite a

bit of background. So, take whatever order you're on, put your two cents in where we are. I imagine there may be differences of opinion on that, and I imagine there will be very diverse opinions on what our next step is, but I want to hear from any of you.

MS. ELIAS: Well, I'll jump in because nobody else jumped in. The city council rejected the proposed settlements. Scio Township accepted the proposed settlements with some conditions. I believe the Huron River Watershed Council accepted but with conditions. The county rejected the settlement. So, it's a bit of a mixed bag. So, the really, the big question is where do we go from here? And if people have any -- I can go ahead and put forward what we've talked about, at least among the interveners, and I think it's been bounced off with the attorneys for Gelman and the state, although nobody has made a decision.

The city council, as you know, just went through an election, and there has been a significant turnover. Scio Township has been through an election, and there has been a less significant but still significant turnover. The

county, I believe, is fairly stable in terms of the election results.

MR. POSTEMA: And Judge --

MS. ELIAS: The city council did approve a resolution for this to petition -- the Governor to petition the EPA. Brian can address that to some extent in a bit. But it was clear from their comments, and they added to the resolution that they wanted to continue the negotiations. And I think that's the -- the county did not make any other decision besides the rejection of the settlement. I think Bob Davis can address their interest in continued negotiations.

But I think the general feeling among those of us in the room is that we actually, we got a lot accomplished. We're actually somewhere between pretty and very close. And the biggest issue I think that we're all having is that there's some very, very, very vocal opponents to the settlement in the community, some of whom insist that we should go to the EPA. Many of whom are frustrated by the lack of transparency, to use the word of the day, because they did not know what went on in negotiations. They did not

have access to the data that we looked at, the analyses we looked at, et cetera, et cetera.

So, an idea we've come up with is something along the lines of a mediated going forward, but with a twist from the normal mediation; something along the lines of a facilitated mediation, but bringing in an environmental mediation expert for the benefit of the Court. It would be a court-appointed individual who could then meet with not just party representatives, but community representatives to address the issues of what is the data, what's the analysis, how do you come up with step A, B, C, and all these various elements in the proposed consent judgment.

And you know, following to some extent if the person could do this, some of your peacemaking concepts, which is listening to and hearing what the community nay-sayers have to say, but also being able to look at whether they actually have the expertise that our clients think they have, which is a reason to have our clients in the room as well. Because we as attorneys think that there's a lot of comment from the community that our clients believe comes

from experts but doesn't come from experts, and there needs to be a diplomatic way to diffuse that perceived expertise.

If all of us had voted yes on the CJ and the Court had said that's great and entered it, that would have had I think a disastrous effect in the community. This is stepping back from all of us having recommended the settlement documents to our clients. There's a negative perception of Gelman that I don't know if ever can be diffused. If Gelman sends somebody to participate in these sessions, that might help. There might actually be a face and the ability to talk to people.

I know Mike and Ray may be saying, what is she talking about? But I'm just thinking out loud. We haven't really form edited what the recommendation is, but wanted to run it by you, Judge, to see what your thoughts are on that for an option for going forward; to try not to lose all of the progress that we've made so far, and whether there's an additional mediator or if we just have an environmental consultant who steps into a mediation role. We haven't decided. We haven't come up with a final recommendation. But

a lot of the environmental firms that do the mediation work do have a community outreach component that they're able to use successfully in the process of developing a plan.

And here I don't think we see this as starting from scratch. I think it's a more addressing the five issues, give or take, that seem to be the biggest hang up or hold up for our clients in the community. And with that I will be quiet, and others can weigh in on what I missed or misstated.

MR. POSTEMA: Judge, the only thing I would add to Abby's summary is that from the city's standpoint, she's right that the vote to reject was a close vote, number one, and I have a new council as of November 6th. And you know, where they're going on it, you know that the politics in Ann Arbor were very divisive, and I have a new council. So, it was a close vote and I have a new council now.

MR. STAPLETON: Yes, Your Honor, just to fill you in a little bit on Scio Township. Scio Township was also a very close vote. They voted to approve with conditions by one vote, but I am getting almost an entirely new board that is

going to be seated, I believe tomorrow for the first time. And I do know that they are going to take under consideration a motion to rescind the approval that they gave for the consent judgment. So, I've got a different board that I'm dealing with that appears to be from what I understand, will be, you know, more resistant to the CJ in its current form.

MR. NEGELE: I might as well chime in now. You know, Abby said a lot of things that I had on my mind to say. It is, you know, it is basically, you know, the boards and councils have been, you know like, are being driven by, you know, subtle, very persistent, and passionate community members, which I admire. But, you know, they've been driven to the point of ignoring their own very expert and highly qualified legal and technical experts in favor of, you know, a couple of folks that are held up in the community as being the experts. And they would never qualify as an expert in, you know, either a legal sense or a technical sense, but they are, you know, having been vocal through the decades, they are viewed as the experts for the site.

I also wanted to bring in another point, too, about how EPA gets involved in a situation like this, in this takeover; because that's what, you know, the votes were I think to some degree, you know, a vote for EPA takeover even though that wasn't necessarily what, you know, was, you know, actually voted on each time. Because that's what's been I think driving the rejection of the consent judgment is this concept that they're going to get something -- we'll get something better through EPA, and that better is a complete cleanup of the aquifer.

And that just is not, you know, our -- an expert, you know, Larry Lemke said that's just really not possible, highly respected by both, you know, on both sides of, you know, the table here. And you know, as part of that process, though, is the Governor has to actually request that EPA come in and do the takeover. And this happened back in 2017, I admit a different administration. But at that point in time, EGLE advised or it was then MDEQ, advised the Governor that, you know, not to do that. That, you know, basically we have this.

And so, you know, EGLE Remediation

Redevelopment Division's advice remains the same at this point. We have no reason to suggest that or to believe that EPA takeover is any more warranted now than it was then. And you know, we're throwing away a lot of very good work, and you know, in order to get this, you know, kind of a pie in the sky kind of a result.

MR. CALDWELL: Your Honor, if I may. I understand, believe me I understand the frustration that all of the good attorneys on this call feel in connection with the loud, the volume of a few voices that as Brian points out, don't have any particular expertise in the matters that they are opining on or are just, you know, simply wrong, seeming to carry the day. And the question we all collectively face is, how do we get back to a result that I think, that as Abby points out, everybody has recommended to their clients.

And you know, just to back up a moment, Your Honor, obviously we disagreed with your decision to allow the intervention, respectfully, but we respected that decision. And through the efforts of the people on this call and if I may self-servingly say that efforts of our client who

didn't just sit in the corner and pout, but rather rolled up the sleeves, fully engaged in the process that you, you know, perhaps legally went out on a limb to create for the benefit of the community.

And it worked, Your Honor. We ended up with a negotiated settlement that we all, of course, have things in there that we don't -- wish that they weren't in there. There are things that are not in there that we wish that they were. And believe me, Gelman feels the same way about the settlement, but it's a good deal that we all recommended to our clients. I wanted to congratulate the Court, I guess, for setting up that process; and then, express my appreciation to counsel for efforts that they've made in getting to this point.

And so, how do we -- how do we pull a victory from the jaws of a crushing defeat? We all share that goal. And I understand the community, the facilitated community engagement. This was, I understand the urge to do that. And you know, frankly this was an idea that EGLE brought up when they still would have been DEQ, I think they would have been DEQ at that point.

Brian, if I'm not wrong, I believe you actually had a contract with a community facilitator to engage, you know, so you could have a more productive give and take with the community than just a town hall where everybody gets up and complains. And we supported that. Now, that didn't happen, but I mean, we supported that concept because, you know, we recognize that there's a lot of misinformation that's out in the community, and I won't attribute that to any two people in particular.

But the question is, is that process likely to get us to where we want to go now? And as originally conceived, that was a process that was going to take place over a number of years. I mean, this was not going to be, you know, a couple of meetings and everybody is on the same page and goes home. It was going to be an ongoing engagement, and we supported that.

At this point, however, I don't -- and I have made our thoughts clear to intervening counsel in the last week or so, we just can't support that noble, I think, concept as we stand now for a couple of reasons. One, we've been doing this for closing on four years. I mean,

the intervention motions were filed four years ago I think this week, the original ones. And we started negotiating in March of 2017. And it's taken us this long to get to a good result, but we've been in this kind of legal quasi-land. They're not really parties, they haven't filed their complaints yet, but we're engaging with them as if they were.

And at this point, this would take, I don't know, another year. I mean especially if you're talking about bringing in some type of environmental expert, to have to get up to speed on what has taken the interveners and their combined efforts, you know, three and a half years to get up to speed on, I think that is a problem. But more importantly, I just don't think it would work, Your Honor.

We've seen from the -- and obviously, we're not in the closed sessions, but we've monitored the deliberations. And I mean, intervener counselors are some of the best environmental attorneys in the state. I mean, I remember my first memories of environmental law is sitting in a giant courtroom in the Western District of Michigan in a case that involved 150

PRPs. I was representing Waste Management, and Frank Dindoffer is up there running the whole meeting on behalf of the PRPs.

Bob Davis, I didn't really know too much before this case, and he's just been a Godsend. And I've come to respect his expertise. And as I've investigated, I worry about his abilities as a litigator. And Stapleton, you know, if I may speak frankly, he's kicked my ass every time he's sued my client; so, I -- which has been several times. So, I have -- I held -- I hold the attorneys and their abilities in the highest esteem.

But the fact of the matter is, their clients are not listening to the attorneys, they're not listening to the expert, Larry Lemke, who has been a community leader in this -- on this site for many years. They're not listening to them.

I mean, in connection with the superfund resolution, the city's attorney's office responded to a question from one of the council members with a memo outlining factually what it would mean to go to EPA. And frankly, I'm trying to work up the nerve to ask -- it came

from Stephen and Abby's office. I imagine Fred had something to do with the drafting of it. I'm kind of working up the nerve to ask for a Word version of the document so I can plagiarize it when I, you know, deal with issues regarding superfund in the future. It's -- you could not possibly read that memo, which is just concise, to the point, and clearly stated. You could not -- and factual. You could not read that memo and think going to the superfund is a good idea. And yet, that's exactly what the city council decided to do.

And so, I don't think that bringing the, you know, if the decision-makers are not listening to the experts that they hired to provide opinions or are listening to the lawyers that they hired to provide recommendations and guidance, the idea of bringing in a facilitator that's going to somehow, you know, convince -- or expert, convince the decision-makers of the rightness of this path that we've all identified as being the right one, I just don't see that as being realistic.

These are, you know, and quite honestly, the recent decisions have, you know,

validated every concern we had about bringing in local politics into remedial decisions like we have, and a case study perhaps on why remedial design decisions need to be made by a state agency, a state or federal agency.

So, although I share the goal, I share the frustration because there's so much misinformation out there, it's frustrating beyond what I can describe. We don't think that best -- although the intention is not, we just don't think it's the right path to get us to where we all want to go.

We think, and this is not any attempt to be unnecessarily litigious or anything, but we think the only way to get us to the goal that we share of pulling this deal back together is for the Court to set litigation dates, the date when they file their complaints, and dates for us to respond. Because what I think the problem is, and I believe it was Brian that alluded to it, is they're not comparing the deal -- and as the Court knows and has explained to countless parties, any settlement is a good settlement if nobody is happy with it. And there are problems, you know, from both sides that we can all

identify.

But the decision-makers are comparing this deal, which provides for community involvement going forward, it really provides an opportunity for the kind of community buy-in that I think this Court was hoping to achieve. They're comparing that deal to a magic wand. They're comparing that deal to an outcome that doesn't exist in reality.

And the current version -- first, the current version of that magic wand is EPA. EPA will, you know, they're being told by two people that EPA will come in, in addition to divesting this Court of its jurisdiction, the EPA will come in and put big bad Gelman in its place.

And everybody -- I know that I'm confident that I speak for everybody on this call, we all think that EPA would be the worst possible path forward for this community. And I think, so that we focus the decision-makers on the reality of the situation and encourage them to compare the deal that we've negotiated to the best outcome, reasonable outcome that they could reasonably expect to get in the course of the litigation, I think that's the only way they come

to realize that this is the best option politically.

And you know, Stephen has mentioned that the city council has many new members, and frankly, I'm encouraged by that, having listened in to the last few meetings. And you know, we're not asking the Court to order the interveners to file their complaints next week, but we think we should meet and confer, come up with a reasonable schedule that perhaps allows Stephen and Abby and Fred to bring the new council members up to speed. And you know, set a date by which, if the negotiated deal is not approved by all the interveners by such a date, then interveners file their complaints so many days after that. But I think that is, as a practical matter, the only way we're going to rescue this deal.

MR. POSTEMA: Judge, if I could just clarify one thing about the council. Your Honor recognized that we were in the middle of an election, and I -- my client now is the new council. When you asked me before in August, that is always an awkward to talk about a lame duck situation. And so, I think that we have direction from the council from the past, but we

do have -- we do have people that may take a much different view of the EPA route.

And so, the only other thing I want to clarify is we did talk about public engagement, and that was important. I don't want to downplay that. That's important to you and it's important to me and important to the city. On the other hand -- and that did result in some critic of the consent judgment. It's true that we recommended that this should go public, and that was a useful process, but my council, just to be clear, by a very close vote, made some amendments that I think were important to address. And had that gone forward and been approved, we possibly would be in a different situation despite there were some legitimate concerns on it, but everybody has said the correct thing, that there was significant achievements have been met overall.

THE COURT: Thank you. Would anyone else like to offer their thoughts?

MR. CALDWELL: Just --

MR. DAVIS: Bob Davis from the County, may I speak?

THE COURT: Sure.

MR. DAVIS: Your Honor, the county

board of commissioners voted unanimously to reject the current consent document. During the course of our time together, I think the position on whether this matter ends up in the hands of the EPA has been in my opinion a hot topic. And I think that the attorneys have advised the clients in very detailed and correct manners with respect to the EPA process. There was even a public meeting where the EPA appeared and there's a link to that if any, you know, if the Court was interested in looking at it, but I think the EPA representatives who appeared gave credibility to the issues that we as lawyers had been raising with our clients about the EPA process.

It's my humble opinion that it's going to be difficult to make progress until the -- until the concept or the left-hand turn that, you know, we can send this matter to the EPA is dispelled as not being either: A) an option, or B) not being a good option. And it seems to me Brian Negele who has already spoken has, you know, has made it pretty clear to us that the agency through its attorneys is not currently of the mind that it would recommend that the Governor take action to get this matter to the

EPA.

We do have a national politic issue who seems to intervene on behalf of, in my opinion, advocating for the case to go to the EPA. But until that option is either off the table and rejected by the EPA, or our clients are convinced that going to the EPA is not a good idea, which I tend to believe it is not a good idea, I think it's -- I think that lingers in the background and gets in the way of the progress on adopting the consent judgment that has been so carefully put together.

So, I think the monkey in the room is that issue, is we have to get past the concept that the EPA is either available to us or is a good option for us. From the science standpoint and a legal standpoint, I think it is a horrible -- I think it's not a good option for the site as a cleanup site. And I think that the community through the voices of a very narrow public has been enamored with the idea of going to the EPA. I would say, and the other lawyers can chime in, 75 percent of public comment at all the meetings involves going to the EPA, and we need to resolve that issue. Thank you, Judge.

THE COURT: Anyone else?

MR. STAPLETON: Yes, Judge. My only thought, just kind of picking up on what Bob had said, is that, you know, if we were engaging in these sorts of community engagement with a facilitator, it might make sense to narrow the issue that we're addressing to the EPA issue. You know, and as Bob says, I'm not sure we can get anywhere before we kind of dispel this notion. And it might be worth some effort, and this may involve, you know, maybe some input from EGLE, even the EPA, the AG's office, trying to connect with the community in some kind of organized fashion to fully give them the facts about -- about the EPA and, you know, let the know that it is really not a viable option.

The EPA, you know, has said in public that they're really not interested in this site, and there's no reason to believe that if a petition were filed that they would ever list the site on the NPL. So, I think that, you know, I have a feeling Mr. Caldwell saying we kind of need to move this case along, but if there is any inclination to, you know, some sort of community engagement, you know, if we kind of narrow it

down to the EPA issue as opposed to trying to open back up the CJ and talk about issues in the CJ, that might be, it would likely take less time and it might be better than trying to dispel that notion that it is an option. Thank you, Judge.

THE COURT: Anyone else? Okay.

So, I have four general categories of thoughts in response to this, and I purposefully have stayed out of -- I've not read anything. You know, I can't help but hear little whispers in the wind, but I purposely ignore them. I do appreciate the process of dealing with various bodies of elected officials. I've been doing it for decades. I do appreciate how difficult it can be sometimes that those bodies can be swayed by vocal output, and oftentimes a small group may appear to be speaking for a larger group, and I understand all of that. So, those dynamics I'm not unfamiliar with, but you know, I've stayed out of it. I've not engaged in it, because I didn't think it would be appropriate for me to do so.

So, the first kind of category I think I'd like to comment on is process. And you know, participation in decision-making does not mean

you get to make the ultimate decision. It means you get a voice at the table, but it does not mean that your voice by the invitation, then, you ultimately make the decision. My reasoning for inviting in the interveners, which I am eternally grateful for, is that I thought having those voices at the table add to the discussion, add to the awareness, assist me in sort of understanding the various viewpoints, and frankly, the collective strength of recommendations or thoughts or advocacy of what needs to be done.

So, the invitation to participate was never an abrogation of my ultimate responsibility. If we don't have agreement, I have to make a decision. I also made the decision that with the change in the requirements of what the acceptable levels were, that legally meant that it was worth that additional step. So, I recognize there were differences of opinion on that. I think the courts have already weighed in on that, so we are where we are. So, we go back to that and you know, even if everybody agreed, I had the ultimate responsibility to say yea or nae.

So, I go back to then, what is this

process? And the process is that the science is important, that we do have experts in our legal system to assist the trier of fact in understanding specialized knowledge or information, not as a substitute, not as an abrogation, but to help them to understand. And I am very thankful for all of you by having, you know, these various experts to look at data together. I know you have spent time doing it. I have not looked at those reports in any kind of detail. I have relied on you to sort of let me know where things stand. But I don't -- I think it's time now I need to do what I'm supposed to do.

So, I think what we'll do is set up a schedule, and what I would like is to go first to the science. So, I'd like each of your experts again to detail the report for me as a factfinder; to say, here's the situation, here's what should be done and why. And then, at least we have a record of what the science is recommending, and the experts are recommending. So, really bringing it down to that, here's what we have, here's what should be done.

Then, the next step, so that's number

two. One is that process responsibility, two is the science, and we start with that and we really distill that down. I don't want -- I don't need a great deal of testimony. I don't want to do examination, cross-examination. I want experts just to tell me saying, I'm here, I have to make this responsibility, don't do this as some higher advocate. Tell me what the situation is, from a scientific standpoint what you think you should be done and why. I suppose an analogy could be made to the people we should be listening to or hope to be listening to on public health issues such as COVID. Just be your job as a science person.

Then, the third is your jobs as attorneys and all of our jobs in the legal profession. So, I start with then, when I have the science and at least I have those experts, then I want to hear from each of you. And we start with the duty of candor. And you can say, Judge, my clients reject this. I've informed them. They feel -- they don't feel this is what they wish, but then I'll ask you hard questions from each of you, understand that. What is your view of this evidence as an attorney? What can

you say, you know, in terms of your duty of candor to the Court?

I understand there's people who have differences of opinion. There always will be. There always will be. But where do we go from here and what can we do legally? So, the science says what should be done; tell me what can be done legally practically and why. And tell me what should be done legally and why. Even maybe we leave it, you know, leave the science in, hear the impediments.

The other thing is, as an advocate what I'd like to tell you is, so that I can tell you all at once, I'm looking at you not to say okay, because you recognize I have to balance these various viewpoints, and that's what I should be doing. So, I'm asking you and I'm telling you, you will increase your credibility if I see in your advocacy that you are taking into account the other viewpoints and you are willing to make kinds of concessions, as opposed to saying fine, I need to go way out on our limb figuring he's going to cut it back; and therefore, I have to go to the extreme of my position hoping that it will be somewhere in the middle.

I am telling you as lawyers, I'm telling you the bottom line, the painful line where you want to be. And I'll be able to tell. I will be able to tell. So, the lawyer that ignores that for various reasons and is way out on one end, you lose credibility with me tremendously. The lawyer who looks to me as like is saying this is painful, but this really is sort of the bottom line, here's what we think, it's in your hands, Judge, I'm just giving you one view, that will be helpful to me. So, it's really up to you in terms of that advocacy.

The fourth area I think is sort of the mechanics of this because we will not be doing any jury trials soon. I was hopeful that we were going to open that up. There's an eastern judge in Texas that was doing those and now he had to stop them, 17 people went home with COVID with one person asymptomatic: lawyers, jurors, everybody. I don't see this opening up for some period of time. I have been, because I do the neglect docket and because those, I'm the only judge and our referees that do the neglect docket, we've been doing these hearings and trials since March. So, I have some familiarity

with the challenges that are involved.

And you know, I think the best I can do is develop a record of there's the science, here's what the, you know, from a legal standpoint the arguments of what can or should be done and why, and I'll make the call. I'll just make the decision. I don't think, and I appreciate what you're saying, Mr. Caldwell, you know I brought in the interveners. I don't want them filing a complaint. I don't want an answer to a complaint. I don't want discovery. I don't want all that. You know, we've been years now talking about it.

So, from my process, I've opened up a consent judgment, I've legally been saying I can have the interveners give me your voice of what you think and why, and I'll make the call. Then you have an appellate record. You can go back to your clients, Gelman may say, you know, I might do exactly what you think, Gelman, I don't know. But I truly don't have -- I don't have a preconceived notion of what exactly I'm going to do. But if parties then decide, tough, we want to play a hard line, go up with the Court of Appeals, my advice -- my sense is that would be

unfortunate because it will be -- we may lose ground and we may have further delay, and I don't think that will be satisfactory.

But I don't -- I love the idea, Ms. Elias, I just agree we've had time, we've had the ability to at least have that out there. Now I think it's time that I do my job and simply say, give me the science, give me the proposal, give me your legal reasons what you think I should do and why, and I'll make a call. So, I would like to set it up on a schedule, and I think Referee Sullivan, you're there with me?

REF. SULLIVAN: Yes, Your Honor.

THE COURT: So, since we're not going to be doing jury trials and I know we were hopeful, and I know we're back-to-back with some of these other cases, but I think we're just going to have to start setting some dates in January. And I'll start with submit the report to me and then argument.

MR. CALDWELL: Your Honor, if I may?

THE COURT: Yeah.

MR. CALDWELL: We've engaged in good faith, I think the product that we achieved is evidence of that good faith. And again, I would

like to again thank the attorneys in this meeting for their efforts as well.

But at some point, Your Honor, you know in the intervention and as to the status of the intervention adjudication, the Court issued its decision. We asked the Court of Appeals to look at that on an interlocutory basis, and the decision by the Court of Appeals that the Supreme Court did not disturb was that we had not convinced them that there was a need for immediate judicial review, appellate review. And I can see why they did that. Counsel for the interveners made a good argument, hey, what can be the harm? We just got a seat at the table, you know, it's what we're asking for. And the Court made the decision.

We still have the right at the end of the day to appeal the intervention decision, but more to the point, more immediately, in the intervention decision the Court, this Court and the Court of Appeals, were not allowed to take into account the merits of the interveners claims. That's not -- that's for a later moment, and you make a decision about whether they are a type of party that should be involved in the case

and that initial decision was made to allow them in.

But before the Court has a legal basis for going to the damage or relief stage, my client is entitled, I believe and I would strongly argue, to have its day in court as to whether these interveners have meritorious claims. This is -- they get to argue that in connection with the intervention, but this is the time to argue that if we're going to move forward with in-court proceedings. It's a necessary prerequisite, I believe, and I would strongly argue that it is.

And I think we are, my client is entitled to the due process of having the complaints filed and having the ability to file responsive pleadings, which having reviewed the complaints in some detail, that we would anticipate filing motions for summary disposition as to some if not all of the claims.

THE COURT: I understand that. I understand that, Mr. Caldwell, and I understand it may go up. It took me 17 years to finally try the cases involving the claims against women prisoners. It went up and down. And so, I get

that, but this is what I'm going to do. And then, I fully -- and I will not get angry at anybody. I fully understand you need to do what you need to do, and if the Court of Appeals comes back and says X, Y, or Z, I'll follow it.

But I just think -- first of all, I think, you know, I understand that. But I think the fact that I've ordered in and we've spent this time, I think they have meritorious claims. I am not going to now start from scratch as if we weren't there four years ago. And if the Court of Appeals agrees with you and says, this is the process, that's someone else dictating to me what I -- or determining what and doing their responsibility, and I'll follow that. But I think we need to move forward.

I think if we go either the route of okay, we're just going to engage in more community discussion and facilitation, we have to talk about who that might be and we'll come back in a few months on that, or I go this other route, which as if we're starting from scratch and we start litigating everything, we're two or three years just to the litigation. I don't think -- I don't think anything is served by

that. But again, you were pretty good at telling me, Judge, we're going to go up on you on this, and while we're at the table in good faith, but we're going to talk harshly about you up above, I get it. I'm all right with that. But I really think we need to move forward.

MR. CALDWELL: And I certainly understand. I know Ray and I both understand the Court's desire to bring this to a head and get to a good result. I feel like we've gotten to that result, and then we're all talking about how best to get back there. And unfortunately, and the Court has alluded to this, and I appreciate the Court's larger view on this, I can't imagine that we wouldn't need to try to seek interlocutory appeal of the decision to move forward with the relief stage of the litigation before the complaints are filed.

And I -- and I hope -- I hope our good faith efforts in negotiating with the interveners, despite our disagreement on the intervention, I hope that is evidence of the respect we have for the Court and what it is trying to achieve. And we share I think the same goals in trying to achieve a remedy that is --

that the community has buy-in, that the community has involvement. We provided for that in the -- in the deal that we negotiated. Interveners made it very clear that they needed that, and the final result incorporates that in large part because we saw the benefit of having that continued involvement, even if it, you know, is a little squeaky going forward, we see the benefit of that. And we want to get back to that result.

I'm afraid, I just, I worry that this will not be the quickest way to get there. And I really regret that, but we do have, you know, the client does have legal rights and you know, we haven't talked to the client. I haven't talked to Ray. We've got to figure out our formal reaction, but I just wanted to throw that likely I think possibility out, but to express that we respect what the Court is trying to achieve.

THE COURT: And I, again, I hear you. And what I'm trying to tell you, what you just gave me was a precursor to your closing argument in the relief stage if you ever agree that I'm going to hear it.

MR. POSTEMA: Right.

THE COURT: I'm going to hear it. So,

again, I will not take it as the fact you sometimes have to take alternate paths because of the legal aspect up in the appellate courts with your commitment to trying to resolve a problem. I get that. I get that. And so, you won't lose creditability with me if you have to do what you have to do in terms of staying on that process.

At some point, and I'm going to set it earlier than later, but at some point, I'd like to hear that argument you just gave of why you think this proposal makes sense. And what I'm saying is I'm willing to make a call that is subject for appellate review on all these issues. So, you know, one of the things you could preserve is have this argument on the relief portion, at least have me make the call on the science and what's there, and then you have a record if you want to take it up and say, it shouldn't have been done, it violates due process, should have had a larger process, it needs to go back, remanded, et cetera.

And that's another option that you should be thinking about, I think all of you, is saying I'll make a call at this stage with all the work that's been done, all the proposals, all

the compromises, all the things that could move forward. So, at least when appellate courts are looking at something, it isn't a vacuous okay, let's talk about a general thought, you know, we're focusing on due process as opposed to, we have a problem here that we tried to address, and a call has been made upon and do it. That's what I'm trying to accomplish with you.

MR. DINDOFFER: Your Honor, could we --

THE COURT: I appreciate that. Yeah?

MR. DINDOFFER: Just, if I might ask a question?

THE COURT: I don't know who it is.

MR. DINDOFFER: I'm sorry, it's Fred Dindoffer.

THE COURT: Okay, Fred, you look like a --

MR. DINDOFFER: Yeah, I'm in the dark here.

THE COURT: -- ominous silhouette there, yeah.

MR. DINDOFFER: I've got to get, you know, Caldwell's lighting. You know, he had the flashing going on over his head before.

MR. CALDWELL: Yeah, I'm being beamed

up and Fred looks like the Sith lord in the --

MR. DINDOFFER: That's right.

THE COURT: I thought the same thing. I was going to say the same thing, Mr. Caldwell.

MR. DINDOFFER: I think everybody that has spoken has alluded to a couple of very loud voices in the community that claim to have expertise in something, and which a lot of us would dispute. And I just wondered if Your Honor would care to hear from them as part of this process?

THE COURT: Well, I don't know, you know, I don't really know legally how I have that sort of standing, either. You know, technically, I mean it's not open-mic night. It's not, you know, it's a legal process.

MR. DINDOFFER: (INAUDIBLE.)

THE COURT: And so, I, you know, I think this is why I brought in interveners. This is why I had people who knew from a legal standpoint and from a scientific standpoint who could look at this, who had disagreements. And I am going to do my job at this point. And you know, I think the danger that -- I appreciate that, Counsel. But I think the danger that -- I

mean, well, I don't need to go into, I'm fully aware when I have controversial cases of people who have tried to inappropriately influence a decision, and in their minds probably thought they were trying to appropriately do it.

MR. DINDOFFER: Okay.

THE COURT: So, I'm going to stay in the parameters of where I think ethically I need to be.

(Crosstalk.)

MR. DAVIS: Your Honor, Bob Davis from the County. May I ask one question, please?

THE COURT: Yeah.

MR. DAVIS: Judge, with respect to us making these types of presentations and arguments, do we have to do anything with the current confidentiality order?

THE COURT: Well, I, you know, from my standpoint, it's just I'll have hearings on it. You know, we've had years of going through this. I've told you the process of what I'm asking you to do. If there's variance because of the, either you don't think it has value what I'm asking you to do, or your clients are directing you to do something else, I'm just telling you

what will be helpful to me as a decision-maker.

MR. DAVIS: Okay.

THE COURT: So, it's like a jury asking me questions in advance. So, to me it's an open process. I don't think we're going to, because of the, you know, the difficulties, I'm going to have enough people already on this Zoom trial, but I want it recorded so there's a record of it. And that's why I really do think the scientific just the reports are helpful. It's concise.

We can spend all day arguing about, you know, direct cross-exam and then they go up on appellate review and try to figure out exactly what was said or what wasn't said. I really want a more concise process on this. And Mr. Caldwell, you may well be right that this might get reversed and they say you need to have a different process, but at least I've got something in place. We've got something to work from.

And again, and I see Ray is nodding his head. You do what you feel you have to do. I won't, you know, I told you that four years ago, and I think I've demonstrated it. I understand. And you're muted. You might have done that on

purpose. You must be muttering under your breath.

MR. CALDWELL: (Laughter.) If that's not a Freudian slip, I don't know what is, right.

MR. LASHEFSKI: (INAUDIBLE.)

MR. CALDWELL: No, Your Honor, I'm just going to say that I hope that, I hope that we've demonstrated that we respect where the Court is trying to move this matter through our good faith efforts, even while we've disagreed on the legal issues that we've disagreed on. And we'll continue to respect the Court's orders and what it's trying to accomplish even if we have to exercise our legal rights.

THE COURT: Ray, did you want to say something?

MR. LASHEFSKI: No, that's exactly right, Your Honor. We'll see the Court's order, we'll talk to our client, and we'll determine how to best protect their rights. And we understand that the Court knows that that's our job and we'll -- the Court will understand that we have to do our job.

THE COURT: And I do want to say, this goes to everybody, Brian, everybody. I have

grown to have deep respect for each of you, and I know that you are straight with me and you're candid with me. And I recognize your clients may have positions that put you in a difficult spot. And again, those views will not -- will not prevent me from having respect for, you know, this process or what you're trying to do.

But I'll give you the duty of candor. I'll look you in the eye through the screen and say, okay counselor, what about this? What about that? You know, a little bit, what's the evidence of massive voter fraud, vote fraud. Where do you have it?

So, we've got to, I don't think, I'm saying that, you know, it's probably going to be a difficult road, but it's a road we're going to all take together. And in the end, I'll make a decision and maybe everybody won't like it. But we need to move forward. We just can't continue to spin here. And not that I don't -- and I don't think we need to -- I don't want to lose ground where we were. I think where we can, where we had agreement is a good point to sort of start with and then say, well, what's the deviation from that.

So, you know, one possibility is to look at the -- one possibility is just to look at a document to say, where can we get back to the science. Then, look at okay, here was a proposed consent judgment, what were the factors that (INAUDIBLE) why isn't that, why doesn't that make sense from our client's standpoint? You see?

So, we might start with that in saying, well we, at least the combination of science and legal got us to a proposal, and then a process said, we're not happy, we're rejecting that, we have conditions, or we reject it outright. And so, then I have a hard -- then, I ask the hard question, well why? What's the science behind that? Where does that come from, et cetera. So, that's one possibility is saying well, having heard all those arguments, it seems to me something else makes sense.

So, what I'm, all I'm saying is, don't necessarily say, okay, we're back to our traditional mode of, you know, concede nothing, advocate always for everything our way, and hope that in the end we either beat somebody down or you know, that voice isn't heard. I'm going to hear all the other voices. So, I would like to,

really the process I'd like is, here's the science, here's the scientific report, here's what the proposed consent judgment is. Because I truly don't even know all those parameters and why we reached that, what that compromise was about. And then, unfortunately, clients when that was back for approval, disagreed with that and why. And I'll make a call, okay.

So, what I'd like to do, I am thinking -- Referee Sullivan, are you there?

REF. SULLIVAN: I am, Your Honor.

THE COURT: And that's in honor of Justice Ginsburg, is it not?

REF. SULLIVAN: Yes, Your Honor.

THE COURT: Okay. So, you get to go with the memorandum of just, I'm thinking, Referee Sullivan, if I could put you in a breakout room with them, I can get back to my other motions.

REF. SULLIVAN: Sure. Just I need a little bit of clarification. I found three days in January that I can set this for. I'm just wondering do you want whole days, half days, what are your thoughts about that?

THE COURT: I'm going to let you work

with the lawyers. What I -- you know, and I understand they may be filing interlocutory appeals, et cetera, but I'd like to move forward. Scheduling, I want to at least be sensitive to their schedules, not delays, but to their schedules.

MR. POSTEMA: Judge, if I could ask one clarification before you leave. You had talked about the science and then the legal briefing. Were you envisioning them as a combined document or a stagger, that you wanted the science first for you to digest, and then get a legal a couple of weeks later? That made some sense to me, and I want to clarify that for you.

THE COURT: No, you know what, here's the danger for asking for clarification, because now I'm going to make it more complicated. As I think through this, here is how I would like to proceed, even more I'm thinking this. I'm going back to my last thought. It wasn't really in my head. I think what I would like, because I've had these discussions with you. We're working on a proposed consent agreement. We're working hard. We're making progress. Nobody has really told me the details, nobody told me why, but at

the end of the day, you did have that.

So, what I think in that first hearing is I'd like to hear first from the lawyers saying, here's what we had proposed, and I want to hear why. And all the concessions and all the disagreements, I want a full day of here's what we thought made sense for the problem. And in that, you can attach the science. In that, you attach the science report; here's what our experts said, here's the document, et cetera.

And after maybe that day, and I have a sense of what, you know, where there's diversions, what's the agreement, you know, you've alluded to some discussion about EPA, which is I've heard as much about is what I've heard here on the record. So, we might explore that. And then, I may then say, okay, I'll -- you can go ahead and present, you know, from your client's standpoint additional things they want me to understand about why not to do it.

But I think the reality is, is that I legally, I've worked on a process to bring in and encourage and facilitate from that collective expertise a proposed consent judgment. We did get to a proposed consent judgment, right? I

mean, we did get there. So, rather than just immediately let's blow it all up and start over, I'd like to go to there and why.

And then, and then I'll make a legal determination to what else, from that, what I need to do next. And you'll, you know, at that point you can talk about appellate review and you can just let the -- I think you can go back to each of your clients and say, the Judge wants to have a hearing from the lawyers and the scientific reports available to me, what is the proposed consent judgment, why, how you reached it and why, and why we think it addresses the problem. And I'll go from there.

MR. CALDWELL: Your Honor, if I may? I am understanding that in terms of science, a scientific report, you're seeking a document rather than live testimony?

THE COURT: Yes.

MR. CALDWELL: Yeah, okay.

THE COURT: Yeah, absolutely.

MR. CALDWELL: That's multiple -- yeah, okay.

THE COURT: Absolutely, because it's just an easier sort of thing. I mean, we could

spend all day doing, you know, direct cross-exams on and on and on and on and on, on experts. I mean, you know, after four years, someone can give me something put down in a report to me to assist me as the finder of fact in understanding it. That other process isn't going to help me.

MR. CALDWELL: Thank you.

THE COURT: So, let's do that. And Ms. Sullivan, Referee Sullivan, I'm sorry, why don't you look at dates with them, get that date. I think that first day should be a full day -- well, if you can give them three, give them the three, and we'll get through. If we end up, you know, filling, you know, whatever time, I want people to have the opportunity to say what they want to say.

REF. SULLIVAN: Okay, sounds good.

THE COURT: All right.

REF. SULLIVAN: Lindsay, if you can put all of us in a breakout room?

THE COURT: Yeah. Thank you, everybody, stay safe. Brian, it's good to see you again. You're hanging in up there? And our environmental group there, you had nothing to say to me today.

MS. METTE: You know, I'm very supportive of this process moving forward, and I think, you know, HRWC has been -- I recommended the consent judgment and they're very close to accepting that.

THE COURT: Okay. So, that's -- that will be our focus. What it was, you're going to educate me in that process, and then I'll decide where we go from there, how's that?

EVERYONE: Thank you, Judge.

THE COURT: All right. Take care.

REF. SULLIVAN: Everybody will have to unmute themselves first.

(Hearing concluded at 10:08 a.m.)

CERTIFICATE OF TRANSCRIPTION

STATE OF MICHIGAN)
) SS
COUNTY OF KENT)

I, JANICE P. YATES, hereby certify the transcription of the foregoing proceedings. These proceedings were recorded on an audiotape; said audiotape was not recorded by me nor under my supervision or control. I certify that this is a full, true, complete, and correct transcription of the audiotape to the best of my ability.

JANICE P. YATES, CER-9181
Notary Public,
Kent County, Michigan
My Commission expires: December 2, 2023

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STATE OF MICHIGAN WASHTENAW COUNTY TRIAL COURT	**THIRD AMENDED SCHEDULING ORDER**	CASE NO. 88-034734-CE JUDGE Timothy P. Connors

Court address
101 E. HURON, P.O. BOX 8645, ANN ARBOR, MI 48107

Court telephone no.
734-222-3001

Kelley, Frank J/attorney vs Gelman Sciences Inc

Plaintiff's attorney, bar no.	Defendant's attorney, bar no.
Brian J. Negele; P41846	Michael L CaldwellP40554

There is a Hearing on Modification of the Consent Agreement set for March 8 and 9, 2021at 9:00 AM

Before commencement of the Hearing, counsel shall submit Briefs and Expert reports in accordance with the following schedule:

Intervenors by 1/29/2021

Gelman response by 2/12/2021

EGLE response/Intervenors' reply by 2/26/2021

The Court's previous Scheduling Orders regarding this hearing are vacated and replaced by this Amended Order.

Gelman agrees to this amended schedule, but maintains its previously stated objections to the decision to hold the hearing.

Date

Timothy P. Connors
Trial Court Judge

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel*. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

THE CITY OF ANN ARBOR,

Intervenor,

and

WASHTENAW COUNTY,

Intervenor,

and

THE WASHTENAW COUNTY HEALTH DEPARTMENT,

Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,

Intervenor,

and

THE HURON RIVER WATERSHED COUNCIL,

Intervenor,

and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

/

Case No. 88-34734-CE

Hon. Timothy P. Connors

GELMAN SCIENCES, INC.'S MOTION FOR RECONSIDERATION OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT AND BRIEF IN SUPPORT

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/

GELMAN SCIENCES, INC.'S MOTION FOR RECONSIDERATION OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

Defendant Gelman Sciences, Inc. ("Gelman") hereby respectfully moves the Court pursuant to MCR 2.119(F) to reconsider and vacate its Third Amended Scheduling Order dated December 17, 2020 (Exhibit 1). In support of this Motion, Gelman relies on the accompanying Brief. Pursuant to MCR 2.119(F)(2), no response to the Motion may be filed, and there is no oral argument, unless the Court otherwise directs.

Respectfully submitted,

ZAUSMER, P.C.

/s/ Michael L. Caldwell

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Dated: January 7, 2021

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER SETTING HEARING ON MODIFICATION OF CONSENT AGREEMENT

INTRODUCTION

When this Court erroneously permitted—over Gelman's strenuous objection—six new entities to intervene in this decades-old enforcement action, it was for the limited purpose of granting those entities a "seat at the table" in negotiations between Gelman and the State regarding a proposed Fourth Amended Consent Judgment. By that point, the State and Gelman had already reached consensus on a revised agreement that would have fully incorporated the new state-wide cleanup standards made effective on October 27, 2016. But for the ill-fated interventions, Gelman and the State would have entered the new Consent Judgment in 2017, and the fully protective remedy addressing the new state-wide standards would be well underway.

Gelman continues to object to the involvement of the Intervenors in negotiations regarding a remedy that had, for more than 30 years, proceeded only as between Gelman and the regulator authorized by law to oversee precisely this sort of remediation. But despite these objections, and despite the Court's error in awarding intervention, Gelman nevertheless participated in good faith for almost four years in the "intervention negotiations" sponsored by this Court. That process produced a comprehensive resolution that included remedial actions well beyond those necessary to provide a protective remedy and gave Intervenors limited continuing rights regarding implementation of that remedy. As a result, the parties and the Intervenors' counsel represented to this Court on August 12, 2020 that a tentative agreement had been reached.

Soon thereafter, however, in a surprising blow that wiped away four years of work, the Intervenors' elected officials rejected the settlement. They apparently believe either that a "better" resolution is somehow available through this Court or the political process, or that their interests will be better protected by the U.S. Environmental Protection Agency ("USEPA") than the State. Gelman disagrees in all respects.

As the intervention has clearly failed to achieve a resolution, Gelman submits that there are now only two options: for the Court to dismiss the interventions without prejudice and enter a duly-negotiated settlement reached between the parties to this case (Gelman and the State), allowing Gelman to undertake the remedy it has been ready to implement for four years; or for the Intervenors to file their complaints so that the merits of their claims can be litigated. What is not an option, but what this Court has nevertheless ordered, is for the Court to hold a hearing to weigh evidence and order a remedy in lieu of a negotiated Fourth Amended Consent Judgment—all prior to any adjudication of the merits of the Intervenors' as-yet-unfiled claims. This constitutes palpable error for which reconsideration is required. *See* MCR 2.119(F)(3). Furthermore, it,

would be counterproductive to the shared goal of Gelman, EGLE, and this Court to promptly implement a protective remedy via a revised Consent Judgment.

Gelman thus respectfully asks the Court to reconsider and vacate its December 17, 2020 scheduling order setting such a remedy hearing for four reasons:

First, the Court cannot modify either the existing Third Amended Consent Judgment or the proposed Fourth Amended Consent Judgment absent the consent of the parties to those agreements—the State and Gelman. While the Court's frustration with the failure of the "intervention negotiations" is understandable (and shared by Gelman), it would be procedurally improper for the Court to modify those agreements without the parties' consent, and would deprive Gelman of its opportunity to negotiate in good faith with the responsible regulator.

Second, any award of relief to the Intervenors and against Gelman in the form of a new remedy violates Gelman's right to due process. Gelman is entitled to an opportunity to be heard on its meritorious defenses to the Intervenors' claims, which have not even been filed with the Court. Indeed, Intervenors themselves have acknowledged both Gelman's right to its defenses and the requirement that Gelman's fault and liability be proven before relief against Gelman can be awarded. Intervenor 9/24/2020 Response to Public Comments (Legal), p. 10 (Exhibit 2). It would be procedurally and substantively improper for the Court to proceed directly to the remedy stage of litigation and adjudicate Gelman's liability when litigation has not yet even commenced.

Third, insofar as the Court is seeking to take an active role in mediating the Intervenors' rejection of the proposed Fourth Amended Consent Judgment, as the Court appears to envision under its order, it risks losing its ability to later adjudicate the dispute if necessary. The Court may serve as either the mediator or the fact-finder; it cannot serve as both.

Fourth, the Intervenors are currently seeking USEPA listing of the Gelman site on the National Priorities List for Superfund status. Should the site be listed, the federal government and the federal courts will assume oversight, divesting this Court of jurisdiction. In light of these ongoing overtures by Intervenors, further efforts to produce a revised Consent Judgment through this process would be futile. Further, proceeding with a costly and time-consuming remedy hearing would be a waste of the parties' and this Court's resources, and would not serve the interests of judicial economy.

For these reasons, Gelman respectfully requests this Court reconsider and vacate its Third Amended Scheduling Order, and either dismiss the interventions without prejudice (which would allow Gelman and the State to enter a bilateral agreement), or order the Intervenors to file their complaints so that the merits of their claims can be litigated without further delay.

FACTUAL BACKGROUND

This Court has presided over the State of Michigan's environmental enforcement action involving the Gelman Site for over 30 years. In 1992, the then-Michigan Department of Natural Resources, (n/k/a Department of Environment, Great Lakes, and Energy ("EGLE")) and Gelman successfully negotiated a Consent Judgment setting forth the environmental response actions required to address the 1,4-dioxane contamination associated with former operations of Gelman's Wagner Road facility. Since then, the State and Gelman have successfully negotiated three amended Consent Judgments—the last entered in 2011—to address changing cleanup standards and new legal requirements, and to reflect the parties' evolving understanding of the nature and extent of the contamination. The agreed-upon response actions Gelman has undertaken pursuant to the Consent Judgments have dramatically reduced the contaminant mass present in the environment and successfully protected the public from any unacceptable exposures.

In 2015, Gelman and the State began negotiating a Fourth Amended Consent Judgment in anticipation of the adoption of new, more stringent cleanup criteria. By the time the new standards took effect in October 2016, Gelman and the State had reached agreement on additional response activities required to address the more restrictive criteria and were finalizing a Fourth Amended Consent Judgment to be submitted to this Court for entry. But between November 2016 and January 2017, six new entities sought to intervene in this decades-old case. And by Orders dated January 18, 2017, and February 6, 2017 ("Intervention Orders") (Exhibits 3 and 4), over the vigorous protest of Gelman, this Court granted the motions for intervention filed by the City of Ann Arbor (the "City"), Washtenaw County, Washtenaw County Health Department, and Washtenaw County Health Officer (collectively, "the County"), the Huron River Watershed Council ("HRWC"), and Scio Township (the "Township") (collectively, "Intervenors").

To facilitate the Intervenors' participation in negotiations while avoiding the costs of active litigation, the Orders allowed Intervenors to join the negotiations and, if they were not satisfied with the progress, to file their complaints and begin litigation:

> [Intervenors] shall refrain from filing [their] proposed complaint[s] at this time. Should [Intervenors], after participating in negotiations on a proposed Fourth Amended Consent Judgment, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, [Intervenors] may file [their] complaint[s] after providing notice to the other parties.

Exhibit 3, ¶ 1.a.[1] Importantly, the Intervenors were not granted party status; they were invited to have a "seat at the table" for the Consent Judgment negotiations, but they have not filed complaints and have not joined the underlying litigation itself. If that were not the case, it would not have been necessary for the Intervention Orders to toll the statute of limitations until such time as their

[1]The Intervention Orders also tolled any applicable statute of limitations. *Id.* ¶ 1.e; Exhibit 4, ¶ 1.d.

complaints were filed. Exhibit 3, ¶ 1.e; Exhibit 4, ¶ 1.d *cf.* MCL 600.5856 (tolling statute of limitations when copy of summons and complaint are filed and served on defendant). Thus, although the Intervenors were allowed to—and did—participate in the Consent Judgment negotiations, they could not—and to this day, cannot—receive adjudication of their claims or obtain a remedy from this Court until their complaints are filed and their claims are litigated.

Gelman argued against the requested intervention for a number of reasons. Adding six new parties to the negotiations would prejudice EGLE, Gelman, and the public by delaying implementation of the Consent Judgment modifications already agreed to by Gelman and EGLE, making discussions logistically difficult, and exponentially increasing the likelihood that the Intervenors' often conflicting priorities would ultimately prevent successful negotiations and entry of a Consent Judgment and the timely implementation of a protective environmental remedy.[2]

Despite these concerns—which have since been fully realized—Gelman negotiated in good faith with the Intervenors over the course of nearly four years to accommodate their many and conflicting demands, and to bring their legal counsel and experts up to speed on this incredibly complex 30-year-old remediation project. Through these discussions, Gelman, EGLE, and the Intervenors eventually reached an agreement that Intervenor counsel and technical experts jointly recommended to their respective clients. The settlement consisted of three interrelated documents:

- A proposed Fourth Amended Consent Judgment.
- A Stipulated Order dismissing the Intervention with prejudice, but reserving for the local units of government ("LUGs") a continuing role in future decisions regarding implementation of the remedy, including via a dispute resolution process.
- Individual Settlement Agreements with the LUGs, which included liability releases and obligated the LUGs to cooperate with the agreed-upon remedy.

[2] The Court of Appeals denied Gelman's Application for interlocutory review for "failure to persuade the Court of the need for immediate appellate review." (July 14, 2017 Order, Exhibit 5). The Court of Appeals, however, did not address the merits of this Court's intervention decision.

Both the Intervenors and EGLE fully supported the settlement once it was made public. The City's Mayor, Christopher Taylor, publicly endorsed the settlement, as did the Chairperson of the County Board of Commissioners.[3] The Intervenors' technical experts and staff also embraced the terms of the proposed Fourth Amended Consent Judgment: the City's Water Treatment Manager—the official responsible for ensuring that the City's water supply is safe—promoted the settlement, and the Intervenors' technical expert issued a series of explanatory videos supporting the settlement package.[4] Finally, both Intervenors and EGLE solicited and responded to public comments, endorsing the settlement and correcting the misinformation that was fueling public criticism about the proposed resolution.[5]

Despite the unanimous support for the Fourth Amended Consent Judgment among Gelman, EGLE, and the Intervenors' technical and legal experts, this years-long process culminated in a complete failure in the form of the wholesale rejection of the settlement by the LUGs' elected officials. Rather than accepting the recommendations of their legal and technical experts, these boards and committees were swayed by vocal opposition from a small group of long-time critics of the cleanup, endorsing a complete repudiation of the State's supervision of the site and the pursuit

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[3] *See, e.g.*, Ryan Stanton, MLive, *A closer look at the proposed Gelman plume cleanup plan. Is it enough?*,https://www.mlive.com/news/ann-arbor/2020/09/a-closer-look-at-the-proposed-gelman-plume-cleanup-plan-is-it-enough.html; Ryan Stanton, MLive, *Landmark cleanup agreement announced for Ann Arbor's Gelman dioxane plume*, https://www.mlive.com/news/ann-arbor/2020/08/landmark-cleanup-agreement-announced-for-ann-arbors-gelman-dioxane-plume.html.

[4] David Fair, WEMU, *Issues of the Environment: Consent Judgment Reached to Better Remediate Gelman 1,4 Dioxane Plume*, https://www.wemu.org/post/issues-environment-consent-judgment-reached-better-remediate-gelman-14-dioxane-plume; City of Ann Arbor, Gelman Proposed Settlement Documents, https://www.a2gov.org/Pages/Gelman-Proposed-Settlement-Documents.aspx.

[5] Intervenor Response to Comments, https://www.washtenaw.org/1789/14-Dioxane; EGLE Responsiveness Summary, https://www.michigan.gov/egle/0,9429,7-135-3311_4109_9846-71595--,00.html.

instead of federal Superfund status, which would divest this Court and the State of jurisdiction.[6] Indeed, shortly after voting to reject the negotiated resolution, each of the LUGs sent a written request to Governor Whitmer asking her to petition USEPA to list the Gelman site as a federal Superfund site so that USEPA can take control over the site. (LUGs' letters to Governor attached collectively as Exhibit 6).

On November 19, 2020, Intervenors' counsel notified the Court that the Intervenors had rejected the recommended settlement. Recognizing that the negotiations had thus failed, Gelman asked the Court to set a date for the Intervenors to file their complaints, as contemplated by the Court's Intervention Orders. Instead, the Court informed counsel that a hearing would be scheduled in early 2021, after which the Court would decide whether and how to modify the Consent Judgment regarding the environmental remedy.[7] The Court issued an Order dated November 24, 2020, scheduling a "Hearing on Modification of the Consent Agreement" in January 2021, and subsequently entered the Third Amended Scheduling Order, dated December 17, 2020, establishing a new briefing schedule, setting new hearing dates in March 2021, and vacating the prior orders. Gelman now seeks reconsideration of the Third Amended Scheduling Order.

LEGAL STANDARD

"Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or

[6] The City Council and County Board of Commissioners rejected the settlement outright and passed resolutions seeking Superfund listing. The Township and HRWC initially approved the settlement, but conditioned their approval on additional modifications to the fully negotiated settlement documents. Following the election of four new Township Trustees (a majority of the seven-member board), the new Board of Trustees rescinded the previous Board's approval, and later passed a resolution rejecting the settlement and renewing its support for Superfund listing.

[7] It is not clear if the Court was referring to modifications to the Third Amended Consent Judgment or what modifications, if any, should be made to the now-rejected proposed Fourth Amended Consent Judgment.

by reasonable implication, will not be granted." MCR 2.119(F)(3). Rather, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id.*

A "palpable" error is one that is "easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." *Luckow v Luckow*, 291 Mich App 417, 426; 805 NW2d 453 (2011). MCR 2.119(F)(3) "allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *In re Moukalled Estate*, 269 Mich App 708, 714; 714 NW2d 400 (2006) (quoting *Kokx v Bylenga*, 241 Mich App 655, 659 (2000)). This is true whether or not the motion for reconsideration raises the same issue originally presented to the Court. *In re Moukalled Estate*, 269 Mich App at 713-14.

ARGUMENT

When reconsideration would render a different result, it is appropriately granted. *Three Lakes Ass'n v Kessler*, 101 Mich App 170; 300 NW2d 485 (1980). This is such a case.

I. This Court lacks the authority to modify the existing Third Amended Consent Judgment or to set terms for a proposed Fourth Amended Consent Judgment.

"In general, consent judgments are final and binding on the court and the parties, and, absent fraud, mistake or unconscionable advantage, may not be modified or set aside." 7 Mich Pl & Pr § 45:2 (2d ed) (internal citations omitted). Courts thus have very limited and circumscribed power to modify an existing consent judgment that is still in effect. Because a consent decree is "primarily the act of the parties to the litigation and proper practice requires approval as to both form and substance," the "generally accepted rule [is] that it may not be set aside without the consent of the parties thereto." *Union v Ewing*, 372 Mich 181, 186; 125 NW2d 311 (1963).

In *Shahan v Shahan*, 74 Mich App 621, 623; 254 NW2d 596 (1977), the Court of Appeals rejected a trial judge's effort to circumvent a consent judgment to do what he considered equitable

under the circumstances. When the parties to the settlement in question failed to comply with the agreement's terms, "the learned trial judge became fed up with the situation and decided to take the matter into his own hands." *Id.* at 622. The Court of Appeals was "sympathetic to [the trial judge's] well-intentioned attempt to do equity," but held that he "was powerless to alter the plain unambiguous terms" of the consent judgment, observing that unless "both parties are satisfied to repudiate the quoted proviso" of the settlement, the court was bound to "follow meticulously the terms incorporated in the original consent judgment." *Id.* at 623; *accord Goldberg v Goldberg*, 171 Mich App 643, 646-47; 430 NW2d 926 (1988) (finding that "the circuit court had no authority to enter a modification order, regardless of any possible equities weighing in defendant's favor," where condition precedent to modification set by agreement had not occurred).

This Court's attempt to settle any pending disagreements by modifying the existing Consent Judgment is—like the actions of the court in *Shahan*—certainly "well-intentioned." However, as in *Shahan*, the Court here is similarly powerless to alter the plain and unambiguous terms of the operative agreement. Those terms provide for modification of that document only by agreement of the parties (those parties being Gelman and the State), and the parties have not stipulated to amend the Consent Judgment to allow for judicial resolution of outstanding issues. *See* Section XXIV, 1992 Consent Judgment (Exhibit 7) ("This Consent Judgment may not be modified unless such modification is in writing, signed by all Parties, and approved and entered by the Court."). This provision barring this Court from unilaterally modifying the Consent Judgment absent consent of the parties is "sacrosanct," *Shahan*, 74 Mich App at 623, quoting *Dana Corp v Emp't Sec Comm'n*, 371 Mich 107, 110; 123 NW2d 277 (1963), and applies with equal force to the amendments to the Consent Judgment that have been entered to date.

The rare circumstances justifying a departure from the general rule against judicial modification of a consent judgment are not present here. For example, judicial modification was upheld in *Royal Oak Twp v City of Huntington Woods*, 313 Mich 137; 20 NW2d 840 (1945), where two municipalities entered a consent judgment settling their rights and liabilities following incorporation of the City from Township land. Claiming that several provisions of the consent judgment were inserted "through a mutual mistake of counsel and the court as to the law applicable to said special assessment bonds," the Township asked the trial court to "sua sponte" order a partial rehearing to strike the mistaken provisions. *Id.* at 140. The trial court granted the motion, ordered a rehearing, struck the affected provisions, and added instead several provisions suggested by the Township. *Id.* On review, the Supreme Court ruled that the trial court properly modified the consent judgment based upon a mistake of fact, but further held that the trial court should have ordered a complete rehearing to address other inaccuracies in the consent judgment. *Id.* at 146.

Several differences between this case and *Royal Oak* dictate a different result. First, a party to the *Royal Oak* consent judgment ***requested*** the trial court hold a rehearing and modify the consent judgment; in this sense, the term "sua sponte" is inapposite. Here, no party has requested this Court hold a hearing or modify the existing Third Amended Consent Judgment or the proposed Fourth Amended Consent Judgment. What this Court has proposed is an actual *sua sponte* hearing and modification of a consent judgment—an action squarely prohibited by both Michigan Supreme Court precedent and by the terms of the operative Consent Judgment itself.

Second, the court in *Royal Oak* modified the consent judgment to remove provisions that were based on an established mistake of fact, one of the recognized bases for modification of judgments. See MCR 2.612; *Union*, 372 Mich at 187-88 (vacating consent decree based on lack of consent); *Shelby Twp v Liquid Disposal, Inc*, 71 Mich App 152, 155-56; 246 NW2d 384 (1976)

(allowing judicial modification of consent judgment to extend period for party's compliance where reason for noncompliance "in essence was a mutual mistake"); *cf. Fort Gratiot Charter Twp v Kettlewell*, 150 Mich App 648, 655; 389 NW2d 468 (1986) (observing that "[t]he trial court is allowed to relieve a party from a judgment if it is no longer equitable that the judgment should have prospective application" and affirming modification of consent judgment without agreement of the parties based on changed circumstances). Here, no one has asserted mistake of fact, lack of consent, or any other basis allowing for a modification of a judgment. Rather, the Court seeks to impose remedies that the parties and the Intervenors have not agreed to, out of an understandable—but procedurally inappropriate—desire for expediency and finality. Such modifications to an existing judgment are neither justified nor permitted here.

To the extent this Court is instead attempting to modify the terms of the now-rejected proposed Fourth Amended Consent Judgment, that agreement is not before the Court and it would be beyond the Court's present supervisory authority to seek to modify it. A consent judgment is not enforceable unless and until it is entered by the Court. *See Trendell v Solomon*, 178 Mich App 365, 369; 443 NW2d 509 (1989) (holding once a consent judgment is entered, it becomes a judicial act and possesses the same force and character as a judgment rendered following a contested trial or motion). A proposed Fourth Amended Consent Judgment has not been submitted to this Court, and none will be filed unless and until the parties to the existing Consent Judgment—Gelman and EGLE—consent to its entry.

II. This Court cannot order a remedy for the Intervenors' claims at this stage.

A. The Court's attempt to grant relief before determining liability violates Gelman's due process rights and the terms of the Intervention Orders.

Another fundamental flaw in the Court's proposed hearing order is that the Court apparently intends to determine whether the Intervenors' proposed additional remediation

demands[8] should be incorporated as remedies in an updated Fourth Amended Consent Judgment. This approach is inconsistent with the terms by which the Court allowed the Intervenors to participate in this case. When granting the motions to intervene, this Court ruled that Intervenors are "entitled to participate in any negotiations concerning the proposed Fourth Amended Consent Judgment," and that any of them could file a complaint if they concluded "in good faith that the negotiations have failed or that insufficient progress has been made during negotiations" (Exhibit 3, ¶1; Exhibit 4, ¶ 1). None of the Intervenors has filed a complaint to date.

This is not to say that Intervenors can hold this enforcement action hostage indefinitely or that this Court should not act to move this case forward. But pursuant to this Court's Intervention Orders, the proper action is either to order Intervenors to file their complaints so that their claims to any additional remedy can be litigated, or to enter a Fourth Amended Consent Judgment negotiated and agreed to by the actual parties to this litigation—Gelman and the State. If this Court were to take the latter option, Gelman is confident that EGLE and Gelman, having already twice reached agreement on a protective remedy that comports with applicable law, would be able to present a Fourth Amended Consent Judgment to this Court for entry in short order.

In other words, there are several options to move this matter expeditiously toward a resolution. But there is no proper mechanism for the Court to ignore the terms of its own Intervention Orders and circumvent important procedural safeguards by awarding relief to the Intervenors before they have even filed their complaints. Indeed, in granting the Township's

[8] For example, on December 9, 2020, the Township passed a resolution with 19 additional demands, ranging from dictating to EGLE which analytical method to use in water sampling to barring Gelman from relying on a "Mixing Zone" to address the Groundwater/Surface Water Interface pathway as permitted under Michigan law (Exhibit 6). It is impossible to know what other demands—whether or not bounded by science or law—may be made by the Intervenors or local critics of the cleanup. And in any event, any such demands would go beyond what has been required by the regulator charged by Michigan law to supervise environmental remediation.

motion to intervene, the Court commented that while it hoped agreement could be reached, "if we can't reach a consent judgment[,] this space provides a place for those issues which can't be agreed to which are litigated, a record is established, findings of fact are made and we have appellate review." February 2, 2017 hearing transcript, p. 26 (Exhibit 8). In order to "litigate" the Intervenors' issues that could not be resolved by negotiation, the Intervenors' complaints must be filed to initiate that litigation, and the merits of the Intervenors' claims (and Gelman's defenses thereto)—which were not evaluated by this Court at the motion to intervene stage—must be adjudicated. If the Intervenors' claims survive Gelman's dispositive motions, only then can this Court proceed to discovery and then to the adjudication of the merits of the claims, and only after *that* stage fashion an appropriate remedy. *See, e.g.*, *Reo v Lane Bryant, Inc*, 211 Mich App 364, 367 n4; 536 NW2d 556 (1995) (finding discussion of available remedies premature where Department of Labor had not yet ruled on merits of plaintiff's claim); *Durant v State Bd of Educ*, 424 Mich 364, 395; 381 NW2d 662 (1985) (finding decision on proper remedy premature where factual questions had not been resolved and it was still undetermined whether plaintiffs were entitled to relief).

The Court's proposed hearing skips all of these essential procedural steps—filing of pleadings, dispositive motions, adjudications of the merits—and proceeds directly to remedies. This violates Gelman's procedural due process rights under the Michigan and United States Constitutions to be heard on its defenses and to have the Intervenors meet their burdens of proof before Gelman is forced to expend resources on additional remedies. US Const Amend XIV and Michigan Const 1963, art I § 17. Indeed, "[d]ue process requires that there be an opportunity to present every available defense," *Lindsey v Normet*, 405 US 56, 66 (1972) (quotations omitted), and this "guaranty of due process extends to state action through its judicial as well as through its

legislative, executive, or administrative branch of government," *Brinkerhoff-Faris Trust & Sav. Co v Hill*, 281 US 673, 680 (1930). In its purest form, "due process of law" implies a conformity with natural and inherent principles of justice which forbids the arbitrary taking of another's property. *Holden v Hardy*, 169 US 366, 390-391 (1898).

Here, Gelman's liability has not been established with respect to the claims asserted by either Intervenors or EGLE. In 1991, Judge Conlin granted Gelman's Motion for Involuntary Dismissal following the State's case in chief with respect to all of the significant environmental releases before Gelman even put on its defense. July 25, 1991 Opinion (Exhibit 9). That trial was never completed and Gelman was never found liable. The Consent Judgment expressly states that Gelman does not admit liability. 1992 Consent Judgment, p. 2 (Exhibit 7). Consistent with these prior rulings in this case, and with the above federal and state precedent, the Intervenors themselves have recognized Gelman's due process rights in their response to the public comments, acknowledging that "the Court has not determined Gelman's liability" and that "Gelman's fault and liability would have to be proven with evidence, and decided by a court, and Gelman could assert available defenses." Intervenor 9/24/2020 Response to Public Comments, p. 10 (Exhibit 2).

For the foregoing reasons, it would be clear error for this Court to proceed with the envisioned hearing and to order relief before Gelman's due process rights have been exercised.

B. Gelman has meritorious defenses to Intervenors' claims that must be adjudicated before relief can be granted.

Gelman's insistence that due process be followed is not a matter of form over substance, nor is it an effort to delay its obligations to implement the remedy—a remedy which Gelman committed to and was prepared to implement nearly four years ago. Rather, even a cursory review

of Intervenors' claims reveals serious questions regarding their viability, particularly the claims for injunctive relief that purport to form the basis of the remedy hearing.[9]

First, Intervenors' claims are time-barred. Intervenors' unfiled complaints seek injunctive relief under statutory (Part 201 and Part 17 of NREPA, MCL 324.20101, *et seq* and MCL 324.1701, *et seq*, respectively) and common law (nuisance, public nuisance and negligence) causes of action. Intervenors' statutory claims for injunctive relief under the NREPA are subject to the six-year limitations period established by MCL 600.5813. See *Dep't of Env't Quality v Gomez*, 318 Mich App 1, 24; 896 NW2d 39 (2016) (applying six-year limitation period of MCL 600.5813 to NREPA actions). And Intervenors' common law claims for injunctive relief are barred if filed beyond the three-year limitations period established by MCL 600.5805(2). In cases such as this involving alleged environmental contamination, the harm occurs when the alleged contaminant is first present on the plaintiff's property, regardless of when its presence is discovered. *Henry v Dow Chemical Co*, 501 Mich 965; 905 NW2d 601 (2018); *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387; 738 NW2d 664 (2007). "Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred." *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972).[10] Here, the State filed this enforcement action asserting essentially the

[9] Intervenors also seek recovery of unidentified response costs and money damages, but such monetary claims do not justify their intervention into this action or alleged need to be included in the negotiations over a remedy. Such claims must be pursued in independent lawsuits.

[10] Intervenors also cannot rely on the "continuing wrongs" doctrine to toll the statute of limitations because the Supreme Court abolished that mechanism in *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 284-85; 696 NW2d 646 (2005); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009) (applying *Garg* holding to environmental trespass and nuisance claims).

same claims in 1988. Gelman has not used 1,4-dioxane since May 1986. Intervenors' claims accrued decades ago and are therefore time-barred.

Second, Intervenors' claims for injunctive relief under Part 201 are also jurisdictionally defective. Intervenors' complaints conspicuously avoid identifying what section of Part 201 serves as the basis for their injunctive relief claims. The only section of Part 201 that allows a circuit court to award injunctive relief to a non-State claimant is Section 35, MCL 324.20135. Section 35 permits a "person, ***including a local unit of government*** on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release from a facility. . . [to] commence a civil action." MCL 324.20135(1) (emphasis added). However, there are two important restrictions on such "citizen-suit"/"local-government" actions. First, the challenging party must provide at least 60 days' written notice to EGLE of its intent to sue to EGLE. MCL 324.20135(3)(a). Second, the citizen or local government action is only permitted if "[t]he state has not commenced and is not diligently prosecuting an action under this part or under other appropriate legal authority to obtain injunctive relief concerning the facility or to require compliance with this part or a rule or an order under this part." MCL 324.20135(3)(b). Intervenors did not provide EGLE with 60-day notice, and the State has been diligently prosecuting this enforcement action since 1988. Thus, neither condition precedent has been met.

Other defenses bar Intervenors' claims in whole or in part, including the fact that the only significant releases of hazardous substances have already been found to have been "permitted releases." *See* July 1991 Opinion, pp. 19-27 (Exhibit 9); MCL 324.20126a(5) ("A person shall not be required under [Part 201] to undertake response activity for a permitted release."). Additionally, the City released in the 2006 Settlement Agreement the very claims it now asserts, rendering those claims substantively and procedurally invalid (Exhibit 10, Section IV).

In short, Gelman has shown it has substantial defenses to the claims asserted by Intervenors in their unfiled complaints, and in turn is entitled to have those defenses adjudicated before this Court determines what relief, if any, to award Intervenors.

III. This Court cannot serve as both a mediator and the trier of fact.

The other inherent problem with the Court's proposal is that it puts the Court in the untenable position of both a mediator/facilitator and the trier of fact. In the analogous context of case evaluation, the court rules state that "[a] judge may be selected as a member of a case evaluation panel, but may not preside at the trial of any action in which he or she served as a case evaluator." MCR 2.403(D)(3). The separation between presiding judge and pre-trial mediator is even more rigid when the judge is the trier of fact—in non-jury trials, a judge who learns the results of a case evaluation before rendering judgment is disqualified from further participation in the action. *Bennett v Medical Evaluation Specialists*, 244 Mich App 227, 232-33; 624 NW2d 492 (2000). A judge is also disqualified from conducting a bench trial if he or she must examine case evaluation summaries to review a case evaluation panel's determination that a claim or defense is frivolous. MCR 2.403(N)(2)(d). These rules are designed to prevent the trial judge from using what he or she has learned in the case evaluation process—including and especially matters that are inadmissible or otherwise outside of the record—from improperly influencing the judge's decision as the trier of fact. See *Bennett*, 244 Mich App at 231 (finding "[o]ne of the main concerns of the mediation rule . . . is judicial impartiality where a mediated case proceeds to trial").

The same impartiality concerns are present here to the extent this Court intends to use the scheduled hearing to mediate the differences that have arisen between Gelman, EGLE, and the Intervenors, and/or push the "parties" toward a settlement. Specifically, to the extent the Court is attempting to mediate the settlement negotiations, the Court would be disqualified from presiding over future litigation of this matter, including determination of the remedy if those negotiations

are not successful. The Court may act as a mediator or fact-finder, but not both. Gelman respectfully suggests that holding the proposed hearing for the envisioned purpose would be potentially in conflict with the Court's continued oversight of the State's enforcement action.

IV. The LUGs' pursuit of Superfund listing requires cancellation of the proposed remedy hearing.

Cancelling the hearing is also appropriate in light of the LUGs' determined efforts to divest this Court of jurisdiction by seeking federal Superfund listing. *See* Exhibit 6, Scio Township 12/9/2020 Letter to Governor (asserting that Superfund listing is "the most viable mechanism to address the environmental risks posed to the community by the Gelman contamination"). The LUGs' pursuit of Superfund listing and desire to have USEPA and the federal courts take jurisdiction from EGLE and this Court is contrary to their pursuit of a state court-supervised consent judgment. Indeed, after a City Council member introduced a resolution to delay asking the Governor to petition USEPA to take over the site until after the Court's remedy hearing is held, the same vocal critics that spurred rejection of the Fourth Amended Consent Judgment forced the sponsor to withdraw the resolution before it was even debated. (Exhibit 11, resolution and emails).

If these maneuvers continue, USEPA may well be taking over this site, which would ultimately divest this Court of jurisdiction.[11] If that occurs, USEPA and the federal courts will be devising the remedy without local control or influence, whether by the Intervenors, EGLE, or this Court. Thus, even if the Court's December 17, 2020 Third Amended Scheduling Order were procedurally and substantively proper—and it is not—it makes little sense to go forward with the extensive briefing and the envisioned remedy hearing until the USEPA issue is resolved. If the

[11] USEPA acts pursuant to federal law over which federal courts exercise exclusive jurisdiction. 42 U.S.C. 9613(b) ("[T]he United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA].").

LUGs are seeking Superfund listing in the hopes of leveraging a better settlement from Gelman, they are free to pursue that effort through negotiations.

CONCLUSION AND REQUESTED RELIEF

Gelman shares the Court's desire for an expeditious resolution to the negotiation of a Fourth Amended Consent Judgment. But the Court's proposal to hold a hearing to resolve Intervenors' claims—which have not even been filed, much less adjudicated—and potentially to order remedies against Gelman without an opportunity to litigate its defenses to liability, would violate due process and exceed this Court's power to modify an existing consent judgment. The logic and wisdom of holding such a hearing at this juncture has also been undermined by the LUGs' efforts to divest this Court of jurisdiction by pursuing an USEPA takeover of the site. Gelman respectfully asks this Court to reconsider and vacate its December 17, 2020 order scheduling the remedy hearing, and either dismiss the interventions without prejudice and enter a bilateral agreement reached between Gelman and EGLE, or order the Intervenors to file their complaints so that the merits of their claims can be litigated.

Respectfully submitted,

ZAUSMER, P.C.

/s/ Michael L. Caldwell

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Dated: January 7, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses as directed on the pleadings on January 7, 2021, 2020 by:

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel*. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

THE CITY OF ANN ARBOR,

Intervenor,

and

WASHTENAW COUNTY,

Intervenor,

and

THE WASHTENAW COUNTY HEALTH DEPARTMENT,

Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,

Intervenor,

and

THE HURON RIVER WATERSHED COUNCIL,

Intervenor,

and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

/

Case No. 88-34734-CE
Hon. Timothy P. Connors

GELMAN SCIENCES, INC.'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

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GELMAN SCIENCES, INC.'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

Defendant Gelman Sciences, Inc. ("Gelman") hereby respectfully moves the Court pursuant to MCR 2.614(D) and MCR 7.209(A) to stay its December 17, 2020 Third Amended Scheduling Order setting a "Hearing on Modification of the Consent Agreement." Gelman seeks this stay pending the Court's ruling on Gelman's motion for reconsideration, filed January 7, 2021,

and, if that motion is denied, pending a decision on Gelman's forthcoming Application for Leave to Appeal to the Michigan Court of Appeals from the Third Amended Scheduling Order, and, if the Application is granted, until all appellate proceedings are complete. In support of this Motion, Gelman relies on the accompanying Brief.

Respectfully submitted,

ZAUSMER, P.C.

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel*. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

THE CITY OF ANN ARBOR,

Intervenor,

and

WASHTENAW COUNTY,

Intervenor,

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THE WASHTENAW COUNTY HEALTH DEPARTMENT,

Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,

Intervenor,

and

THE HURON RIVER WATERSHED COUNCIL,

Intervenor,

and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

/

Case No. 88-34734-CE
Hon. Timothy P. Connors

BRIEF IN SUPPORT OF GELMAN SCIENCES, INC.'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

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BRIEF IN SUPPORT OF MOTION FOR STAY OF ORDER SETTING HEARING ON MODIFICATION OF CONSENT AGREEMENT

On January 7, 2021, Defendant Gelman Sciences, Inc. ("Gelman") filed its motion for reconsideration of this Court's December 17, 2020 Third Amended Scheduling Order setting a hearing regarding a potential modification of the "Consent Agreement". Because the Court has yet to act on Gelman's motion for reconsideration, and in light of the imminent briefing and

hearing schedule, Gelman respectfully seeks a stay of the Court's December 17, 2020 Order. A stay is needed to allow Gelman to file an application for leave to appeal in the event its motion for reconsideration is denied, and would serve the interests of judicial economy and conserve the parties' resources.

Under the Court's briefing schedule, Intervenors must file their briefs by January 29, 2021, Gelman's briefs are due by February 12, 2021, and the State's briefs are due by February 26, 2021. Unless this Court reconsiders its decision to hold this hearing, Gelman will file an application for leave to appeal to the Michigan Court of Appeals raising the same arguments set forth in its reconsideration motion. Under MCR 7.209(A)(1), "an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders." This Court has authority to grant such a stay under MCR 2.614(D) and MCR 7.209(A). Gelman thus asks the Court to either grant its motion for reconsideration or, pursuant to MCR 2.614(D) and MCR 7.209(A), to stay the hearing presently scheduled for March 8–9, 2021 and the associated briefing schedule, pending the Court of Appeals' decision on Gelman's application for leave to appeal.

If the Court of Appeals agrees with Gelman that this Court's proposed hearing is procedurally improper, then holding the envisioned hearing would be a moot exercise that would waste precious judicial resources during the COVID-19 pandemic, as well as the public resources of the State and the Intervenors and Gelman's private resources. Further, without the requested stay, Gelman, EGLE, Intervenors, and this Court will be required to expend considerable time and resources litigating, determining, *and potentially implementing* a Court-ordered remedy—even though the Court of Appeals may ultimately conclude that the hearing and process that produced that remedy should never have taken place. The Court also risks disqualifying itself as the judicial

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finder of fact if it uses the hearing to mediate the differences that have arisen between Gelman, the State and the Intervenors.

Staying the hearing makes additional sense in light of the local units of governments' determined efforts to divest this Court of jurisdiction by seeking federal Superfund listing. If the USEPA takes over this site, then USEPA and the federal courts will be determining the remedy without local control and without influence by this Court. Thus, even if the proposed hearing were procedurally and substantively proper—and it is not—it still makes little sense to go forward with the extensive briefing and the envisioned remedy hearing until the USEPA issue is resolved.

Prudence and judicial restraint weigh in favor of staying the scheduled hearing until the Court rules on Gelman's motion for reconsideration, and if that motion is denied, until the Court of Appeals rules on Gelman's objections to that hearing. No party will be prejudiced by staying the hearing until the Court of Appeals can consider Gelman's application. Gelman will, as it has throughout the intervention negotiations, continue to implement the response actions set forth in the Third Amended Consent Judgment. These response actions have and will continue to prevent any unacceptable exposures to the groundwater contamination, even under the new, more stringent, state-wide cleanup standards. And as indicated, Gelman remains willing and eager to resume negotiations directly with EGLE, if this Court determines to dismiss the Intervenors at this time. Gelman believes that it can reach a prompt and effective resolution with EGLE on a Fourth Amended Consent Judgment.

Gelman therefore asks the Court to either grant its motion for reconsideration or, pursuant to MCR 2.614(D) and MCR 7.209(A), to stay its December 17, 2020 Order scheduling the remedy hearing pending the Court of Appeals' decision on Gelman's Application for Leave to Appeal,

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and, if the Application is granted, until all appellate proceedings are complete. Gelman submits that no bond is necessary, as no judgment has yet been entered.

Respectfully submitted,

ZAUSMER, P.C.

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Dated: January 22, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses as directed on the pleadings on January 22, 2021, 2021 by:

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STATE OF MICHIGAN WASHTENAW COUNTY TRIAL COURT	**FOURTH** **AMENDED SCHEDULING ORDER**	CASE NO. 88-034734-CE JUDGE Timothy P. Connors

Court address
101 E. HURON, P.O. BOX 8645, ANN ARBOR, MI 48107

Court telephone no.
734-222-3001

Kelley, Frank J/attorney vs Gelman Sciences Inc

Plaintiff's attorney, bar no.	Defendant's attorney, bar no.
Brian J. Negele; P41846	Michael L CaldwellP40554

There is a Hearing on Modification of the Consent Agreement set for March 22-23 , 2021 at 9:00 AM

Before commencement of the Hearing, counsel shall submit Briefs and Expert reports in accordance with the following schedule:

Intervenors by 2/12/2021

Gelman response by 2/26/2021

EGLE response/Intervenors' reply by 3/12/2021

The Court's previous Scheduling Orders regarding this hearing are vacated and replaced by this Amended Order.

Gelman agrees to this amended schedule, but maintains its previously stated objections to the decision to hold the hearing.

1/27/2021
Date

/s/ Timothy Connors 1/27/2021
Timothy P. Connors
Trial Court Judge

SEAL OF THE CIRCUIT COURT OF WASHTENAW CO. MICH.

(NJTO 01)

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel*. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

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and

WASHTENAW COUNTY,

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THE WASHTENAW COUNTY HEALTH DEPARTMENT,

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and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,

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and

THE HURON RIVER WATERSHED COUNCIL,

Intervenor,

and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

/

Case No. 88-34734-CE
Hon. Timothy P. Connors

SUPPLEMENTAL BRIEF IN SUPPORT OF GELMAN SCIENCES, INC.'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

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SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR STAY OF ORDER SETTING HEARING ON MODIFICATION OF CONSENT AGREEMENT

Defendant Gelman Sciences, Inc. ("Gelman") files this supplemental brief in support of its previously-filed motion for stay. Gelman wishes to make clear that the arguments raised in that motion are being asserted with respect to the Court's January 27, 2021 Fourth Amended Scheduling Order, which vacates and replaces the previously-issued Third Amended Scheduling

Order. To be clear, a stay of the proceedings outlined in the Fourth Amended Scheduling Order is necessary to allow Gelman to file an application for leave to appeal in the event that its pending motion for reconsideration is denied, and would serve the interests of judicial economy and conserve the parties' resources.

Gelman therefore asks the Court to either grant its motion for reconsideration or, pursuant to MCR 2.614(D) and MCR 7.209(A), to stay its January 27, 2021 Order scheduling the remedy hearing pending the Court of Appeals' decision on Gelman's Application for Leave to Appeal, and, if the Application is granted, until all appellate proceedings are complete.

Respectfully submitted,

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Dated: January 27, 2021

PROOF OF SERVICE

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/s/Holly Hood
Holly Hood

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel*. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

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and

THE CITY OF ANN ARBOR,

Intervenor,

and

WASHTENAW COUNTY,

Intervenor,

and

THE WASHTENAW COUNTY HEALTH DEPARTMENT,

Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,

Intervenor,

and

THE HURON RIVER WATERSHED COUNCIL,

Intervenor,

and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

/

Case No. 88-34734-CE

Hon. Timothy P. Connors

GELMAN SCIENCES, INC.'S MOTION FOR RECONSIDERATION OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT AND BRIEF IN SUPPORT

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GELMAN SCIENCES, INC.'S MOTION FOR RECONSIDERATION OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

Defendant Gelman Sciences, Inc. ("Gelman") hereby respectfully moves the Court pursuant to MCR 2.119(F) to reconsider and vacate its Fourth Amended Scheduling Order dated January 27, 2021 (Exhibit 1). In support of this Motion, Gelman relies on the accompanying Brief. Pursuant to MCR 2.119(F)(2), no response to the Motion may be filed, and there is no oral argument, unless the Court otherwise directs.

Respectfully submitted,

ZAUSMER, P.C.

/s/ Michael L. Caldwell

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Dated: January 28, 2021

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF ORDER SETTING HEARING ON MODIFICATION OF CONSENT AGREEMENT

INTRODUCTION

When this Court erroneously permitted—over Gelman's strenuous objection—six new entities to intervene in this decades-old enforcement action, it was for the limited purpose of granting those entities a "seat at the table" in negotiations between Gelman and the State regarding a proposed Fourth Amended Consent Judgment. By that point, the State and Gelman had already reached consensus on a revised agreement that would have fully incorporated the new state-wide cleanup standards made effective on October 27, 2016. But for the ill-fated interventions, Gelman and the State would have entered the new Consent Judgment in 2017, and the fully protective remedy addressing the new state-wide standards would be well underway.

Gelman continues to object to the involvement of the Intervenors in negotiations regarding a remedy that had, for more than 30 years, proceeded only as between Gelman and the regulator authorized by law to oversee precisely this sort of remediation. But despite these objections, and despite the Court's error in awarding intervention, Gelman nevertheless participated in good faith for almost four years in the "intervention negotiations" sponsored by this Court. That process produced a comprehensive resolution that included remedial actions well beyond those necessary to provide a protective remedy and gave Intervenors limited continuing rights regarding implementation of that remedy. As a result, the parties and the Intervenors' counsel represented to this Court on August 12, 2020 that a tentative agreement had been reached.

Soon thereafter, however, in a surprising blow that wiped away four years of work, the Intervenors' elected officials rejected the settlement. They apparently believe either that a "better" resolution is somehow available through this Court or the political process, or that their interests

will be better protected by the U.S. Environmental Protection Agency ("USEPA") than the State. Gelman disagrees in all respects.

As the intervention has clearly failed to achieve a resolution, Gelman submits that there are now only two options: for the Court to dismiss the interventions without prejudice and enter a duly-negotiated settlement reached between the parties to this case (Gelman and the State), allowing Gelman to undertake the remedy it has been ready to implement for four years; or for the Intervenors to file their complaints so that the merits of their claims can be litigated. What is not an option, but what this Court has nevertheless ordered, is for the Court to hold a hearing to weigh evidence and order a remedy in lieu of a negotiated Fourth Amended Consent Judgment—all prior to any adjudication of the merits of the Intervenors' as-yet-unfiled claims. This constitutes palpable error for which reconsideration is required. *See* MCR 2.119(F)(3). Furthermore, it, would be counterproductive to the shared goal of Gelman, EGLE, and this Court to promptly implement a protective remedy via a revised Consent Judgment.

Gelman thus respectfully asks the Court to reconsider and vacate its January 27, 2021 scheduling order setting such a remedy hearing for four reasons:

First, the Court cannot modify either the existing Third Amended Consent Judgment or the proposed Fourth Amended Consent Judgment absent the consent of the parties to those agreements—the State and Gelman. While the Court's frustration with the failure of the "intervention negotiations" is understandable (and shared by Gelman), it would be procedurally improper for the Court to modify those agreements without the parties' consent, and would deprive Gelman of its opportunity to negotiate in good faith with the responsible regulator.

Second, any award of relief to the Intervenors and against Gelman in the form of a new remedy violates Gelman's right to due process. Gelman is entitled to an opportunity to be heard

on its meritorious defenses to the Intervenors' claims, which have not even been filed with the Court. Indeed, Intervenors themselves have acknowledged both Gelman's right to its defenses and the requirement that Gelman's fault and liability be proven before relief against Gelman can be awarded. Intervenor 9/24/2020 Response to Public Comments (Legal), p. 10 (Exhibit 2). It would be procedurally and substantively improper for the Court to proceed directly to the remedy stage of litigation and adjudicate Gelman's liability when litigation has not yet even commenced.

Third, insofar as the Court is seeking to take an active role in mediating the Intervenors' rejection of the proposed Fourth Amended Consent Judgment, as the Court appears to envision under its order, it risks losing its ability to later adjudicate the dispute if necessary. The Court may serve as either the mediator or the fact-finder; it cannot serve as both.

Fourth, the Intervenors are currently seeking USEPA listing of the Gelman site on the National Priorities List for Superfund status. Should the site be listed, the federal government and the federal courts will assume oversight, divesting this Court of jurisdiction. In light of these ongoing overtures by Intervenors, further efforts to produce a revised Consent Judgment through this process would be futile. Further, proceeding with a costly and time-consuming remedy hearing would be a waste of the parties' and this Court's resources, and would not serve the interests of judicial economy.

For these reasons, Gelman respectfully requests this Court reconsider and vacate its Fourth Amended Scheduling Order, and either dismiss the interventions without prejudice (which would allow Gelman and the State to enter a bilateral agreement), or order the Intervenors to file their complaints so that the merits of their claims can be litigated without further delay.

FACTUAL BACKGROUND

This Court has presided over the State of Michigan's environmental enforcement action

involving the Gelman Site for over 30 years. In 1992, the then-Michigan Department of Natural Resources, (n/k/a Department of Environment, Great Lakes, and Energy ("EGLE")) and Gelman successfully negotiated a Consent Judgment setting forth the environmental response actions required to address the 1,4-dioxane contamination associated with former operations of Gelman's Wagner Road facility. Since then, the State and Gelman have successfully negotiated three amended Consent Judgments—the last entered in 2011—to address changing cleanup standards and new legal requirements, and to reflect the parties' evolving understanding of the nature and extent of the contamination. The agreed-upon response actions Gelman has undertaken pursuant to the Consent Judgments have dramatically reduced the contaminant mass present in the environment and successfully protected the public from any unacceptable exposures.

In 2015, Gelman and the State began negotiating a Fourth Amended Consent Judgment in anticipation of the adoption of new, more stringent cleanup criteria. By the time the new standards took effect in October 2016, Gelman and the State had reached agreement on additional response activities required to address the more restrictive criteria and were finalizing a Fourth Amended Consent Judgment to be submitted to this Court for entry. But between November 2016 and January 2017, six new entities sought to intervene in this decades-old case. And by Orders dated January 18, 2017, and February 6, 2017 ("Intervention Orders") (Exhibits 3 and 4), over the vigorous protest of Gelman, this Court granted the motions for intervention filed by the City of Ann Arbor (the "City"), Washtenaw County, Washtenaw County Health Department, and Washtenaw County Health Officer (collectively, "the County"), the Huron River Watershed Council ("HRWC"), and Scio Township (the "Township") (collectively, "Intervenors").

To facilitate the Intervenors' participation in negotiations while avoiding the costs of active litigation, the Orders allowed Intervenors to join the negotiations and, if they were not satisfied

with the progress, to file their complaints and begin litigation:

> [Intervenors] shall refrain from filing [their] proposed complaint[s] at this time. Should [Intervenors], after participating in negotiations on a proposed Fourth Amended Consent Judgment, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, [Intervenors] may file [their] complaint[s] after providing notice to the other parties.

Exhibit 3, ¶ 1.a.[1] Importantly, the Intervenors were not granted party status; they were invited to have a "seat at the table" for the negotiations, but they have not filed complaints or joined the underlying litigation itself. If that were not the case, it would not have been necessary for the Intervention Orders to toll the statute of limitations until the complaints were filed. Exhibit 3, ¶ 1.e; Exhibit 4, ¶ 1.d *cf.* MCL 600.5856 (tolling statute of limitations when summons and complaint are filed and served on defendant). Thus, although the Intervenors were allowed to—and did—participate in the negotiations, they could not—and still cannot—receive adjudication of their claims or obtain a remedy until their complaints are filed and their claims are litigated.

Gelman argued against the requested intervention for a number of reasons. Adding six new parties to the negotiations would prejudice EGLE, Gelman, and the public by delaying implementation of the Consent Judgment modifications already agreed to by Gelman and EGLE, making discussions logistically difficult, and exponentially increasing the likelihood that the Intervenors' often conflicting priorities would ultimately prevent successful negotiations and entry of a Consent Judgment and the timely implementation of a protective environmental remedy.[2]

Despite these concerns—which have since been fully realized—Gelman negotiated in good faith with the Intervenors for nearly four years to accommodate their many and conflicting

[1]The Intervention Orders also tolled any statute of limitations. *Id.* ¶ 1.e; Exhibit 4, ¶ 1.d.

[2] The Court of Appeals denied Gelman's Application for interlocutory review for "failure to persuade the Court of the need for immediate appellate review." (July 14, 2017 Order, Exhibit 5). The Court of Appeals, however, did not address the merits of this Court's intervention decision.

demands, and to bring their legal counsel and experts up to speed on this incredibly complex 30-year-old remediation project. Through these discussions, Gelman, EGLE, and the Intervenors eventually reached an agreement that Intervenor counsel and technical experts jointly recommended to their respective clients. The settlement consisted of three interrelated documents:

- A proposed Fourth Amended Consent Judgment.
- A Stipulated Order dismissing the Intervention with prejudice, but reserving for the local units of government ("LUGs") a continuing role in future decisions regarding implementation of the remedy, including via a dispute resolution process.
- Individual Settlement Agreements with the LUGs, which included liability releases and obligated the LUGs to cooperate with the agreed-upon remedy.

The Intervenors and EGLE supported the settlement once it was made public. The City's Mayor publicly endorsed the settlement, as did the Chairperson of the County Board of Commissioners.[3] The City's Water Treatment Manager—the official responsible for ensuring that the City's water supply is safe—promoted the settlement, and the Intervenors' technical expert issued a series of explanatory videos supporting the settlement package.[4] Finally, Intervenors and EGLE solicited and responded to public comments, endorsing the settlement and correcting misinformation that fueled public criticism about the proposed resolution.[5]

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[3] *See, e.g.*, Ryan Stanton, MLive, *A closer look at the proposed Gelman plume cleanup plan. Is it enough?*,https://www.mlive.com/news/ann-arbor/2020/09/a-closer-look-at-the-proposed-gelman-plume-cleanup-plan-is-it-enough.html; Ryan Stanton, MLive, *Landmark cleanup agreement announced for Ann Arbor's Gelman dioxane plume*, https://www.mlive.com/news/ann-arbor/2020/08/landmark-cleanup-agreement-announced-for-ann-arbors-gelman-dioxane-plume.html.

[4] David Fair, WEMU, *Issues of the Environment: Consent Judgment Reached to Better Remediate Gelman 1,4 Dioxane Plume*, https://www.wemu.org/post/issues-environment-consent-judgment-reached-better-remediate-gelman-14-dioxane-plume; City of Ann Arbor, Gelman Proposed Settlement Documents, https://www.a2gov.org/Pages/Gelman-Proposed-Settlement-Documents.aspx.

[5] Intervenor Response to Comments, https://www.washtenaw.org/1789/14-Dioxane; EGLE Responsiveness Summary, https://www.michigan.gov/egle/0,9429,7-135-3311_4109_9846-71595--,00.html.

Despite the unanimous support for the Fourth Amended Consent Judgment among Gelman, EGLE, and the Intervenors' technical and legal experts, this years-long process culminated in a complete failure in the form of the wholesale rejection of the settlement by the LUGs' elected officials. Rather than accepting the recommendations of their legal and technical experts, these boards and committees were swayed by vocal opposition from a small group of long-time critics of the cleanup, endorsing a complete repudiation of the State's supervision of the site and the pursuit instead of federal Superfund status, which would divest this Court and the State of jurisdiction.[6] Indeed, shortly after voting to reject the negotiated resolution, each of the LUGs sent a written request to Governor Whitmer asking her to petition USEPA to list the Gelman site as a federal Superfund site so that USEPA can control the site. (Exhibit 6, LUGs' letters to Governor).

On November 19, 2020, Intervenors' counsel notified the Court that the Intervenors had rejected the recommended settlement. Recognizing that the negotiations had thus failed, Gelman asked the Court to set a date for the Intervenors to file their complaints, as contemplated by the Court's Intervention Orders. Instead, the Court informed counsel that a hearing would be scheduled in early 2021, after which the Court would decide whether and how to modify the Consent Judgment regarding the environmental remedy.[7] The Court issued an Order dated November 24, 2020, scheduling a "Hearing on Modification of the Consent Agreement" in January 2021, and subsequently entered the Fourth Amended Scheduling Order, dated January 27, 2021,

[6] The City Council and County Board of Commissioners rejected the settlement outright and passed resolutions seeking Superfund listing. The Township and HRWC initially approved the settlement, but conditioned their approval on additional modifications to the fully negotiated settlement documents. Following the election of four new Township Trustees (a majority of the seven-member board), the new Board of Trustees rescinded the previous Board's approval, and later passed a resolution rejecting the settlement and renewing its support for Superfund listing.

[7] It is not clear if the Court was referring to modifications to the Third Amended Consent Judgment or modifications to the now-rejected proposed Fourth Amended Consent Judgment.

establishing a new briefing schedule, setting new hearing dates in March 2021, and vacating the prior orders. Gelman now seeks reconsideration of the Fourth Amended Scheduling Order.

LEGAL STANDARD

"Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3). Rather, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." *Id.*

A "palpable" error is one that is "easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." *Luckow v Luckow*, 291 Mich App 417, 426; 805 NW2d 453 (2011). MCR 2.119(F)(3) "allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *In re Moukalled Estate*, 269 Mich App 708, 714; 714 NW2d 400 (2006) (quoting *Kokx v Bylenga*, 241 Mich App 655, 659 (2000)). This is true whether or not the motion for reconsideration raises the same issue originally presented to the Court. *In re Moukalled Estate*, 269 Mich App at 713-14.

ARGUMENT

When reconsideration would render a different result, it is appropriately granted. *Three Lakes Ass'n v Kessler*, 101 Mich App 170; 300 NW2d 485 (1980). This is such a case.

I. This Court lacks the authority to modify the existing Third Amended Consent Judgment or to set terms for a proposed Fourth Amended Consent Judgment.

"In general, consent judgments are final and binding on the court and the parties, and, absent fraud, mistake or unconscionable advantage, may not be modified or set aside." 7 Mich Pl & Pr § 45:2 (2d ed) (internal citations omitted). Courts thus have very limited and circumscribed power to modify an existing consent judgment that is still in effect. Because a consent decree is

"primarily the act of the parties to the litigation and proper practice requires approval as to both form and substance," the "generally accepted rule [is] that it may not be set aside without the consent of the parties thereto." *Union v Ewing*, 372 Mich 181, 186; 125 NW2d 311 (1963).

In *Shahan v Shahan*, 74 Mich App 621, 623; 254 NW2d 596 (1977), the Court of Appeals rejected a trial judge's effort to circumvent a consent judgment to do what he considered equitable under the circumstances. When the parties to the settlement in question failed to comply with the agreement's terms, "the learned trial judge became fed up with the situation and decided to take the matter into his own hands." *Id.* at 622. The Court of Appeals was "sympathetic to [the trial judge's] well-intentioned attempt to do equity," but held that he "was powerless to alter the plain unambiguous terms" of the consent judgment, observing that unless "both parties are satisfied to repudiate the quoted proviso" of the settlement, the court was bound to "follow meticulously the terms incorporated in the original consent judgment." *Id.* at 623; *accord Goldberg v Goldberg*, 171 Mich App 643, 646-47; 430 NW2d 926 (1988) (finding that "the circuit court had no authority to enter a modification order, regardless of any possible equities weighing in defendant's favor," where condition precedent to modification set by agreement had not occurred).

This Court's attempt to settle any pending disagreements by modifying the existing Consent Judgment is—like the actions of the court in *Shahan*—certainly "well-intentioned." However, as in *Shahan*, the Court here is similarly powerless to alter the plain and unambiguous terms of the operative agreement. Those terms provide for modification of that document only by agreement of the parties (those parties being Gelman and the State), and the parties have not stipulated to amend the Consent Judgment to allow for judicial resolution of outstanding issues. *See* Section XXIV, 1992 Consent Judgment (Exhibit 7) ("This Consent Judgment may not be modified unless such modification is in writing, signed by all Parties, and approved and entered

by the Court."). This provision barring this Court from unilaterally modifying the Consent Judgment absent consent of the parties is "sacrosanct," *Shahan*, 74 Mich App at 623, quoting *Dana Corp v Emp't Sec Comm'n*, 371 Mich 107, 110; 123 NW2d 277 (1963), and applies with equal force to the amendments to the Consent Judgment that have been entered to date.

The rare circumstances justifying a departure from the general rule against judicial modification of a consent judgment are not present here. For example, judicial modification was upheld in *Royal Oak Twp v City of Huntington Woods*, 313 Mich 137; 20 NW2d 840 (1945), where two municipalities entered a consent judgment settling their rights and liabilities following incorporation of the City from Township land. Claiming that several provisions of the consent judgment were inserted "through a mutual mistake of counsel and the court as to the law applicable to said special assessment bonds," the Township asked the trial court to "sua sponte" order a partial rehearing to strike the mistaken provisions. *Id.* at 140. The trial court granted the motion, ordered a rehearing, struck the affected provisions, and added instead several provisions suggested by the Township. *Id*. On review, the Supreme Court ruled that the trial court properly modified the consent judgment based upon a mistake of fact, but further held that the trial court should have ordered a complete rehearing to address other inaccuracies in the consent judgment. *Id.* at 146.

Several differences between this case and *Royal Oak* dictate a different result. First, a party to the *Royal Oak* consent judgment ***requested*** the trial court hold a rehearing and modify the consent judgment; in this sense, the term "sua sponte" is inapposite. Here, no party has requested this Court hold a hearing or modify the existing Third Amended Consent Judgment or the proposed Fourth Amended Consent Judgment. What this Court has proposed is an actual *sua sponte* hearing and modification of a consent judgment—an action squarely prohibited by both Michigan Supreme Court precedent and by the terms of the operative Consent Judgment itself.

Second, the court in *Royal Oak* modified the consent judgment to remove provisions that were based on an established mistake of fact, one of the recognized bases for modification of judgments. See MCR 2.612; *Union*, 372 Mich at 187-88 (vacating consent decree based on lack of consent); *Shelby Twp v Liquid Disposal, Inc*, 71 Mich App 152, 155-56; 246 NW2d 384 (1976) (allowing judicial modification of consent judgment to extend period for party's compliance where reason for noncompliance "in essence was a mutual mistake"); *cf. Fort Gratiot Charter Twp v Kettlewell*, 150 Mich App 648, 655; 389 NW2d 468 (1986) (observing that "[t]he trial court is allowed to relieve a party from a judgment if it is no longer equitable that the judgment should have prospective application" and affirming modification of consent judgment without parties' agreement based on changed circumstances). Here, no one has asserted mistake of fact, lack of consent, or any other basis allowing for a modification of a judgment. Rather, the Court seeks to impose remedies that the parties and the Intervenors have not agreed to, out of an understandable—but procedurally inappropriate—desire for expediency and finality. Such modifications to an existing judgment are neither justified nor permitted here.

To the extent this Court is instead attempting to modify the terms of the now-rejected proposed Fourth Amended Consent Judgment, that agreement is not before the Court and it would be beyond the Court's present supervisory authority to seek to modify it. A consent judgment is not enforceable unless and until it is entered by the Court. *See Trendell v Solomon*, 178 Mich App 365, 369; 443 NW2d 509 (1989) (holding once a consent judgment is entered, it becomes a judicial act and possesses the same force and character as a contested judgment). A proposed Fourth Amended Consent Judgment has not been submitted to this Court, and none will be filed unless and until the parties to the existing Consent Judgment—Gelman and EGLE—consent to its entry.

II. This Court cannot order a remedy for the Intervenors' claims at this stage.

A. The Court's attempt to grant relief before determining liability violates Gelman's due process rights and the terms of the Intervention Orders.

Another fundamental flaw in the Court's proposed hearing order is that the Court apparently intends to determine whether the Intervenors' proposed additional remediation demands[8] should be incorporated as remedies in an updated Fourth Amended Consent Judgment. This approach is inconsistent with the terms by which the Court allowed the Intervenors to participate in this case. When granting the motions to intervene, this Court ruled that Intervenors are "entitled to participate in any negotiations concerning the proposed Fourth Amended Consent Judgment," and that any of them could file a complaint if they concluded "in good faith that the negotiations have failed or that insufficient progress has been made during negotiations" (Exhibit 3, ¶1; Exhibit 4, ¶ 1). None of the Intervenors has filed a complaint to date.

This is not to say that Intervenors can hold this enforcement action hostage indefinitely or that this Court should not act to move this case forward. But pursuant to this Court's Intervention Orders, the proper action is either to order Intervenors to file their complaints so that their claims to any additional remedy can be litigated, or to enter a Fourth Amended Consent Judgment negotiated and agreed to by the actual parties to this litigation—Gelman and the State. If this Court were to take the latter option, Gelman is confident that EGLE and Gelman, having already twice reached agreement on a protective remedy that comports with applicable law, would be able

[8] For example, on December 9, 2020, the Township passed a resolution with 19 additional demands, ranging from dictating to EGLE which analytical method to use in water sampling to barring Gelman from relying on a "Mixing Zone" to address the Groundwater/Surface Water Interface pathway as permitted under Michigan law (Exhibit 6). It is impossible to know what other demands—whether or not bounded by science or law—may be made by the Intervenors or local critics of the cleanup. And in any event, any such demands would go beyond what has been required by the regulator charged by Michigan law to supervise environmental remediation.

to present a Fourth Amended Consent Judgment to this Court for entry in short order.

In other words, there are several options to move this matter expeditiously toward a resolution. But there is no proper mechanism for the Court to ignore the terms of its own Intervention Orders and circumvent important procedural safeguards by awarding relief to the Intervenors before they have even filed their complaints. Indeed, in granting the Township's motion to intervene, the Court commented that while it hoped agreement could be reached, "if we can't reach a consent judgment[,] this space provides a place for those issues which can't be agreed to which are litigated, a record is established, findings of fact are made and we have appellate review." February 2, 2017 hearing transcript, p. 26 (Exhibit 8). In order to "litigate" the Intervenors' issues that could not be resolved by negotiation, the Intervenors' complaints must be filed to initiate that litigation, and the merits of the Intervenors' claims (and Gelman's defenses thereto)—which were not evaluated by this Court at the motion to intervene stage—must be adjudicated. If the Intervenors' claims survive Gelman's dispositive motions, only then can this Court proceed to discovery and then to the adjudication of the merits of the claims, and only after *that* stage fashion an appropriate remedy. *See, e.g.*, *Reo v Lane Bryant, Inc*, 211 Mich App 364, 367 n4; 536 NW2d 556 (1995) (finding discussion of available remedies premature where Department of Labor had not yet ruled on merits of plaintiff's claim); *Durant v State Bd of Educ*, 424 Mich 364, 395; 381 NW2d 662 (1985) (finding decision on proper remedy premature where factual questions were unresolved and plaintiff's entitlement to relief was undetermined).

The Court's proposed hearing skips all of these essential procedural steps—filing of pleadings, dispositive motions, adjudications of the merits—and proceeds directly to remedies. This violates Gelman's procedural due process rights under the Michigan and United States Constitutions to be heard on its defenses and to have the Intervenors meet their burdens of proof

before Gelman is forced to expend resources on additional remedies. US Const Amend XIV and Michigan Const 1963, art I § 17. Indeed, "[d]ue process requires that there be an opportunity to present every available defense," *Lindsey v Normet*, 405 US 56, 66 (1972) (quotations omitted), and this "guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government," *Brinkerhoff-Faris Trust & Sav. Co v Hill*, 281 US 673, 680 (1930). In its purest form, "due process of law" implies a conformity with natural and inherent principles of justice which forbids the arbitrary taking of another's property. *Holden v Hardy*, 169 US 366, 390-391 (1898).

Here, Gelman's liability has not been established with respect to the claims asserted by either Intervenors or EGLE. In 1991, Judge Conlin granted Gelman's Motion for Involuntary Dismissal following the State's case in chief with respect to all of the significant environmental releases before Gelman even put on its defense. July 25, 1991 Opinion (Exhibit 9). That trial was never completed and Gelman was never found liable. The Consent Judgment expressly states that Gelman does not admit liability. 1992 Consent Judgment, p. 2 (Exhibit 7). Consistent with these prior rulings in this case, and with the above federal and state precedent, the Intervenors themselves have recognized Gelman's due process rights in their response to the public comments, acknowledging that "the Court has not determined Gelman's liability" and that "Gelman's fault and liability would have to be proven with evidence, and decided by a court, and Gelman could assert available defenses." Intervenor 9/24/2020 Response to Public Comments, p. 10 (Exhibit 2).

For the foregoing reasons, it would be clear error for this Court to proceed with the envisioned hearing and to order relief before Gelman's due process rights have been exercised.

B. Gelman has meritorious defenses to Intervenors' claims that must be adjudicated before relief can be granted.

Gelman's insistence that due process be followed is not a matter of form over substance, nor is it an effort to delay its obligations to implement the remedy—a remedy which Gelman committed to and was prepared to implement nearly four years ago. Rather, even a cursory review of Intervenors' claims reveals serious questions regarding their viability, particularly the claims for injunctive relief that purport to form the basis of the remedy hearing. [9]

First, Intervenors' claims are time-barred. Intervenors' unfiled complaints seek injunctive relief under statutory (Part 201 and Part 17 of NREPA, MCL 324.20101, *et seq* and MCL 324.1701, *et seq*, respectively) and common law (nuisance, public nuisance and negligence) causes of action. Intervenors' statutory claims for injunctive relief under the NREPA are subject to the six-year limitations period established by MCL 600.5813. See *Dep't of Env't Quality v Gomez*, 318 Mich App 1, 24; 896 NW2d 39 (2016) (applying six-year limitation period of MCL 600.5813 to NREPA actions). And Intervenors' common law claims for injunctive relief are barred if filed beyond the three-year limitations period established by MCL 600.5805(2). In cases such as this involving alleged environmental contamination, the harm occurs when the alleged contaminant is first present on the plaintiff's property, regardless of when its presence is discovered. *Henry v Dow Chemical Co*, 501 Mich 965; 905 NW2d 601 (2018); *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387; 738 NW2d 664 (2007). "Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred." *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 151; 200 NW2d 70 (1972).[10] Here, the State filed this enforcement action asserting essentially the

[9] Intervenors also seek recovery of unidentified response costs and money damages, but such monetary claims do not justify their intervention into this action or alleged need to be included in the negotiations over a remedy. Such claims must be pursued in independent lawsuits.

[10] Intervenors also cannot rely on the "continuing wrongs" doctrine to toll the statute of limitations because the Supreme Court abolished that mechanism in *Garg v Macomb County Community*

same claims in 1988. Gelman has not used 1,4-dioxane since May 1986. Intervenors' claims accrued decades ago and are therefore time-barred.

Second, Intervenors' claims for injunctive relief under Part 201 are also jurisdictionally defective. Intervenors' complaints conspicuously avoid identifying what section of Part 201 serves as the basis for their injunctive relief claims. The only section of Part 201 that allows a circuit court to award injunctive relief to a non-State claimant is Section 35, MCL 324.20135. Section 35 permits a "person, ***including a local unit of government*** on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release from a facility. . . [to] commence a civil action." MCL 324.20135(1) (emphasis added). However, there are two important restrictions on such "citizen-suit"/"local-government" actions. First, the challenging party must provide at least 60 days' written notice to EGLE of its intent to sue to EGLE. MCL 324.20135(3)(a). Second, the citizen or local government action is only permitted if "[t]he state has not commenced and is not diligently prosecuting an action under this part or under other appropriate legal authority to obtain injunctive relief concerning the facility or to require compliance with this part or a rule or an order under this part." MCL 324.20135(3)(b). Intervenors did not provide EGLE with 60-day notice, and the State has been diligently prosecuting this enforcement action since 1988. Thus, neither condition precedent has been met.

Other defenses bar Intervenors' claims in whole or in part, including the fact that the only significant releases of hazardous substances have already been found to have been "permitted releases." *See* July 1991 Opinion, pp. 19-27 (Exhibit 9); MCL 324.20126a(5) ("A person shall not be required under [Part 201] to undertake response activity for a permitted release."). Additionally,

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Mental Health Services, 472 Mich 263, 284-85; 696 NW2d 646 (2005); *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009) (applying *Garg* holding to environmental trespass and nuisance claims).

the City released in the 2006 Settlement Agreement the very claims it now asserts, rendering those claims substantively and procedurally invalid (Exhibit 10, Section IV).

In short, Gelman has shown it has substantial defenses to the claims asserted by Intervenors in their unfiled complaints, and in turn is entitled to have those defenses adjudicated before this Court determines what relief, if any, to award Intervenors.

III. This Court cannot serve as both a mediator and the trier of fact.

The other inherent problem with the Court's proposal is that it puts the Court in the untenable position of both a mediator/facilitator and the trier of fact. In the analogous context of case evaluation, the court rules state that "[a] judge may be selected as a member of a case evaluation panel, but may not preside at the trial of any action in which he or she served as a case evaluator." MCR 2.403(D)(3). The separation between presiding judge and pre-trial mediator is even more rigid when the judge is the trier of fact—in non-jury trials, a judge who learns the results of a case evaluation before rendering judgment is disqualified from further participation in the action. *Bennett v Medical Evaluation Specialists*, 244 Mich App 227, 232-33; 624 NW2d 492 (2000). A judge is also disqualified from conducting a bench trial if he or she must examine case evaluation summaries to review a case evaluation panel's determination that a claim or defense is frivolous. MCR 2.403(N)(2)(d). These rules are designed to prevent the trial judge from using what he or she has learned in the case evaluation process—including and especially matters that are inadmissible or otherwise outside of the record—from improperly influencing the judge's decision as the trier of fact. See *Bennett*, 244 Mich App at 231 (finding "[o]ne of the main concerns of the mediation rule . . . is judicial impartiality where a mediated case proceeds to trial").

The same impartiality concerns are present here to the extent this Court intends to use the scheduled hearing to mediate the differences that have arisen between Gelman, EGLE, and the Intervenors, and/or push the "parties" toward a settlement. Specifically, to the extent the Court is

attempting to mediate the settlement negotiations, the Court would be disqualified from presiding over future litigation of this matter, including determination of the remedy if those negotiations are not successful. The Court may act as a mediator or fact-finder, but not both. Gelman respectfully suggests that holding the proposed hearing for the envisioned purpose would be potentially in conflict with the Court's continued oversight of the State's enforcement action.

IV. The LUGs' pursuit of Superfund listing requires cancellation of the proposed remedy hearing.

Cancelling the hearing is also appropriate in light of the LUGs' determined efforts to divest this Court of jurisdiction by seeking federal Superfund listing. *See* Exhibit 6, Scio Township 12/9/2020 Letter to Governor (asserting that Superfund listing is "the most viable mechanism to address the environmental risks posed to the community by the Gelman contamination"). The LUGs' pursuit of Superfund listing and desire to have USEPA and the federal courts take jurisdiction from EGLE and this Court is contrary to their pursuit of a state court-supervised consent judgment. Indeed, after a City Council member introduced a resolution to delay asking the Governor to petition USEPA to take over the site until after the Court's remedy hearing is held, the same vocal critics that spurred rejection of the Fourth Amended Consent Judgment forced the sponsor to withdraw the resolution before it was even debated. (Exhibit 11, resolution and emails).

If these maneuvers continue, USEPA may well be taking over this site, which would ultimately divest this Court of jurisdiction.[11] If that occurs, USEPA and the federal courts will be devising the remedy without local control or influence, whether by the Intervenors, EGLE, or this Court. Thus, even if the Court's January 27, 2021 Fourth Amended Scheduling Order were

[11] USEPA acts pursuant to federal law over which federal courts exercise exclusive jurisdiction. 42 U.S.C. 9613(b) ("[T]he United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA].").

procedurally and substantively proper—and it is not—it makes little sense to go forward with the extensive briefing and the envisioned remedy hearing until the USEPA issue is resolved. If the LUGs are seeking Superfund listing in the hopes of leveraging a better settlement from Gelman, they are free to pursue that effort through negotiations.

CONCLUSION AND REQUESTED RELIEF

Gelman shares the Court's desire for an expeditious resolution to the negotiation of a Fourth Amended Consent Judgment. But the Court's proposal to hold a hearing to resolve Intervenors' claims—which have not even been filed, much less adjudicated—and potentially to order remedies against Gelman without an opportunity to litigate its defenses to liability, would violate due process and exceed this Court's power to modify an existing consent judgment. The logic and wisdom of holding such a hearing at this juncture has also been undermined by the LUGs' efforts to divest this Court of jurisdiction by pursuing an USEPA takeover of the site. Gelman respectfully asks this Court to reconsider and vacate its January 27, 2021 order scheduling the remedy hearing, and either dismiss the interventions without prejudice and enter a bilateral agreement reached between Gelman and EGLE, or order the Intervenors to file their complaints so that the merits of their claims can be litigated.

Respectfully submitted,

ZAUSMER, P.C.

/s/ Michael L. Caldwell

MICHAEL L. CALDWELL (P40554)
KAREN E. BEACH (P75172)
Attorney for Defendant Gelman Sciences, Inc.
32255 Northwestern Hwy, Suite 225
Farmington Hills, MI 48334
(248) 851-4111

Dated: January 28, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses as directed on the pleadings on January 28, 2021 by:

☒ E-FILE ☐ US MAIL ☐ HAND DELIVERY ☐ UPS
☐ FEDERAL EXPRESS ☐ OTHER

/s/Holly Hood
Holly Hood

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel*. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,
Plaintiff,

and

THE CITY OF ANN ARBOR,
Intervenor,

and

WASHTENAW COUNTY,
Intervenor,

and

THE WASHTENAW COUNTY HEALTH DEPARTMENT,
Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,
Intervenor,

and

THE HURON RIVER WATERSHED COUNCIL,
Intervenor,

and

SCIO TOWNSHIP,
Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,
Defendant.
_____/

Case No. 88-34734-CE
Hon. Timothy P. Connors

EXHIBIT LOG

GELMAN SCIENCES, INC.'S MOTION FOR RECONSIDERATION OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT AND BRIEF IN SUPPORT

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/

EXHIBIT LOG

GELMAN SCIENCES, INC.'S MOTION FOR RECONSIDERATION OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT AND BRIEF IN SUPPORT

Exhibit 1	Fourth Amended Scheduling Order
Exhibit 2	Dindoffer Response to Public Comments
Exhibit 3	January 18, 2017 Intervention Order

Exhibit 4	February 6, 2017 Intervention Order
Exhibit 5	July 14, 2017 Court of Appeals Order
Exhibit 6	LUG Letters Scio Township, Washtenaw County, and City of Ann Arbor)
Exhibit 7	1992 Consent Judgment
Exhibit 8	February 2, 2017 transcript
Exhibit 9	July 25, 1991 Opinion
Exhibit 10	2006 Settlement Agreement with City
Exhibit 11	Proposed City Resolution and emails

EXHIBIT 1

STATE OF MICHIGAN WASHTENAW COUNTY TRIAL COURT	**FOURTH** **AMENDED SCHEDULING ORDER**	CASE NO. 88-034734-CE JUDGE Timothy P. Connors

Court address
101 E. HURON, P.O. BOX 8645, ANN ARBOR, MI 48107

Court telephone no.
734-222-3001

Kelley, Frank J/attorney vs Gelman Sciences Inc

Plaintiff's attorney, bar no.	Defendant's attorney, bar no.
Brian J. Negele; P41846	Michael L CaldwellP40554

There is a Hearing on Modification of the Consent Agreement set for March 22-23 , 2021 at 9:00 AM

Before commencement of the Hearing, counsel shall submit Briefs and Expert reports in accordance with the following schedule:

Intervenors by 2/12/2021

Gelman response by 2/26/2021

EGLE response/Intervenors' reply by 3/12/2021

The Court's previous Scheduling Orders regarding this hearing are vacated and replaced by this Amended Order.

Gelman agrees to this amended schedule, but maintains its previously stated objections to the decision to hold the hearing.

1/27/2021
Date

/s/ Timothy Connors 1/27/2021
Timothy P. Connors
Trial Court Judge

SEAL OF THE CIRCUIT COURT OF WASHTENAW CO., MICH.

(NJTO 01)

EXHIBIT 2

Joint Meeting of the Washtenaw County Board of Commissioners; Scio Township Trustees; and City Council of Ann Arbor, Regarding Gelman Sciences Dioxane

September 24, 2020

Legal Issues

in Public Comments/Questions

Three Proposed Documents :

(1) the Proposed 4th Amended CJ;

(2) the Proposed Stipulated Order, that would dismiss the current intervention while **Preserving Continuing Future Rights** for the Government Intervenors; and

(3) the Proposed Settlement Agreements between Gelman and each of the Government Intervenors.

These documents should not be viewed in isolation

The Negotiations

- Conducted under the Court's Confidentiality Order
- We may not discuss what happened in the Negotiations, such as what was considered proposed, offered, rejected, argued or bargained.
- The court has lifted the order to permit us to discuss the final results and
  - how those Proposals compare to the current CJ and
  - what has been accomplished

What is in the Proposed Documents?

Review the Document Repository

- Suggest that everyone review the Three Proposed Documents in the Repository. Each Local Government has links to the Repository: See, e.g., https://www.a2gov.org/Pages/Gelman-Proposed-Settlement-Documents.aspx
- To aid in understanding, suggest review of
  - Summary of Key Differences document
  - View the seven videos prepared by Professor Lemke

Key Changes -- 4th CJ compared to 3rd CJ:

- III.Q: PZ Boundary expanded to reflect 85 to 7.2 reduction;
  - All within City where wells prohibited, so no risk of dioxane drinking water exposure
- V.A.1.a: Gelman must prevent migration of 7.2 past PZ boundary
- V.A.5.a.ii.B: Gelman must plan/take active remedial actions if Sentinel Well ever greater than 7.2
- V.A.2.f: Gelman avoids active measures only if it proves by "clear and convincing evidence that there are compelling reasons" that PZ expansion is "needed to prevent an unacceptable risk to human health"
- Government Intervenors may contest PZ expansion in court.

Key Changes, cont'd:

- Removes 2800 ppb Maple Road containment – In fact, all areas of plumes east of Wagner Road are below 2800
- GSI to be met: Statute allows use of Mixing Zone to meet 280 ppb
- Added Clusters of MWs for delineation and compliance
- Adds Rose and Parklake Wells – 1.5X volume and 3X dioxane removal
- New Gelman Site actions:
  - 3 new extraction wells, and possibly more
  - Phytoremediation in (1) former pond areas; and (2) Marshy area
  - Heated Soil Vapor Extraction at former Burn Pit and cap after done

The Stipulated Order

- Dismisses Current Intervention
- But, Provides Continuing Rights to Government Intervenors to contest any significant event under the CJ, including, e.g.
  - Changes to CJ
  - Modification, reduction or termination of Gelman actions
  - Proposals to change PZ
  - Termination of CJ
- These Continuing Rights terminate for a particular Intervenor if it later petitions EPA to take over or if it does not support this CJ if some other Government asks EPA to take over.
- HRWC does not have Continuing Rights under the Order

Responses to Comments/Questions

Why does the CJ provide that Gelman does not admit fault or liability?

- standard provision in just about every settlement ever entered, [and the court has not determined Gelman's liability]
- In the event of a dispute, Gelman's fault and liability would have to be proven with evidence, and decided by a court, and Gelman could assert available defenses

If Proposals are accepted, do the Government Intervenors give up all future claims and rights?

- **No**
- The Order preserves Continuing Rights, by which the Government Intervenors may dispute up through the court any proposed significant changes
- The 2006 Ann Arbor Settlement allows future claims by Ann Arbor for
  - Newly discovered plumes (e.g., going to Barton Pond or other areas)
  - Unforeseen change in direction of known plume that breaches PZ
  - Certain Impacts and costs in downgradient part of PZ

Can Gelman **unilaterally** increase the size of the PZ in the future?

- **No**
- Gelman cannot unilaterally change anything in the CJ
- Gelman may ask the court to expand the PZ
- Government Intervenors can contest such a request in court
- To expand PZ, Gelman must convince the court "**by clear and convincing evidence that there are compelling reasons** that the proposed expansion is needed to prevent an unacceptable risk to human health". These are very high burdens of proof and persuasion.

If an area has dioxane greater than 7.2 ppb, is that considered a compelling reason to expand the Prohibition Zone Boundary?

- **No**
- V.A.1.a requires Gelman to prevent migration of 7.2 past PZ boundary
- V.A.5.a.ii.B requires Gelman to determine active response actions to prevent breach of the PZ
- Gelman might ask court to expand PZ to avoid active measures.
- However, Gelman may avoid use of active measures only if it convinces the court, with clear and convincing evidence, that the PZ needs to be expanded to prevent an unacceptable risk to human life.

Can the PZ be contracted in size?

- Yes. In fact, Section V.A.6 creates a PZ boundary review process to occur every five years to determine whether the boundary of the PZ can be contracted.

What will happen if not all Government Intervenors approve the settlement/proposed CJ?

- No clear answer.
- Gelman may tell the court it does not agree with the CJ.
- The court might order Mediation or Facilitation.
- The court might hold hearings on the issues in dispute
- The court might start the litigation process leading to a trial.
- After consideration, the court may simply decide to enter this 4th CJ.
- Other possible results.

What rights will the state and Intervenors have against Danaher if it fails to comply with the CJ?

- If Gelman violates the CJ, following a negotiation, the state can petition the court for an order compelling compliance, and the Government Intervenors have the right to petition the court if Gelman's actions are inconsistent with their Continuing Rights
- Note, Danaher has not been designated as a liable party. Factual and legal research would be needed to determine if Danaher could be held liable here.

If CJ and Stipulated Order are entered, have the local governments given up rights to go to EPA?

- There may be ways to file such a petition, but there would be risks and penalties.
- Such a petitioner would give up its continuing rights under the Order to contest Gelman's actions.
- Financial penalty to Ann Arbor

If the proposed CJ is not approved, are the parties still bound under the current CJ?

- Yes.
- Until the current CJ is vacated or amended, it remains in force.

How does the Financial Assurance Mechanism work? what about 100 years from now?

- XX.C.1 requires Gelman to update and maintain the FAM continuously until no longer needed.

If EGLE does not issue an NPDES permit for the Parklake well discharge into First Sister Lake, then what?

- Gelman could argue that it is not required to address that hot spot.

Are the following comments true?

- "USEPA would halt the dioxane plume and restore the aquifer to drinking water quality".
- "*** the main elements of a Superfund Site clean-up would be: 1) active remediation of the aquifer to a protective drinking water criterion, regardless of whether the plume was in a Prohibition Zone or not.***"
- **No.** Review USEPA's own words at time segment 1:01:05 through 1:02:30 in the video of the January 16, 2020 joint meeting that can be found at: 01/16/2020 EPA Joint Meeting video

What would EPA do, cont'd:

- Joan Tanaka of EPA stated that it is "impossible to say" what USEPA would do.
- Tanaka continued, by stating that USEPA "frequently uses Institutional Controls" (like this Prohibition Zone) to put "controls on the use of water so that no one gets hurt" -- sometimes as a "long term cleanup remedy".
- In other words, USEPA might leave the Prohibition Zone in place, and not require clean up to drinking water standards. It is not appropriate to promise that USEPA will require a different remedy here.

Would USEPA use its Emergency Removal Cleanup Authority to take immediate action to clean up the Gelman Plumes?

- No!
- USEPA stated that it could use such emergency authority only if there was exposure to 1,4-dioxane in a person's drinking water—not groundwater—at a concentration greater than 46 ppb. See, time segment 1:04:10 through 1:05:20 of the above video. Currently there are no residential wells with 1,4-dioxane in excess of the drinking water standard of 7.2ppb.

Three Key Points

- 1. The CJ would require immediate action by Gelman to better delineate the contamination, and increase cleanup, reducing risks that PZ will be breached or exposures will occur.
- 2. The CJ and Order provide continuing rights to the Government Intervenors to contest any attempt by Gelman to reduce actions, expand the PZ or alter the CJ.
- 3. USEPA will take much longer to act and there is no basis to claim USEPA will take the site or require any different or additional actions by Gelman. And under USEPA control, the Government Intervenors would not have direct ongoing rights to challenge changes to the Gelman requirements and actions.

EXHIBIT 3

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

-v-

File No. 88-34734-CE
Honorable Timothy P. Connors

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

ORDER GRANTING MOTIONS TO INTERVENE OF THE CITY OF ANN ARBOR, WASHTENAW COUNTY, AND THE HURON RIVER WATERSHED COUNCIL

At a session of said Court
held in the City of Ann Arbor, County of Washtenaw,
State of Michigan on 1/18/2017

PRESENT: Hon. Timothy P. Connors

Washtenaw County, the Washtenaw County Health Department, Washtenaw County Health Officer Ellen Rabinowitz (collectively, the "Washtenaw County Parties"), the City of Ann Arbor, and the Huron River Watershed Council ("HRWC") having filed motions to intervene in this matter, the parties having submitted briefs and appeared for oral argument, and the Court being fully advised on the premises, it is hereby ORDERED that:

1. The motions to intervene filed by the City of Ann Arbor, the Washtenaw County Parties, and the HRWC are granted, pursuant to MCR 2.209(B) and for the reasons stated on the record, provided that;

   a. The City of Ann Arbor, the Washtenaw County Parties, and the HRWC (the "Intervenors") shall refrain from filing their proposed complaints at

this time. Should any of the Intervenors, after participating in negotiations on a proposed Fourth Amended Consent Judgement, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, they may file their complaint(s) after providing notice to the other parties.

b. The City of Ann Arbor, the Washtenaw County Parties, and the HRWC are entitled to participate in negotiations concerning the proposed Fourth Amended Consent Judgment to be presented to the Court in this matter.

c. Any party may request a status conference with the Court if that party is unsatisfied with the progress being made in the negotiations, or if they believe that the participation of the court may aid the parties in reaching an agreement.

d. The intervention of the HRWC is limited to any claim or issue that pertains to the surface waters of the Huron River and its tributaries.

e. Any applicable statute of limitations or doctrine of laches that may apply to any of the claims of the City of Ann Arbor, the Washtenaw County Parties, and/or the HRWC are tolled as of December 15, 2016, until such time as a Proposed Fourth Amended Consent Judgment is agreed upon by all the parties and presented to the Court, or until such time as an Intervenor files a complaint.

f. Parties shall work in good faith to promptly schedule meetings and/or conference calls to negotiate a final Proposed Fourth Amended Consent Judgment.

IT IS SO ORDERED.

This is not a final order and does not close this case.

Tim Connors

HON. TIMOTHY P. CONNORS
CIRCUIT COURT JUDGE

APPROVED AS TO FORM ONLY

Brian J. Negele /w/p

BRIAN J. NEGELE (P41846)
Attorney for Plaintiffs

MICHAEL L. CALDWELL (P40554)
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Thomas P. Bruetsch /w/p

THOMAS P. BRUETSCH (P57473)
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Robert C. Davis /w/p

ROBERT C. DAVIS (P40155)
Attorney for Washtenaw County

Oday Salim /w/p

ODAY SALIM (P80897)
Attorney for Huron River Watershed Council

EXHIBIT 4

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

-v-

File No. 88-34734-CE
Honorable Timothy P. Connors

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

ORDER GRANTING SCIO TOWNSHIP'S MOTION TO INTERVENE

At a session of said Court
held in the City of Ann Arbor, County of Washtenaw,
State of Michigan on 2-6-2017

PRESENT: Hon. Timothy P. Connors

Scio Township having filed its motion to intervene in this matter, the parties having submitted briefs and appeared for oral argument, and the Court being fully advised on the premises, it is hereby ORDERED that:

1. The motion to intervene filed by Scio Township is granted, pursuant to MCR 2.209(B) and for the reasons stated on the record, provided that;

   a. Scio Township shall refrain from filing its proposed complaint at this time. Should Scio Township, after participating in negotiations on a proposed Fourth Amended Consent Judgement, conclude in good faith that the negotiations have failed or that insufficient progress has been made during negotiations, Scio Township may file its complaint after providing notice to the other parties.

b. Scio Township is entitled to participate in negotiations concerning the proposed Fourth Amended Consent Judgment to be presented to the Court in this matter.

c. Any party may request a status conference with the Court if that party is unsatisfied with the progress being made in the negotiations, or if they believe that the participation of the court may aid the parties in reaching an agreement.

d. Any applicable statute of limitations or doctrine of laches that may apply to any of the claims of Scio Township are tolled as of January 26, 2017, until such time as a Proposed Fourth Amended Consent Judgment is agreed upon by all the parties and presented to the Court, or until such time as Scio Township files a complaint.

f. Parties shall work in good faith to promptly schedule meetings and/or conference calls to negotiate a final Proposed Fourth Amended Consent Judgment.

IT IS SO ORDERED.

This is not a final order and does not close this case.

Tim Connors

HON. TIMOTHY P. CONNORS
CIRCUIT COURT JUDGE

APPROVED AS TO FORM ONLY

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Attorney for Huron River Watershed Council

William J. Stapleton (w/permission)
WILLIAM J. STAPLETON (P38339)
Attorney for Scio Township

EXHIBIT 5

Court of Appeals, State of Michigan

ORDER

Attorney General v Gelman Sciences Inc

Docket No. 337818

LC No. 88-034734-CE

Mark T. Boonstra
Presiding Judge

William B. Murphy

Jane E. Markey
Judges

The Court orders that the motions for immediate consideration are GRANTED.

The Court further orders that the motion for stay pending appeal is DENIED.

The Court orders that the motion for leave to exceed the page limit for combined reply to answers is GRANTED and the reply received on May 8, 2017 is accepted for filing.

The Court orders that the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUL 14 2017
Date

Chief Clerk

EXHIBIT 6

Township of Scio

December 9, 2020

Dear Governor Whitmer,

I am writing on behalf of Scio Township to request your support for the designation of the Gelman Sciences, Inc. site located in Scio Township, Michigan (Gelman Site) as a United States Environmental Protection Agency (USEPA) National Priorities List Site, commonly called a USEPA Superfund Site.

Based upon the USEPA 2017 Preliminary Assessment conducted on the Gelman Site, the Gelman Site qualifies as a USEPA National Priorities List (NPL) Site. We request that you provide a Concurrence Letter to USEPA supporting the continuance of the designation process for inclusion of the Gelman Site as a NPL Site.

Previous investigative work has established that the Gelman Site has already contaminated an approximately four-mile by one-mile area of the local aquifer with 1,4-dioxane (dioxane). The dioxane contamination is a threat to a public potable water supply; private residential water wells; residential buildings from vapor intrusion; and the natural resources. This dioxane pollution presents an imminent and substantial endangerment to public health and the environment.

The communities have worked with the Michigan Department of Environment, Great Lakes and Energy and Gelman through a 1992 Consent Judgment to obtain a protective remedy for this site. However, Gelman has refused to perform work that will protect the public health and the environment from the release and migration of dioxane, which USEPA has categorized as a probable human carcinogen. The proposed August 2020 Fourth Amended Consent Judgment has been rejected by Scio Township and other local communities as not sufficient to protect the lives, homes and environment, see attached Resolution. **The County of Washtenaw, City of Ann Arbor, Ann Arbor Charter Township and Scio Township are now in agreement that placing the Gelman Site on the NPL is the most viable mechanism to address the environmental risks posed to the community by the Gelman contamination.**

Thank you.

Sincerely,

William Hathaway
Supervisor – Scio Township

Enclosure

827 N. Zeeb Road · Ann Arbor, MI 48103
734/369-9400 · 734/665-0825 Fax
www.ScioTownship.org

Scio Township Board Of Trustees
Resolution Rejecting The 4th Amended Consent Judgment And
Renewing The Petition For the Gelman Sciences, Inc. Site
To Be Designated As A USEPA Superfund Site

Whereas, From 1966 and continuing into the 1980s, Gelman Sciences, Inc. (Gelman), generated many tons of 1,4-dioxane as a waste material of its production process at its plant located in Scio Township and, through various means, dumped this hazardous chemical into the natural environment where it contaminated the surface and groundwaters of the State; and

Whereas, Members of the public and environmental advocates have worked for decades to document the problem and seek State of Michigan action to require Gelman to clean up its toxic pollution, but Gelman has evaded responsibility by repeatedly concealing the extent of the contamination, opting for less-effective clean-up methods, and using legal strategies to delay and thereby allow the plume of 1,4-dioxane pollution to spread through the groundwater, contaminating wells and potentially intruding into residential basements; and

Whereas, The State of Michigan has for decades litigated against and attempted to regulate Gelman to enforce the State of Michigan environmental laws, but the dioxane plume continues to spread in multiple directions and toward the Huron River; and

Whereas, Scio Township, Ann Arbor Charter Township, and the Sierra Club joined together in 2016 to petition for action by the United States Environmental Protection Agency (USEPA) to designate the Gelman site a Superfund site; and

Whereas, The Scio Township official position supporting the designation of Gelman site as a USEPA Superfund site was approved by a unanimous vote of the board of trustees on June 14, 2016, and remains in effect; and

Whereas, Scio Township intervened, together with others, in the State's ongoing lawsuit against Gelman pending in Washtenaw County Circuit Court; and

Whereas, Settlement negotiations have occurred since 2017, with Scio Township's participation, toward a new consent judgment that would result in better cleanup of the contamination; and

Whereas, Scio Township is dissatisfied with progress on the delineation, containment and remediation of the contamination under the current third or proposed fourth consent judgment; and

Whereas, The USEPA completed the Preliminary Assessment in 2017 and indicated that the Gelman Site was eligible for the National Priorities List (NPL) but a State Concurrence Letter was required to continue the NPL designation process; and

Whereas, The delineation, containment and remediation of the contamination will be bolstered by USEPA's active involvement and enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the "Superfund" Act, as it applies to the contamination.

Whereas, This renewal of Scio Township's 2016 petition for involvement by USEPA does not preclude simultaneous efforts to obtain a thorough clean-up either through negotiations or a court-ordered ruling from the Washtenaw County Circuit Court;

Resolved, That the Scio Township Board of Trustees rejects the fourth amended consent judgment based on the following specific areas of concern raised by members of the public and asks that the Washtenaw County Circuit Court consider these items as it formulates a new plan for remediation of the Gelman site:

1. Revise the 500 ppb standard for termination of extraction wells to a lower standard of continuing to pump and treat as long mass removal is still occurring.

2. Make explicit the right of the Intervenors to participate in the NPDES permitting process, including the process for any required wetland permits.

3. Do NOT allow the discharge of treated wastewater to First Sister Lake, instead require alternative discharge sites for any water pumped and treated from the Parklake well, either by piping back to the Gelman site or piping to a site east of the Ann Arbor water intakes unless treated to non-detect and in quantities not to exceed 500 gallons a day.

4. Prohibit the expansion of the Prohibition Zone beyond the boundaries established in the third amended consent judgement.

5. Re-establish the Maple Road Containment Objective with the new generic GSI of 280 ppb

6. Re-establish the Little Lake Area System Non-expansion Objective and operation of the Ann Arbor Cleaning Supply Well.

7. Require that Gelman and EGLE perform Method 522 dioxane analytical analysis on all drinking water wells, Sentinel Wells and Compliance Wells samples.

8. Lower the trigger levels for all the delineation/sentinel wells in the Western Area and along the northern boundary of the Prohibition Zone from 7.2 ppb to a level half of the whatever the current State drinking water standard is, to ensure that remedial action takes effect before the measured level exceeds the allowable amount.

9. Require Gelman to conduct quarterly surface water sampling of all the Allen Creek storm water drains east of Maple Road, Honey Creek, First Sister Lake, etc.

10. Establish metrics/standards for the phytoremediation in the source area. For example, specify what action would be triggered if plant detritus is found to contain dioxane rather than to have dispersed it. State how long the phytoremediation will last, how it will be maintained, and under what conditions it will be discontinued.

11. Mandate additional monitoring wells for delineation, particularly toward Barton Pond so that expansion of the contamination plume will be detected well before it reaches Barton Pond, whatever direction it is traveling.

12. Make the three optional extraction wells in the source area mandatory for a total of 6 extraction wells.

13. Perform a Remedial Design Investigation across the plume area to to determine how many extraction wells are required and at what pumping rate to control and capture the dioxane groundwater plume.

14. Locate enough additional Sentinel and Compliance Wells along the northern boundary of the Prohibition Zone, east of Maple Road and across M-14 in the northwestern area near the Wagner Road and Dexter/Ann Arbor Road intersection to ensure that expansion of the contamination plume won't escape detection.

15. Require that the Municipal Water Connection Contingency Plan provide a private land owner with a municipal water supply when the dioxane concentration reaches one-half of the drinking water criterion.

16. Do not permit Gelman to apply a Mixing Zone-Based GSI to attain compliance with the GSI Objective.

17. Change the definition of GSI to the new 280 ug/L dioxane from the old 2,800 ug/L dioxane without placing any preconditions such as the omission of the Maple Road Containment Objective.

18. Require that Gelman provide public, Quarterly Reports including: analytical trends; compliance with CJ objectives and criteria; compliance with Verification Plans, Monitoring Plans, and Down-gradient Investigations; discussion of quarterly analytical results and protocols; extraction system requirement compliance; plume migration compliance; and recommendations for follow-up actions.

19. Protect the ongoing rights of local government to intervene in court processes related to the Gelman contamination so that they can effectively advocate on behalf of the health and safety of their residents.

Resolved, That the Scio Township Board of Trustees supports USEPA active involvement, as the lead agency, and enforcement of CERCLA, the "Superfund" Act, as it applies to the contamination;

Resolved, That the Scio Township Board of Trustees reaffirms its request the USEPA to list the Gelman Site a "Superfund" Site on the National Priorities List under CERCLA;

Resolved, That the Scio Township Board of Trustees authorizes the Township Supervisor to write to the Governor enclosing this resolution and soliciting a Concurrence Letter to USEPA in support of making the Gelman Site into a National Priorities List site;

Resolved, That the Scio Township Board of Trustees authorizes the Township Clerk to send this resolution and any such State Concurrence to the Washtenaw County delegation to the Michigan Legislature, the Director of the Michigan Department of Environment, Great Lakes, and Energy; and Congresswoman Debbie Dingell; and

Resolved, That the Scio Township Board of Trustees authorizes the Supervisor to take such further actions that are consistent with the purposes of this resolution.

The foregoing preamble and resolution were offered by Trustee Kathleen Knol, and supported by Trustee Jacqueline Courteau at the Regular Meeting of the Board of Trustees, Township of Scio, County of Washtenaw, State of Michigan, at the Regular Meeting held remotely at 7:00 p.m. on Tuesday, December 8, 2020.

ROLL CALL VOTE:
Ayes: Supervisor William Hathaway, Treasurer Donna E. Palmer, Trustee Jacqueline Courteau, Trustee Alec Jerome, Trustee Kathleen Knol, Trustee Jane Vogel.
Nays: Clerk Jessica M. Flintoft.

RESOLUTION DECLARED ADOPTED.

Jessica M. Flintoft
Clerk, Township of Scio

CERTIFICATE

I hereby certify that the foregoing is a true and complete copy of a resolution adopted by the Board of Trustees, of the Township of Scio, County of Washtenaw, State of Michigan, at the Regular Meeting held remotely at 7:00 p.m. on Tuesday, December 8, 2020, and that said meeting was conducted and public notice of said meeting was given pursuant to and in full compliance with the Open Meetings Act No. 267, Public Acts of Michigan, 1976, as amended, and that the minutes of said meeting were kept and will be or have been made available as required by said Act.

Dated: December 9, 2020

Jessica M. Flintoft
Clerk, Township of Scio

COUNTY ADMINISTRATOR

220 North Main Street, PO Box 8645 • Ann Arbor, Michigan • 48107-8645

December 11, 2020

To: Gretchen Whitmer
Governor of the State of Michigan

From: Gregory Dill
County Administrator, Washtenaw County, Michigan

Re: Adding the Gelman Sciences, Inc., 1, 4 Dioxane contamination site to the EPA's National Priorities List

Dear Governor Whitmer,

As the County Administrator for Washtenaw County, I write on behalf of the Board of Commissioners to request your support and concurrence in nominating and taking all other steps necessary to add the Gelman Sciences, Inc., 1, 4 Dioxane contamination site ("Gelman Site") located in Washtenaw County to the EPA's National Priorities List ("NPL"). As you know, the NPL is a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants in the United States. This NPL process is authorized by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") which is more commonly referenced to as Superfund.

Washtenaw County is asking you to nominate and support the Gelman Site as a candidate for the NPL process through a letter of concurrence to the EPA. This will allow the public notice / Federal Register process to start, with the ultimate goal being to compel Gelman Sciences, Inc. to engage in a more robust remedial action cleanup process of the Site as allowed by CERCLA. The County believes the Gelman Site already technically qualifies for the NPL based on a prior score under the Hazardous Ranking System. The County also believes the Gelman Site poses a significant threat to human health and the environment and otherwise constitutes an imminent and substantial endangerment to the public health and welfare and the environment due to the release of pollutant(s) into the groundwater at the Gelman Site.

At this time, and notwithstanding considerable efforts by the County and other communities/members of the impacted public over many years, the County asserts that the US EPA is best positioned to address the Gelman Site and to ensure that the contamination at the Gelman Site is fully delineated, contained and remediated in accordance with the various provisions and regulations under CERCLA. Your concurrence in this matter would be of

immense value to the residents of Washtenaw County. The County's resolution authorizing this measure is attached for your review. Please advise if your Office requires further information.

Thank you for your consideration.

Sincerely,

Greg Dill

Gregory Dill
County Administrator
Washtenaw County, Michigan

WASHTENAW COUNTY BOARD OF COMMISSIONERS RESOLUTION SUPPORTING THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (USEPA) DESIGNATION OF THE GELMAN SCEINCES, INC. SITE AS A USEPA SUPERFUND SITE & GOVERNOR CONCURRENCE LETTER TO USEPA FOR A GELMAN SCIENCES, INC. SUPERFUND SITE

WASHTENAW COUNTY BOARD OF COMMISSIONERS

December 2, 2020

Sponsored by: Commissioner Morgan

WHEREAS, the County and its residents have worked for decades to require Gelman to delineate, and clean up City ground water contaminated by 1,4-dioxane ("Dioxane") that originated at the Gelman Sciences ("Gelman") Wagner Road facility (the "Contamination"), and to protect City ground water from further spreading of the Contamination; and

WHEREAS, as part of that work, the City of Ann Arbor sued Gelman in state and federal court more than 10 years ago, and ultimately agreed to settle that lawsuit; and

WHEREAS, the State of Michigan ("State") has for decades separately litigated against, and otherwise regulated, Gelman to enforce State environmental laws that apply to the Contamination; and

WHEREAS, following the State's tightening of its standards for Dioxane groundwater pollution, as part of the County's continuing efforts, it, along with the City of Ann Arbor, Scio Township, the Huron River Watershed Council, intervened in the State's ongoing lawsuit against Gelman pending in Washtenaw County Trial Court; and

WHEREAS, since its intervention, the County has engaged in settlement negotiations over a potential new consent judgment; and

WHEREAS, negotiations aside, the County is not satisfied with the progress of the delineation, containment and remediation of the Contamination; and

WHEREAS, the County recognizes that the Contamination poses a long-term threat to public health and the security of the City of Ann Arbor municipal water system; and

WHEREAS, in 2017 the United States Environmental Protection Agency (USEPA) completed the Preliminary Assessment and indicated that the Gelman Site was eligible for the National Priorities List (NPL) but a State Concurrence Letter was required to continue the NPL designation process; and

WHEREAS, Washtenaw County believes that delineation, containment and remediation of the Contamination will be bolstered by the USEPA active involvement and

enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the "Superfund" Act, as it applies to the Contamination.

NOW THEREFORE BE IT RESOLVED that the Washtenaw County Board of Commissioners supports USEPA active involvement, as the lead agency, and enforcement of CERCLA, the "Superfund" Act, as it applies to the Contamination;

BE IT FURTHER RESOLVED that the Washtenaw County Board of Commissioners ask the USEPA to list the Gelman Site a "Superfund" Site on the National Priorities List under CERCLA;

BE IT FURTHER RESOLVED that the Washtenaw County Board of Commissioners directs the County Administrator to write to the Governor enclosing this resolution and soliciting a Concurrence Letter to USEPA in support of making the Gelman Site into a National Priorities List site;

BE IT FURTHER RESOLVED that the Washtenaw County Board of Commissioners direct the County Administrator to send this resolution and any such State Concurrence to the Washtenaw County delegation to the Michigan Legislature, the Director of the Michigan Department of Environment, Great Lakes, and Energy; and Congresswoman Debbie Dingell; and

BE IT FURTHER RESOLVED that the Washtenaw County Board of Commissioners authorize the County Administrator to take such further actions that are consistent with the purposes of this resolution.

Sponsored by:

City of Ann Arbor
City Administrator's Office
301 E. Huron Street, PO Box 8647
Ann Arbor, MI 48107-8647
734-794-6110 x41101

Governor Gretchen Whitmer
P.O. Box 30013
Lansing, MI 48909

Re: City of Ann Arbor Resolution Requesting Referral of Gelman Life Sciences. Inc. Site to the United States Environmental Protection Agency

Dear Governor Whitmer:

Enclosed please find Resolution #R-20-425 approved by the Ann Arbor City Council on November 5, 2020.

As directed by the Resolution, this letter requests you send a Concurrence Letter to the United States Environmental Protection Agency in support of listing and proceeding with the Gelman Life Sciences, Inc., site (currently a Michigan Part 201 site) as a Superfund site on the National Priorities List, as set out more specifically in the Resolution. The City also is continuing as a participant in the Washtenaw County Circuit Court litigation (*Attorney General v. Gelman Sciences, Inc., Case No. 88-34734-CE*).

Sincerely,

Tom Crawford
City Administrator

Enclosure

cc: Ann Arbor Mayor and City Council

Text of Legislative File 19-1887

Resolution Supporting the Environmental Protection Agency's Active Involvement with the Gelman Site and Encouraging its Listing of the same as a "Superfund" Site

The City and its residents have worked for decades to require Gelman to delineate and clean up City ground water contaminated by 1,4-dioxane that originated at the Gelman Sciences Wagner Road facility, and to protect City ground water from further spreading of the Contamination. As part of that effort, the City sued Gelman in state and federal court more than 10 years ago, before agreeing to settle the lawsuit. Separately, the State has for decades litigated against, and otherwise regulated, Gelman to enforce State environmental laws that apply to the Contamination. Those parties have operated under various versions of a consent judgment over the years.

Following the State's recent tightening of its standards for dioxane groundwater pollution, the City, with others, intervened in the State's ongoing lawsuit against Gelman pending in Washtenaw County Trial Court. Since its intervention was allowed in 2017, the City has engaged in settlement negotiations over a potential new consent judgment. Those negotiations aside, however, the City is simply not satisfied with the progress of the delineation, containment and remediation of the contamination. The City believes that delineation, containment and remediation will be bolstered by EPA's active involvement and enforcement of the Superfund law at this site. At this time, the EPA has a single employee assigned to closely monitor this situation and work with the State. Unless the EPA's involvement moves beyond the preliminary assessment that it's completed, that employee may be reassigned.

Prepared by: Councilmember Griswold

Whereas, The City and its residents have worked for decades to require Gelman to delineate, and clean up City ground water contaminated by 1,4-dioxane ("Dioxane") that originated at the Gelman Sciences ("Gelman") Wagner Road facility (the "Contamination"), and to protect City ground water from further spreading of the Contamination;

Whereas, As part of that work, The City sued Gelman in state and federal court more than 10 years ago, and ultimately agreed to settle that lawsuit;

Whereas, The State of Michigan ("State") has for decades separately litigated against, and otherwise regulated, Gelman to enforce State environmental laws that apply to the Contamination;

Whereas, Following the State's recent tightening of its standards for Dioxane groundwater pollution, as part of the City's continuing efforts, it, along with others, intervened in the State's ongoing lawsuit against Gelman pending in Washtenaw County Trial Court;

Whereas, Since its intervention was allowed in 2017, the City has engaged in settlement

negotiations over a potential new consent judgment;

Whereas, Negotiations aside, the City is not satisfied with the progress of the delineation, containment and remediation of the Contamination;

Whereas, City Council directs the City Administrator to continue the fourth consent judgment negotiation process; and

Whereas, The City believes that delineation, containment and remediation of the Contamination will be bolstered by the United States Environmental Protection Agency's ("EPA") active involvement and enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), the "Superfund" Act, as it applies to the Contamination;

RESOLVED, That the City Council supports EPA's active involvement, as the lead agency, and enforcement of CERCLA, the "Superfund" Act, as it applies to the Contamination;

RESOLVED, That the City Council encourages the EPA to list the site of the Contamination a "Superfund" site on the National Priorities List under CERCLA;

RESOLVED, That the City Council direct the City Administrator to write to the Governor enclosing this resolution and soliciting a Concurrence Letter to USEPA in support of making the Gelman Site into a National Priorities List site;

RESOLVED, That the City Council direct the City Administrator to send this resolution and any such State concurrence to the Washtenaw County delegation to the Michigan Legislature, the Director of the Michigan Department of Environment, Great Lakes, and Energy, and Congresswoman Debbie Dingell; and

RESOLVED, That the City Council authorize the City Administrator to take such further actions that are consistent with the purposes of this resolution.

Sponsored by: Councilmembers Griswold, Hayner, Bannister, Eaton and Ramlawi

As Amended and Approved by Ann Arbor City Council on November 5, 2020

EXHIBIT 7

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

FRANK J. KELLEY, Attorney General
for the State of Michigan, ex rel,
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION,
and MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

v

GELMAN SCIENCES, INC.,
a Michigan corporation,

Defendant.

OCT 30 1992

File No. 88-34734-CE

Honorable Patrick J. Conlin

Robert P. Reichel (P31878)
Assistant Attorneys General
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-7780
Attorneys for Plaintiff

David H. Fink (P28235)
Alan D. Wasserman (P39509)
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48018
Telephone: (313) 851-4111
Attorneys for Defendant

CONSENT JUDGMENT

The Parties enter this Consent Judgment in recognition of, and with the intention of, furtherance of the public interest by (1) addressing environmental concerns raised in Plaintiffs' Complaint; (2) expediting remedial action at the Site; and (3) avoiding further litigation concerning matters covered by this Consent Judgment. The Parties agree to be bound by the terms of this Consent Judgment and stipulate to its entry by the Court.

EXHIBIT 136

The Parties recognize that this Consent Judgment is a compromise of disputed claims. By entering into this Consent Judgment, Defendant does not admit any of the allegations of the Complaint, does not admit any fault or liability under any statutory or common law, and does not waive any rights, claims, or defenses with respect to any person, including the State of Michigan, its agencies, and employees, except as otherwise provided herein. By entering into this Consent Judgment, Plaintiffs do not admit the validity or factual basis of any of the defenses asserted by Defendant, do not admit the validity of any factual or legal determinations previously made by the Court in this matter, and do not waive any rights with respect to any person, including Defendant, except as otherwise provided herein. The Parties agree, and the Court by entering this Judgment finds, that the terms and conditions of the Judgment are reasonable, adequately resolve the environmental issues covered by the Judgment, and properly protect the public interest.

NOW, THEREFORE, upon the consent of the Parties, by their attorneys, it is hereby ORDERED and ADJUDGED:

I. JURISDICTION

A. This Court has jurisdiction over the subject matter of this action. This Court also has personal jurisdiction over the Defendant.

B. This Court shall retain jurisdiction over the Parties and the subject matter of this action to enforce this Judgment and to resolve disputes arising under the Judgment.

II. PARTIES BOUND

This Consent Judgment applies to, is binding upon, and inures to the benefit of Plaintiffs, Defendant, and their successors and assigns.

III. DEFINITIONS

Whenever the terms listed below are used in this Consent Judgment or the Attachments which are appended hereto, the following definitions shall apply:

A. "Consent Judgment" or "Judgment" shall mean this Consent Judgment and all Attachments appended hereto. All Attachments to this Consent Judgment are incorporated herein and made enforceable parts of this Consent Judgment.

B. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday, or a State legal holiday. In computing any period of time under this Consent Judgment, where the last day would fall on a Saturday, Sunday, or State legal holiday, the period shall run until the end of the next working day.

C. "Defendant" shall mean Gelman Sciences, Inc.

D. "Evergreen Subdivision Area" shall mean the residential subdivision generally located north of I-94 and between Wagner and Maple Roads, bounded on the west by Rose Street, on the north by Dexter Road, and on the south and east by Valley Drive.

E. "Gelman" or "GSI" shall mean Gelman Sciences, Inc.

F. "GSI Property" shall mean the real property described in Attachment A, currently owned and operated by GSI in Scio Township, Michigan.

G. "Groundwater Contamination" or "Groundwater Contaminant" shall mean 1,4-dioxane in groundwater at a concentration in excess of 3 micrograms per liter ("ug/l") determined by the sampling and analytical method(s) described in Attachment B.

H. "MDNR" shall mean the Michigan Department of Natural Resources.

I. "Parties" shall mean Plaintiffs and Defendant.

J. "Plaintiffs" shall mean Frank J. Kelley, Attorney General of the State of Michigan, ex rel, Michigan Natural Resources Commission, Michigan Water Resources Commission, and Michigan Department of Natural Resources.

K. "Redskin Well" means the purge well currently located on the Redskin Industries property.

L. "Remedial Action" or "Remediation" shall mean removal, treatment, and proper disposal of groundwater and soil contaminants pursuant to the terms and conditions of this Consent Judgment and work plans approved by the MDNR under this Judgment.

M. "Site" shall mean the GSI Property and other areas affected by the migration of groundwater contamination emanating from the GSI Property.

N. "Soil Contamination" or "Soil Contaminant" shall mean 1,4-dioxane in soil at a concentration in excess of 60 ug/kg, as determined by the sampling and analytical method(s) described in Attachment C, or other higher concentration limit derived by means consistent with Mich Admin Code R 299.5711(2) or R 299.5717.

O. "Spray Irrigation Field" shall mean that area of the GSI site formerly used for spray irrigation of treated process wastewater, as depicted on the map included as Attachment D.

P. "Unit C3 Aquifer" means the aquifer identified as the C3 Unit in reports prepared for Defendant by Keck Consulting.

IV. IMPLEMENTATION OF REMEDIAL ACTION BY DEFENDANT

Defendant shall implement the Remedial Action to address groundwater and soil contamination at, and emanating from, the GSI Property in accordance with (1) the terms and conditions of this Consent Judgment; and (2) work plans approved by the MDNR pursuant to this Consent Judgment.

V. GROUNDWATER REMEDIATION

Defendant shall design, install, operate, and maintain the systems described below to remove, to treat (as required), and to dispose properly of contaminated groundwater. The objectives of these systems shall be to contain the plumes of groundwater contamination emanating from the GSI Property as described below and to extract the contaminated groundwater from the aquifers at designated locations for treatment (as required) and disposal. Defendant also shall implement a monitoring program to verify the effectiveness of these systems.

A. Evergreen Subdivision Area System (hereinafter "Evergreen System")

1. Objectives. The objectives of this system shall be: (a) to intercept and contain the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area; (b) to remove the contaminated

groundwater from the affected aquifer; and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that is not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section VI.

2. Investigation and Design of System.

a. Pump Test Report. Defendant has constructed a purge/test well in the Evergreen Subdivision and conducted a pump test. No later than five days after entry of this Consent Judgment, Defendant shall submit to MDNR a report showing the well construction details and containing pump test and aquifer performance data.

b. Treatment Equipment. Within five days after entry of this Consent Judgment, Defendant shall submit to MDNR specifications for equipment for the treatment of purged groundwater using ultraviolet light and oxidating agents sufficient to remove 1,4-dioxane from goundwater to levels of 3 ug/l or lower. Defendant shall order such equipment within ten days after receiving approval from MDNR.

c. Obtaining Authorization for Groundwater Reinjection. Within 90 days after entry of the Consent Judgment, Defendant shall do one of the following: (i) submit a complete application to the Water Resources Commission for a groundwater discharge permit or permit exemption to authorize the reinjection

of purged, treated groundwater from the Evergreen System; or (ii) submit a plan to MDNR for reinjection of purged, treated groundwater from the Evergreen System that will assure compliance with and be authorized by the generic Exemption for Groundwater Remediation Activites issued by the Water Resources Commission on August 20, 1992.

d. Work Plan. Within 90 days after entry of the Consent Judgment, Defendant shall submit to MDNR for its review and approval a work plan for continued investigation of the Evergreen Subdivision and design of the Evergreen System. At a minimum, the work plan shall include, without limitation, installation of at least one purge well and associated observation well(s) and a schedule for implementing the work plan. The work plan shall specify the treatment and disposal options to be used for the Evergreen System as described in Section V.A.5. The existing test/purge well can be incorporated into the work plan if appropriate.

3. Implementation. Within 14 days after receipt of the MDNR's written approval of the work plan described in Section V.A.2., Defendant shall implement the work plan. Defendant shall submit the following to MDNR according to the approved time schedule: (a) the completed Evergreen System design; (b) a schedule for implementing the design; (c) an operation and maintenance plan for the Evergreen System; and (d) an effectiveness monitoring plan.

4. Operation and Maintenance. Upon approval of the Evergreen System design by the MDNR, Defendant shall install the Evergreen System according to the approved schedule and thereafter, except for temporary shutdowns pursuant to Section V.A.6. of this Consent Judgement, continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate purge well operations pursuant to Section V.D.

5. Treatment and Disposal. Groundwater extracted by the purge well(s) in the Evergreen System shall be treated as necessary using ultraviolet light and oxidizing agents and disposed of in accordance with the Evergeen System design approved by the MDNR. The options for such disposal are the following:

a. Groundwater Discharge. The purged groundwater shall be treated to reduce 1,4-dioxane concentrations to the level required by the Water Resources Commission, and discharged to groundwaters in the vicinity of the Evergreen Subdivision in compliance with the permit or exemption authorizing such discharge referred to in Section V.A.2.c.

b. Sanitary Sewer Discharge. Use of the sanitary sewer leading to the Ann Arbor Wastewater Treatment Plant is conditioned upon approval of the City of Ann Arbor. If discharge is made to the sanitary sewer, the Evergreen System shall be operated and monitored in compliance with the terms

and conditions of the Industrial User's Permit to be issued by the City of Ann Arbor, a copy of which is attached hereto as Attachment G, and any subsequent written amendment of that Permit made by the City of Ann Arbor. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment.

c. Storm Drain Discharge. Use of the storm drain is conditioned upon approval of such use by the City of Ann Arbor and the Allen Creek Drainage District. Discharge to the Huron River via the Ann Arbor stormwater system shall be in accordance with NPDES Permit No. MI-008453 and conditions required by the City and the Drainage District. If the storm drain is to be used for disposal, no later than 21 days after permission is granted by the City and the Drainage District to use the storm drain for continuous disposal of purged groundwater, Defendant shall submit to MDNR, the City of Ann Arbor, and the Drainage District for their review and approval a protocol under which the purge system shall be temporarily shut down: (i) for maintenance of the storm drain; and (ii) during storm events to assure that the stormwater system retains adequate capacity to handle run-off created during such events. The purge system shall be operated in accordance with the approved protocol for temporary shutdown.

6. Monitoring Plan. Defendant shall implement the approved monitoring plan required by Section V.A.3.d. The monitoring plan shall include collection of data to measure the effectiveness of the System in: (a) hydraulically containing groundwater contamination; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring plan shall be continued until terminated pursuant to Section V.E.

B. Core Area System
(hereinafter "Core System")

1. Objectives. For purposes of the Consent Judgment, the "Core Area" means that portion of the Unit C3 aquifer containing 1,4-dioxane in a concentration exceeding 500 ug/l. The objectives of the Core System are to intercept and contain the migration of groundwater from the Core Area and remove contaminated groundwater from the Core Area until the termination criterion for the Core System in Section V.D.1. is satisfied. The Core System shall also prevent the discharge of contaminated groundwater into the Honey Creek Tributary in concentrations in excess of 100 ug/l or in excess of a concentration which would cause groundwater contamination at any location along or adjacent to the entire length of Honey Creek or the Honey Creek Tributary.

2. Evaluation of Groundwater Reinjection Alternative. No later than 35 days after entry of the Consent Judgment, Defendant will complete and submit to MDNR a report on a pilot test for the treatment system using ultraviolet light and oxidizing agent(s) to be used for treatment of extracted groundwater prior to reinjection. No later than 90 days after entry of this Consent Judgment, Defendant may apply to the Michigan Water Resources Commission for authorization for Defendant to reinject treated groundwater extracted from the Core Area. A reinjection program shall consist of the following: (a) installation of a series of purge wells that will control groundwater flow as described in Section V.B.1. and extract water from the Core Area to be treated and reinjected; (b) the system described in the application shall include a groundwater treatment system using ultraviolet light and oxidizing agent(s) to reduce 1,4-dioxane concentrations in the purged groundwater to the level required for a discharge by the Water Resources Commission; (c) the discharge level for 1,4-dioxane in groundwater to be reinjected in the Core Area shall be established based upon performance of further tests by Defendant on the treatment technology and shall in any event be less than 60 ug/l.

3. Groundwater Reinjection. Defendant shall, no later than 120 days after entry of this Consent Judgment: (a) select, verify, and calibrate a model for the groundwater reinjection system; (b) prepare a final report on the model;

and (c) submit to MDNR for review and approval the final report on the model, Defendant's proposed final design for the Core System, a schedule for implementing the design, an operation and maintenance plan for the system, and an effectiveness monitoring plan for the system.

The Groundwater Reinjection System, including the discharge level for 1,4-dioxane, shall be subject to the final approval of the Water Resources Commission and the MDNR. At a minimum, the System shall be designed and operated so as to ensure that: (a) the purged groundwater is reinjected only into portions of the aquifer(s) where groundwater contamination is already present; (b) the concentration of 1,4-dioxane in the aquifer(s) is not increased; and (c) the areal extent of groundwater contamination is not increased.

4. Surface Water Discharge Alternative. In the event that Defendant elects not to proceed with groundwater reinjection as provided in Section V.B.2., or in the event Defendant is denied permission to install such a system, no later than 90 days after the election or denial, Defendant shall submit to the MDNR for its review and approval Defendant's proposed final design of the Core System, a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan for the System. The Core System shall include groundwater purge wells as necessary to meet the

objectives described in Section V.B.1. The Core System also shall include a treatment system using ultraviolet light and oxidizing agent(s) to reduce 1,4-dioxane concentrations in the purged groundwater to the levels required for a discharge described below and facilities for discharging the treated water into local surface waters or sanitary sewer line(s). Discharge to local surface waters shall be in accordance with NPDES Permit No. MI-008453 and any subsequent amendment of that Permit. Use of the sanitary sewer is conditioned upon and subject to an Industrial Users Permit to be obtained from either the City of Ann Arbor or Scio Township, as required by law. If discharge is made to the sanitary sewer, the Core Treatment System shall be operated and monitored to assure compliance with the terms and conditions of the required Industrial User's Permit and any subsequent amendment of that permit. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment.

5. Implementation of Program. Upon approval by the MDNR, Defendant shall install the Core System according to the approved schedule and thereafter continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate operation pursuant to Section V.D. Defendant may, thereafter and at its option, continue purge operations as provided in this Section.

6. Monitoring Plan. Defendant shall implement the approved monitoring plan required by Section V.B. The monitoring plan shall include collection of data to demonstrate the effectiveness of the Core System in: (a) hydraulically containing the Core Area; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring plan shall be continued until terminated pursuant to Section V.E.

C. Western Plume System
(hereinafter "Western System")

1. Objectives. The objectives of the Western System are: (a) to contain downgradient migration of any plume(s) of groundwater contamination emanating from the GSI Property that are located outside the Core Area and to the northwest, west, or southwest of the GSI facility; (b) to remove groundwater contaminants from the affected aquifer(s); and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that are not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section IV.

2. Design of System. The Western System shall include a series of groundwater test/purge wells placed and operated so as to create overlapping capture zones preventing the downgradient migration of groundwater contaminants. The System

also may incorporate one or more existing artesian wells with overlapping capture zones preventing the downgradient migration of groundwater contaminants. The System also may incorporate one or more existing artesian wells with overlapping capture zones to prevent the downgradient migration of groundwater contaminated with 1,4-dioxane. Defendant shall apply for authorization to reinject purged groundwater or for a permit for discharge of the purged groundwater into the Honey Creek if facilities are constructed for such discharge as part of the Western System. The Western System shall also include facilities for treating purged groundwater as necessary to meet applicable permit requirements and facilities for monitoring the effectiveness of the System.

3. Remedial Investigation. No later than 60 days after the effective date of this Consent Judgment, Defendant shall submit to the MDNR for its review and approval a work plan for remedial investigation and design of the Western System and a schedule for implementing the work plan. The work plan shall include plans for installation of a series of test/purge wells, conduct of an aquifer performance test(s), groundwater monitoring operations and maintenance plan, and system design.

4. Implementation of Remedial Investigation. Defendant shall implement the approved work plan according to the approved schedule.

5. Installation of System. Upon approval by the MDNR, Defendant shall install the Western System and thereafter continuously operate and maintain the system according to the approved plans and schedules until Defendant is authorized to terminate operation pursuant to Section V.D. of this Consent Judgment.

6. Monitoring. Defendant shall implement the approved monitoring plan to verify the effectiveness of the Western System in meeting the objectives of Section V.C.1. The monitoring plan shall include collection of data to demonstrate the effectiveness of the Western System in: (a) hydraulically containing groundwater contamination; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring program shall be continued until terminated pursuant to Section V.E.

D. Termination Of Groundwater Purge Systems Operation

1. Evergreen System. Except as otherwise provided pursuant to Section V.D.2., Defendant shall continue to operate the Evergreen System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s), including all upgradient monitoring wells in the Core Area, fail to detect the presence

of 1,4-dioxane in groundwater at a concentration which exceeds 3 ug/l.

Western System. Except as otherwise provided pursuant to Section V.D.2., Defendant shall continue to operate the Western System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s), including all upgradient monitoring wells in the Core Area, fail to detect the presence of 1,4-dioxane in groundwater at a concentration which exceeds 3 ug/l.

Core System. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to operate the Core System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration which exceeds 60 ug/l if the Groundwater Reinjection Alternative is selected, or 500 ug/l if Surface Water Discharge Alternative is selected.

2. The termination criteria provided in Section V.D.1. may be modified as follows:

a. At any time two years after entry of this Consent Judgment, Defendant may propose to the MDNR that the termination criteria be modified based upon either or both of the following:

i. a change in legally applicable or relevant and appropriate regulatory criteria since the entry of this Consent Judgment; for purposes of this subparagraph, "regulatory criteria" shall mean any promulgated standard criterion or limitation under federal or state environmental law specifically applicable to 1,4-dioxane; or

ii. scientific evidence newly released since the entry of this Consent Judgment, which, in combination with the existing scientific evidence, establishes that different termination criteria for 1,4-dioxane are appropriate and will assure protection of public health, safety, welfare, the environment, and natural resources.

b. Defendant shall submit any such proposal in writing, together with supporting documentation, to the MDNR for review.

c. If the Parties agree to a proposed modification, the agreement shall be made by written Stipulation filed with the Court pursuant to Section XXIV of this Judgment.

d. If MDNR disapproves the proposed modification, Defendant may invoke the Dispute Resolution procedures contained in Section XVI of this Consent Judgment. Alternatively, if MDNR disapproves a

proposed modification, Defendant and Plaintiffs may agree to resolve the dispute pursuant to subparagraph V.D.3.

3. If the parties do not agree to a proposed modification, Defendant and Plaintiffs may prepare a list of the items of difference to be submitted to a scientific advisory panel for review and recommendations. The scientific advisory panel shall be comprised of three persons with scientific expertise in the discipline(s) relevant to the items of difference. No member of the panel may be a person who has been employed or retained by either party, except persons compensated solely for providing peer review of the Hartung Report, in connection with the subject of this litigation.

a. If this procedure is invoked, each party shall, within 14 days, select one member of the panel. Those two members of the panel shall select the third member. Defendant shall, within 28 days after this procedure is invoked, establish a fund of at least $10,000.00, from which each member of the panel shall be paid reasonable compensation for their services, including actual and necessary expenses. If the parties do not agree concerning the qualifications, eligibility, or compensation of panel members, they may invoke the Dispute Resolution procedures contained in Section XVI of this Consent Judgment.

b. Within a reasonable period of time after selection of all panel members, the panel shall confer and establish a schedule for acceptance of submissions from the parties completing review and making recommendations on the items of difference.

c. The scientific advisory panel shall make its recommendations concerning resolution of the items of difference to the parties. If both parties accept those recommendations, the termination criteria shall be modified in accordance with such recommendations. If the parties disagree with the recommendations, the MDNR's proposed resolution of the dispute shall be final unless Defendant invokes the procedures for judicial Dispute Resolution as provided in Section XVI of the Judgment. The recommendation of the scientific advisory panel and any related documents shall be submitted to the Court as part of the record to be considered by the Court in resolving the dispute.

4. Notification of Termination. At least 30 days prior to the date Defendant proposes to terminate operation of a purge well pursuant to the criteria established in subparagraph V.D.1., or a modified criterion established through subparagraph V.D.2., Defendant shall send written notice to the MDNR identifying the proposed action and the test data demonstrating compliance with the termination criterion.

5. Termination. Within 30 days after the MDNR's receipt of the notice and supporting documentation, the MDNR shall approve or disapprove the proposed termination in writing. Defendant may terminate operation of the well system(s) in question upon: (a) receipt of written notice of approval from the MDNR; or (b) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of the Consent Judgment.

E. Post-Termination Monitoring

1. For systems with a termination criterion of 3 ug/l, for a period of five years after cessation of operation of any purge well, Defendant shall continue monitoring of the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify the MDNR and shall collect a second sample within 14 days of such finding. If the second sample confirms the presence of 1,4-dioxane in excess of the termination criterion:

a. if the confirmed concentrations are in excess of 6 ug/l, Defendant shall restart the associated purge well system; or

b. if the confirmed concentrations are between 3 ug/l and 6 ug/l, Defendant may continue to monitor the well bi-weekly for two months without restart of the associated purge well. At the end of the monitoring period, if concentrations in the monitoring well meet the termination criterion of 3 ug/l, Defendant shall continue to monitor as required by the approved monitoring program; if concentrations do not meet the termination criterion, Defendant shall restart the associated purge well.

2. For all other groundwater systems, for a period of five years after ceasing operation of any purge well, Defendant shall continue monitoring of the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify MDNR and shall collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, Defendant shall immediately restart the purge well system.

VI. GSI PROPERTY REMEDIATION

Defendant shall design, install, operate, and maintain the systems described below to control, remove, and treat (as required) soil contamination at the GSI Property. The overall objective of these systems shall be to: (1) prevent the migration of 1,4-dioxane from contaminated soils into any aquifer in concentrations that cause groundwater contamination; (2) to prevent venting of groundwater contamination into Honey Creek Tributary; and (3) to prevent venting of groundwater contamination to Third Sister Lake. Defendant also shall implement a monitoring plan to verify the effectiveness of these systems.

A. Marshy Area System
(hereinafter "Marshy Area System")

1. Objectives. The objectives of this System are to: (a) remove contaminated groundwater from the Marshy Area located north of former Ponds I and II; (b) reduce the migration of contaminated groundwater from the Marshy Area into other aquifers; and (c) to prevent the discharge of contaminated groundwater from the Marshy Area into the Honey Creek Tributary in concentrations in excess of 100 ug/l or in excess of a concentration which would cause groundwater contamination along or adjacent to the entire length of Honey Creek or Honey Creek Tributary.

2. Design. No later than 150 days after the effective date, Defendant shall submit its proposed design of the Marshy Area System a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan to MDNR for its review and approval.

3. Treatment and Disposal. The Marshy Area System shall include: (a) facilities for the collection of contaminated groundwater (either an interceptor trench or sumps); (b) facilities for disposing of the contaminated groundwater (including disposal to local surface waters in accordance with NPDES Permit MI-008453, Defendant's deep well, or in any other manner approved by MDNR and/or the Water Resources Commission); and (c) if the water is to be discharged to the sanitary sewer for ultimate disposal at the City of Ann Arbor Wastewater Treatment Plant, treatment facilities to ensure that discharge to the sanitary sewer complies with the terms and conditions of the Industrial User's Permit authorizing such discharge, and any subsequent amendment to that Permit. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment. Use of the sanitary sewer is conditioned on approval of the City of Ann Arbor and Scio Township.

4. Installation and Operation. Upon approval by the MDNR, Defendant shall install the Marshy Area System and thereafter continuously operate and maintain the System according to the approved plans until it is authorized to shut down the System pursuant to Section VI.D. of this Consent Judgment.

5. Monitoring. Defendant shall implement the approved monitoring plan to verify the effectiveness of the Marshy Area System in meeting the requirements of this Remedial Action Consent Judgment. The monitoring plan shall be continued until terminated pursuant to Section VI.D. of this Consent Judgment.

B. Spray Irrigation Field

1. Objectives. The objectives of this program shall be to meet the overall objective of Section VI upon completion of the program and to prevent the discharge of groundwater contamination into Third Sister Lake.

2. Remedial Investigation. Defendant shall, no later than 180 days after the effective date, submit to MDNR for review and approval a work plan for determining the distribution of soil contamination in the former spray irrigation area. Soil characteristics for the area may be extrapolated from results of samples taken from representative spray head locations.

3. Soil Flushing System. Defendant shall, no later than 240 days after the effective date, submit to MDNR for review and approval a work plan for the installation of a system to flush the former spray irrigation field with clean water to enhance removal of 1,4-dioxane from contaminated soils. The work plan shall include Defendant's proposed design of the system, a time schedule for implementation of the system, an operating and maintenance plan, and effectiveness monitoring plan.

4. Structures in the Spray Field. The following structures have been constructed over portions of the former spray irrigation area: (a) the Defendant's warehouse; (b) the parking area south of the Defendant's warehouse; and (c) the parking lot between the Medical Device Division Building and the Defendant's warehouse. These structures are identified in Attachment D. With respect to these structures, during such time as they are kept in good maintenance and repair, the soils beneath such structures need not be sampled nor directly addressed in the soils systems remediation plan. In the event that the structures are not kept in good maintenance or repair, or are scheduled to be replaced or demolished, Defendant shall notify MDNR of such a circumstance, and take the following actions:

a. Defendant shall, within 21 days after notification, submit to MDNR for approval a work plan for investigating the extent of contamination (if any) of the soils beneath the structure, along with a schedule for implementation of the work plan.

b. Within 14 days after approval of the work plan by MDNR, Defendant shall implement the work plan and submit a report of the results to MDNR within the time specified in the approved schedule.

c. If soil contamination is identified in any of the areas investigated, Defendant shall submit, together with the report required in Section VI.B.4.b., a remediation plan for that area that provides for induced flushing of contaminants from the impacted soils. The plan shall include a proposed schedule for implementation. The remediation system shall be installed, operated, and terminated in accordance with the approved plan.

5. Installation, Operation, and Monitoring. Upon approval by MDNR, Defendant shall install, operate, maintain, and monitor the Spray Irrigation Field System in accordance with the approved plans and the termination criteria established in Section VI.D.

C. Soils System

1. Objectives. The objectives of this program are to: (a) evaluate the feasibility and effectiveness of available options for remediation of identified source areas; (b) design and implement remedial systems to achieve the overall objectives of Section VI; and (c) verify the effectiveness of those systems.

2. Soils Remediation Plan. Defendant shall, no later than 210 days after the effective date, submit to MDNR for review and approval a soils remediation plan for addressing identified areas of soil contamination. The areas to be addressed include the burn pit; the former Pond I area; the former Pond II area; the former Lift Station area; and Pond III. These areas are depicted on Attachment E. As part of the remediation plan, Defendant may make a demonstration that with respect to any of these areas, cleanup to a level established under Mich Adm Code R 299.5717 ("Type C") is appropriate by addressing the factors set forth in Mich Adm Code R 299.5717(3). Defendant's proposal for the preferred remedial alternative(s) to be implemented to address each area of soil contamination shall be identified in the soils remediation plan. The proposed remedial alternative(s) to be implemented must attain the overall objectives of Section VI. Based upon their review, the MDNR shall either: (a) approve Defendant's proposed remedial alternative(s); or (b) disapprove the proposed remedial

alternative(s) and select the other remedial alternative(s) to be implemented. A decision by MDNR to disapprove Defendant's remedial proposal is subject to Defendant's rights under the Dispute Resolution provisions of Section XVI of the Consent Judgment.

3. Design. Defendant shall, not later than 60 days after: (a) the MDNR's decision approving the proposed remedial alternative(s); or (b) the final decision in Dispute Resolution pursuant to Section XVI of the Consent Judgment, submit the following to the MDNR for review and approval: Defendant's proposed design of each selected remedial system, a time schedule for implementation of the system, an operating and maintenance plan, and effectiveness monitoring plan.

4. Installation, Operation, and Monitoring. Upon approval by MDNR, Defendant shall install, operate, maintain, and monitor the systems in accordance with the approved plans, and the termination criteria established in Section VI.D. of the Consent Judgment.

D. Termination Criteria for GSI Property Remediation

1. Remedial Systems Collecting or Extracting Contaminated Groundwater.

a. Except as otherwise provided pursuant to Section VI.D.3., Defendant shall continue to operate the Marshy Area System and any groundwater remediation program developed as part of the Soils System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. Notwithstanding this criterion, Defendant shall continue to operate the portions of the such systems necessary to assure that contaminated groundwater does not vent into surface waters in concentrations in excess of 100 ug/l until such time as Defendant demonstrates to Plaintiff that venting in excess of 100 ug/l is not occurring from the Marshy Areas or Soils Systems and Defendant demonstrates that venting into surface waters will not cause groundwater contamination along or adjacent to the entire length of Honey Creek or the Honey Creek Tributary. These Systems shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

b. Except as otherwise provided pursuant to Section VI.D.3., Defendant shall continue to operate the purge wells for the Spray Irrigation Field System until six consecutive monthly tests of samples from the purge well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. Notwithstanding this criterion, Defendant

shall continue to operate such purge wells as necessary to assure that contaminated groundwater does not vent into Third Sister Lake. These Systems shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

2. All Other GSI Property Remedial Systems. Except as provided in Section VI.D.3., each GSI Property Remedial System not subject to termination pursuant to Section VI.D.1. shall be operated until Defendant demonstrates, through representative soil sampling and analysis in accordance with the effectiveness monitoring plan approved by the MDNR, that the concentration of 1,4-dioxane in soils in the area in question does not exceed 60 ug/kg or other higher concentration derived by means consistent with Mich Admin Code R 299.5711(2) or R 299.5717.

3. The termination criteria provided in Section VI.D. may be modified in the same manner as specified in Sections V.D.2. and V.D.3.

4. At least 30 days prior to the date Defendant proposes to terminate operation of a system pursuant to Section VI.D., Defendant shall send a written notice to the MDNR identifying the proposed action and shall send test data demonstrating compliance with the termination criterion.

5. Within 30 days after the MDNR's receipt of the written notice and supporting documentation, the MDNR shall approve or disapprove the proposed termination in writing. Defendant may terminate operation of the system(s) in question upon: (a) receipt of written notice of approval from Plaintiffs; or (b) if the Dispute Resolution procedures of Section XVI are invoked, receipt of a final decision pursuant to that Section.

VII. COMPLIANCE WITH OTHER LAWS AND PERMITS

A. Defendant shall undertake all activities pursuant to this Consent Judgment in accordance with the requirements of all applicable laws, regulations, and permits.

B. Defendant shall apply for all permits necessary for implementation of the Consent Judgment including, without limitation, surface water discharge permit(s) and air discharge permit(s).

C. Defendant shall include in all contracts entered into by the Defendant for Remedial Action required under this Consent Judgment (and shall require that any contractor include in all subcontract(s), a provision stating that such contractors and subcontractors, including their agents and employees, shall perform all activities required by such contracts or subcontracts in compliance with and all applicable laws, regulations, and permits. Defendant shall provide a copy of relevant approved workplans to any such contractor or subcontractor.

D. The Parties agree to provide reasonable cooperation and assistance to the Defendant in obtaining necessary approvals and permits for Remedial Action. Plaintiffs shall not unreasonably withhold or delay any required approvals or permits for Defendant's performance of the Remedial Action. Plaintiffs expressly acknowledge that one or more of the following permits and approvals may be necessary for Remedial Action:

1. NPDES Permit No. MI-008453.
2. An Air Permit for discharges of contaminants to the atmosphere for vapor extraction systems, if such systems are part of the remedial design;
3. A Wetlands Permit if necessary for construction of the Marshy Area System or the construction of facilities as part of the Core or Western Systems;
4. An Industrial User's Permit to be issued by the City of Ann Arbor for use of the sewer to dispose of treated or untreated purged groundwater. Plaintiffs have no objection to receipt by the Ann Arbor Wastewater Treatment Plant of the purged groundwater extracted pursuant to the terms and conditions of this Judgment, and acknowledge that receipt of the purged groundwater would not necessitate any change in current and proposed residual management programs of the Ann Arbor Wastewater Treatment Plant;

5. Permit(s) or permit exemptions to be issued by the Water Resources Commission to authorize the reinjection of purged and treated groundwater in the Evergreen, Core, and Western System Areas;

6. Surface water discharge permit(s) for discharge into surface waters in the Western System area, if necessary;

7. Approval of the City of Ann Arbor and the Washtenaw County Drain Commissioner to use storm drains for the remedial programs; or

8. A permit for the use of Defendant's deep well for injection of purged groundwater from the remedial systems required under this Consent Judgment.

VIII. SAMPLING AND ANALYSIS

Defendant shall make available to Plaintiffs the results of all sampling, tests, and/or other data generated in the performance or monitoring of any requirement under this Consent Judgment. Sampling data generated consistent with this Consent Judgment shall be admissible in evidence in any proceeding related to enforcement of this Judgment without waiver by any Party of any objection as to weight or relevance. Plaintiffs and/or their authorized representatives, at their discretion, may

take split or duplicate samples and observe the sampling event. Plaintiffs shall make available to Defendant the results of all sampling, tests, and/or other data generated in the performance or monitoring of any requirement under this Consent Judgment. Defendant will provide Plaintiffs with reasonable notice of changes in the schedule of data collection activities included in the progress reports submitted pursuant to Section XII.

IX. ACCESS

A. From the effective date of this Consent Judgment, the Plaintiffs, their authorized employees, agents, representatives, contractors, and consultants, upon presentation of proper identification, shall have the right at all reasonable times to enter the Site and any property to which access is required for the implementation of this Consent Judgment, to the extent access to the property is owned, controlled by, or available to the Defendant, for the purpose of conducting any activity authorized by this Consent Judgment, including, but not limited to:

1. Monitoring of the Remedial Action or any other activities taking place pursuant to this Consent Judgment on the property;
2. Verification of any data or information submitted to the Plaintiffs;

3. Conduct of investigations related to contamination at the Site;

4. Collection of samples;

5. Assessment of the need for, or planning and implementing of, Response Actions at the Site; and

6. Inspection and copying of non-privileged documents including records, operating logs, contracts, or other documents required to assess Defendant's compliance with this Consent Judgment.

All Parties with access to the Site or other property pursuant to this paragraph shall comply with all applicable health and safety laws and regulations.

B. To the extent that the Site or any other area where Remedial Action is to be performed by the Defendant under this Consent Judgment is owned or controlled by persons other than the Defendant, Defendant shall use its best efforts to secure from such persons access for Defendant, Plaintiffs, and their authorized employees, agents, representatives, contractors, and consultants. Defendant shall provide Plaintiffs with a copy of each access agreement secured pursuant to this paragraph. For purposes of this Paragraph, "best efforts" includes, but is not limited to, seeking judicial assistance to secure such access. If access is not obtained within 30 days after the MDNR approves any work plan or design for which such access is necessary,

Defendant shall notify the Plaintiffs promptly. Plaintiffs thereafter shall assist Defendant in obtaining access. Plaintiffs agree to use appropriate authority available under state law, including authority provided under the Michigan Environmental Response Act, as amended, MCL 229.601 et seq, to obtain access to property on behalf of themselves and Defendant for the purpose of implementing Remedial Action under this Consent Judgment.

X. APPROVALS OF SUBMISSIONS

Upon receipt of any plan, report, or other item that is required to be submitted for approval pursuant to this Consent Judgment, as soon as practicable, but in no event later than 56 days after receipt of any such submission, the Plaintiffs will: (1) approve the submission; or (2) submit to Defendant changes in the submission that would result in approval of the submission. If Plaintiffs do not respond within 56 days after receipt of the submittal, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. Upon receipt of a notice of approval or changes from Plaintiffs, Defendant shall proceed to take any action required by the plan, report, or other item, as approved or as may be modified to address the deficiencies identified by Plaintiffs. If Defendant does not accept the changes proposed by Plaintiffs, Defendant may submit the matter to Dispute Resolution, Section XVI.

XI. PROJECT COORDINATORS

A. Plaintiffs designate Leonard Lipinski as Plaintiffs' Project Coordinator. Defendant designates James Fahrner, Vice President and Chief Financial Officer, as Defendant's Project Coordinator. Defendant's Project Coordinator shall have primary responsibility for implementation of the Remedial Action at the Site. Plaintiffs' Project Coordinator will be the primary designated representative for Plaintiffs with respect to implementation of the Remedial Action at the Site. All communication between Defendant and Plaintiffs, including all documents, reports, approvals, other submissions and correspondence concerning the activities performed pursuant to the terms and conditions of this Consent Judgment, shall be directed through the Project Coordinators. If any Party changes its designated Project Coordinator, that Party shall provide the name, address, and telephone number of the successor in writing to the other Party seven days prior to the date on which the change is to be effective. This paragraph does not relieve Defendant from other reporting obligations under the law.

B. Plaintiffs may designate other authorized representatives, employees, contractors, and consultants to observe and monitor the progress of any activity undertaken pursuant to this Consent Judgment. Plaintiffs' Project Coordinator shall provide Defendant's Project Coordinator

with the names, addresses, telephone numbers, positions, and responsibilities of any person designated pursuant to this section.

XII. PROGRESS REPORTS

Defendant shall provide to Plaintiffs written quarterly progress reports that shall: (1) describe the actions which have been taken toward achieving compliance with this Consent Judgment during the previous three months; (2) describe data collection and activities scheduled for the next three months; and (3) include all results of sampling and tests and other data received by the Defendant, its consultants, engineers, or agents during the previous three months relating to Remedial Action performed pursuant to this Consent Judgment. Defendant shall submit the first quarterly report to MDNR within 120 days after entry of this Consent Judgment, and by the 30th day of the month following each quarterly period thereafter, as feasible, until termination of this Consent Judgment as provided in Section XXV.

XIII. RESTRICTIONS ON ALIENATION

A. Defendant shall not sell, lease, or alienate the GSI Property unless the purchaser, lessee, or grantee provides prior written agreement with Plaintiffs that the purchaser, lessee, or grantee will not interfere with any term or condition of this

Consent Judgment. Notwithstanding any purchase, lease, or grant, Defendant shall remain obligated to comply with all terms and conditions of this Consent Judgment.

B. Any deed, title, or other instrument of conveyance regarding the GSI Property shall contain a notice that Defendant's Property is the subject of this Consent Judgment, setting forth the caption of the case, the case number, and the court having jurisdiction herein.

XIV. FORCE MAJEURE

Any delay attributable to a Force Majeure shall not be deemed a violation of Defendant's obligations under this Consent Judgment.

A. "Force Majeure" is defined as an occurrence or nonoccurrence arising from causes beyond the control of Defendant or of any entity controlled by the Defendant performing Remedial Action, such as Defendant's employees, contractors, and subcontractors. Such occurrence or nonoccurrence includes, but is not limited to: (1) an Act of God; (2) untimely review of permit applications or submissions; (3) acts or omissions of third parties for which Defendant is not responsible; (4) insolvency of any vendor, contractor, or subcontractor retained by Defendant as part of implementation of this Judgment; and (5) delay in obtaining necessary access agreements under Section IX

that could not have been avoided or overcome by due diligence. "Force Majeure" does not include unanticipated or increased costs, changed financial circumstances, or nonattainment of the treatment and termination standards set forth in Sections V and VI.

B. When circumstances occur that Defendant believes constitute Force Majeure, Defendant shall notify the MDNR by telephone of the circumstances within 48 hours after Defendant first believes those circumstances to apply. Within 14 working days after Defendant first believes those circumstances to apply, Defendant shall supply to the MDNR, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by Defendant to avoid, minimize, or overcome the delay, and the timetable for implementation of such measures. Failure of Defendant to comply with the written notice provisions of this paragraph shall constitute a waiver of Defendant's right to assert a claim of Force Majeure with respect to the circumstances in question.

C. A determination by the MDNR that an event does not constitute Majeure, that a delay was not caused by Force, or that the period of delay was not necessary to compensate for Force Majeure may be subject to Dispute Resolution under Section XVI of this Judgment.

D. The MDNR shall respond, in writing, to any request by Defendant for a Force Majeure extension within 30 days of receipt of the Defendant's request. If the MDNR does not respond within that time period, Defendant's request shall be deemed granted. If the MDNR agrees that a delay is or was caused by Force Majeure, Defendant's delays shall be excused, stipulated penalties shall not accrue, and the MDNR shall provide Defendant such additional time as may be necessary to compensate for the Force Majeure event.

E. Delay in achievement of any obligation established by the Consent Judgment shall not automatically justify or excuse delay in achievement of any subsequent obligation unless the subsequent obligation automatically follows from the delayed obligation.

XV. REVOCATION OR MODIFICATION OF LICENSES OR PERMITS

Any delay attributable to the revocation or modification of licenses or permits obtained by Defendant to implement remediation actions as set forth in this Consent Judgment shall not be deemed a violation of Defendant's obligations under this Consent Judgment, provided that such revocation or modification arises from causes beyond the control of Defendant or of any entity controlled by the Defendant performing Remedial Action, such as Defendant's employees, contractors, and subcontractors.

A. Licenses or permits that may need to be obtained or modified by Defendant to implement the Remedial Actions are those specified in Section VII.D. and licenses, easements, and other agreements for access to property or rights of way on property necessary for the installation of remedial systems required by this Consent Judgment.

B. A revocation or modification of a license or permit within the meaning of this section means withdrawal of permission, denial of permission, a limitation or a change in license or permit conditions that delays the implementation of all or part of a remedial system. Revocation or modification due to Defendant's violation of a license or permit (or any conditions of a license or permit) shall not constitute a revocation or modification covered by this section.

C. When circumstances occur that Defendant believes constitute revocation or modification of a license or permit, Defendant shall notify the MDNR by telephone of the circumstances within 48 hours after Defendant first believes those circumstances to apply. Within 14 working days after Defendant first believes those circumstances to apply, Defendant shall supply to the MDNR, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by Defendant to avoid, minimize, or overcome the delay, and the

timetable for implementation of such measures. Failure of Defendant to comply with the written notice provisions of this paragraph shall constitute a waiver of Defendant's right to assert a claim of revocation or modification of a license or permit with respect to the circumstances in question.

D. A determination by the MDNR that an event does not constitute revocation or modification of a license or permit, that a delay was not caused by revocation or modification of a license or permit, or that the period of delay was not necessary to compensate for revocation or modification of a license or permit may be subject to Dispute Resolution under Section XVI of this Consent Judgment.

E. The MDNR shall respond, in writing, to any request by Defendant for a revocation or modification of a license or permit extension within 30 days of receipt of the Defendant's request. If the MDNR does not respond within that time period, Defendant's request shall be deemed granted. If the MDNR agrees that a delay is or was caused by revocation or modification of a license or permit, Defendant's delays shall be excused, stipulated penalties shall not accrue, and the MDNR shall provide Defendant such additional time as may be necessary to compensate for the revocation or modification of a license or permit.

F. Delay in achievement of any obligation established by the Consent Judgment shall not automatically justify or excuse delay in achievement of any subsequent obligation unless the subsequent obligation automatically follows from the delayed obligation.

XVI. DISPUTE RESOLUTION

A. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under this Consent Judgment and shall apply to all provisions of this Consent Judgment, whether or not particular provisions of the Consent Judgment in question make reference to the dispute resolution provisions of this Section. Any dispute that arises under this Consent Judgment initially shall be the subject of informal negotiations between the Parties. The period of negotiations shall not exceed ten working days from the date of written notice by any Party that a dispute has arisen. This period may be extended or shortened by agreement of the Parties.

B. Immediately upon expiration of the informal negotiation period (or sooner if upon agreement of the parties), the MDNR shall provide to Defendant a written statement setting forth the MDNR's proposed resolution of the dispute. Such resolution shall be final unless, within 15 days after receipt of the MDNR's proposed resolution (clearly identified as such

under this Section), Defendant files a petition for resolution with the Washtenaw County Circuit Court setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Judgment.

C. Within ten days of the filing of the petition, Plaintiffs may file a response to the petition, and unless a dispute arises from the alleged failure of MDNR to timely make a decision, MDNR will submit to the Court all documents containing information related to the matters in dispute, including documents provided to MDNR by Defendant. In the event of a dispute arising from the alleged failure of MDNR to timely make a decision, within ten days of filing of the petition, each party shall submit to the Court correspondence, reports, affidavits, maps, diagrams, and other documents setting forth facts pertaining to the matters in dispute. Those documents and this Consent Judgment shall comprise the record upon which the Court shall resolve the dispute. Additional evidence may be taken by the Court on its own motion or at the request of either party if the Court finds that the record is incomplete or inadequate. Review of the petition shall be conducted by the Court and shall be confined to the record. The review shall be independent of any factual or legal conclusions made by the Court prior to the date of entry of the Consent Judgment.

D. The Court shall uphold the decision of MDNR on the issue in dispute unless the Court determines that the decision is any of the following:

1. Inconsistent with this Consent Judgment;
2. Not supported by competent, material, and substantial evidence on the whole record;
3. Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion; and
4. Affected by other substantial and material error of law;

E. The filing of a petition for resolution of a dispute shall not by itself extend or postpone any obligation of Defendant under this Consent Judgment, provided, however, that payment of stipulated penalties with respect to the disputed matter shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue as provided in Section XVII. Stipulated penalties that have accrued with respect to the matter in dispute shall not be assessed by the Court and shall be dissolved if Defendant prevails on the matter. The Court may also direct that stipulated penalties shall not be assessed and paid as provided in Section XVII upon a determination that there was a substantial basis for Defendant's position on the disputed matter.

XVII. STIPULATED PENALTIES

A. Except as otherwise provided, if Defendant fails or refuses to comply with any term or condition in Sections IV, V, VI, VII, or VIII, or with any plan, requirement, or schedule established pursuant to those Sections, then Defendant shall pay stipulated penalties in the following amounts for each working day for every failure or refusal to comply or conform:

Period of Delay	Penalty Per Violation Per Day
1st through 15th Day	$ 1,000
15th through 30th Day	$ 1,500
Beyond 30 Days	$ 2,000

B. Except as otherwise provided if Defendant fails or refuses to comply with any other term or condition of this Consent Judgment, Defendant shall pay to Plaintiffs stipulated penalties of $500.00 per working day for each and every failure to comply.

C. If Defendant is in violation of this Consent Judgment, Defendant shall notify Plaintiffs of any violation no later than five working days after first becoming aware of such violation, and shall describe the violation.

D. Stipulated penalties shall begin to accrue upon the next day after performance was due or other failure or refusal to comply occurred. Penalties shall continue to accrue until the final day of correction of the noncompliance. Separate penalties

shall accrue for each separate failure or refusal to comply with the terms and conditions of this Consent Judgment. Penalties may be waived in whole or in part by Plaintiffs or may be dissolved by the Court pursuant to Section XVII.

E. Stipulated penalties shall be paid no later than 14 working days after receipt by Defendant of a written demand from Plaintiffs. Defendant shall make payment by transmitting a check in the amount due, payable to the "State of Michigan", addressed to the Assistant Attorney General in Charge, Environmental Protection Division, P.O. Box 30212, Lansing, Michigan 48909.

F. Plaintiffs agree that, in the event that an act or omission of Defendant constitutes a violation of this Consent Judgment subject to stipulated penalties and a violation of other applicable law, Plaintiffs will not impose upon Defendant for that violation both the stipulated penalties provided under this Consent Judgment and the civil penalties permitted under other applicable laws. Plaintiffs reserve the right to pursue any other remedy or remedies to which they may be entitled under this Consent Judgment or any applicable law for any failure or refusal of the Defendant to comply with the requirements of this Consent Judgment.

XVIII. PLAINTIFFS' COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

A. Except as otherwise provided in this Consent Judgment, Plaintiffs covenant not to sue or take administrative action for Covered Matters against Defendant, its officers, employees, agents, directors, and any persons acting on its behalf or under its control.

B. "Covered Matters" shall mean any and all claims available to Plaintiffs under federal and state law arising out of the subject matter of the Plaintiffs' Complaint with respect to the following:

1. Claims for injunctive relief to address soil, groundwater, and surface water contamination at or emanating from the GSI Property;
2. Claims for civil penalties and costs;
3. Claims for natural resource damages;
4. Claims for reimbursement of response costs incurred prior to entry of this Consent Judgment or incurred by Plaintiffs for provision of alternative water supplies in the Evergreen Subdivision; and
5. Claims for reimbursement of costs incurred by Plaintiffs for overseeing the implementation of this Consent Judgment.

C. "Covered Matters" does not include:

1. Claims based upon a failure by Defendant to comply with the requirements of this Consent Judgment;
2. Liability for violations of federal or state law which occur during implementation of the Remedial Action; and
3. Liability arising from the disposal, treatment, or handling of any hazardous substance removed from the Site.

D. With respect to liability for alleged past violations of law, this covenant not to sue shall take effect on the effective date of this Consent Judgment. With respect to future liability for performance of response activities required to be performed under this Consent Judgment, the covenant not to sue shall take effect upon issuance by MDNR of the Certificate of Completion in accordance with Section XXV.

E. Notwithstanding any other provision in this Consent Judgment: (1) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to require Defendant to perform any additional response activity at the Site; and (2) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to reimburse Plaintiffs for response costs incurred by the State of Michigan relating to the Site. Plaintiffs' rights in D.1. and D.2. apply if and only

if the following conditions are met:

1. For proceedings prior to Plaintiffs' certification of completion of the Remedial Action concerning the Site,
   a. conditions at the Site, previously unknown to the Plaintiffs, are discovered after the entry of this Consent Judgment, or new information previously unknown to Plaintiffs is received after the effective date of the Consent Judgment; and
   b. these previously unknown conditions indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment; and
2. For proceedings subsequent to Plaintiffs' certification of completion of the Remedial Action concerning the Site,
   a. conditions at the Site, previously unknown to the Plaintiffs, are discovered or new information previously unknown to Plaintiffs is received after the certification of completion by Plaintiffs; and

b. these previously unknown conditions indicate that the remedial action is not protective of the public health, safety, welfare, and the environment.

F. Nothing in this Consent Judgment shall in any manner restrict or limit the nature or scope of response actions that may be taken by Plaintiffs in fulfilling their responsibilities under federal and state law, and this Consent Judgment does not release, waive, limit, or impair in any manner the claims, rights, remedies, or defenses of Plaintiffs against a person or entity not a party to this Consent Judgment.

G. Except as expressly provided in this Consent Judgment, Plaintiffs reserve all other rights and defenses that they may have, and this Consent Judgment is without prejudice, and shall not be construed to waive, estop, or otherwise diminish Plaintiffs' right to seek other relief with respect to all matters other than Covered Matters.

XIX. DEFENDANT'S COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

A. Defendant hereby covenants not to sue and agrees not to assert any claim or cause of action against Plaintiffs or any other agency of the State of Michigan with respect to environmental contamination at the Site or response activities relating to the Site arising from this Consent Judgment.

B. Notwithstanding any other provision in this Consent Judgment, for matters that are not Covered Matters as defined in Section XVIII.E., or in the event that Plaintiffs institute proceedings as allowed under Section XVIII.E., Defendant reserves all other rights, defenses, or counterclaims that it may have with respect to such matters and this Consent Judgment is without prejudice, and shall not be construed to waive, estop, or otherwise diminish Defendant's right to seek other relief and to assert any other rights and defenses with respect to such other matters.

C. Nothing in this Consent Judgment shall in any way impair Defendant's rights, claims, or defenses with respect to any person not a party to this Consent Judgment.

XX. INDEMNIFICATION AND INSURANCE

A. Defendant shall indemnify and save and hold harmless the State of Michigan and its departments, agencies, officials, agents, employees, contractors, and representatives from any and all claims or causes of action arising from, or on account of, acts or omissions of Defendant, its officers, employees, agents, and any persons acting on its behalf or under its control in carrying out Remedial Action pursuant to this Consent Judgment. Plaintiffs shall not be held out as a party to any contract entered into by or on behalf of Defendant in carrying out

activities pursuant to this Consent Judgment. Neither the Defendant nor any contractor shall be considered an agent of Plaintiffs. Defendant shall not indemnify or save and hold harmless Plaintiffs from their own negligence pursuant to this paragraph.

B. Prior to commencing any Remedial Action on the Gelman Property, Defendant shall secure, and shall maintain for the duration of the Remedial Action, comprehensive general liability insurance with limits of $1,000,000.00, combined single limit, naming as an additional insured the State of Michigan. If Defendant demonstrates by evidence satisfactory to Plaintiffs that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then with respect to that contractor or subcontractor, Defendant need provide only that portion, if any, of the insurance described above that is not maintained by the contractor or subcontractor.

XXI. RECORD RETENTION

Defendant, Plaintiffs, and their representatives, consultants, and contractors shall preserve and retain, during the pendency of this Consent Judgment and for a period of ten years after its termination, all records, sampling or test results, charts, and other documents that are maintained or

generated pursuant to any requirement of this Consent Judgment, including, but not limited to, documents reflecting the results of any sampling or tests or other data or information generated or acquired by Plaintiffs or Defendant, or on their behalf, with respect to the implementation of this Consent Judgment. After the ten year period of document retention, the Defendant and its successors shall notify Plaintiffs, in writing, at least 90 days prior to the destruction of such documents or records, and upon request, the Defendant and/or its successor shall relinquish custody of all records and documents to Plaintiffs.

XXII. ACCESS TO INFORMATION

Upon request, Plaintiffs and Defendant shall provide to the requesting Party copies of or access to all nonprivileged documents and information within their possession and/or control or that of their employees, contractors, agents, or representatives, relating to activities at the Site or to the implementation of this Consent Judgment, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Remedial Action. Upon request, Defendant shall also make available to Plaintiffs, their employees, contractors, agents, or representatives with knowledge of relevant facts concerning the performance of the Remedial Action. The

Plaintiffs shall treat as confidential all documents provided to Plaintiffs by the Defendant marked "confidential" or "proprietary."

XXIII. NOTICES

Whenever under the terms of this Consent Judgment notice is required to be given or a report, sampling data, analysis, or other document is required to be forwarded by one Party to the other, such notice or document shall be directed to the following individuals at the specified addresses or at such other address as may subsequently be designated in writing:

For Plaintiffs:

Leonard Lipinski
Project Manager
Michigan Deptartment
of Natural Resources
Environmental Response Division
301 East Louis Glick Highway
Jackson, MI 49201

For Defendants:

James Fahrner
Vice President
Gelman Sciences, Inc.
600 South Wagner Road
Ann Arbor, MI 48106

and

David H. Fink
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334

Any party may substitute for those designated to receive such notices by providing prior written notice to the other parties.

XXIV. MODIFICATION

This Consent Judgment may not be modified unless such modification is in writing, signed by all Parties, and approved and entered by the Court. Remedial Plans, work plans, or other submissions made pursuant to this Consent Judgment may be modified by mutual agreement of the Parties.

XXV. CERTIFICATION AND TERMINATION

A. When Defendant determines that it has completed all Remedial Action required by this Consent Judgment, Defendant shall submit to the MDNR a Notification of Completion and a draft final report. The draft final report must summarize all Remedial Action performed under this Consent Judgment and the performance levels achieved. The draft final report shall include or refer to any supporting documentation.

B. Upon receipt of the Notification of Completion, the MDNR will review the Notification of Completion and the accompanying draft final report, any supporting documentation, and the actual Remedial Action performed pursuant to this Consent Judgment. After conducting this review, and not later than three months after receipt of the Notification of Completion, the MDNR shall issue a Certificate of Completion upon a determination by the MDNR that Defendant has completed satisfactorily all requirements of this Consent Decree, including, but not limited

to, completion of all Remedial Action, achievement of all termination and treatment standards required by this Consent Judgment, compliance with all terms and conditions of this Consent Judgment, and payment of any and all stipulated penalties owed to Plaintiffs. If the MDNR does not respond to the Notification of Completion within three months after receipt of the Notification of Completion, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. This Consent Judgment shall terminate upon motion and order of this Court after issuance of the Certificate of Completion. Upon issuance, the Certificate of Completion may be recorded.

XXVI. RELATED SETTLEMENT

The Parties' agreement to be bound by this Consent Judgment is contingent upon the stipulation by the Parties to, and the entry by the Court of, the proposed Consent Judgment in the related case State of Michigan v Gelman Sciences, Inc. (E.D. Mich. No. 90-CV-72946-DT), a copy of which is attached hereto as Attachment F. In the event that the related Consent Judgment in Michigan v Gelman Sciences, Inc. is not entered, this Consent Judgment shall be without force and effect.

XXVII. EFFECTIVE DATE

The effective date of this Consent Judgment shall be the date upon which this Consent Judgment is entered by the Court.

XXVIII. SEVERABILITY

The provisions of this Consent Judgment shall be severable. Should any provision be declared by a court of competent jurisdiction to be inconsistent with federal or state law, and therefore unenforceable, the remaining provisions of this Consent Judgment shall remain in full force and effect.

XXIX. SIGNATORIES

Each undersigned representative of a Party to this Consent Judgment certifies that he or she is fully authorized by the Party to enter into this Consent Judgment and to legally bind such Party to the respective terms and conditions of this Consent Judgment.

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

FRANK J. KELLEY
Attorney General for
the State of Michigan
Attorney for Plaintiffs

Robert P. Reichel

A. Michael Leffler (P24254)
Robert P. Reichel (P31878)
Assistant Attorneys General
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-7780

Dated: 10/23/92

DEFENDANT

GELMAN SCIENCES, INC.

Approved as to form:
Cooper, Fink & Zausmer, P.C.
Attorneys for Defendant
Gelman Sciences, Inc.

David H. Fink (P28235)
Alan D. Wasserman (P39509)
Thomas A. Biscup (P40380)
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334

Dated: 10/16/92

IT IS SO ORDERED AND ADJUDGED this _____ day of OCT 26 1992, 1992.

HONORABLE PATRICK J. CONLIN
Circuit Court Judge

A TRUE COPY

EXHIBIT 8

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

v

Case No. 88-34734-CE

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant./

MOTION TO INTERVENE

BEFORE THE HONORABLE TIMOTHY P. CONNORS, CIRCUIT JUDGE

Ann Arbor, Michigan - Thursday, February 2, 2017

APPEARANCES:

For the Plaintiff:
BRIAN J. NEGELE (P41846)
Department of Attorney General
525 West Ottawa Street
PO Box 30212
Lansing, Michigan 48909
(517) 373-7540

For the Defendant:
MICHAEL L. CALDWELL (P40554)
Zausmer, August and Caldwell, P.C.
31700 Middlebelt Road, Suite 150
Farmington Hills, Michigan 48334
(248) 851-4111

For the Intervener Scio Township:
WILLIAM J. STAPLETON (P38339)
Hooper Hathaway P.C.
126 South Main Street
Ann Arbor, Michigan 48104
(734) 662-4426

APPEARANCES (continued):

For the Intervener Huron River Watershed Council:	ODAY SALIM (P80897) Great Lakes Environmental Law Center 4444 Second Avenue Detroit, Michigan 48201 (313) 782-3372
For the Intervener City of Ann Arbor:	ABIGAIL ELIAS (P34941) Ann Arbor City Attorney's Office 301 East Huron Street Ann Arbor, Michigan 48104 (734) 794-6188
Transcript Provided by:	Accurate Transcription Services, LLC Firm # 8493 (734)944-5818
Transcribed by:	Lisa Beam, CER #8647

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Ann Arbor, Michigan

Thursday, February 2, 2017 - 9:15 a.m.

* * * * * *

THE CLERK: Kelley (sic) v Gelman Sciences, 88-34734-CE.

THE COURT: Good morning.

MR. CALDWELL: Morning your Honor, Mike Caldwell on behalf of Gelman Sciences.

MR. STAPLETON: Good morning your Honor, William Stapleton appearing for Scio Township. I'm also here this morning with Bryce Kelly, Township Manager and ah -- Board Trustees Christine Green and Kathy Knol are also present in the courtroom.

MR. SALIM: Good morning your Honor, Oday Salim here for the Intervener Huron River Watershed Council.

THE COURT: Okay.

MS. ELIAS: Abigail Elias for Intervener City of Detroit -- City of Ann Arbor.

MR. NEGELE: Brian Negele representing the State.

THE COURT: So -- you know -- I always believe in transparency so I should say I -- there's some additional people I know -- Ms. Green I've known a long time and it's good to see you again.

MS. GREEN: Thank you. Nice to see you.

THE COURT: I haven't seen you in a while; I hope you're doing well.

MS. GREEN: Thank you very much.

THE COURT: And in full disclosure I was a grunt laborer for Mr. Kelley back when I was in college in law school. That won't be --

MR. CALDWELL: Motion to recuse.

THE COURT: -- no, no he treated me very roughly. You want him -- you want me there.

MR. CALDWELL: I'm sure -- I'm sure appropriately your Honor.

THE COURT: Yeah in retrospect he was right and I wasn't but yeah -- good to see you again Mr. Kelley.

MR. KELLEY: Good to see you your Honor.

THE COURT: Mr. Stapleton.

MR. STAPLETON: Yes, your Honor. As I understand it, Gelman is the only party object -- objecting to the intervention by Scio um --

THE COURT: Okay.

MR. STAPLETON: -- the Attorney General does not object to permissive intervention and none of the interveners object to the intervention. Um -- and just a procedural point Judge ah -- Gelman is concerned about additional interveners because negotiations would have to be restarted each time a party is added and -- you know if

Scio were asking to intervene a year from now Judge maybe Gelman would have a point but the negotiations haven't even started. Um -- as the Court is aware -- the Court's order was entered I believe two weeks ago um -- the original intervention order. There have not been any negotiations between the parties yet. No documents have been exchanged. In fact, as I understand it, I believe the parties have scheduled an initial conference with the Court for March 22nd um -- and so intervention by the Township won't cause any delay, won't cause any prejudice um -- and Scio would be able to be at the table for the start of the negotiations.

And so I guess the question is why does Scio want to intervene in this case and I guess -- first Judge I would say that Scio is not just any intervener. It is perhaps the governmental entity with the greatest interest in this matter because Scio -- as I'm sure the Court is aware -- is where everything happened. Um -- that's where the facility is located, it's where all the discharges occurred, it's where the highest concentrations of contaminants remain, um -- it's where there are continuing releases today from the facility and numerous residential wells which are at risk at the -- at the edge of the plume. So our position is that Scio very much deserves to be at the negotiating table when remedial options for the

dioxane con -- contamination are -- are discussed.

Judge, more specifically, the Township has three primary concerns. First, as I said, the Township is where all the releases initially occurred and in fact are still occurring today. These releases are the source of this entire plume that we're all here today talking about. The concentrations in the source area remain in the thousands of parts per billion um -- which is obviously greatly in excess of the new drinking water standard of 7.2 and this is of great concern to the Township. You can't stop the plume from spreading until you stop the releases at the source. Now Gelman doesn't dispute that the releases in the Township are still occurring it's just a fact that all the parties have to deal with and hopefully we'll be able to come up with -- come up with a solution to stop -- stop the releases at the source. And the Township would be interested in a renewed focus in the source area, to reduce the concentrations as much as possible and stop the releases from occurring.

And Judge, the Township -- you know has some thoughts about potential alternative remediation techniques in the source area, for example there's oxidants, microbial agents that can be introduced to the ground water to reduce concentrations and Judge this -- these two -- you know these types of options may turn out

not to be feasible but I think the point of -- of the int -- of all the interveners is it's these sort of ideas that should be on the table um -- and at least discussed and considered and hopefully the parties can come to a consensus on the most effective treatment option for the source area.

The second area of concern Judge for the Township is the residential wells located near the northern edge of the plume. A few of these wells have already registered low levels of dioxane and these wells are located on Elizabeth Drive and I believe they were attached -- the location of the wells and the levels of concentration were attached as Exhibit H to our brief um -- and Gelman doesn't dispute the presence of the dioxane in the wells but the response is well don't worry about it because the plume isn't expanding. Well -- you know Judge as we all know the plume has been expanded greatly over the last 30 years and the Township would just like to be in discussions about containment of the plume particularly in those areas near the residential wells that are really at risk and as I said some have already shown contamination.

And as an example Judge, pumping rates of existing extraction wells could be increased. Additional extraction wells could be added near the edge of the plume

to control the hydraulic gradient and help ensure containment of the plume. There could be additional monitoring wells installed to detect any further migration of the plume and once again Judge, these are just ideas that -- that the township has that we think should be on the table for everyone to consider -- all of the interveners.

And -- and finally Judge the third primary area the Township is concerned about is the western progression of the plume in the Little Lake area. Gelman operates a single extraction well in this area but the plume has migrated beyond the well. I believe the -- the well is operated on a periodic basis only um -- at this point um -- but there are three monitoring wells of concern to the Township and they're all down gradient from the extraction well. There's monitoring Well 53 and this was mentioned in our brief and the results are attached as Exhibit I to our brief um -- and levels of dioxane in this well ranged from 33 parts per billion to 120 parts per billion in 2015, significantly above the drinking water standard. There's monitoring Well 93, that's located just north of the extraction well and levels of dioxane in that well have ranged from three to seven parts per billion ah -- which is just below the drinking water standard. And then I think Judge the -- the well that is of most concern is

monitoring Well 41 and that's because it's located quite a distance from the extraction well and it's near the western edge of the plume. And the levels in this well ah -- in 2015 -- have ranged from 28 to 30 parts per billion, once again significantly in excess of the new drinking water standard. The other issue Judge is -- just as with -- on the northern edge -- there's a lot of residential wells just off the western edge of the plume in the Honey Creek area and so this is of great concern to the Township and once again the Township would just like to be involved in a discussion about how to contain -- better contain this western edge of the plume.

So Judge I guess in summary the Township thinks it has a lot to offer to the negotiations. We'd very much like to be a part of the discussions going forward, to hopefully reach global resolution of this problem that's been vexing all of us for so many years um -- and ah -- and as I said we -- we think we have a lot to add. So for that reason we'd ask the Court to grant our motion for intervention.

THE COURT: Thank you.

MR. CALDWELL: Thank you, your Honor and um -- I think -- and I appreciate Mr. Stapleton's focus on some of the facts um -- that maybe aren't discussed fully in the briefs. I think our dis -- our respective discussions of

the standards for intervention and -- and all that are -- are fully set forth in the brief. I'm not gonna -- as Mr. Stapleton has refrained from doing, I'm gonna refrain from -- at least try to -- from repeating our arguments on those.

Um -- with regard to the general thrust of the Township's pleadings that the plume is expanding in the -- in the Scio Township area, that it's out of control and that residential wells are in danger; I just want to say clearly and unequivocally, none of those things are true. The Township is, of course, where the facility is located. It is also where the majority of the ah -- remedial efforts have been focused for that reason and the um -- I think it's useful to breakdown our understanding of the western area, which is the entire affected area west of Wagner Road into two areas. There's the site area in the immediate vicinity where there's ah -- where there were initially quite high concentrations when the problem was initially discovered and then there's the Honey Creek area further west where these wells -- and the Little Lake area -- where these wells that Mr. Stapleton referred to. Um -- that area has never been the subject of or affected by the extremely high levels of contamination that were initially found on the site. Ah -- where we had -- you know parts per million (ph) levels on the site. The

levels in the Honey Creek/Little Lake area, were never above 500 parts per billion. It's always been kind of an echo of the ah -- onsite plume area and the concentrations -- first of all our aggressive remediation onsite in that immediate vicinity has, as we've set forth in our briefs and I won't belabor it, dramatically re -- reduce the concentrations in the ground water from -- 20 to 25,000 or higher to generally a thousand parts per billion or lower in the ground water and there's -- mister -- Mr. Stapleton cites to an area with 2,000 parts -- more than 2,000 parts per billion. Monitoring Well 5 is -- is a relatively shallow well, it's barely got enough water in it for us to successfully sample it. You know you have to pull certain volumes of water out before you can sample it to get a representative sample. Sometimes it doesn't have enough water to do that. So it is not reflective of an area of -- of widespread contamination above that level. There's a couple of isolated spots like that that are above 1,000 but generally even on site those levels have been dramatically decreased.

Now with respect to the idea that the plume is expanding, that's simply not the case and we have been obligated under both State law and specifically by the consent judgment through the DEQs enforcement efforts to -- to keep the plume of contamination from expanding and to

actively remediate that plume of contamination and we have been doing so for many years. The plume has not -- in Scio Township the plume has not been expanding for many, many years. Um -- do -- you know we like to take some credit for that because of our active remediation and aggressive addressing of the plume but the truth is it really is -- had reached a steady state where it's just not going any farther. And that was true when the standard was 85 and when it appeared that the standard may be reduced we went out with no legal obligation to do so and investigated the very areas that Mr. Stapleton is concerned about, monitoring Well 53I which was the one well in the entire Honey Creek/Little Lake area that was above the old standard and that got brought down. It's -- I think currently 58. Um -- monitoring Well 41 and the other -- 93 -- we went out in that area to confirm that not just that 85 part per billion wasn't expanding but that one part per billion wasn't expanding so that we could ensure as we sat down with the DEQ to discuss what additional adjustments needed to be made if the standard did in fact change to a -- to a single digit standard. We went out and investigated that in 2014 and confirmed that the plume even at one part per billion was not expanding and we've been monitoring with those additional monitoring wells in addition to the many other wells that we've been

monitoring in this area for 25 years and it's not expanding.

Um -- the DEQ went out and sampled I think 60 or so maybe more residential wells in that area um -- that had previously not been close enough to the 85 to -- to regularly sample -- just to make sure -- all were non-detect. Ah -- the -- the one area that has had periodic low level hits, I'm talking one, two, three parts per billion, one hit at four part per billion in one well. And on Elizabeth Road those concentrations peaked, if you can use that word, in 2006 or so at -- and that was when the one detect at four parts per billion was had. Since then -- since -- there was one other well in 2013 that had a um -- a low level of one or two, three parts per billion detection in 2013, but other than that one detect and it's been non-detect since, there's not been any dctectable contamination in any of the Elizabeth Lake Road wells except for one well since 2007 I think or something like that. And in that one well -- that one point was four -- one sampling event, since then it has dropped and the last three results over the last couple of years have been non-detect one part per billion, one part per billion.

So the -- and there is -- as our hydro-geologist has testified in his affidavit, he's testified that there are no data that show that any higher levels are heading

out there now after we've literally been sampling that area since 1986 I think and there is no data that suggests that the plume is going towards that area at any levels other than what are already there and those levels are going down. And ah -- it frankly it's an area that's on the -- you know just beyond the edge of a decaying plume. Concentrations have been going down in these areas ever since we've been monitoring them and the idea that the ah -- plume is expanding in Scio Township is simply demonstrably false. This isn't a matter of well they've got their data and we've got our data. This is a -- you know if this was an affirmative claim we would be at summary disposition on that issue.

Ah -- the other issue mentioned in the pleadings from the town --

THE COURT: If I were to grant it.

MR. CALDWELL: If you were to grant it your Honor.

THE COURT: Little --

MR. CALDWELL: I would -- I --

THE COURT: -- addendum there.

MR. CALDWELL: -- did not -- I did not --

THE COURT: Not quite a --

MR. CALDWELL: -- I did not identify that subtlety.

THE COURT: -- a foregone --

MR. CALDWELL: Yes.

THE COURT: All right.

MR. CALDWELL: I -- I would feel comfortable as an officer of the court --

THE COURT: Bringing the claim --

MR. CALDWELL: -- asserting that you should --

THE COURT: -- all right.

MR. CALDWELL: -- grant it but obviously that would be within the Court's purview. Um -- the new vapor intrusion screening level of 29 parts per billion um -- first of all there are very few homes -- or -- and property -- occupied properties ah -- that are in the area of 29 parts per billion. Most of the um -- plume in Scio Township goes along the creek -- the creeks and the tributary for Honey Creek ah -- unoccupied, inaccessible -- you know marshy areas um -- very few homes actually are on top of any contamination at that level. As -- as Mr. Stapleton knows, the shallow groundwater investigation -- 'cuz -- and I'm not sure that this has been made perfectly clear and I apologize if it hasn't been before -- but the 29 parts per billion screening level -- and so the Court knows a screening level is just a level that if you're above that you have to investigate further to see if there are any unacceptable exposures. It doesn't mean that

there actually are unacceptable exposures at that level and it only applies -- that screening level only applies if the groundwater with that level of contamination is shallow enough to come into contact with basements ah -- whether it be -- well residential basements is the scenario and um -- so the State -- before that standard was -- well the draft rules were still out there before the emergency rule was -- was drafted -- the State proactively, and I would argue in terms of adequate representation, more than adequately representing the concerns of the community went out and designed a investigation to see where in the few areas where shallow groundwater -- shallow groundwater exists is -- shallow enough to come into contact ah -- to see if there was any contamination in the neighborhood of 29 parts per billion.

And we agreed to go ahead and do that for the State -- you know after they designed the ah -- the investigation and only in two of the 27 borings was any contamination at all detected at 1.9 and 3.3 parts per billion, in other words like a tenth of the screening level that you have to be above before you even have to look to see if there's any unacceptable exposures and most relevant to this motion neither of those two locations was in Scio Township. So the new vapor intrusion ah -- screening level really doesn't affect or certainly provide

a basis for intervention by the Township.

Um -- and then finally the -- the prohibition zone. There's concern expressed in the -- the Township's pleadings that the pro -- prohibition zone will affect three thousand Scio Township residents. The prohibition zone doesn't extend to Scio Township. It's all east of Wagner Road. So there is no effect of the prohibition zone on Scio Township. There are a couple of Township islands which we discuss in our brief that aren't -- aren't currently affected by that at all.

Um -- and I know in the reply brief the Township has expressed its concern that the prohibition zone might be expanded to Scio Township. It might require the abandonment -- I assume this is what they're referring to -- the abandonment of -- of residential wells. Well your Honor the -- the prohibition zone's not necessary for Scio Township precisely because -- you know Mr. Stapleton cites two administrative rules, one says that once the clean-up starts the -- the plume can't expand and two it says you have to actively remediate groundwater contamination if it's not breaking down through chemical or biological processes. We're -- we're complying with both of those rules already. We don't need a prohibition zone and we wouldn't ask for a prohibition zone ah -- in our current situation because the plume's not expanding and we're

actively remediating.

Now if the -- the consent judgment does provide that if we get to the point where we can demonstrate that the plume's not expanding ah -- even without active remediation we do have the option under State law to turn off the pumps. If -- but only if we have restrictive covenants really rather than a prohibition zone in place but that -- we're not anywhere close to that and that -- that change took place back in 2011 so it doesn't provide any current basis for intervention.

But more generally your Honor um -- we understand -- it's become abundantly clear that there are just basic misunderstandings within the community about what's been accomplished by the clean-up. How the clean-up that the DEQ has demanded and that we have willingly ah -- implemented -- how that is protective of the community. How their interests are being addressed and -- but I think that -- you know to give you an example of the protectiveness -- your Honor I don't think there are too many clean-ups in the State where you could have a 10-fold reduction in the ah -- clean-up standard as we have here -- more than 10 and still have no unacceptable exposures throughout the entire affected area. That's the margin of safety that's been built in to the clean -- the clean-up program that the DEQ has demanded and that we've -- we've

more than willingly provided. We could've done just a bare minimal type approach as everybody seems to think that we have and it wouldn't have been protective with the new clean-up standard and yet we had no unacceptable exposures. Yes, there needs to be a couple more -- you know there needs to be adjustments to ensure that it continues to be protective but it is protective and has prev -- and is continuing to prevent any unacceptable exposures throughout the entire site, not just in Scio Township.

But I think this -- this basic -- and I am cognizant and appreciate the Court's wisdom in -- in talking about the benefits of collective um -- decision making and getting all ah -- perspectives included in those deliberations and -- and Mr. Stapleton has every right to bring it up and he's right to do it. Ah -- but I think that argues more for the type of community engagement that the DEQ is already in the process of implementing, they want facilitated community engagement, interviewing various representatives of the -- of the stakeholders in the community. Ah -- we have -- we have already conveyed our commitment to participate in that and -- you know I think the hope is, to steal somebody else's phrase, but that the people that are in that process that come to understand and -- and I'm not saying we wouldn't

be educated as well from getting ah -- additional viewpoints -- but that the people involved in that process could act as fact ambassadors for the community.

Say -- you know -- and I want to -- and this doesn't directly affect the -- the Township -- well I guess it does but I do want to say affirmatively, unequivocally and hopefully clearly that with regard to Barton Pond which gets mentioned all the time and the -- and the City's water intake at Barton Pond that gets mentioned in the paper, that's been mentioned in pleadings which is kind of shocking -- that -- that Barton Pond and the City's water intake is not threatened by the plume. It's not going to be. Not tomorrow, not five years ago (sic), not 10 years from now, not 100 years from now. The water is simply not heading in that direction and anybody with any technical competence that's looked at that issue agrees including the City's own consultant.

And if there can be a greater understanding through this facilitated community engagement we are all for it and we will participate in that but to allow multiple parties to intervene and in par -- and I'm not gonna -- your Honor I'm not gonna repeat the arguments about timeliness that were made with regard to the previous intervention motions. Um -- respectfully we do believe that those same timeliness arguments apply to the

Township's um -- intervention request, but with regard to the Township there's the additional concern and prejudice to the parties related to the fact that it's coming -- you know a couple months after the hearing where this Court allowed the earlier interventions and it really validates our concern that there will be still additional interested parties and certainly there are more interested parties out there that -- that try to intervene and that uncertain really -- and there's many cases that are cited in our brief that talks about that uncertainty being particularly prejudicial in environmental enforcement actions where the whole statutory framework of Part 201 and CERCLA are set up to um -- authorize and arm the DEQ in this case, the regulatory agency, with the ability to take those competing individualistic interests into account but be the gatekeeper for those -- for those concerns. Be -- with their technical expertise, with their familiarity with what Part 201 ah -- in this case requires, their familiarity with the environmental laws, to fashion a protective clean-up program that takes into account the imbalances of these competing interests. You know we've got -- you know there's limited -- you know permit discharge volume capacity. Ah -- you could have -- you know based on what -- what's in the pleadings from the various intervening interveners there could be fighting

over that capacity. There has to be somebody in charge of ah -- weighing these -- these competing concerns and the way the statute is written, the way Part 201 is written and it's -- it's the same framework as CERCLA, you can't challenge -- you know the DEQ is in charge of that -- of that weighing of competing interests and to allow the par -- additional parties to intervene -- particularly in environmental enforcement -- I mean this is not a no-fault action, this is not -- you know a run of the mill type of litigation ah -- it would be completely contrary to um -- how the environmental statutes are set up and we believe that the Township motion should be denied for that reason your Honor.

THE COURT: Thank you. You need not respond.

MR. STAPLETON: Thanks Judge.

THE COURT: As always I appreciate the um -- depth and the breadth of the pleadings to frame the issues for consideration and to develop a record. Today the request is to have an additional entity, in this case Scio Township, through its elected officials intervene by permission in this litigation. I am going to grant permissive intervention and let me give you the four reasons why I think it is appropriate.

First, the external factors that we've discussed before. There are these new standards, there is the

emergency rule and there is a heightened awareness to the problem, in part because of those new rules. Secondly, the internal factors. When an issue like this that does affect everyone regardless of the degree of the problem but it affects all of us because water is -- as I said before -- it's the basic block of who we are in our bodies and who we are in our communities and where it goes and our obligation. So I think that absolutely when we deal with something that belongs to all of us and affects all of us it should be done in as much as possible with openness and transparency, understanding we all do have different views about what could or should be done.

Third, I want to talk about the process. Counsel has mentioned that this would be antithetical to how litigation involving the environment has been done -- or not typically done -- I told you at the beginning I'm like so what -- I mean I think we should do what makes sense. And to me, given this history that I went over of several decades, representations being made over those decades about things being facts that turned out not to be facts, denials of problems that turned out there are problems. That develops to some extent perhaps what you are referring to, a misinformation in the public and perhaps even a distrust. So the process of openness, of having people at the table, of having open debate about

things can lead to the ability for people to be better informed and to the extent that we are misunderstood at least a forum where we could be understood as opposed to simply that's not true, that's not true and you're not -- you don't get the right to talk about it.

Also in that process I was particularly struck by one of our Supreme Court Justices, Bridget McCormick who's from Washtenaw County when she was sworn in at the Supreme Court and she turned to her colleagues at that moment and she said, I know and expect with our -- our responsibility that at times we will and should disagree on issues, but I promise you I will never be disagreeable in those discussions. And I think as we go into this it's important to remember that this will be one of -- this process will be one of mutual respect in the sense that we all have an internal obligation right on the oath, right there as you walk out, the obligation that we all take as a privilege to practice law in this State and if we follow that people will be truthful, will be honest, will be open even if we disagree and if we vary from it then we are violating the very oath that we all took. So the process will be one of -- of respectful dialogue.

Finally, the reason I'm doing it is that it is an issue of stewardship. I think this is an appropriate entity. Of course we're not going to let everybody who

files a pleading intervene but we need to have responsible entities that can help bring those issues to the table. I was actually pleased to see that you came in because the source, as you've indicated, is in the Township, it's right on the edge of the City of Ann Arbor, I thought these were the two entities absolutely that should be there. The County I thought makes sense and I'm still thankful for the thinking and the -- and the dedication from Great Lakes about that -- on the surface water. So I think we have a good group of people and I think that each of those groups have the ability to tap into even better minds and I think each of those groups can help to get information out, receive information and talk about how do we sit around and come up with the solution -- the best solution that we can agree to if we can agree to it and if we can't reach a consent judgment this space provides a place for those issues which can't be agreed to which are litigated, a record is established, findings of facts are made and we have appellate review. So we're in the right place and I look forward to working with you.

I will again say and I'm glad -- I don't even know who reached out -- somebody reached out about meeting together, absolutely I'm available to do it and absolutely on motion days I'm happy to set up different times so you're not waiting. I'm willing to spend the time

necessary personally in this case to do the best I can ah -- for my responsibility. Okay.

MR. CALDWELL: Very good.

THE COURT: All right.

MR. CALDWELL: Your Honor if I could just --

MR. STAPLETON: Thanks Judge.

MR. CALDWELL: -- say -- two quick things.

THE COURT: Yeah.

MR. CALDWELL: One, I totally hear you with regard to respectful dialogue and you have our commitment, I'm sure everyone else's commitment to that, it's important. And two um -- with -- and maybe Bill, we can talk about this, but I'm assuming that we will enter into the same order that the other interveners entered into um -- with regard to the -- the order.

MR. STAPLETON: Yeah and I'll talk to the Township about it Judge but I think that that makes a lot of sense.

THE COURT: That would make sense if we could do it that way and then --

MR. STAPLETON: Sure.

THE COURT: -- so you're in and then I don't even know apparently there's a date we're gonna set -- get together in March?

MR. CALDWELL: Yeah I think it's March 22nd.

THE COURT: All right and um -- so we will all sit around and talk.

MR. CALDWELL: Thanks Judge.

MR. STAPLETON: Thank you, your Honor.

THE COURT: Great Lakes you want to say anything? You came all the way down here this morning.

MR. SALIM: No, but thank you your Honor. We appreciate the gesture.

THE COURT: All right.

(At 9:52 a.m., proceeding concluded)

* * * * * *

STATE OF MICHIGAN)

COUNTY OF WASHTENAW)ss.

I certify that this transcript, consisting of 29 pages, is a true and accurate transcription to the best of my ability of the proceeding in this case before the Honorable Timothy P. Connors, as recorded by the clerk.

Proceedings were recorded and provided to this transcriptionist by the Circuit Court and this certified reporter accepts no responsibility for any events that occurred during the above proceedings, for any inaudible and/or indiscernible responses by any person or party involved in the proceeding or for the content of the recording provided.

Dated: February 8, 2017

Lisa Beam/S.J.

Lisa Beam, CER #8647

EXHIBIT 9

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

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FRANK J. KELLEY, Attorney General
for the State of Michigan, ex rel.
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION,
AND MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs

v. No. 88-34734 CE

GELMAN SCIENCES, INC., OPINION AND ORDER
A Michigan corporation,

Defendant

- - - - - - - - - - - - - - - - - - -

OPINION AND ORDER rendered by the HONORABLE PATRICK J. CONLIN, CIRCUIT JUDGE, at Ann Arbor, Michigan, on July 25, 1991.

APPEARANCES;

A. MICHAEL LEFFLER (P24254)
ROBERT P. REICHEL (P31878)
SALLY J. CHURCHILL (P40558)
Assistant Attorneys General

DAVID H. FINK (P28235)
ALAN D. WASSERMAN (P39509)
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Attorneys for Defendant

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

- - - - - - - - - - - - - - - - -

FRANK J. KELLEY, ATTORNEY GENERAL
FOR THE STATE OF MICHIGAN, EX REL.
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION
and MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs

v. No. 88-34734 CE

GELMAN SCIENCES, INC., OPINION AND ORDER
A Michigan corporation,

Defendant

- - - - - - - - - - - - - - - - -

At a session of said Court held in the City of Ann Arbor, Washtenaw County, Michigan, on July 25, 1991.

PRESENT: HONORABLE PATRICK J. CONLIN, CIRCUIT JUDGE

FINDING OF FACT

This case involves the use by Gelman Sciences, hereinafter known as "Gelman" of 1,4-dioxane. This substance is one of the raw materials used in the production of cellulose triacetate membrane. Gelman began manufacturing the cellulose triacetate membrane in 1966. In October of 1965 Gelman submitted a statement on new or increased use of water of the state for waste disposal purposes to the Water Resources Commission in accordance with Sec. 8b, Act 245 of

Public Acts of 1929, as amended. In that statement Gelman stated that it was disposing of up to 9,000 gallons per day of processed waste water. In describing the expected characteristics of the waste to be discharged Gelman did not identify 1,4-dioxane by name, but did indicate that among the substances which Gelman proposed to discharge into its lagoon were ethelyne glycol ether. 1,4-dioxane is an ethelyne glycol ether. By submittal of the statement on new or increased water of the state for waste disposal purposes, dated October 26, 1965, Gelman applied for permission to discharge its processed waste water by discharge to the surface of the ground to soak in and evaporate. (Plaintiff's Exhibit 69)

By order of determination dated December 15, 1965, the Water Resources Commission, hereinafter known as the "WRC" authorized Gelman to discharge waste waters containing ethelyne glycol ethers to the ground. (Plaintiff's Exhibit 71)

Order 816 provides as follows:

"STATE OF MICHIGAN

WATER RESOURCES COMMISSION

Order No. 816

Statement of GELMAN INSTRUMENT COMPANY, a: Michigan Corporation, Regarding a New Use: of the GROUND WATERS near ANN ARBOR, : MICHIGAN

ORDER OF DETERMINATION

WHEREAS, Gelman Instrument Company, a Michigan Corporation

has filed with the Water Resources Commission a written statement dated October 17, 1965 for a prospective new use of the waters of the State for disposal of sewage and wastes from a proposed filter and instrument manufacturing business to be located at 600 South Wagner Road, Scio Township, Washtenaw County, Michigan; and

WHEREAS, the said written statement sets forth that Gelman Instrument Company proposes to dispose of approximately nine thousand (9,000) gallons per day of process wastes containing 0.5% ethylene glycol, 0.5% ethylene glycol ethers, 0.025% methyl pyrlidone, 0.005% dimethyl formamide and 2 milligrams per liter Triton X-100 and approximately three thousand (3,000) gallons per day of sanitary sewage into the ground, using certain described methods and facilities; and

WHEREAS, the Commission at its meeting on December 15, 1965, after giving due consideration to the statement and to investigations by its staff of the factors involved, is of the opinion and has determined that the restrictions and conditions as hereinafter set forth are necessary to protect the waters of the state against unlawful pollution;

NOW THEREFORE BE IT RESOLVED, that it is the order of the Commission that Gelman Instrument Company, a Corporation, their agents or successors, in disposing of sewage and wastes from a proposed filter and instrument manufacturing business to be located at 600 South Wagner Road, Scio Township, Washtenaw County, Michigan shall comply with the following restrictions and conditions:

1. No waste waters resulting from filter and instrument manufacturing process shall be discharged directly or indirectly into the surface waters of the state, but same shall be disposed of into the ground in such a manner and by means of such facilities and at such location that they shall not injuriously affect public health or commercial, industrial, and domestic water supply use.

2. No human sewage shall be discharged directly or indirectly into the surface waters of the state, but the same shall be disposed of into the ground by subsurface percolation methods.

3. No facilities necessary for compliance with restrictions and conditions set forth in this Order shall be constructed until plans for the

same have been submitted to and approved by the Chief Engineer of the Commission.

BE IT FURTHER RESOLVED, that the aforesaid restrictions and conditions set forth in this Order shall become effective at and from the time this Order becomes final as provided herein and shall remain in effect until further order of the Commission: PROVIDED HOWEVER, that all sewage and wastes from said Gelman Instrument Company shall be connected to any sanitary system, which may be provided by any governmental unit, within sixty (60) days from the date when said sewer becomes available. At that time any restrictions and conditions imposed by said governmental unit shall supersede the restrictions and conditions imposed by this Order and this Order shall then be terminated.

BE IT FURTHER RESOLVED, that this instrument does not obviate the necessity of obtaining such permits as may be required by law from other units of government.

This Order made this 15th day of December, 1965 by the Commission in accordance with Act 245, P. A. 1929, as amended, and shall be final in the absence of request for public hearing filed within 15 days after receipt hereof, on motion by Mr. Vogt, supported by Mr. Ball, and unanimously carried.

PRESENT AND VOTING:

Gerald E. Eddy, for Director of Conservation, Chairman
Lynn F. Baldwin, for Conservation Groups, Vice Chairman
John E. Vogt, for State Health Commissioner
James V. Murray, for State Highway Commission
B. Dale Ball, Director of Agriculture
Jim Gilmore, for Industrial Management Groups
George F. Liddle, for Municipal Groups."

Gelman used a series of three ponds for treatment of its processed waste water. These ponds have been referred to as ponds 1, 2 and 3. Pond 1 was constructed in the early 1960's to accept processed waste water from Gelman's manufacturing.

Pond 1 was used until approximately 1976, at which time

it was filled with dirt.

Pond 2 was located west of the Gelman Sciences plant and to the south of a marshy area. Gelman placed overflow water from pond 1 into pond 2. The water flowing into pond 2 was treated by using aerators and aerobic bacteria. For approximately two years in the late 1960's after water in pond 2 had reached a certain level, the water would overflow through a pipe into a marshy area. The rate of flow was between 5 to 10 gallons per minute. When the Water Resources Commission learned of this overflow in the late 1960's Gelman stopped the overflow from pond 2 by dredging out the bottom of pond 2 and letting the water seep into the ground. The order of determination of the WRC required seepage of the waste water from the bottom of pond 2 into the ground. This waste water did contain 1,4-dioxane. Thus, 1,4-dioxane was seeping into the ground with the approval of the DNR and WRC.

In March of 1970 in response to inquiries by the WRC concerning the status of Gelman's waste water system, Gelman affirmatively represented that the soluble organic solvents contained in the Gelman waste were not toxic or noxious per se.

The DNR had a toxic substance list. However, the substance 1,4-dioxane was not on the Michigan critical materials register at that time.

Pond 3 was constructed in approximately 1973 and continued in service until 1987. Pond 3 is located directly south of pond 2. Process waste water was deposited in pond 3

immediately after it was constructed. The sides of pond 3 were lined with a plastic polymer material. The base in pond 3 was clay.

In the fall of 1976 Gelman applied for a permit to discharge its processed waste water through spray irrigation. The application required Gelman to disclose whether substances listed on the Michigan critical materials register are to be present in the discharge. Again, 1,4-dioxane was not on the critical materials register in 1976. Gelman again reported the discharge would contain "organic solvents" from filter manufacturing.

The order of determination previously issued by the WRC remained in effect until the issuance by the WRC in 1977 of a permit authorizing spray irrigation of processed waste water.

In October of 1970 in response to further inquiries by the WRC, Gelman stated it was forced to originate a new method of treatment because of the waste that was unique to its process. Gelman further represented that they did not damage the environment. Gelman further reported on the status of the waste water treatment system stating that gas chromatography has shown that none of the solvents used were present in pond 2, the last stage in the treatment process except for possible doubtful traces of glycol in some determinations.

The DNR had knowledge in 1970 that Gelman had expanded its use beyond that allowed in the original application and

that there were "traces of glycol" in its discharge.

Gelman acknowledged that in an internal Gelman memorandum that in October of 1970 indicating that Gelman could not definitely, safely continue to drain pond 2 at the rate of 4,000 to 5,000 gallons per day as the waste might reach someone's well and any overflow would be in violation of the WRC order 816.

The WRC permit No. MO0337 superseded the Order of Determination 816 authorizing Gelman to discharge its treated waste waters to the groundwaters of the state in accordance with the conditions specified herein:

"MICHIGAN WATER RESOURCES COMMISSION

PERMIT TO DISCHARGE

In compliance with the provisions of the Michigan Water Resources Commission Act, as amended, (Act 245, Public Acts of 1929, as amended, the "Michigan Act),

GELMAN INSTRUMENT COMPANY
600 South Wagner Road
Ann Arbor, Michigan 48106

is authorized to discharge from a facility located at

600 South Wagner Road
Ann Arbor, Michigan 48106
Washtenaw County

to the ground waters in accordance with effluent limitations monitoring requirements and other conditions set forth in Parts I, II and III hereof.

This permit shall become effective on the date of issuance.

This permit and the authorization to discharge shall expire at midnight, April 30, 1982. In order to receive authorization to discharge beyond the date of expiration, the permittee shall submit such information and forms as are required by the Michigan Water Resources Commission no later than 180 days prior to the date of expiration.

This permit is based on the company's application dated

November 5, 1976, and shall supersede any and all Orders of Determination, Stipulation, or Final Orders of Determination previously adopted by the Michigan Water Resources Commission.

Issued this Twenty-seventh day of May, 1977, for the Michigan Water Resources Commission.

s/ Robert J. Courchaine
Robert J. Courchaine
Executive Secretary"

(See attached for complete Permit No. M 00337)

The permit in paragraph (a) clearly allowed Gelman to pump at 44,000 gallons per day on average with a daily maximum of 112,700 gallons per day disposed of by spray irrigation in such a manner that they will not injuriously affect the public health or welfare, or commercial, industrial, domestic, agricultural, recreational or other uses of the underground waters or surface waters of the state. This permit was issued after the DNR was notified of the overflow with possible traces of glycol.

Again, no one knew that 1,4-dioxane was a possible contaminant. It was not listed on the critical materials register in 1976 when the application was applied for.

It is clear that the overwhelming source of 1,4-dioxane contamination of the aquifers came from seepage by the ponds, specifically pond 2 and by spray irrigation. There were other minor sources.

Aside from the major elements of contamination there is evidence of some other contaminations. One is a 1980 overflow. There was evidence testified to by a DNR conservation officer, Robert McHolme, who testified that in

1980 he observed and photographed a pump located at pond 2 with one hose extending from the pump to a small quantity of liquid standing in the bottom of the pond and a second hose extending from the pump along the bank of the pond toward the fence located along the northern edge of pond 2. He observed that the hose from the pump had a little bit of liquid in it in which the snow had melted. Mr. McHolme gave his report to the DNR. One Sue Morton evidently made a report. For some unknown reason, the DNR, after reviewing his complaint in 1980, did nothing. He was told by his superiors that there was a permit to discharge water in 1980. It is very interesting that this evidence was presented to the Court when the DNR did not consider it to be worth anything in 1980. The DNR after receiving McHolme's whole report never contacted Gelman. The DNR evidently felt that Gelman was in compliance with its order.

There is further testimony regarding a burn pit that was utilized from 1966 to November of 1979. It was Gelman's regular business practice to dispose of scrap polymer and solvent waste used to clean manufacturing equipment by dumping it untreated into an open burn pit dug in the ground behind the Gelman plant building. Scrap and solvent waste generated in the manufacture of cellulose triacetate membranes during that period contained 1,4-dioxane. There were high concentrations of 1,4-dioxane in the burn pit.

Part of the testimony of James Marshall was that the pit had a clay bottom. Five-gallon buckets of scrap polymer were

taken to the pit and burned. In response to an inspection and request by the DNR, Gelman ceased using the burn pit and excavated materials from the burn pit in 1979. The soil from the burn pit was actually excavated and taken in to Wayne County to the Wayne County Waste Disposal Center.

There is further testimony that the lift station developed a crack and that there was leakage. That as soon as Gelman discovered the crack in the lift station this knowledge was disclosed to the DNR. However, testimony of Dr. Chalmer indicated very slow seepage from the lift station. Further, Gelman actually informed the DNR within 15 to 20 minutes after discovery of the crack that there was this leakage.

The DNR further claims that a lawn mower ran over and cut a hose used to transport the waste to pond 3 back to the plant to the deep well injection. Gelman immediately informed the DNR of this incident. The amount of water spilled from the cut line was approximately 18,000 gallons. The total amount of 1,4-dioxane eventually discharged from the cut was 4.8 ounces of 1,4-dioxane. This was testimony of Dr. Paul Chalmer, April 18, 1990.

Gelman has attempted to purge water taken from the wells on the Redskin property immediately north of Gelman's property. Testimony of Dr. Chalmer was that they took over 3800 pounds of 1,4-dioxane out of the aquifer. The most that could possibly have been put into the groundwater from the cut hose was 4.8 ounces of 1,4-dioxane.

There is no evidence of any amount of seepage in the McHolme incident. As to the crack in the lift station, the only evidence is that this leak was a very small amount and certainly the amount taken out by Gelman was more than adequate to account for any amount to this area. In the burn pit, the soil was excavated from the burn pit and taken to another area. The Court finds that the total amount of 1,4-dioxane that could possibly have seeped into the ground waters was, at most, a few pounds. Gelman has extracted 3,800 pounds already. Therefore, these claims by the DNR are insignificant.

Thus, we are back to the same two major areas of contamination: that is, the seepage and overflow from pond 2 and the spray irrigation.

CONTAMINATION

Both of the experts who have testified, Mr. Minning and Mr. Hayes, indicate that there is substantial contamination of the ground waters by the chemical 1,4-dioxane. Mr. Hayes believes there are at least three aquifers present, the shallow, intermediate and the deep. He believes that all three are contaminated and the contamination of all three originated at the Gelman site. He believes that the contamination that has occurred has occurred because of hydraulic communication between the aquifers. His only question is whether or not there is communication between the deepest aquifer to the west. Mr. Minning's testimony was similar. He also believes that the aquifers are

contaminated.

The highest concentrations of 1,4-dioxane have been found in the Redskin well located just north of the Gelman facility. The Redskin well is located in the C3 or intermediate aquifer. Contamination of the ground water with 1,4-dioxane in excess of 3.4 parts per million have been found only in the core area of contamination near the Redskin well. Ground water contaminated with low concentration of 1,4-dioxane has been found west of the Gelman facility extending out towards Park Road and east of the Gelman facility in the Westover Subdivision. Soil borings of the spray irrigation field and other site locations have shown the presence of 1,4-dioxane.

Both sides believe that the Third Sister Lake is contaminated by the intermediate aquifer and that there is a plume of 1,4-dioxane to the west and its extent can be defined. However, Mr. Minning believes that the extent to the north and the east is more difficult to define as it may have entered the 3 subzero aquifer which is in his determination the deepest aquifer.

CARCINOGENISTIC ATTRIBUTES

The evidence indicates that 1,4-dioxane causes cancer in animals, that is, it has caused liver cancer and nasal tumors in rats. Dr. Venman testified on May 9, 1990, that 1,4-dioxane is a possible human carcinogen. The United States Environmental Protection Agency and the International Agency for Research on Cancer have concluded that there is

sufficient evidence that 1,4-dioxane causes cancer in animal studies and have classified it as a probable human carcinogen. The biological mechanism by which 1,4-dioxane causes cancer is not yet known. The DNR has presented evidence that it should be treated as a non-threshold carcinogen, that is, that there is no established threshold level of exposure whereby there would be no increase in the risk of cancer.

The preponderance of the scientific evidence establishes that 1,4-dioxane acts as a promoter and not as an initiator of cancer. A carcinogen is classified as an initiator if it is capable of itself initiating the mutation of genetic material. A carcinogen is a promoter if it takes an existing change in genetic material and causes it to develop into a tumor or carcinogenic end point. There is evidence that 1,4-dioxane does cause cancer in livers and carcinogenetic nasal tumors in rats. This Court could easily infer and does infer that a tame rat is not much different than a wild rat or muskrat. Therefore, this Court does find that there is evidence in that 1,4-dioxane could cause injury to wild animals.

The DNR believes that there is not enough scientific information available concerning an acceptable level of 1,4-dioxane.

Dr. Hartung in his report indicated that the preponderance of scientific evidence establishes that concentrations of 1,4-dioxane below the level established in

his report of 3.4 parts per million do not present a significant health threat to humans (Defendant's exhibit 11, page 101.)

The DNR has presented no evidence on this record suggesting that the 1,4-dioxane concentration found in local surface waters has any adverse effect upon fish, wildlife or other biological material.

REMEDIATION

In 1987 Gelman reorganized technical work-group meetings in order to have discussions and information sharing regarding site conditions, investigation and remediation of the contamination. Representatives of the DNR, the Michigan Department of Public Health and the Washtenaw County Health Department were invited to attend and did attend. At the meetings available data, studies and information were exchanged. At the meetings representatives of the state worked with Gelman to design further investigation and approaches to the expansion of the hydrogeologic study. DNR representatives would not discuss remediation proposals at the site at the technical work meetings. In 1987 Gelman submitted to the DNR a preliminary clean-up program in which they proposed to purge ground water from the most contaminated area, the Redskin Industries, and inject the purged water into a deep well. The DNR refused to accept any remediation. Gelman proceeded on its own to purge ground water from the Redskin well. The purge well operated from July of 1987 to November of 1987, whereupon a change in

regulatory status of the deep well prohibited further use. During that period of time approximately 3,800 pounds of 1,4-dioxane was removed.

In 1987 Gelman submitted a plan to remediate the soil to the DNR. For the initial phases of the program Gelman requested the state to provide a person to attend the meetings to help in the remediation, but the DNR did not send any representative. Defendant's exhibit 7, a deposition exhibit, indicates that at one meeting a DNR agent was at the meeting and was instructed to neither approve nor disapprove the remediation.

Defendant's exhibit 8 was a clean-up proposal. Dr. Chalmer wrote most of it himself. He wanted to purge the most highly concentrated areas with monitoring wells which are called sentinels along the outer area. This would show how and where the 1,4-dioxane was migrating and if it was going in a particular direction. Then they could purge in that area. Further, they could use concentrated purges where the problem was most acute. This document was submitted to the DNR. Dr.Chalmer wanted to start immediately before getting to the other questions as this would stop further dispersal at the most highly concentrated sites. The DNR would not accept the proposal of Dr. Chalmer. However, Dr. Chalmer did attempt to carry out his work regardless of whether it was going to be approved. He sought and obtained permission from Redskin Industries to do this purging. The water from Redskin was to be piped to Gelman with a number of

fail-safe devices and the water was routed to injection wells. The purged water was injected into deep wells. The 1,4-dioxane concentration was 220 parts per million and in November 1987, after treatment, it was down to 60 parts per million. This continued until federal regulations prevented Gelman from continuing.

Dr. Chalmer further believed that most of the 1,4-dioxane in the bog was still on the surface and had not gotten very far into the bog and it could be cleaned out as soon as they cleaned the bog.

The DNR believed that neither the Water Resources Commission nor the DNR had the most complete knowledge of the chemical constituents and that they should therefore do nothing nor allow anything to be done to stem the flow. As Gelman represented the constituents as being not toxic, noxious or deleterious solvents, the DNR believed that Gelman should be held accountable.

WRC and the DNR were required by the Michigan Constitution and the Michigan Water Resources Commission Act to ensure that Gelman permitted discharges would not become injurious to the public health. The DNR employees should not have issued a permit or order of determination without making such a determination. These permits allowed the contamination of our aquifers.

CONCLUSION OF LAW

STANDARDS FOR INVOLUNTARY DISMISSAL

Gelman has moved this Court for involuntary dismissal of

the Plaintiff's complaint. Alternatively, Gelman has asked the Court to dismiss those portions of the complaint which the Plaintiff has failed to show a right to relief. The Michigan Court Rule 2.504(b)(2) provides as follows:

> "In an action tried without a jury, after the presentation of the plaintiff's evidence, the defendant without waiving the right to offer evidence if the motion is not granted may move for dismissal on the grounds that on the facts and the law the plaintiff has not shown the right to relief. The court may then determine the facts and render judgment against the plaintiff or may decline to render judgment until close of all the evidence. If the court renders judgment on the merits against the plaintiff the court shall make the findings provided in MCR 2.517. In a ruling on this motion the court may waive the evidence, pass on the credibility of the witnesses and select between conflicting inferences and make other factual determinations".

WATER RESOURCES COMMISSION ACT

A. Elements of Action Under the WRCA.

Plaintiffs allege that Gelman had violated Section 6(a) and Section 7 of the Water Resources Commission Act, MCLA Sec. 323.6, 323.7 ("WRCA) (Complaint Paragraphs 61-71) In order to establish a violation of Section 6(a), Plaintiffs must demonstrate that:

1. Gelman directly or indirectly discharged
2. into the waters of the state,
3. a substance or substances which is or may become:
    a. Injurious to the public health, safety or welfare; or
    b. Injurious to domestic, commercial, industrial, agricultural, recreational, or other uses which are being or may be made of such waters; or
    c. Injurious to the value or utility of riparian lands; or

d. Injurious to livestock, wild animals, birds, fish, aquatic life, or plants or the growth or propagation thereof be prevented or injuriously affected or whereby the value of fish and game is or may be destroyed or impaired.

See MCLA Sec. 323.6(a). In order to prove a violation of Section 7 of the WRCA, Plaintiffs must prove that Gelman:

1. discharged waste or waste effluent,

2. into the waters of the state,

3. without a valid permit therefor from the WRC.

See MCLA Sec. 323.7.

The evidence adduced during Plaintiffs' case shows that Defendant has been in substantial compliance with the permits issued to it. Further, the relevant regulatory agencies were informed of the nature of Gelman's process wastewater and, in particular, that 1,4-dioxane (ethylene glycol ethers) was being discharged. The permits issued by the WRC and the DNR authorized and instructed Gelman to discharge directly to the groundwaters.

A permit or Order of Determination issued pursuant to Section 7 of the WRCA provides a complete defense to claims that permitted discharges violated Sections 6(a) or 7. To find otherwise would mean that the WRC and the DNR could issue permits for discharges that violate the statute. Further, to hold otherwise would mean that a permit or Order of Determination does not, in actuality, provide any protection to a permittee for discharges in compliance with a permit.

The WRC and the DNR were required by the Michigan

Constitution and the WRCA to insure that Gelman's permitted discharges would not become injurious to the public health. The DNR employees could not issue a permit or Order of Determination pursuant to Sec. 7 of the WRCA without first making such a determination. Plaintiffs now seek to foist upon Gelman the responsibility for protecting the public welfare based on the following general prohibition contained in the permits issued to Gelman:

> No waste water resulting from filter and instrument manufacturing process shall be discharged directly or indirectly into the surface waters of the state, but the same shall be disposed of into the ground in such a manner and by means of such facilities and at such location that they shall not injuriously affect public health or commercial, industrial and domestic water supply use.

(Plaintiffs' Exhibit No. 71) (Order of Determination No. 816) The attempt by Plaintiffs to impose liability on Gelman based on the inclusion of such "boilerplate" language in the permits issued to Gelman is based upon the assertion that as Gelman had the most complete knowledge of the chemical constituents they were discharging, they should be held liable. This action is an attempt by the DNR and the WRC to absolve themselves of their duty to protect the environment and the public health. Having authorized Defendant's discharges, Plaintiffs cannot now impose liability on Gelman. Any threat to the public health would be the result of the failure of the WRC and the DNR to accurately evaluate the effects of the discharges they authorized. The WRC and/or the DNR are supposed to have people that know, study and test

these things. It certainly is an illogical conclusion to say that Gelman should be held responsible because they had more knowledge. If that is followed to its logical conclusion that would mean that in every instance, we are leaving the polluters in charge of determining whether or not they are polluting. That clearly is the "fox in the hen house" theory of control.

There can be no dispute that Order of Determination No. 816 expressly authorized Gelman to discharge its process wastewater containing ethylene glycol ethers directly to the ground. 1,4-dioxane is an ethylene glycol ether. In November, 1969, Pond 2 was deepened to enhance seepage of the wastewater to the ground, at the suggestion of the DNR. This authorized seepage from Pond 2 caused the most substantial amount of the off-site contamination.

A discharge that was permitted and in compliance with the WRCA when made is not converted to a violation of the WRCA by the subsequent discovery of groundwater contamination.

Notwithstanding that Gelman disclosed in its application that the water to be irrigated could contain organic solvents, the spray irrigation permit did not contain any specific discharge limitations for 1,4-dioxane, or any other organic solvents.

Plaintiffs contend that the spray irrigation permit did not authorize the discharge of 1,4-dioxane. The only evidence on record establishes that the DNR and/or WRC knew

that Gelman's process water could contain 1,4-dioxane going back to 1965. Plaintiffs did not offer a single witness who was familiar with the permit issued to Gelman and who could testify as to what it did, or did not, authorize. Similarly, Plaintiffs have presented no evidence or testimony establishing any spray permit violations by Gelman.

Plaintiffs have failed to demonstrate that the discharge of 1,4-dioxane through spray irrigation by Gelman violated the WRCA.

Defendant claims that alleged violations of Gelman's permits are barred by the applicable statute of limitations (either two years under MCLA Sec. 660.5809 for civil penalties or three years under MCLA Sec. 600.5805(8)) Specifically, Defendant claims that Plaintiffs' allegations under the WRCA regarding alleged violations of the Order of Determination are untimely. The Order of Determination was terminated in 1977 by issuance of the spray irrigation permit by the DNR. The spray irrigation permit expressly superseded the Order of Determination. The evidence shows that discharge pursuant to the Order terminated well beyond the applicable limitations period.

With respect to spray irrigation, the uncontroverted evidence introduced during presentation of Plaintiffs' case establishes that Gelman stopped spray irrigation in Fall, 1984. At that time, Plaintiffs knew that the irrigated wastewater contained 1,4-dioxane. Yet Plaintiffs failed to bring this action until December, 1988, more than four years

later. Accordingly, any claim that Gelman violated its spray irrigation permit is time-barred.

However, as there is evidence of unauthorized overflows from Pond 2 to the marshy area, beyond the permit, the Court will decline to enter judgment against Plaintiffs on this issue. Claims based on continuing harm are not barred by the applicable limitation period. Defnet v. City of Detroit, 327 Mich 254 (1950); Moore v. Pontiac, 143 Mich App 610 (1985). Judgment is rendered against Plaintiffs on all other issues.

MICHIGAN ENVIRONMENTAL PROTECTION ACT

Plaintiffs have brought a claim under MEPA seeking "equitable relief to protect the water and other natural resources, or the public trust therein."

A. Elements of the MEPA Action.

In order to sustain a claim under MEPA, Plaintiffs must make out a prima facie case. The elements to a prima facie case under MEPA are:

1. that air, water, or other natural resources are involved;

2. that Defendant's conduct is involved;

3. that such conduct has, or is likely to, pollute, impair, or destroy the natural resource involved.

MCLA Sec. 691.1203(1).

Consistent with a constitutional mandate, MEPA imposes a duty upon the government and the citizens of this State to prevent the pollution, impairment, or destruction of the natural resources of this State. MCLA Sec. 691.1202. From and after October 1, 1980, the effective date of MEPA,

in issuing wastewater discharge permits to Gelman, the State was required to make a determination that the proposed discharges would meet the mandates of the WRCA, the Constitution and MEPA. Having made such a finding, Plaintiffs now cannot challenge collaterally their own determination.

The proofs establish that the great majority of groundwater contamination was caused by Gelman's compliance with its wastewater discharge permits. Plaintiffs cannot seek to hold Gelman responsible for complying with permits issued by Plaintiffs, especially where, as here, Plaintiffs made the determination that issuance of said permits was consistent with protection of human health and the environment. However, in paragraph 76 of the Complaint, Plaintiffs state that:

> "Gelman's unauthorized release of wastewater into the ground and into a neighboring wetland violates MEPA Sec. 3(1), MCL 691.1203; MSA 14.528(203), in that its conduct has and is likely to pollute, impair, or destroy water or other natural resources, or the trust therein." (Emphasis added)

The Plaintiffs have shown that there were unauthorized releases of wastewater in a neighboring wetland. The Court, therefore, declines to render judgment on this issue, as 1,4-dioxane continues to leak and migrate from their unauthorized discharge, Hodgeson v. Drain Commissioner, 52 Mich App 411 (1974); Defnet v. City of Detroit, supra; Moore v. Pontiac, supra. However, judgment is rendered against Plaintiffs upon all other issues.

MICHIGAN ENVIRONMENTAL RESPONSE ACT

In Count III, Plaintiffs sought to recover $474,000.00 incurred under MEPA ("Act 307") for provision of bottled water, extension of the municipal water system, and other response activities. By Opinion and Order dated October 15, 1989, this Court granted Gelman's Motion for Partial Summary Disposition related to this Count of the Complaint. This Court determined that Gelman could not be responsible for any funds expended by State agencies when the DNR had ignored its legal duty to promulgate administrative rules necessary to carry out Act 307. This Court concluded:

> As the Department of Natural Resources has had since 1982 the obligation to promulgate rules necessary to carryout the requirements of MERA; and as they did not do it, Gelman cannot be held liable for any evaluation costs or response activity related to the site for which Gelman is responsible.

(Opinion and Order, p. 4) Plaintiffs cannot recover those costs incurred under Act 307 as alleged in the Complaint.

In response to Gelman's Motion in Limine, Plaintiffs have suggested that the costs may be recovered under alternative theories (i.e., Sec. 10 of the WRCA and public nuisance). At the hearing on November 22, 1989, this Court indicated that Plaintiffs may only obtain relief that has been specifically identified in the Complaint (If, of course, Plaintiffs carry their burden of proof).

Plaintiffs have not introduced any evidence regarding the amount allegedly expended at the Gelman site. There is not enough evidence on the record to even deduce the scope of activities of State agencies. Plaintiffs may be able to

recover some costs under MERA for the unauthorized discharge, however. The Court, therefore, refuses to enter judgment on this issue, but does on all other issues. Claims based on continuing harm are not barred by the statute of limitations. Hodgeson v. Genesee County Drain Commissioner, supra; Defnet v. City of Detroit, supra.

COMMON LAW PUBLIC NUISANCE

A. Elements of Claim for Public Nuisance.

To establish their claim regarding public nuisance, Plaintiffs must demonstrate that Defendant's discharges have unreasonably interfered with the public's use and enjoyment of its land. In the context of this case, Plaintiffs must establish that the alleged contamination poses a threat to the public health. Garfield Township v. Young, 348 Mich 337 (1957); McDonell v. Brozo, 285 Mich 39 (1938).

Toxicological studies and expert testimony regarding 1,4-dioxane demonstrate that, except for the "core" area, the levels of 1,4-dioxane found in the aquifers do not pose any threat to the public health and thus do not constitute a public nuisance. See Section II.B., supra. With respect to 1,4-dioxane found in the "core" area, no nuisance exists because there is no evidence that these waters are being used as a drinking water source or for any other purposes.

It is well established that the State cannot prosecute as a public nuisance activities which it has authorized. Rohan v. Detroit Racing Association, 314 Mich 326 (1946); Grand Rapids & I.R. Company v. Heisel, 39 Mich 62 (1878);

Chope v. Detroit and H. Plank Road Company, 37 Mich 195 (1877). As set forth above, Defendant's discharges which allegedly carried the groundwater contamination have, for the most part, been explicitly authorized by the WRC and the DNR pursuant to discharge permits.

However, again, this Court refuses to enter judgment against Plaintiffs because of the aforesaid unauthorized discharge, but does as to all other issues.

Therefore, the Court hereby dismisses all claims against Gelman under the WRCA, MEPA, MERA and for nuisance, except for those relating to the unpermitted discharge of processed wastewater in the late 1960s.

The Court may determine the percentage of cost of all the remediation attributable to Gelman, if such be necessary after the close of proofs. The WRCA does not contain a complete list of specific remedies that a trial court may order, Attorney General v Biewer, 140 Mich App 1 (1985). However, this Court will fashion a remedy

Regarding the DNR request for preliminary injunction, Bratton v DAIIE, 120 Mich App 73 (1982) sets forth the standards for reviewing the grant of a preliminary injunction:

> "The grant or denial of a preliminary injunction is within the sound discretion of the trial court. Grand Rapids v. Central Land Co., 294 Mich 103, 112; 292 NW 579 (1940); Michigan Consolidated Gas Co. v. Public Service Comm, 99 Mich App 470, 478; 297 NW2d 874 (1980). The object of a preliminary injunction is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either. Gates v. Detroit & M R Co. 151 Mich 548, 551; 115 NW 420 (1908). The status

quo which will be preserved by a preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy. Steggles v. National Discount Corp, 326 Mich 44,51; 39 NW2d 237 (1949); Van Buren School Dist v. Wayne Circuit Judge, 61 Mich App 6, 20; 232 NW2d 278 (1975). The injunction should not be issued if the party seeking it fails to show that it will suffer irreparable injury if the injunction is not issued. Niedzialek v. Barbers Union, 331 Mich 296, 300; 49 NW2d 273 (1951); Van Buren School Dist, supra, 16. Furthermore, a preliminary injunction will not be issued if it will grant one of the parties all the relief requested prior to a hearing on the merits. Epworth Assembly v. Ludington & N R Co. 223 Mich 589, 596; 194 NW 562 (1923). Finally, a preliminary injunction should not be issued where the party seeking it has an adequate remedy at law. Van Buren School Dist. supra, p 16." See also Council 25, AFSCME v. Wayne County, 136 Mich App 21, 25-26; 355 NW2d 624 (1984).

Gelman is the only party that has done anything to halt the plume of 1,4-dioxane. Of its own volition, without any assistance from the DNR, Gelman has made substantial efforts to remove the 1,4-dioxane from the aquifers. The DNR has done nothing, They have been at meetings wherein Gelman has tried to formulate a successful plan to halt and eliminate the plume of 1,4-dioxane. Yet, the DNR has done nothing. They, incredibly enough, would not allow their agents to either approve or disapprove any formulation of any plan to dissipate the plume. The DNR has, in fact, hindered Gelman from removing the contaminated 1,4-dioxane from the aquifers. As the DNR has done nothing to halt the onward movement of the plume of 1,4-dioxane and as they have permitted the contaminants to enter into the soil, the Court will not issue a preliminary injunction.

As the State is primarily at fault, the Court believes that the State would be much better off submitting a plan to

eliminate 1,4-dioxane from the aquifers to this Court rather than continuing extensive litigation. The people of Washtenaw County are not being well served by prolonged litigation while the plumes of 1,4-dioxane continue to expand to the west and north.

The Motion for Preliminary Injunction is denied.

Patrick J. Conlin (P12126)
Circuit Judge

EXHIBIT 10

RELEASE OF CLAIMS AND SETTLEMENT AGREEMENT

This Release of Claims and Settlement Agreement ("Settlement Agreement" or "Agreement") is made and entered into this 20th day of November, 2006, between the City of Ann Arbor ("City"), a Michigan municipal corporation, with offices at 100 N. Fifth Ave, Ann Arbor, Michigan, 48104, and Gelman Sciences, Inc., a Michigan Corporation, d/b/a Pall Life Sciences ("PLS"), with offices at 600 South Wagner Road, Ann Arbor, Michigan, 48103.

I. GENERAL PROVISIONS

A. Proceedings. The City and PLS (collectively, the "Parties") acknowledge that this Settlement Agreement is a compromise of claims made in the following proceedings:

1. *City of Ann Arbor v. Gelman Sciences, Inc. d/b/a Pall Life Sciences,* Case No. 04-513-CF (Washtenaw Cty. Cir. Ct.) ("State Lawsuit");

2. *City of Ann Arbor v. Gelman Sciences, Inc. d/b/a Pall Life Sciences,* Case No. 05-73100 (U.S. Dist. Ct., E.D. Mich.) ("Federal Lawsuit"); and

3. *In Re Point Source Pollution Control National Pollution Discharge Elimination System (NPDES) Petition of the City of Ann Arbor on Permit NPDES No. MI 0048453 (Pall Life Sciences)* ("Contested Case").

B. Compromise of Claims. The Parties recognize that this Settlement Agreement is a compromise of disputed claims and defenses. By entering into this Settlement Agreement, neither Party admits any fault or liability under any statutory or common law, and does not waive any rights, claims, or defenses with respect to any person except as otherwise provided herein. By entering into this Settlement Agreement, neither Party admits the validity or factual basis of any of the positions or defenses asserted by the other Party. The Settlement Agreement and the compromises reflected therein shall have

no *res judicata* effect and shall not be admissible as evidence in any other proceeding, except in a proceeding between the Parties seeking enforcement of this Agreement.

C. Parties Bound. This Settlement Agreement applies to and is binding upon and inures to the benefit of the City, PLS, and their successors and assigns. This Settlement Agreement shall be binding upon the successors and assigns, if any, of PLS to its obligations and rights under the Consent Judgment entered into in *Attorney General v. Gelman Sciences,* Case No. 88-34734-CE (Washtenaw Cty. Cir. Ct.) (as modified by subsequent orders of the court) (the "Consent Judgment").

II. DEFINITIONS

The following terms, when capitalized in this Agreement, shall have the meanings specified in this Section II.

A. 1,4-Dioxane means the 1,4-dioxane present in surface water and the groundwater aquifers in the vicinity of the PLS Property, including the Unit E Aquifer, but this term as it is used in this Agreement shall not include any 1,4-dioxane that PLS establishes by a preponderance of the evidence to have originated from a release for which PLS is not legally responsible. For purposes of this Agreement only, "1,4-Dioxane" includes the 1,4-dioxane currently identified in the Unit E Aquifer, including but not limited to that which currently is below 85 ppb in concentration, which is located either (a) in the Prohibition Zone; or (b) at and in the vicinity of the Northwest Supply Well. PLS acknowledges that, as of the date of this Agreement, it is not aware of another source of the currently known 1,4-dioxane. Accordingly, the Parties agree that any 1,4-dioxane found in and near the Prohibition Zone or in and near the vicinity of the Northwest Supply Well shall be presumed to be within the above definition unless PLS can make

the proof stated above to the contrary. This definition shall not have any evidentiary effect in any future dispute or litigation between PLS and any person or entity other than the City.

B. Bromate means the bromate present in the surface water and the groundwater aquifers in the vicinity of the PLS Property, including the unnamed tributary to Honey Creek, which is the location of Outfall 001 under the NPDES Permit (the "Honey Creek Tributary"), Honey Creek and Unit E Aquifer, but this term as it is used in this Agreement shall not include any bromate that is established by PLS to have originated from a release or discharge for which PLS is not legally responsible.

C. City Property means property, buildings and facilities owned by the City.

D. Claims means any claim, allegation, demand, order, directive, action, suit, cause of action, counterclaim, cross-claim, third-party action, or arbitration or mediation demand, whether at law or in equity, and whether sounding in tort, equity, nuisance, trespass, negligence, strict liability or any other statutory, regulatory, administrative, or common law cause of action of any sort, asserted and unasserted, known and unknown, anticipated and unanticipated, past, present, and future of any nature whatsoever, including, without limitation, any and all claims for injunctive relief, declaratory relief, contribution, indemnification, reimbursement, Response Costs, Response Activity Costs, loss in the value of property, statutory relief, damages, expenses, penalties, costs, liens, or attorney fees.

E. Effective Date: The Effective Date of this Agreement shall be the latest date of the entry of the orders of dismissal specified in Section III. This Agreement shall be effective only if all of the orders of dismissal specified in Section III are entered.

F. Escalator Factor shall be calculated by as follows:

Escalator Index (Month of Trigger) - Escalator Index (November 2006)
Escalator Index (November 2006)

The percentage change from the November 2006 Index to the Index for the month during which the Contingent Payment is triggered under Section VI.B will be calculated to the second decimal place.

G. Escalator Amount shall be computed by multiplying the Escalator Factor by the Contingent Payment.

H. Escalator Index shall be the Engineering News Record Construction Cost Index, available at the www.enr.com web site. In the event the Escalator Index is no longer published by McGraw Hill or its successor, the Parties agree to establish an alternative method of determining the Escalator Amount based on a currently published and generally accepted construction cost index.

I. Federal Maximum Contaminant Level means the maximum contaminant level established by the Environmental Protection Agency under the Federal Safe Drinking Water Act. 42 U.S.C. 300f, et seq.

J. GCGI means the generic residential criterion for groundwater based on ingestion of groundwater developed by the MDEQ for 1,4-dioxane under Part 201 of the Michigan Natural Resources and Environmental Protection Act ("NREPA") MCL 324.20101 *et seq.*, and Mich. Admin. Code R. 299.710, as such criteria may be amended, adjusted or replaced.

K. Hazardous Substances has the same definition as that term in Section 20101(1) of NREPA, MCL 324.20101(1).

L. HCT Water Treatment System means the system used by PLS to treat water collected by the PLS remediation systems and to discharge that water to the Honey Creek Tributary at Outfall 001, as described in the NPDES Permit.

M. Major Reports means those reports that PLS is required to submit under the Consent Judgment or a MDEQ-approved work plan that address response activities affecting properties within the City or City Property, and any other final reports that PLS in good faith determines would be of significant interest to the City.

N. MDEQ means the State of Michigan Department of Environmental Quality, and its successor state agencies.

O. NPDES Permit means, unless specified otherwise, National Pollutant Discharge Elimination System Permit No. MI 0048453, as amended, renewed, or replaced, that authorizes PLS' discharge of treated water and effluent limits for such discharge.

P. Northwest Supply Well means the City's municipal water supply wells located on Montgomery Street in the City of Ann Arbor.

Q. Northwest Supply Wellfield means the municipal well field associated with the Northwest Supply Well.

R. Prohibition Zone means the area within which groundwater use is restricted pursuant to the Prohibition Zone Order, the boundaries of which are as depicted on the attached Figure 3, including a proposed expansion of the Prohibition Zone boundary that, as of the date of this Agreement, has not been approved by the MDEQ. The Prohibition Zone as that term is used in this Agreement shall include the proposed expansion as approved by the MDEQ. Upon MDEQ approval of the expansion, the document attached as Figure 3 and identified as "PROPOSED EXPANSION 4/18/06" will be replaced with a new Figure 3 showing the

expansion as approved by the MDEQ. The Prohibition Zone, as that term is used in this Agreement, shall not include any further expansion of the Prohibition Zone beyond the boundaries depicted on Figure 3.

S. Prohibition Zone Order means the May 17, 2005 Order Prohibiting Groundwater Use entered in *Attorney General, et al. v. Gelman Sciences, Inc.* Case No. 88-34734-CE (Washtenaw Cty. Cir. Ct.).

T. PLS Property means the PLS facility located at 600 S. Wagner Road, Ann Arbor, Michigan.

U. PLS Remediation means the response activities PLS is required to undertake by the Consent Judgment, associated court orders and MDEQ-approved workplans.

V. Response Activity Costs has the same meaning as the definition of that term in Section 20101(1)(ff) of NREPA, MCL 324.20101(1)(ff).

W. Response Costs has the same meaning as the definition of that term in 42 U.S.C. 9607(a).

X. State Maximum Contaminant Level means the maximum contaminant level established by the State under Michigan's Safe Drinking Water Act, MCL 325.1001, *et seq.*

Y. Trigger Level, as of the date of this Agreement, means the current GCGI for 1,4-dioxane of 85 parts per billion ("ppb"). If a new GCGI value is promulgated by the MDEQ, that value will become the Trigger Level from the time of promulgation forward, unless the new GCGI value is based on the development by the State of Michigan of a State Maximum Contaminant Level for 1,4-dioxane that is not a Federal Maximum Contaminant Level developed by USEPA. If, however, a Federal Maximum Containment Level is developed for 1,4-dioxane, a change in the GCGI value based on

that Federal Maximum Containment Level will become the new Trigger Level upon promulgation of the revised GCGI value by the MDEQ.

Z. Unit E Aquifer means the groundwater aquifer that is the subject of the Unit E Order.

AA. Unit E Order means the December 17, 2004 Order and Opinion Regarding Remediation of the Contamination of the "Unit E" Aquifer in *Attorney General, et al. v. Gelman Sciences, Inc.,* Case No. 88-34734-CE (Washtenaw Cty. Cir. Ct.), as may be amended.

BB. USEPA means the United States Environmental Protection Agency.

CC. Verified Monitoring Results shall be the results of the laboratory analysis of groundwater samples obtained from the Series A and Series B Wells described in Section VI, below, following completion of the Quality Assurance/Quality Control ("QA/QC") and verification procedures described in Appendix A.

DD. Well Information Database means the information PLS maintains with groundwater monitoring well information and outfall water quality information, including the following: well identification information (address, X and Y coordinates, top of casing and ground elevations, well and screen depths, survey information), dates of sampling, and sampling results.

III. SETTLEMENT PAYMENT AND DISMISSAL OF PROCEEDINGS.

A. Settlement Payment By PLS. Within Twenty-one (21) days after the Effective Date of this Agreement, PLS shall pay to the City the sum of Two Hundred Eighty Five Thousand Dollars ($285,000). The payment shall be made by check or draft payable to "The City of Ann Arbor" and be sent by overnight delivery to: Stephen K. Postema, City Attorney, 100 N. Fifth Avenue, Ann Arbor, Michigan 48104.

B. Dismissal of Proceedings. Upon execution of this Agreement, the City shall promptly dismiss with prejudice all Claims in the State Lawsuit, the Federal Lawsuit, and the Contested Case, with each Party to bear its own costs. Each Party shall, at its own expense, take whatever steps are necessary on its behalf to effectuate such dismissals.

IV. RELEASE OF CLAIMS AND RESERVATION OF RIGHTS

A. City Release. Except as provided in Paragraph IV.B, below, the City hereby irrevocably and unconditionally forever releases, discharges, and covenants not to sue, proceed against, or seek contribution from PLS, and any of its predecessors, successors, assigns, parents, subsidiaries, affiliates, officers, directors, employees, attorneys, agents, and/or representatives (the "Released Parties") and shall forever relinquish, remise, discharge, waive, and release any and all Claims that it may now or in the future have against the Released Parties in connection with the Covered Matters. Covered Matters are defined as:

1. All Claims arising directly or indirectly from Hazardous Substances in soil, groundwater, and surface water at or emanating, released, or discharged from the PLS Property (collectively "Contamination"), including, without limitation, all Claims that were or could have been asserted in the State Lawsuit, the Federal Lawsuit and/or the Contested Case.
2. All Claims, past, present and future, for civil fines, penalties and costs.
3. All Claims and rights under the Administrative Procedures Act to petition, challenge or contest any future NPDES permit issued to PLS that authorizes the discharge to the Honey Creek Tributary from PLS' groundwater treatment system(s).

B. Exceptions and Reservation of Rights. Notwithstanding Paragraph IV.A, above, the City reserves, and this Agreement is without prejudice to, its right to petition, challenge, sue, proceed against or otherwise seek reimbursement, contribution, indemnification and/or other remedy from PLS, with respect to:

1. Enforcement of this Agreement.

2. Any future necessary Response Activity Costs or Response Costs to address a new plume of Contamination or Contamination in a previously uncontaminated aquifer that is discovered after the date of this Agreement that could not have been brought in the State Lawsuit or Federal Lawsuit ("New Contamination"). This exception to the general release set forth in Paragraph IV.A shall not apply to:

   a. The future migration of Contamination within the Prohibition Zone;

   b. Contamination present in the groundwater at levels below the then applicable GCGI or State or Federal Maximum Contaminant Level, if any, that is associated with the plumes of Contamination known to exist as of the date of this Agreement ("Known Plumes") or;

   c. Contamination present at the Northwest Supply Wellfield or the property on which the Northwest Supply Well is located.

3. Claims that arise from the unforeseen change in the migration pathway of a Known Plume that: (a) Results in the presence of 1,4-Dioxane at levels above the then applicable GCGI or State or Federal Maximum Contaminant Level at locations where such concentrations are not present as of the date of this Agreement; and (b) causes a City Property to be considered a "facility" as defined under Part 201. This exception to the general release set forth in Paragraph IV.A shall not apply to any Claims associated with:

a. The migration of Contamination within the Prohibition Zone; or

b. The Northwest Supply Wellfield or the property on which the Northwest Supply Well is located.

4. The presence of Contamination at the Steere Farm Wellfield.

5. Necessary Response Costs and/or Response Activity Costs to extent the City may recover such costs under 42 U.S.C. 9607a and/or MCL 324.20126a that arise from the continued presence of 1,4-Dioxane at levels above the GCGI within the Prohibition Zone and one or more of the following:

a. Soil and/or water sampling and analysis from areas within the Prohibition Zone, to determine if 1,4-Dioxane is present in wells, excavations, and similar locations where groundwater is present or evident;

b. Dewatering costs and disposal costs, including permit costs, for soil and groundwater removed from the Prohibition Zone that is contaminated with 1,4-Dioxane if permits are required for such dewatering or disposal;

c. Worker training and use of protective gear;

d. Increased costs of contracting in areas affected by 1,4-Dioxane (e.g., need to use 40-hour OSHA hazardous substance/waste trained personnel rather than standard contractors; increased time for completion of projects and the like); and

e. The City's due care obligations under MCL 324.20107a and 42 U.S.C. 9607(q)(1)(A)(iii).

This exception to the general release set forth in Paragraph IV.A shall not apply to any Claims associated with the Northwest Supply Wellfield or the Northwest Supply Well itself.

6. The issuance of any future NPDES Permit or renewal of PLS' current NPDES Permit that authorizes PLS' discharge of treated groundwater to the Honey Creek Tributary, but only to the extent that a future proposed NPDES Permit/renewal:

a. Contains a new effluent limitation for a compound that is less restrictive than the effluent limitation in the current NPDES Permit;

b. Contains an effluent limitation for a compound that is not subject to an effluent limitation in the current NPDES Permit;

c. Allows the discharge of compounds that are not present in PLS' current effluent; or

d. Authorizes PLS to discharge a greater volume of treated water to the Honey Creek Tributary than the current NPDES Permit.

Unchanged portions of any future NPDES Permit shall not be subject to petition, challenge or contest.

7. The City's rights, if any, to take action to require the MDEQ to enforce violations of the NPDES Permit.

V. HONEY CREEK RESPONSE ACTIONS REGARDING BROMATE

A. Monitoring. Except as otherwise provided in this Agreement, monitoring for Bromate shall be accomplished at a single location. Sampling procedures and methods shall be as follows:

1. *Monitoring Location and Frequency:* PLS will sample surface water for Bromate on a daily basis, Monday through Friday, at the confluence of Honey Creek and the Huron River (hereinafter, "HC/HR"), as generally depicted in the diagram attached as Figure 1. The City may, at its discretion, collect samples on Saturday and Sunday of each week and is responsible for retaining any such samples. Except as provided below, PLS will only be responsible for analyzing one of the City's weekend samples (Saturday or Sunday) per month on the Monday following collection if and when the City collects such samples. PLS will also analyze the City's weekend samples if equipment malfunction or other

circumstance causing an "upset" condition occurs or is discovered on a Friday or Monday.

2. *Sampling Method and Transmission of Results*: Surface water will be collected as a grab sample. Samples will be collected between 7:00 a.m. and 10:00 a.m. or as soon as weather permits. For any samples PLS is required to obtain under this Section, the PLS analytical laboratory will analyze and report the results on the same day (for Monday through Friday samples) by email to the City's Environmental Coordinator and to the City's Water Quality Manager. Bromate analyses at PLS shall be conducted using USEPA Method 317 (or an equivalent, USEPA approved, method). The method detection limit (MDL) for Bromate using this method is currently 2 ppb, which constitutes the MDL that will be used with reference to determining action under this section. A lower MDL may be substituted for the agreed MDL if future changes in laboratory capabilities using acceptable methods allow.

3. *Split Sampling:* The City: (1) may split samples with PLS at any time, with 24 hours notice to PLS; (2) may collect samples at any time independent of the PLS sampling schedule; and (3) may utilize the PLS analytical laboratory as a backup laboratory for analyzing the City's split samples at a reasonable charge not to exceed PLS' costs.

B. Action Plan. If an analysis of a sample by PLS or the City indicates that the concentrations of Bromate at the HC/HR exceed 2 ppb, PLS will take the following actions:

1. PLS will perform a quality control and quality assurance review to determine if the monitoring result was due to an analytical or reporting error.

2. PLS will review the performance of its HCT Water Treatment System to determine if that system is operating properly, and, if it determines the functioning of the HCT Treatment System to be a possible cause of the monitoring result, PLS will make such adjustments as it deems necessary and collect an effluent sample shortly after those adjustments to determine system performance after such adjustments.

3. Within thirty-six (36) hours after completing the actions in subparagraphs 1 and 2, PLS will collect another surface water sample at HC/HR ("Confirming Sample"). PLS will collect another surface water sample at HC/HR on any Saturday following a Friday with a monitoring result in excess of 2 ppb. The City may collect a split sample of the Confirming Sample. If the Confirming Sample shows that Bromate at HC/HR is no longer present at concentrations in excess of 2 ppb, then monitoring shall resume as provided in this Section and no further action is necessary.

4. If the Confirming Sample shows the presence of Bromate in excess of 2 ppb, PLS will take actions as soon as practicable to reduce Bromate levels at HC/HR below 2 ppb. The initial actions may include, but are not limited to, the following:

   a. PLS may alter the flow composition into the HCT Water Treatment System so as to reduce the Bromate levels, but maintain the total flow of water treated and discharged by the system.

   b. PLS may reduce the total flow at the point of discharge to the Honey Creek Tributary (Outfall 001 in NPDES Permit MI 00 48453).

5. If the steps outlined in the previous subsections are not sufficient to reduce concentrations of Bromate to 2 ppb at the HC/HR within a reasonable time, PLS will take additional actions to achieve this reduction. Such actions may include, but are not limited to, the following:

   a. PLS may replace the current HCT Water Treatment System technology (ozone and hydrogen peroxide) with a combination of ultraviolet light (UV) and ozone technologies or other technology.

   b. PLS may install a pipeline to deliver treated water to a point along the Huron River downstream from the City's water intake.

C. Unavailability of PLS' Laboratory. In the event PLS' laboratory is no longer available, the Parties agree to negotiate in good faith to make appropriate adjustments, if any, to the laboratory turn around times set forth in this Section V. All commercially reasonable efforts will be made by PLS to identify and use a laboratory that will meet the turn around times set forth in this Section V.

D. Termination of Honey Creek Monitoring. PLS' obligations under this Section V shall terminate once PLS is no longer discharging treated groundwater to the Honey Creek Tributary or any other surface water body connected to Honey Creek or the Huron River or if PLS' HCT Water Treatment System is changed to a system that does not produce or otherwise cause Bromate to be present in the discharge.

VI. NORTHWEST SUPPLY WELL RESPONSE ACTIVITIES

A. Groundwater Monitoring Plan. PLS will undertake the following groundwater monitoring:

1. *Series A Well Location.* Within 90 days of the Effective Date of this Agreement, PLS will install a nested well configuration at the approximate location identified on the map attached hereto as Figure 2 (the "Series A Wells").

2. *Monitoring of Series A Wells.* PLS shall sample the Series A Wells for 1,4-Dioxane quarterly until termination using the procedures set forth in Appendix A.

3. *Series B Wells.* If the Verified Monitoring Result obtained from any Series A Well exceeds one-half (1/2) of the Trigger Level, PLS will install a nested well configuration at each of the locations described below within 90 days of obtaining access (the "Series B Wells"). One location will be in the general vicinity of Bemidji as shown on the map attached as Figure 2. The second well location will be determined by the Parties at the time the Verified Monitoring Result obtained from any Series A Well exceeds one-half (1/2) of the Trigger Level.

4. *Monitoring of Series B Wells.* PLS shall sample the Series B Wells for 1,4-Dioxane quarterly until termination as provided in Paragraph VI.A.6 using the procedures set forth in Appendix A.

5. *Well Installation.* Wells required under this Section VI are to be installed by PLS and shall follow the well construction procedures described in Appendix A.

6. *Termination.* PLS' obligations under this Section VI will continue until such time as the earliest of the following occurs:

   a. The MDEQ (or other regulatory body with oversight of the PLS Remediation) no longer requires groundwater monitoring in the Unit E Aquifer upgradient of the Northwest Supply Well;

   b. The Northwest Supply Wellfield is rendered unsuitable for drinking because of reasons other than the presence of 1,4-Dioxane;

   c. The Northwest Supply Well fails or becomes unusable and cannot legally be replaced for reasons other than the presence of 1,4-Dioxane; or

   d. By mutual agreement of the Parties.

B. Contingent Payment.

1. *Trigger of Contingent Payment.* In the event the Verified Monitoring Results indicate that the average concentration of 1,4-Dioxane in the nested wells at either Series B Well location exceeds the Trigger Level, then PLS shall make the payments described in Paragraphs VI.B.2 and 3. PLS' obligation to make such payments shall not be affected or reduced by the presence of 1,4-dioxane other than "1,4-Dioxane" (as defined in this Agreement) if the Trigger Level would have been exceeded even absent the presence of such 1,4-dioxane.

2. *Contingent Payment.* In the event the Contingent Payment is triggered, as described in Paragraph VI.B.1, PLS shall pay the City the sum of Four Million Dollars ($4,000,000) (the "Contingent Payment") within Sixty (60) days of receipt of the Verified Monitoring Results. The payment shall be made by check or draft payable to "The City of Ann Arbor" and be sent by overnight delivery to: Stephen K. Postema (or his successor), City Attorney, 100 N. Fifth Avenue, Ann Arbor, Michigan 48104.

3. *Escalator Payment.* In the event the Contingent Payment is triggered, as described in Paragraph VI.B.1, PLS shall, in addition to the Contingent Payment, pay the City the Escalator Payment within Sixty (60) days of the date the Escalator Index for the month during which the Contingent Payment is triggered becomes publicly available.

C. Additional Provisions

1. *Operation of Northwest Supply Wellfield.* The City shall only operate the Northwest Supply Wellfield in a manner that benefits the City's public water

supply system. The City shall not operate the Northwest Supply Well or install and operate a new well in the Northwest Supply Wellfield for the purpose of moving the plume of 1,4-Dioxane toward the Northwest Supply Well.

2. *Response Activities.* PLS may undertake additional response activities in the vicinity of the Northwest Supply Well to provide additional assurance that concentrations of 1,4-Dioxane in the monitoring wells do not reach the Trigger Level. If these additional response activities entail installation of infrastructure within the City, the City will cooperate with such activities in a manner consistent with Section IX of this Agreement.

VII. ADDITIONAL RESPONSE ACTIVITIES

A. PLS Performance of Future Laboratory Analyses.

1. *Analysis of City Samples.* PLS at its sole cost will perform laboratory analyses for 1,4-Dioxane, and provide the results of same and related laboratory QA/QC documentation to the City, with regard to samples the City obtains from the City's source waters. PLS' obligation to analyze such samples shall be limited to samples taken at the following frequencies and from the following locations:

   a. Quarterly groundwater samples from either the Northwest Supply Well or from the existing monitoring well located at the Northwest Supply Wellfield.

   b. Monthly groundwater samples from the transmission main from the Steere Farm Wellfield. If 1,4-dioxane is detected in a monthly sample from the transmission main, PLS will analyze monthly groundwater samples obtained by the City from the individual Steere Farm production wells.

   c. Monthly surface water samples from the Huron River and from Barton Pond.

2. *Split Sampling.* PLS agrees that, for quality control and quality assurance (QA/QC) purposes, on occasion the City may obtain duplicate (split) samples of water from the same sources or locations noted in Paragraph VII.A.1, above, and will cause those duplicate samples to be analyzed by a separate, independent laboratory. PLS will reimburse the City the amounts it pays in the future to obtain such independent laboratory analyses, provided that the number of such split samples is not greater than that reasonably required for appropriate QA/QC purposes.

3. *City Staff Time.* The City shall be responsible for obtaining the water samples from the locations described in Paragraph VII.A, above, and for following all appropriate sampling protocols and procedures. Except for Claims reserved in Section IV, above, PLS will not be required to reimburse the City for costs of obtaining such samples, including City staff time.

4. In the event PLS' laboratory is not available, PLS will be responsible for the cost of obtaining the laboratory analyses described in this Section VII.

VIII. TRANSPARENCY

A. Well Information Database. Within 30 days after the Effective Date, PLS shall transmit to the City its current Well Information Database as of the date of transmittal. This information shall be provided electronically in one or more Excel® files. Data to be provided in the Well Information Database will include at a minimum: the well or other sample location information (X and Y coordinates, top of casing and ground elevations, well and screen depths, address, etc.); sampling results for 1,4-Dioxane and/or Bromate; and other water quality data from the analysis. Submittals from PLS may also include

other fields of data mutually agreed upon by the City and PLS. Thereafter, no later than the 20th day of the first full month following the initial submittal, and continuing monthly thereafter, PLS will provide to the City an update to the Well Information Database ("Update") in Excel® format. Each Update shall include dates and sample results for the previous month and any new well information developed and entered into the Well Information Database by PLS after the last submittal.

B. Major Reports. PLS will provide the City with copies of final versions of Major Reports submitted to the MDEQ at the same time and in the same format they are submitted to the MDEQ, provided that the City can request any Major Report, or portion thereof, in electronic form, and PLS will then provide the requested material in electronic form when reasonable. PLS shall also provide copies of additional reports reasonably requested by the City. PLS shall also provide copies of requests by PLS to the MDEQ for permit modifications and copies of reports showing trend analysis of 1,4-Dioxane or Bromate concentrations in surface or groundwater. If any of the foregoing reports or documents is in paper format, the City may request that the report or document or portion(s) thereof be provided electronically, and PLS will cooperate to the extent practicable. Except as explicitly modified above, PLS will continue to provide to the City all data and reports that it is otherwise required to provide and/or which it already is providing to the City. The data and reports addressed in this Section VIII are in addition to or are modifications of those data and reports.

C. Use of Information and Data. The City may manipulate data and information provided under this Section in any manner it chooses and understands. The City may release the data and any reports the City creates, in either paper or electronic format, provided,

however, that any such document or electronic file shall clearly state on its face that it has been created by the City. The City will provide PLS with copies of all reports that are released or that are subject to release to the public. The City shall not release any of the reports or data provided by PLS pursuant to this Section VIII in the form provided by PLS in either paper or electronic format except in response to a Freedom of Information Act ("FOIA") request. The City shall not publish any of the reports or data PLS provides to the City on the Internet in the form provided by PLS. PLS is responsible for marking each document that PLS asserts is protected by copyright.

D. Data Gaps. The City may review the Well Information Database and Updates and identify any perceived data gaps to PLS. After the City identifies such a gap, PLS will fill in the field(s) with information, if it is available, with the next Update. PLS will identify those gaps for which there is no information. To the extent practical, within 90 days after the City identifies a data gap to PLS, PLS will complete the dataset(s) or document why data are incomplete. The Parties acknowledge that the PLS Remediation has been ongoing for many years, and, in some cases, information regarding wells may not have been collected or may be missing or lost.

E. Provision of Reports from the City to PLS. The City will provide PLS with any final reports that the City in good faith determines would be of significant interest to PLS. The City shall also provide copies of additional reports reasonably requested by PLS. If any of the foregoing reports is in paper format, PLS may request that the report or portion(s) thereof be provided electronically, and the City will cooperate to the extent practical.

F. Disputes. Any issue arising under this Section which cannot be resolved quickly at a staff level shall be referred to the Coordination Committee for discussion and resolution.

IX. COOPERATION AND COORDINATION

A. Access. The City shall provide access to City Property and rights of way to facilitate the installation of monitoring wells PLS is required to install under MDEQ-approved work plans at appropriate locations and pursuant to mutually acceptable license agreements. The City shall process PLS' access requests in an expeditious manner. The City has the right to discuss the proposed location with PLS and to recommend an alternate location(s) for the well prior to submittal of sites to the MDEQ. PLS will submit to the City an application for a license for a monitoring well at that location, subject to approval by the MDEQ. PLS will endeavor to provide both the City and property owners on the same and intersecting street(s) within 200 feet of the well location with a minimum of seventy-two (72) hours notice prior to the installation date for any such well(s).

B. Master Bond. PLS will provide a "Master Bond" in the form attached hereto as Appendix B. The Master Bond will satisfy the surety bonding requirements of all current license agreements between the City and PLS for existing monitoring wells on City Property or rights of way and up to an additional ten (10) monitoring wells that may be installed by PLS on City Property or rights of way in the future.

C. Communication.

1. *Communications from PLS.* PLS will use reasonable efforts to inform the City contemporaneous with the MDEQ of any unexpected findings regarding conditions on City Property and property within the City limits, conditions both inside or outside City boundaries that may or do affect property within the City limits, City-owned facilities or City-provided services, and any other findings PLS in good faith deems to be of significant concern to the City. PLS will copy

the City (if in writing) on any communications with the MDEQ and will use reasonable efforts to inform the City of other communications from PLS regarding the foregoing. To the extent possible, Mr. Fotouhi will contact Ms. McCormick and/or Mr. Naud by telephone, facsimile, or email to communicate the relevant information.

PLS will copy the City (if in writing) on any communications with the MDEQ and will use reasonable efforts to inform the City of other communications from PLS regarding the promulgation of a maximum contaminant level ("MCL") for 1,4-dioxane. To the extent possible, Mr. Fotouhi will contact Ms. McCormick and/or Mr. Naud by telephone, facsimile, or email to communicate the relevant information.

2. *Communications from the City.* The City will copy PLS (if in writing) on any communications with the MDEQ and will use reasonable efforts to inform PLS of other communications from the City regarding City comments on PLS' cleanup efforts or regarding the promulgation of a maximum contaminant level ("MCL") for 1,4-Dioxane. To the extent possible, Mr. Naud and/or Ms. McCormick will contact Mr. Fotouhi by telephone, facsimile, or email to communicate the relevant information.

D. Meetings.

1. *City Council Meetings.* In the event that City Council intends to consider an issue that the City in good faith deems to be a significant concern to PLS, the City will use reasonable efforts to provide PLS with advance notice and the opportunity to make a written or oral presentation to City Council. To the extent possible, Mr.

Naud or Ms. McCormick will contact Mr. Fotouhi by telephone, facsimile, or email to communicate the relevant information.

2. *Public Meetings.* In the event the City intends to hold or co-sponsor a public meeting related to PLS, the City will provide PLS with advance notice and the opportunity to participate in the meeting. PLS will use reasonable efforts to participate in any such public meeting. The City agrees that its participation in any such meeting shall be consistent with its agreement to cooperate with PLS' implementation of the Unit E Order and all MDEQ-approved plans entered under the Unit E Order.

3. *Intergovernmental or Citizen/Governmental Coalitions and Organizations.* In the event the City participates in any intergovernmental coalitions or citizen/governmental coalitions or organizations regarding the PLS Remediation, the City's participation shall be consistent with its agreement to cooperate with PLS' implementation of the Unit E Order and all MDEQ-approved plans entered under that Order. The City will use reasonable efforts to have a PLS representative included in any such coalition or organization. The City will copy PLS (if in writing) on any communications to such groups and will use reasonable efforts to inform PLS of other communications that the City in good faith determines would be of interest to PLS.

4. *Quarterly/Semiannual Meetings of Coordination Committee.* The City and PLS shall meet on a regular basis to discuss issues of interest to the City and/or to PLS related to the PLS Remediation. Issues of interest to the City and/or to PLS are issues related to conditions on City Property, to conditions on property within the

City limits, and to conditions both within and outside the City boundaries that may or do affect City-owned facilities or City-provided services and any other topics mutually agreed upon by the Parties. The meetings will take place quarterly for the first two years, followed by semiannual meetings thereafter, unless a different schedule is mutually agreed upon by the Parties. The participants shall be Mr. Fotouhi, Mr. Naud, and Ms. McCormick. Ms. Bartlett will participate in such meetings by telephone. Members of City Council also may participate. This group shall be referred to as the Coordination Committee. At least one week prior to each meeting, Mr. Naud and/or Ms. McCormick will notify Mr. Fotouhi of any questions or topics they wish Mr. Fotouhi to answer or address at the meeting, and Ms. Bartlett and/or Mr. Fotouhi will notify Mr. Naud and Ms. McCormick of any questions or topics they wish Mr. Naud and/or Ms. McCormick to answer or address at the meeting.

E. Use of City Utilities. The City shall evaluate any application by PLS to use the City sanitary sewer system in accordance with the provisions of Chapter 28 of the Ann Arbor City Code. PLS understands that sanitary sewer services may be extended to a property outside the City under only certain, limited circumstances, that a service connection to the sanitary sewer within the City may only be made by agreement with the owner of the property that is serviced, and that Chapter 28 requires users of the sanitary sewer system to comply with specified pretreatment standards. If PLS requires use of the City's sanitary or storm water sewer systems in the future as a short-term method of disposing of purged groundwater, the City will consider such requests on a case-by-case basis in accordance with the provisions of Chapters 28 and 33 of the Ann Arbor City Code.

F. City Resolution. To the extent it is inconsistent, City Council Resolution No. R-583-12-96, entitled Resolution Regarding the Immediate Cleanup of Gelman Sciences' Groundwater Contamination, is superseded by the provisions of this Agreement.

G. Cooperation with Implementation of Unit E Order. The City shall cooperate with PLS' implementation of the Unit E Order and all MDEQ-approved plans entered under the Unit E Order. The City's cooperation shall include, but is not limited to, maintaining the Prohibition Zone Order and the attached map that depicts the Prohibition Zone established by the Prohibition Zone Order, as amended, in the same manner as the City already has done pursuant to the Prohibition Zone Order.

H. *Successor Responsibilities.* All references to specific persons in this Section IX also include the individual's successor in the event he or she leaves the employ of the respective Party.

X. FORCE MAJEURE

A. Force Majeure. Any delay attributable to a Force Majeure shall not be deemed a violation of a Party's obligations under this Agreement. "Force Majeure" is defined as an occurrence or nonoccurrence arising from causes beyond the control of a Party or of any entity controlled by the Party. Such occurrence or nonoccurrence includes, but is not limited to: (1) an Act of God; (2) acts or omissions of third parties for which the Party is not responsible; (3) insolvency of any vendor, contractor, or subcontractor retained by a Party as part of implementation of this Agreement; and (4) delay in obtaining necessary access agreements that could not have been avoided or overcome by due diligence. "Force Majeure" does not include unanticipated or increased costs or changed financial circumstances.

B. When circumstances occur that a Party believes constitute Force Majeure, the Party shall notify the other Party by telephone, facsimile, or email of the circumstances within 48 hours after the Party first believes those circumstances to apply. Within 14 working days after the Party first believes those circumstances to apply, the Party shall supply to the other Party, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by the Party to avoid, minimize, or overcome the delay, and the timetable for implementation of such measures.

XI. TERMINATION OF AGREEMENT

The Parties' obligations under this Agreement shall terminate upon PLS' receipt of the Certificate of Completion from the MDEQ confirming that PLS has completed satisfactorily all requirements of the Consent Judgment, as provided in Section XXV of the Consent Judgment, or after the MDEQ determines that 1,4-Dioxane within the Prohibition Zone does not exceed the applicable GCGI, whichever is later. Notwithstanding the foregoing, Section IV shall survive the termination of this Agreement.

XII. MISCELLANEOUS

A. Severability. The provisions of this Agreement shall be severable. Should any provision be declared by a court of competent jurisdiction to be inconsistent with federal or state law, and therefore unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.

B. Warranties. The Parties each represent and warrant that:

1. The execution and delivery of this Agreement has been duly and validly authorized and approved by all requisite action required under applicable law and that no further action is necessary to make this Agreement valid and binding.

2. Each is fully authorized to enter into this Agreement and is duly organized and validly existing in good standing under the laws of one of the states of the United States of America.

3. Each has taken all necessary governmental, corporate and internal legal actions to duly approve the making and performance of this Agreement and that no further corporate or other internal approval is necessary.

4. The making and performance of this Agreement will not, to the knowledge of either of the Parties, violate any provision of law or of their respective articles of incorporation, charter or by-laws.

5. Knowledgeable officials, officers, employees and/or agents of each Party have read this entire Agreement and know the contents hereof and that the terms of the Agreement are contractual and not merely recitals. Each Party has authorized this Agreement to be signed of its own free act, and, in making this Agreement, each has obtained the advice of legal counsel.

C. Signatories. Each person executing this Agreement warrants that he or she has the authority and power to execute this Agreement from the Party on whose behalf he or she is executing.

D. Change of Circumstances. Each Party to this Agreement acknowledges that it may hereafter discover facts in addition to or different from those which it now knows or believes to be true with respect to the subject matter of this Agreement. The Parties each expressly accept

and assume the risk of such possible difference in facts and agree that this Agreement shall be and remain effective notwithstanding such difference in facts.

E. No Rights to Non-Parties. Except as expressly provided herein, this Agreement is intended to confer rights and benefits only upon the City and PLS, and is not intended to confer any right or benefit upon any other person or entity. Except as expressly provided herein, no person or entity other than PLS and the City shall have any legally enforceable right under this Agreement.

F. Arms-Length Negotiations. This Agreement is the product of arms-length negotiation, and the language in all parts of this Agreement shall be construed as a whole according to its meaning, and not strictly for or against any Party. The Parties hereto agree that this Agreement shall not be construed according to any special rules of construction applicable to contracts of adhesion and/or insurance contracts.

G. Modification. This Agreement may not be modified in whole or in part except by written agreement signed by the City and PLS.

H. Headings. The headings used in this Agreement are for convenience only and shall not be used to construe the provisions of this Agreement.

I. Cooperation. The City and PLS shall execute promptly any and all voluntary dismissals, stipulations, supplemental agreements, releases, affidavits, waivers and other documents of any nature or kind which the other Party may reasonably require in order to implement the provisions or objectives of this Agreement.

J. No Representations. The Parties represent and agree that in executing this Agreement they do not rely and have not relied upon any representation or statement made by any other Party or by any other person or entity released herein with regard to the subject

matter, basis, or effect of this Agreement, or otherwise, which is not specifically set forth herein.

K. Entire Agreement. This Agreement represents the entire understanding of the City and PLS, and this Agreement shall supersede and control any and all prior communications, correspondence, and memorialization of agreement or prior communication between the City and PLS or their representatives relative to the matters contained herein.

L. Counterpart Signatures. This Agreement may be executed in multiple counterparts, each of which, when so executed and delivered, shall be an original, but such counterparts shall together constitute one and the same instrument and agreement.

M. Governing Law. This Agreement shall in all respects be interpreted, enforced, and governed under the law of the State of Michigan and the law of the United States without regard to Michigan's conflict of laws principles.

N. No Waiver. The failure of any of the Parties to exercise any power given such Party hereunder or to insist upon strict compliance by any Party with its obligations under this Agreement, and no custom or practice of the Parties at variance with the terms of this Agreement shall constitute a waiver of the Parties' right to demand exact compliance with the terms hereof.

O. Enforcement. The Parties agree that the Washtenaw County Circuit Court and the United States District Court for the Eastern District of Michigan each may retain jurisdiction to enforce the terms of this Agreement as appropriate.

****SIGNATURE PAGE FOLLOWS****

IN WITNESS WHEREOF, the Parties have executed this Agreement, consisting of Thirty (30) pages plus Appendices A and B and Figures 1 – 3, by their duly authorized representatives as set forth below.

City of Ann Arbor

By: John Hieftje,
Its: Mayor

By: Jacqueline Beaudry,
Its: City Clerk

Roger W. Fraser,
City Administrator

Sue F. McCormick, Public Services Administrator

Stephen K. Postema,
City Attorney
Counsel for the City of Ann Arbor

Fredrick J. Dindoffer,
Bodman, LLP
Counsel for the City of Ann Arbor

Gelman Sciences, Inc., d/b/a Pall Life Sciences

By: Mary Ann Bartlett
Its: Secretary and Director

Michael L. Caldwell,
Zausmer, Kaufman, August & Caldwell, PC
Counsel for Gelman Sciences, Inc. d/b/a Pall Life Sciences

Alan D. Wasserman,
Williams, Acosta, PLLC
Counsel for Gelman Sciences, Inc. d/b/a Pall Life Sciences

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Fredrick J. Dindoffer,
Bodman, LLP
Counsel for the City of Ann Arbor

Gelman Sciences, Inc., d/b/a Pall Life Sciences

By: Mary Ann Bartlett
Its: Secretary and Director

Michael L. Caldwell,
Zausmer, Kaufman, August & Caldwell, PC
Counsel for Gelman Sciences, Inc. d/b/a Pall Life Sciences

Alan D. Wasserman,
Williams, Acosta, PLLC
Counsel for Gelman Sciences, Inc. d/b/a Pall Life Sciences

EXHIBIT 11

Brenda Smith

From: cardcore@googlegroups.com on behalf of Beth Collins <rdhbeth@gmail.com>
Sent: Sunday, December 6, 2020 9:55 AM
To: cardcore@googlegroups.com; WC Card
Subject: [CARDcore] Gelman- City Resolution to Delay Letter to Governor in Support of Gelman Superfund Site

Dear CARDcore Members,

There is a Resolution on the December 7, 2020 City Council Meeting Agenda to **delay** asking the Governor to reques the process to designate the Gelman Site as a USEPA Superfund Site, see below Resolution. The City November 5, 2 passed supported a Gelman USEPA Superfund Site and asked that the Governor send a Concurrence Letter to USEP USEPA designation process.

If this December 7 Resolution passes, it will continue the over four year delay in getting federal government help to c Site.

One of our County Commissioners has said that they believe that getting federal assistance is an Environmental Justi Resolution it would be - Justice delayed is justice denied.

Sincerely,

Beth Collins, CARD secretary

Here is the resolution:

DC-3

Title

Resolution to Clarify and Modify R-20-425 Regarding United States Environmental Protection Age with the Gelman Site

Memorandum

On November 5, 2020, City Council approved Resolution R-20-425, "Resolution Supporting the En Protection Agency's Active Involvement with the Gelman Site and Encouraging its Listing of the sa Site." Since then the Washtenaw Circuit Court has scheduled a hearing in early 2021 in the lawsuit k General v. Gelman Sciences, Inc., 22nd Circuit Court, File No. 88-34734-CE, in which the City is a Although City Council intended continued participation in the litigation, the reference only to negoti from clarification that City Council intends to pursue the City's interests in the court proceedings.

In addition, to allow the court hearing to go forward and to consider the court's decision following th of the request to Governor Whitmer for a concurrence Letter to the United States Environmental Pro place the Gelman Site on the National Priority List and treat it as a Superfund site is warranted. A de brief period of time after the trial court's decision will allow City Council to consider the decision be Environmental Protection Agency action is sent.

Body

Whereas, The City wishes to continue to participate in and allow the litigation process in Attorney G Sciences, Inc., 22nd Circuit Court, File No. 88-34734-CE, to proceed; and

Whereas, Clarification and modification of Resolution R-20-425 are warranted for that purpose;

RESOLVED, That the seventh "Whereas" clause of R-20-425, which directed the City Administrato fourth consent judgment negotiation process," is clarified to include direction to the City Administra Attorney to proceed with litigation in Attorney General v. Gelman Sciences, Inc.;

RESOLVED, That the direction to the City Administrator in the fourth "RESOLVED" clause of Res "to write to the Governor enclosing this resolution and soliciting a Concurrence Letter to USEPA in the Gelman Site into a National Priorities List site" be delayed until 30 days after the decision by the Circuit Court following its hearing in early 2021 in Attorney General v. Gelman Sciences, Inc.;

RESOLVED, That Resolution R-20-425, as approved by City Council on November 5, 2020, otherw unchanged and in effect; and

RESOLVED, That the City Council authorize the City Administrator and City Attorney to take such are consistent with the purposes of this resolution.

Sponsored by: Councilmembers Briggs and Disch

--

[sent via cardcore@googlegroups.com]

Brenda Smith

From: cardcore@googlegroups.com on behalf of Erica Briggs <ericafora2@gmail.com>
Sent: Sunday, December 6, 2020 12:35 PM
To: Beth Collins
Cc: cardcore@googlegroups.com; WC Card; Briggs, Erica
Subject: Re: [CARDcore] Gelman- City Resolution to Delay Letter to Governor in Support of Gelman Superfund Site

Beth, thanks for sharing information about DC-3. However, I disagree that this resolution would delay justice. The intent is to ensure that the City does not take any steps that might unintentionally delay or jeopardize the litigation we are currently engaged in with Gelman. Before us now is the prospect of justice in a matter of months, not decades. All of our community partners have said they want litigation to continue. I introduced this resolution because I am concerned a request for Superfund treatment before the state court hearing and decision are done could raise questions as to whether the City is serious about seeking relief in the state court hearing. It is important for the community to recognize that with the rejection of the 4th CJ the legal terrain has shifted. The circuit court judge will decide and order the remediation requirements with which Gelman will need to comply. It won't be a negotiated remediation plan. The court will also decide the role of the City and other Intervenors after judgment is entered.

I live directly above the plume. This is not an abstract threat. I am outraged that the polluter has been allowed to get away with doing so little for so long. I will not do anything to jeopardize the process we are in now, when the opportunity to hold Gelman to a much higher standard could be reached in just a few short months.

Thank you and I welcome dialogue with anyone on this matter who wants to discuss it at greater length. I have office hours at 4pm today and you can sign-up at my website below.

--
Erica Briggs
Ann Arbor City Councilmember, 5th Ward
(c) 734-355-3931
www.ericafora2.com

On Sun, Dec 6, 2020 at 9:55 AM Beth Collins <rdhbeth@gmail.com> wrote:

Dear CARDcore Members,

There is a Resolution on the December 7, 2020 City Council Meeting Agenda to **delay** asking the Governor to requ the process to designate the Gelman Site as a USEPA Superfund Site, see below Resolution. The City November 5.

Brenda Smith

From: cardcore@googlegroups.com on behalf of Beth Collins <rdhbeth@gmail.com>
Sent: Sunday, December 6, 2020 1:06 PM
To: CARDcore
Subject: [CARDcore] Fwd: Gelman - City Resolution to Delay Gelman USEPA Superfund Site Designation

---------- Forwarded message ---------
From: **DANBICKNELL** <danjbicknell@live.com>
Date: Sun, Dec 6, 2020 at 10:59 AM
Subject: Gelman - City Resolution to Delay Gelman USEPA Superfund Site Designation
To: Lisa Disch@a2gov.org <LDisch@a2gov.org>, Erica Briggs@a2gov.org <EBriggs@a2gov.org>, Linh Song@a2gov.org <LSong@a2gov.org>, Travis Radina@a2gov.org <TRadina@a2gov.org>, Jen Eyer@a2gov.org <JEyer@a2gov.org>
Cc: Taylor, Christopher (Mayor) <CTaylor@a2gov.org>, Griswold, Kathy <KGriswold@a2gov.org>, Hayner, Jeff <JHayner@a2gov.org>, <JGrand@a2gov.org>, <ENelson@a2gov.org>, <ARamlawi@a2gov.org>, Steglitz, Brian <BSteglitz@a2gov.org>, Elias, Abigail <AElias@a2gov.org>, Crawford, Tom <TCrawford@a2gov.org>, Jason Maciejewski <maciejewskij@washtenaw.org>, Andy LaBarre <labarrea@washtenaw.org>, Sue Shink <shinks@washtenaw.org>, Shannon Beeman <beemans@washtenaw.org>, Felicia Brabec <brabecf@washtenaw.org>, Ricky L. Jefferson <jeffersonr@washtenaw.org>, Jason Morgan <morganj@washtenaw.org>, Katie Scott <scottk@washtenaw.org>, Gregory Dill <dillg@washtenaw.org>, Evan Pratt <pratte@ewashtenaw.org>, Jimena Loveluck <loveluckj@washtenaw.org>, Kristen Schweighoefer <schweighoeferk@washtenaw.org>, Jennifer Conn <connj@washtenaw.org>, Will Hathaway <hathwill@gmail.com>, Kathy Knol <kknol1@comcast.net>, <townshipboard@sciotownship.org>, <depalmer@sciotownship.org>, <JFlintoft@sciotownship.org>, Michael Moran <moran@aatwp.org>, Diane O'Connell <supervisor@aatwp.org>, <d2@debbiedingell.com>, <Greg.Sunstrum@mail.house.gov>, Jesaitis, Katie <Katie.Jesaitis@mail.house.gov>, Jeff Irwin <jeffmirwin@gmail.com>, State Representative Yousef Rabhi <yousefrabhi@house.mi.gov>, <DonnaLasinski@house.mi.gov>, Nancy Shiffler <nshiffler@comcast.net>, James Carl D'Amour <james@peoplepowerunlimited.com>, Roger Rayle <rmrayle@gmail.com>, Rita Mitchell <ritalmitchell@gmail.com>, McCall, Patti <Patti.Mccall@tetratech.com>, Beth Collins <rdhbeth@gmail.com>, Bailey, Robert <bob.bailey@tm.net>, Vince Caruso <vrcaruso@comcast.net>, Rita Caruso <rlochcaruso@gmail.com>, Jack Eaton <jackeaton@live.com>, Anne Bannister <bannister4council@gmail.com>, <spencer@fourthviewmedia.com>, Dylan Thomas <dylan@fourthviewmedia.com>, O'Rielly, Steve <sorielly@umich.edu>, <mjnaud@gmail.com>, Environmental Commission <ec@a2gov.org>, Ryan J Stanton <RStanton@mlive.com>, Jim Crowfoot <crowfoot@umich.edu>

New City Council Members:

As you know, the December 7 City Council meeting will consider a Resolution to delay asking the Governor to send a Concurrence Letter to USEPA in support of designating the Gelman Site as a USEPA Superfund Site. The City attorneys and Mayor have stated that if the City asks for the Governor Concurrence Letter now that it will upset Gelman and the Consent Judgment negotiations. This fabrication has been told over the last four years to all the City, County, and Townships elected officials in an attempt to never make progress towards a Gelman USEPA Superfund Site. This assertion has been rejected by all the local governments. As new members of the City Council, please use your common sense. You are the decision-makers responsible and accountable for protecting the public health and the environment.

We need two paths to combat this Gelman dioxane pollution that is adversely impacting our public health and the environment. The path of obtaining a better Consent Judgment and the path towards a Gelman USEPA Superfund Site., Asking that the Governor not now send the Concurrence Letter will continue the obstruction of the federal Superfund path.

A basic principle In any negotiation is that pressure must be created against the opposition to gain favorable terms and condition, especially in a Consent Judgment (CJ). Gelman has established that it does not want a Gelman USEPA Superfund Site, in part, by requiring in the 4th Amended CJ related Settlement Agreement that the City not ask for a Gelman USEPA Superfund Site or pay a $1M penalty. The concept that Gelman will get upset and walk away from the CJ negotiations if the City requests now a Governor Concurrence Letter is nonsense. If Gelman walks away, then the current CJ will remain in-place, except that the Court will be required to update the CJ with the current EGLE drinking water and groundwater-surface water criteria to comply with current State of Michigan laws and regulations. As stated recently by the State of Michigan - Assistant Attorney General on this case, this will then immediately place Gelman in violation of the CJ, thereby, triggering requirements for Gelman to take actions now to stop the dioxane plume migration and remediate the groundwater contamination.

After spending over $1M and three years on CJ negotiation, the result under the current treatment of Gelman has been a totally deficient proposed 4th Amended CJ. Applying additional pressure on Gelman is now required; not less pressure.

Attorneys make recommendations (in this case for many different reasons) and Council make decisions using good reasoning.

Please take action to protect our homes and community by not passing the December 7 Resolution. Please do not make one of your first votes a vote that you will later regret.

If you have any questions or comments, please contact me at your convenience.

Thank you.

Best regards,

Daniel J. Bicknell, MPH

President

Global Environment Alliance, LLC

Phone -248-720-9432

danjbicknell@live.com

--
[sent via cardcore@googlegroups.com]

You received this message because you are subscribed to the Google Groups "CARDcore" group.
To unsubscribe from this group and stop receiving emails from it, send an email to cardcore+unsubscribe@googlegroups.com.
To view this discussion on the web visit https://groups.google.com/d/msgid/cardcore/CALY%3DzNKFHmgByiLHNzZ-co6tZCtSnYW7z9YH%3DGHOs%2BTC7w64sw%40mail.gmail.com.

Brenda Smith

From: cardcore@googlegroups.com on behalf of Ralph McKee <rmckee2258@gmail.com>
Sent: Sunday, December 6, 2020 3:54 PM
To: Erica Briggs
Cc: Beth Collins; cardcore@googlegroups.com; WC Card; Briggs, Erica
Subject: Re: [CARDcore] Gelman- City Resolution to Delay Letter to Governor in Support of Gelman Superfund Site

I am writing to respond to the email you sent earlier today to Beth Collins and other CARD members re your DC-3 resolution. I am dismayed that, despite my detailed critique of the resolution and the state court Gelman litigation sent to you this morning, you persist in making public statements which are factually unsupported and disingenuous. You say your resolution is to ensure that the City does not "unintentionally delay or jeopardize the litigation," and that the EPA request "could raise questions as to whether the City is serious about seeking relief in the state court…". You have not provided any support for those statements, because there isn't any. Frankly, as I told you this morning, all that is needed is for City counsel to tell the judge 1) the EPA will not be here for quite some time, 2) therefore, this litigation is very important to the City, and 3) the City is going to proceed full bore with litigation. Quite simple.

Your expressed expectations as to the timing and the results of the January hearings are naive at best because they ignore numerous litigation realities, including that there has been no discovery, no motion practice and no pretrial order; to have a full blown trial under these circumstances on a month's notice would be highly unusual. Other intervenor counsel are perplexed by the judge's order re the hearings and are asking for clarification. City counsel have regularly said state law is vey weak. The judge may order more hearings, or take the matter under advisement for months. And if the judge does order Gelman/Danaher to do something beyond what it wants to do, they will certainly appeal. That will take at least a year, maybe two or more, to resolve. Given all that, to think that we will get an enforceable order that we like in "just a few short months" is wildly unrealistic. I will note that you're not a lawyer and have no litigation experience remotely close to this, but to be fair, I would say the same thing to City counsel.

Finally, to undercut the negotiating leverage provided by the EPA request via this resolution is unfathomable. Every qualified lawyer I have discussed this matter with agrees that the best card we have is that leverage, and that to undercut it is the worst move that we could make.

Given all the above, why you are persisting with your resolution is beyond explanation. I am asking to have this sent to all CARD members.

On Dec 6, 2020, at 12:34 PM, Erica Briggs <ericafora2@gmail.com> wrote:

Beth, thanks for sharing information about DC-3. However, I disagree that this resolution would delay justice. The intent is to ensure that the City does not take any steps that might unintentionally delay or jeopardize the litigation we are currently engaged in with Gelman. Before us now is the prospect of justice in a matter of months,

not decades. All of our community partners have said they want litigation to continue. I introduced this resolution because I am concerned a request for Superfund treatment before the state court hearing and decision are done could raise questions as to whether the City is serious about seeking relief in the state court hearing. It is important for the community to recognize that with the rejection of the 4th CJ the legal terrain has shifted. The circuit court judge will decide and order the remediation requirements with which Gelman will need to comply. It won't be a negotiated remediation plan. The court will also decide the role of the City and other Intervenors after judgment is entered.

I live directly above the plume. This is not an abstract threat. I am outraged that the polluter has been allowed to get away with doing so little for so long. I will not do anything to jeopardize the process we are in now, when the opportunity to hold Gelman to a much higher standard could be reached in just a few short months.

Thank you and I welcome dialogue with anyone on this matter who wants to discuss it at greater length. I have office hours at 4pm today and you can sign-up at my website below.

--
Erica Briggs
Ann Arbor City Councilmember, 5th Ward
(c) 734-355-3931
www.ericafora2.com

On Sun, Dec 6, 2020 at 9:55 AM Beth Collins <rdhbeth@gmail.com> wrote:

Dear CARDcore Members,

There is a Resolution on the December 7, 2020 City Council Meeting Agenda to **delay** asking the Governor the process to designate the Gelman Site as a USEPA Superfund Site, see below Resolution. The City Nover passed supported a Gelman USEPA Superfund Site and asked that the Governor send a Concurrence Letter t USEPA designation process.

If this December 7 Resolution passes, it will continue the over four year delay in getting federal government Site.

One of our County Commissioners has said that they believe that getting federal assistance is an Environmer Resolution it would be - Justice delayed is justice denied.

Sincerely,

Beth Collins, CARD secretary

Here is the resolution:

Brenda Smith

From: cardcore@googlegroups.com on behalf of Michael Moran <moranmc@prodigy.net>
Sent: Sunday, December 6, 2020 10:30 PM
To: Beth Collins; Erica Briggs
Cc: cardcore@googlegroups.com; WC Card; Briggs, Erica
Subject: Re: [CARDcore] Gelman- City Resolution to Delay Letter to Governor in Support of Gelman Superfund Site

Erica, while your intent may be to bring about a speedier, acceptable resolution of this 30+ year litigation, your proposed resolution will do just the reverse. We have not met, I was Ann Arbor Township's Supervisor for the last 18 years, retiring June 1, 2020. I remain an Ann Arbor Township Trustee, having been elected in November. I am also a retired lawyer who had a trial and appellate practice in local, state and federal courts with an office in Ann Arbor. I spent much of those 18 years as Supervisor dealing with the Gelman pollution issues and case. AA Township was a founding member of CARD, the Committee for Action on Remediation of Dioxane, and I am Vice-Chair of CARD. We founded CARD because our citizens were getting no help from the MiciganDepartment of Environmenta Quality in forcing Gelman to remedy the spreading plume of pollution it created. During those years I traveled on many occassions to Lansing along with other local officials to engage with the AttorneysGeneral and the Headsof the MDEQ to force them to pay attention to this spreading problem that they seemed unable to focus on. I attended several court proceedings during those years and witnessed how Gelman's lawyers were masters of creating delay after delay, thwarting any possibility of holding Gelman to account. for its recklesness. Along with other CARD members we have spend thousands of hours on doing what the state agencies were not doing and thousands of hours more keeping a living record of this problem for others to follow when we were no longer able to carry to load.

You do not seem to have an understanding of the Gelman lawsuit, or even lawsuits in general. Your assertion that the Judge will "render a judgment" after the three days of hearing in January is simply incorrect. Those hearings are in the manner of a status conference to determine after four years of negotiations whether an agreed upon resolution has been reached--a consent judgment, indeed a Fourth Consent Judgment CJ4.That proposed judgment was negotiated without any community involvement. It is a 93 page document, that when read discloses, once again, that Gelman simply wants to forestall any directive to make it clean up its mess. The proposed remedies identified in CJ4 were wholly inadequate to even keep the current plume from spreading across our contiguous local jurisdictions. Experts hired by the City of Ann Arbor found that the number of proposed new sentinal and purge wells were wholly inadequate to remediate the pollution or to even prevent it spread. Dr Lemke, an expert hired by the City, could not even say that the plume of pollution would not spread to Barton Pond, the source of 85% of the City's drinking water. Likewise, he advised that there were not enought wells proposed in CJ4 to tell us in teh future whether the plume is heading to Barton Pond. CJ4 in fact removed several goals established in the Third CJ to prevent the spread of the pollution. The proposed CJ4 even set out a strategy for Gelman to withdraw from the remediation efforts and walk away from the problem. A serious reading of the related Settlement AGreement makes it clear that Gelman desperately wants to keep the EPA out of any leadership role in forcing Gelman to clean up this mess at its expense. There is so much wrong with this proposed CJ4 that no amount of tinkering with its provisions can make it acceptible. Your assertion that we are within months of achieving justice is so profoundly wrong. The delay you want to create will not bring us justice, it will just bring us another delay; it will not bring us a "judgment" it will just give Gelman yet another delay, and another victory.

You seem to want to help the residents in your political district, but your action will not help them. Please realzethat those of us who have been figinting Gelman for these many years have learned some things,about this substance 1-4- Dioxane and about Gelman. Please reconsider your approach and withdraw your motion. I would be happy to talk with you more about this problem if you like. My cell phone is 734-649-7666.

Michael Moran

On Sunday, December 6, 2020, 12:49:10 PM EST, Erica Briggs wrote:

Brenda Smith

From:	cardcore@googlegroups.com on behalf of Erica Briggs <ericafora2@gmail.com>
Sent:	Sunday, December 6, 2020 11:25 PM
To:	Michael Moran
Cc:	Beth Collins; cardcore@googlegroups.com; WC Card; Briggs, Erica
Subject:	Re: [CARDcore] Gelman- City Resolution to Delay Letter to Governor in Support of Gelman Superfund Site

CM Disch and I appreciate all of the public feedback, particularly from members of this group, we have received on this issue and we would like CARD members to know we are withdrawing our resolution in the morning so it will not be on the agenda.

Sincerely,
Erica Briggs, 5th Ward CM

On Dec 6, 2020, at 10:32 PM, Michael Moran wrote:

Erica, while your intent may be to bring about a speedier, acceptable resolution of this 30+ year litigation, your proposed resolution will do just the reverse. We have not met, I was Ann Arbor Township's Supervisor for the last 18 years, retiring June 1, 2020. I remain an Ann Arbor Township Trustee, having been elected in November. I am also a retired lawyer who had a trial and appellate practice in local, state and federal courts with an office in Ann Arbor. I spent much of those 18 years as Supervisor dealing with the Gelman pollution issues and case. AA Township was a founding member of CARD, the Committee for Action on Remediation of Dioxane, and I am Vice-Chair of CARD. We founded CARD because our citizens were getting no help from the MiciganDepartment of Environmenta Quality in forcing Gelman to remedy the spreading plume of pollution it created. During those years I traveled on many occassions to Lansing along with other local officials to engage with the AttorneysGeneral and the Headsof the MDEQ to force them to pay attention to this spreading problem that they seemed unable to focus on. I attended several court proceedings during those years and witnessed how Gelman's lawyers were masters of creating delay after delay, thwarting any possibility of holding Gelman to account. for its recklesness. Along with other CARD members we have spend thousands of hours on doing what the state agencies were not doing and thousands of hours more keeping a living record of this problem for others to follow when we were no longer able to carry to load.

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Zausmer, P.C.
32255 Northwestern Highway, Suite 225, Farmington Hills, MI 48334-1574

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel*. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,
Plaintiff,

and

THE CITY OF ANN ARBOR,
Intervenor,

and

WASHTENAW COUNTY,
Intervenor,

and

THE WASHTENAW COUNTY HEALTH DEPARTMENT,
Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,
Intervenor,

and

THE HURON RIVER WATERSHED COUNCIL,
Intervenor,

and

SCIO TOWNSHIP,
Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,
Defendant.
/

Case No. 88-34734-CE
Hon. Timothy P. Connors

GELMAN SCIENCES, INC.'S NOTICE OF WITHDRAWAL OF MOTION FOR RECONSIDERATION OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

Zausmer, P.C.
32255 Northwestern Highway, Suite 225, Farmington Hills, MI 48334-1574

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ROBERT CHARLES DAVIS (P40155)
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126 S. Main Street
Ann Arbor, MI 48104
(734) 662-4426

/

GELMAN SCIENCES, INC.'S NOTICE OF WITHDRAWAL OF JANUARY 7, 2021 MOTION FOR RECONSIDERATION OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

Gelman Sciences, Inc., by and through its undersigned counsel, hereby files this Notice of Withdrawal of its Motion for Reconsideration of Order Scheduling Hearing on Modification of Consent Agreement filed on January 7, 2021, with respect to the Court's Third Amended Scheduling Order. Gelman will be filing a Motion for Reconsideration of the Court's January 27,

2021 Fourth Amended Scheduling Order, which will be identical in form and content to the withdrawn Motion for Reconsideration of the Third Amended Scheduling Order.

Respectfully submitted,

ZAUSMER, P.C.

/s/ Michael L. Caldwell

MICHAEL L. CALDWELL (P40554)
KAREN E. BEACH (P75172)
Attorney for Defendant Gelman Sciences, Inc.
32255 Northwestern Hwy, Suite 225
Farmington Hills, MI 48334
(248) 851-4111

Dated: January 28, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses as directed on the pleadings on January 28, 2021 by:

☒ E-FILE ☐ US MAIL ☐ HAND DELIVERY ☐ UPS
☐ FEDERAL EXPRESS ☐ OTHER

/s/Holly Hood
Holly Hood

Zausmer, P.C.
32255 Northwestern Highway, Suite 225, Farmington Hills, MI 48334-1574

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR,
Intervenor,
And

WASHTENAW COUNTY,
Intervenor,

And

WASHTENAW COUNTY HEALTH DEPARTMENT,
Intervenor,

And

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,
Intervenor,
And

THE HURON RIVER WATERSHED COUNCIL,
Intervenor,
And

SCIO TOWNSHIP,
Intervenor,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,
Defendant.

Case No. 88-034734-CE
Hon. Timothy P. Connors

INTERVENORS' RESPONSE IN OPPOSITION TO GELMAN'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF THE CONSENT AGREEMENT

BRIAN J. NEGELE (P41846)
Michigan Dept of Attorney General
Attorney for Plaintiff EGLE
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(517) 373-7540

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Davis Listman PLLC
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Washtenaw County Health Department,
and Washtenaw County Health Officer,
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INTERVENORS' RESPONSE IN OPPOSITION TO GELMAN'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

The Intervenors, by their counsel of Record, for their Response In Opposition To Gelman's Motion For Stay Of Order Scheduling Hearing On Modification Of Consent Agreement, state the following:

I. INTRODUCTION

On November 19, 2020, this Court conducted a Court ordered status conference with all attorneys of Record. Because it was a status conference, no arguments were heard and no pleadings, testimony or evidence were submitted. This Court did not issue any rulings for the Record. Rather, this Court exercised its broad and unquestioned authority to manage its docket and issued a scheduling order ("Scheduling Order"). The Michigan Supreme Court is crystal clear that trial courts have the express authority to "direct and control the proceedings before them":

> **We further acknowledge that our trial courts also have express authority to direct and control the proceedings before them**. MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." Additionally, MCR 2.504(B)(1) provides that "[i]f the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant. *Maldonado* v. *Ford Motor Co.*, 476 Mich. 372, 376; 719 NW2d 809, 811 (2006). (Emphasis Added)

The Michigan Court of Appeals also has ruled that a trial court has the inherent authority to control its own docket. A trial court's exercise of its inherent power may only be disturbed upon a finding that there has been a clear abuse of discretion:

> **A trial court has the inherent authority to control its own docket**. Maldonado v Ford Motor Co, 476 Mich 372, 376; 719 NW2d 809 (2006) ("[T]rial courts possess the inherent authority . . . to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); see also Brenner v Kolk, 226 Mich App 149, 158-160, n 5; 573 NW2d 65 (1997). "**An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion**." Brenner, 226 Mich App at 160. An abuse of discretion occurs when a court chooses an outcome outside the range of principled outcomes. Maldonado, 476 Mich at 376." *Baynesan* v. *Wayne State Univ.*, 316 Mich. App. 643, 651; 894 NW2d 102, 106 (2016). (Emphasis Added)

This Court did not abuse its discretion when it issued its Scheduling Order and Gelman does not argue that it did. Here, the Scheduling Order at issue set a hearing and a briefing

schedule. The dates in that Scheduling Order have since been modified by stipulation of the parties, but no other element of the Scheduling Order such as setting a hearing and requiring briefs from the parties has been modified. The Scheduling Order does not contain any substantive rulings. The briefs related to the hearing set by the Scheduling Order are not yet due. The hearing has not been conducted. No oral arguments have been presented.

On January 7, 2021, 49 days after the Court issued the Scheduling Order, Gelman filed a Motion for Reconsideration of the Scheduling Order. Gelman did not appeal the Scheduling Order to the Michigan Court of Appeals. Gelman did not seek clarification of the Scheduling Order by motion or otherwise. Gelman did not file a motion to set aside the Scheduling Order.

Since the issuance of the Scheduling Order, and starting long before Gelman filed its Motion for Reconsideration, the Intervenors and their attorneys have worked diligently and expended significant time and resources with their retained experts to prepare the Brief requested by this Court. That Brief, as requested, provides both legal and scientific support for the Intervenors' positions. That Brief, and its exhibits, are now due to this Court on February 12, 2021.

II. LEGAL ARGUMENTS

Gelman's current Motion for a Stay has no legal support. In its Brief, Gelman relies solely on MCR 2.614(D) and MCR 7.209(A). No case law is presented or argued. The cited Michigan Court Rules do not support Gelman's position as outlined below. Overall, Gelman's current Motion for a Stay is just a masquerade for its intent to ask this Court to rule quickly on the Motion for Reconsideration. In fact, Gelman's request for relief in its brief (and again in its Supplemental Brief filed on January 27, 2021) is explicit that it wants this Court either to grant

its Motion for Reconsideration or to grant its request for a stay. Gelman does not -- and cannot -- provide any authority to support that position.

Gelman's relief is cast in its Motion in three (3) requests.[1] Intervenors address each separately.

A. Without Authority, Gelman Seeks "this stay pending the Court's ruling on Gelman's motion for reconsideration, filed January 7, 2021, . ."

First, Gelman seeks a stay pending this Court's ruling on Gelman's Motion for Reconsideration. This stay request is inconsistent as Gelman asks this Court to stay proceedings even as it asks this Court to issue rulings during the period of the stay. Gelman cannot have it both ways.

In support, Gelman cites MCR 2.614(D) and MCR 7.209(A). MCR 2.614 (D) applies to a "Stay on Appeal." This Court Rule does not apply here. There is no pending appeal at issue. MCR 7.209 (A) is entitled "Effect of Appeal; Prerequisites" and states that an appeal does not stay the effect or enforceability of a judgment or order of a trial court unless the trial court or the Court of Appeals otherwise orders. Again, as is evident from its plain language, this Court Rule also does not apply here. There is no pending appeal at issue.

Gelman has yet to file an appeal to the Michigan Court of Appeals. Instead of filing an application for leave to appeal within 21 days of the Scheduling Order, Gelman decided to file a Motion for Reconsideration. MCR 7.205(A)(1)(a) and (b) require an application for leave to appeal to be filed within 21 days after entry of the judgment or order appealed **or** 21 days after entry of an order deciding a motion for reconsideration **if** the motion for reconsideration was filed within the initial 21-day appeal period.

[1] Gelman also presents an unsupported argument relating to the EPA's potential involvement at the site. The EPA has not yet acted. Gelman states incorrectly and without authority that EPA involvement will divest this Court of jurisdiction. Gelman is wrong. The controlling state statute that governs this case applies independent of any actions by the EPA.

Gelman did not file an application for leave to appeal within 21 days of this Court issuing its Scheduling Order. Instead, Gelman filed a Motion for Reconsideration. As a result, Gelman's current pursuit of a "Stay on Appeal" pursuant to MCR 2.614(D) has no basis.

B. Without Authority, Gelman Seeks a Stay "pending Gelman's Forthcoming Application For Leave To Appeal to the Michigan Court Of Appeals from the Third Amended Scheduling Order…"

Second, Gelman seeks a stay pending Gelman's alleged forthcoming filing of an Application for Leave to Appeal to the Michigan Court of Appeals. This is a request for a stay from this Court pending future events that have not occurred -- and may never occur. Gelman does not cite any Michigan Court Rule or any other legal authority that allows Gelman to seek a stay prior to this Court ruling on Gelman's Motion for Reconsideration and prior to Gelman filing its Application for Leave to Appeal. This request is speculative at best and lacks merit. There is no support for this argument in any of the Court Rules that govern the grounds and procedure for a stay to be heard or granted. The lack of authority in Gelman's brief is also grounds to reject this request. A party cannot simply announce in its brief a position and leave it to the Court to search for authority either to sustain or reject the position taken. See *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959).

C. Without Authority, Gelman Seeks a Stay "until all appellate proceedings are complete."

Third, Gelman seeks a stay until all future appellate proceedings are complete. This request is even more problematic because it seeks a stay conditioned on a sequence of multiple future events that have yet to occur and/or ripen. These future events include: this Court denying Gelman's Motion for Reconsideration, Gelman Filing an Application for Leave to Appeal to the Michigan Court of Appeals, and the Michigan Court of Appeals granting Gelman's Application for Leave to Appeal. Gelman does not cite a Michigan Court Rule or any other legal authority

that allows Gelman to seek a stay prior to this Court ruling on Gelman's Motion for Reconsideration, prior to Gelman filing its Application for Leave to Appeal and prior to the Michigan Court of Appeals granting that Application for Leave to Appeal if it is filed. In addition to the request being speculative and without merit, the failure to provide authority for the position taken dooms this request. See *Mitcham, supra*.

D. Gelman's Requests Are Premature at Best.

Gelman's request for multiple stays is premature and improvident. When Gelman filed its Motion for Reconsideration, it selected a path premised on this Court ruling on the Motion for Reconsideration. This Court has not yet done so. Once this Court rules on the Motion for Reconsideration, Gelman will then have to consider its options which may -- or may not -- include the filing an Application for Leave to Appeal to the Michigan Court of Appeals and/or seeking a stay at that time.

III. CONCLUSIONS AND RELIEF REQUESTED

This Court maintains jurisdiction over the Consent Judgment now in place between Gelman and the State of Michigan. The Intervenors were granted Intervention, in significant part, because that Consent Judgment must now be revised to implement the significant changes made by the State with respect to the applicable cleanup levels for 1,4 dioxane in both groundwater and soils. The Emergency Rules promulgated on the 1,4 dioxane cleanup levels in late 2016 said, in pertinent part, the following:

> "The current cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway." (**Exhibit** 1 -- Emergency Rules)

This Court set a hearing and requested legal briefing, supported by science, on the issue of what is appropriate to fully and fairly implement the new cleanup standards and protect public health

and environment. These matters are critical and impact public health, welfare and the environment and should proceed as scheduled by this Court.

The stay now sought by Gelman is premature and not supported. Gelman's Motion for Stay of Order Scheduling Hearing on Modification of Consent Agreement should be denied.

WHEREFORE, the Intervenors respectfully request that this Court enter an Order:

(I) Denying Gelman's Motion for Stay of Proceedings; and

(II) Granting such other relief in favor of the Intervenors as this Court deems just, equitable and appropriate under the circumstances presented.

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PROOF OF SERVICE

I served the **Intervenors' Response In Opposition To Gelman's Motion For Stay Of Order Scheduling Hearing On Modification Of Consent Agreement** upon the attorneys of record and/or parties in this case on **January 29, 2021**. **I declare the foregoing statement to be true to the best of my information, knowledge and belief.**

☐ **U.S. Mail**
☐ Hand Delivered
☐ Express MailPrivate
☐ Fax
☐ Messenger
X Other: E-file

/s/ William N. Listman
William N. Listman

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 22ND JUDICIAL CIRCUIT
WASHTENAW COUNTY

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

THE CITY OF ANN ARBOR,

Intervenor,

and

WASHTENAW COUNTY,

Intervenor,

and

THE WASHTENAW COUNTY HEALTH DEPARTMENT,

Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,

Intervenor,

and

THE HURON RIVER WATERSHED COUNCIL,

Intervenor,

No. 88-34734-CE

HON. TIMOTHY P. CONNORS

DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S RESPONSE TO GELMAN SCIENCES, INC.'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

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DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S RESPONSE TO GELMAN SCIENCES, INC.'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

The Department of Environment, Great Lakes, and Energy (EGLE) takes no position on Gelman Sciences, Inc.'s motion for stay. However, it is essential that response activities continue to progress at the Gelman site while this Court considers the best course of action to address the risks from contamination at the site. Nearly four years were expended negotiating the now rejected Fourth Amended and Restated Consent Judgment (4th CJ). In order to ensure continued response activity progress, EGLE intends to seek this Court's approval to move forward with long overdue, and uncontested, response activities necessary to protect public health and the environment while proceedings in this case continue.

During the November 19, 2020 status conference, the parties informed the Court that the elected officials of the local government Intervenors had, contrary to the recommendations of their experienced environmental counsel and experts, rejected the 4th CJ after nearly four years of negotiations.

The elected officials rejected the 4th CJ to seek U.S. Environmental Protection Agency (USEPA) takeover of the Gelman Sciences, Inc. (Gelman) Site as a "Superfund" site, adopting the belief asserted by community activists that USEPA will force Gelman to clean up the contaminated aquifer to drinking water standards. Somewhat inconsistently, the elected officials also directed their legal counsel to simultaneously pursue a "better" resolution than the 4th CJ through litigation before this Court.

The result of the November status conference was the Court's December 17, 2020 Scheduling Order, as modified by its January 27, 2021 Scheduling Order, that directs the parties to submit Briefs and Expert Reports both supporting the proposed 4th CJ and identifying revisions to address its perceived inadequacies.

On January 7, 2021, Gelman filed a motion for reconsideration of the December 17, 2020 Scheduling Order and, on January 22, 2021, moved this Court to stay the Scheduling Order's briefing schedule and hearings pursuant to MCR 2.614(D) and MCR 7.209(A).[1]

EGLE takes no position on the appropriateness of the stay requested by Gelman. EGLE's interest and statutory obligation in this litigation is to ensure expeditious compliance with the law under an enforceable schedule, which the 4th CJ accomplishes. EGLE anticipates that the Intervenors will bring forward arguments about how the 4th CJ should be improved. But EGLE has substantial concerns that no revisions ordered by this Court, short of aquifer restoration to drinking water standards[2]—the primary reason the elected officials rejected the 4th CJ and are seeking USEPA takeover—will satisfy the elected officials.

[1] On January 28, 2021, Gelman withdrew its motion for reconsideration and brief and refiled its motion and brief to reflect the revised Scheduling Order issued January 27, 2021.

[2] EGLE does not oppose aquifer restoration, but aquifer restoration is not required under Michigan law; even if Michigan law authorized the Court to order such a remedy (it does not expressly do so), EGLE notes that the Intervenors' own expert hydrogeologist, Dr. Lemke, stated his professional opinion is that the "site is too large and too complex to remediate completely." Part 7 Summary and Concluding Thoughts - YouTube, at 1:39–2:15, posted August 28, 2020.

As noted by Gelman in its recent filings, at the time of the original intervention hearings, EGLE and Gelman had reached agreement on the substance of a proposed 4th CJ that would have updated the existing Consent Judgment to current cleanup standards, required substantial additional investigation, including potential surface water impacts, and remedial work. That work has been on hold due to the subsequent years-long and now ultimately failed negotiations for the 4th CJ.

Therefore, EGLE requests that the Court take into consideration when considering Gelman's Motion for Stay and the upcoming filings, should they proceed, that EGLE's highest priority is to address the now years-overdue updating of the Consent Judgment through an amended 4th CJ incorporating the uncontested response activities. The arguments and proceedings about what more can or should be done can proceed after the updated Consent Judgment is in place. EGLE intends to ensure that entry into an amended 4th CJ will not preclude any further proceedings or discussion by the parties.

This approach will allow the substantial amount of work required under the 4th CJ to proceed immediately—the work that is not in dispute and was not objected to by the public[3] during public comment periods—while the proceedings before this

[3] EGLE's responses to public comments regarding the proposed 4th CJ remain valid because EGLE does not anticipate adding any new terms. Therefore, there will be no need to engage in another public comment period prior to entry of an amended 4th CJ. The Court should note that EGLE engaged in the public comment period because of community interest in the 4th CJ. That is, the public comment period was not a legal requirement.

Court or the Court of Appeals play out. The amended 4th CJ will be fully protective and compliant with Michigan law.

Respectfully submitted,

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Dated: February 1, 2021

LF: Gelman Sciences CIR/AG#1989-001467-A/Response to Motion for Stay 2021-02-01

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN ex rel. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

And

THE CITY OF ANN ARBOR,
Intervenor,
And

WASHTENAW COUNTY,
Intervenor,

And

WASHTENAW COUNTY HEALTH DEPARTMENT,
Intervenor,

And

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,
Intervenor,
And

THE HURON RIVER WATERSHED COUNCIL,
Intervenor,
And

SCIO TOWNSHIP,
Intervenor,

V.

GELMAN SCIENCES, INC., a Michigan Corporation,
Defendant.

Case No. 88-34734-CE
Hon. Timothy P. Connors

REPLY OF INTERENORS CITY OF ANN ARBOR AND SCIO TOWNSHIP TO CORRECT MISSTATEMENTS IN BRIEFS FILED BY THE BY STATE AND GELMAN RELATED TO MOTION FOR STAY OF ORDER

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REPLY OF INTERVENORS CITY OF ANN ARBOR AND SCIO TOWNSHIP TO CORRECT MISSTATEMENTS IN BRIEFS FILED BY THE STATE AND GELMAN RELATED TO MOTION FOR STAY OF ORDER

Intervenors City of Ann Arbor and Scio Township, by their undersigned attorneys, feel compelled to reply to statements made in the Response Brief filed by the State on February 1,

2021, and in the Reply Brief filed by Gelman on February 3, 2021. The Washtenaw County Intervenors and Intervenor Huron River Watershed Council concur.

Both briefs make incorrect statements, without basis, that the reason or primary reason the governing bodies of the Intervenors rejected the negotiated and proposed Fourth Amended Consent Judgment was that it did not include aquifer restoration. (State Response Brief p. 2; Gelman Reply Brief p. 4) The record of the reasons for rejection are clear that was not the reason—or even a reason. These misstatements are misleading and even offensive.

The reasons for rejection are not relevant to the Court's decision on the pending Motion for Stay, and the City and Scio Township are confident the Court understands the Intervenors are working diligently to provide the Court with comprehensive legal and scientific support for the various modifications of response activities the Intervenors seek—which do not include aquifer restoration. Therefore, in the context of this Motion, the City and Scio Township will not burden the record with documentation of the several reasons for the rejections, which did not include the absence of aquifer restoration.

The City and Scio Township request this Court to ignore those misrepresentations.

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Dated: February 3, 2021

PROOF OF SERVICE

I hereby certify that on February 3, 2021, I electronically filed the foregoing document with the Clerk of the Court using the MiFile System which will send notice of such filing to the following: all registered parties, and I hereby certify that I have mailed by US Mail the document to the following non-MiFile participants: None.

/s/ Dawn M. Bagozzi
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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN *ex rel*. MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

THE CITY OF ANN ARBOR,

Intervenor,

and

WASHTENAW COUNTY,

Intervenor,

and

THE WASHTENAW COUNTY HEALTH DEPARTMENT,

Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER, JIMENA LOVELUCK,

Intervenor,

and

THE HURON RIVER WATERSHED COUNCIL,

Intervenor,

and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan Corporation,

Defendant.

/

Case No. 88-34734-CE
Hon. Timothy P. Connors

REPLY BRIEF IN SUPPORT OF GELMAN SCIENCES, INC.'S MOTION FOR STAY OF ORDER SCHEDULING HEARING ON MODIFICATION OF CONSENT AGREEMENT

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REPLY BRIEF IN SUPPORT OF MOTION FOR STAY OF ORDER SETTING HEARING ON MODIFICATION OF CONSENT AGREEMENT

Defendant Gelman Sciences, Inc. ("Gelman") files this reply brief in support of its motion for a stay of the proceedings outlined in the January 27, 2021 Fourth Amended Scheduling Order.[1]

[1] As noted in Gelman's motion for reconsideration, Gelman's first and preferred form of relief is for the Court to vacate the January 27, 2021 Scheduling Order and dismiss the intervention without

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Each of Intervenors' procedural objections to Gelman's motion lacks merit. First, Intervenors argue that a stay should be denied because Gelman's motion for reconsideration was untimely. This argument is incorrect. Gelman timely sought reconsideration of this Court's January 27, 2021 Order scheduling the remedy hearing. Each of the three proceeding orders regarding the remedy hearing was vacated within 21 days of its entry. A vacated order cannot be reconsidered or appealed from, because it is a legal nullity. See, e.g., *Smith v MEEMIC Ins Co*, 285 Mich App 529, 532-533; 776 NW2d 408 (2009) (collecting cases holding that judgments that have been set aside or vacated are nullities). The language in each amended Scheduling Order specified that the Order vacated all previous Scheduling Orders, precisely to avoid any ambiguity as to which Scheduling Order was in effect and thus subject to appeal.

Gelman has always been forthright regarding its intent to appeal the Court's decision to hold the remedy hearing, and this Court should not entertain Intervenors' spurious arguments that Gelman is not entitled to a stay simply because the appeal has been delayed by the numerous modifications to the order setting that hearing. Gelman's January 28, 2021 motion for reconsideration of the January 27, 2021 Fourth Amended Scheduling Order was timely, and any application for leave to appeal will be timely filed within 21 days of an order denying that motion. Alternatively, Gelman is prepared to file an application for leave to appeal within 21 days of the Fourth Amended Scheduling Order if no decision on the motion for reconsideration has been issued by that time.[2]

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prejudice, or to order the Intervenors to file their complaints so that the merits of their claims can be litigated.

[2] Although Gelman filed its reconsideration motion to provide the Court with the opportunity to reconsider its decision to hold a remedy hearing, there is no requirement that Gelman wait for a ruling on that motion before seeking interlocutory review.

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Intervenors also incorrectly argue that Gelman's motion for stay is premature because it was filed before the Application. Litigants routinely file motions for stay in advance of the anticipated filing of an application for leave to appeal because a request for stay must first be made in the trial court. MCR 7.209(A)(2). Gelman followed this same sequence in 2017—without objection—when it sought to stay this Court's intervention decisions prior to filing its application for leave to appeal: Motion for Stay filed 4/3/17 ("pending a decision on Gelman's *forthcoming Application* . . ."); Application for Leave to Appeal filed 4/6/17. If the trial court denies a motion for stay, a transcript of the motion hearing must be filed with the Court of Appeals along with the motion for stay. MCR 7.209(A)(3). This process takes time, and an appellant prosecuting a time-sensitive interlocutory appeal cannot wait until after the application is filed to file, argue, and obtain the transcript of a motion for stay in the trial court. Indeed, the 21-day automatic stay provided for appeals as of right is expressly designed to allow the appealing party to obtain a stay or appeal bond in order to protect themselves against proceedings on a judgment while an appeal is pending. MCR 7.209(E); MCR 2.614(A)(1). Absent a stay, a party must comply with the order pending the appeal, even if it believes that the order is incorrect. See *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003). These procedural realities underscore why Intervenors' opposition to Gelman's motion as premature is baseless.

Intervenors' remaining arguments are similarly frivolous and without merit. For example, Intervenors argue that Gelman cannot request a stay of proceedings for the duration of appellate proceedings. This is standard language for any appellate stay and is intended to further the interests of judicial economy, as it would be an immense waste of private, public and judicial resources to revisit a stay of proceedings at every step in the appellate process.

EGLE, for its part, does not take a position with regard to the requested stay. However, its

pleading suggests a path to entry of a bilateral Fourth Amended Consent Judgment that bears weighty consideration. Gelman's motion for reconsideration asked this Court to dismiss the intervention without prejudice because the intervention failed to accomplish the desired result: a resolution that would be accepted by the community. Indeed, far from bringing the parties closer to such a resolution, this process has made clear that it is impossible to craft any remedy that is both realistic and achievable and that will be acceptable to Ann Arbor's politicians and activists. That is because, as EGLE points out in its response, the elected officials that rejected the carefully negotiated settlement are unlikely to be satisfied by anything other than aquifer restoration—which the Intervenors' own experts recognize is not technically feasible or required by applicable law—or by having EPA take over the site. In the face of this reality, continuation of the intervention serves no purpose; as a result, the intervention should be dismissed.

But even if this Court is unwilling to dismiss the intervention, Gelman agrees with EGLE that entry of a bilateral Fourth Amended Consent Judgment would accomplish what is long overdue: the prompt implementation of a fully protective remedy tied to the more stringent statewide cleanup standards. As evidence of its good faith, Gelman will agree to enter into a bilaterally negotiated Fourth Amended Consent Judgment based on the response activities Gelman and EGLE agreed upon four years ago, without requiring dismissal of the intervention and without prejudice to Intervenors' ability to seek additional relief. As made clear in its February 1, 2021 filing, EGLE is in agreement with Gelman on this immediate path forward, which is both in the public interest and would not require further delay.

For the foregoing reasons, and in order to conserve public, private and judicial resources, Gelman respectfully asks this Court to:

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A. Grant its motion for reconsideration and either dismiss the intervention without prejudice, or cancel the hearing and require Intervenors to file their complaints so the merits of their claims can be litigated; or alternatively

B. Grant Gelman's motion pursuant to MCR 2.614(D) and MCR 7.209(A), to stay the January 27, 2021 Order scheduling the remedy hearing pending the Court of Appeals' decision on Gelman's Application for Leave to Appeal, and, if the Application is granted, until all appellate proceedings are complete.

Respectfully submitted,

ZAUSMER, P.C.

/s/ Michael L. Caldwell
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Dated: February 3, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses as directed on the pleadings on February 3, 2021, by:

☒ E-FILE ☐ US MAIL ☐ HAND DELIVERY ☐ UPS
☐ FEDERAL EXPRESS ☐ OTHER

/s/Holly Hood
Holly Hood

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32255 Northwestern Highway, Suite 225, Farmington Hills, MI 48334-1574

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

FRANK J. KELLEY, ATTORNEY GENERAL, et al,

Plaintiffs,

Case No. 88-034734-CE

-vs-

GELMAN SCIENCES, INC.,

Defendant.

_____/

V I D E O T A P E D P R O C E E D I N G S

Hearing on Motion for Stay

BEFORE THE HONORABLE TIMOTHY P. CONNORS

Ann Arbor, Michigan - February 4, 2021

TRANSCRIBED BY: Ginger K. Hoffman, CSMR-9234

Core Litigation Support, LLC

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ALSO APPEARING: Mr. Raymond B. Ludwiszewski

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Thursday, February 4, 2021
Ann Arbor, Michigan
9:38 a.m.
* * *

THE CLERK: Now on record in the matter of Frank Kelley versus Gelman Sciences, Case No. 88-34734-CE. This is Defendant's Motion for Stay of Order Scheduling Hearing on Modification of Consent Agreement Pending Appeal.

THE COURT: Good morning. This is Judge Connors. Could we have everybody who's in on this case please first of all put yourself on video and identify yourself.

MR. STAPLETON: Your Honor, William Stapleton for Scio Township.

MR. DAVIS: Your Honor, Robert Davis on behalf of the County.

MR. POSTEMA: Your Honor, Stephen Postema on behalf of the City. And with me today I have Fred Dindoffer, Nathan Dupes, and Abby Elias, all for the City of Ann Arbor. Thank you.

MR. DINDOFFER: Good morning, Your Honor.

MS. METTE: Your Honor, Erin Mette with the Huron River Watershed Council.

MR. NEGELE: Good morning, Your Honor. Brian

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Negele, Assistant Attorney General, appearing on behalf of the Michigan Department of Environment, Great Lakes, and Energy, also referred to as EGLE.

MR. CALDWELL: Thank you, Your Honor. Mike Caldwell on behalf of Gelman Sciences -- excuse me -- and I have Ray Ludwiszewski with me, as well.

THE COURT: There are -- is that everyone has put their appearance on? Yes.

So I looked at both the motion for the stay and then the motion for reconsideration, and I know that the court rules are such that we normally don't grant oral argument on a motion for reconsideration, per se. But Mr. Caldwell, you raise some very legitimate points in your motion for reconsideration. It was the hope, of course, that with the intervenors -- and I do want to say I was impressed by the fact -- how hard everyone worked. I don't know the terms of the consent judgment because, ultimately, those were partly, you know, settlement negotiations.

You raise a very good point, Mr. Caldwell, that if I try to impose a remedy at this point without the due process of litigation of what right, if any, intervenors have in that, that would be error. If it came back, we'd have to get a whole nother judge.

So I'd like -- I think he -- I think

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Mr. Caldwell raises some -- some very good points. The two options, as he sees it, is I dismiss it. The intervenors were discretionary. It was at the discretion of the Court that I brought them in. So one is to simply say -- dismissing that, and then it's up to the parties to enter -- to modify their consent agreement. Or I litigate what rights, if any, the intervenors actually have in the case.

And Mr. Caldwell makes a very good point. They need to file a complaint. They can file defenses. I'll have to make decisions. There'll be appellate review. It'll probably take a good deal of time and litigation and cost for everybody, but I can't just ignore that.

And secondly, apparently from the pleadings, it's indicated some of the intervenors are seeking relief from the federal government and if that was granted, then I would lose jurisdiction completely, anyway. So I'd like to give the opportunity for those of you to respond to the motion for reconsideration as to what you think I should do. Go right ahead.

MR. DAVIS: Your Honor, Robert Davis on behalf of the County. I was prepared this morning to address you with respect to the request for stay. The request for stay was a three layered set of requests to

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which I found no legal support and no case law support. Essentially, I didn't see any support for you to issue a stay pending your motion for reconsideration. I didn't see any legal or court rule support for you to issue any stay for an appeal that hasn't been filed yet, and I haven't found any case law that would support you to issue a stay for an appeal that hasn't been granted yet.

On the issue of reconsideration, is the Court asking that we be allowed under the court rule to respond with a brief on the motion for reconsideration?

THE COURT: I think so. I think what I'd rather do is let you respond to that. But I -- I've read that, and I think he's -- he -- I think Mr. Caldwell raises significantly valid legal arguments. So it would make the stay moot. I mean, I would either do one of the two options: Dismiss the intervenors, or we would litigate what right, role, what relief, if any legally, each of those intervenors can have. And so that's what I'm looking at.

And I don't think -- but I think regardless, one of those two would make the stay moot. It probably would create another grounds for appellate review, and this case may be going up and down or up and down and up and down. We all know how that goes.

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So my -- I think really the stay is not the issue. The stay is really the points he makes in the -- in the motion for reconsideration.

MR. DAVIS: Well, from the County's perspective, Judge, I don't know how the other intervenors feel, but under the court rule, if requested, we would like to brief and be heard on the issue of reconsideration.

THE COURT: Mr. Postema?

MR. POSTEMA: Yeah, the City feels the same way. We feel that that issue, we disagree fully on the reconsideration and the merits. I know you've read both -- you've read Gelman's position on it and you've indicated some concerns on it, but we think that we can address those in a legal brief fully and address those concerns. And so we would certainly concur in the County's position on addressing that because we -- we believe that -- that when you see both sides of this, that you will -- you may look at it a different way.

THE COURT: Stapleton?

MR. STAPLETON: Yes, Your Honor. Scio Township would also agree that we would like the opportunity to address all of the issues raised in the motion for consideration in writing to the Court. And perhaps the Court, once receiving the briefs, could set

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the matter for oral argument. You know, just as an example, the Court mentioned that EPA involvement could strip this Court of jurisdiction, and in reality, Judge, that's just not true.

MR. POSTEMA: Right.

MR. STAPLETON: The EPA has an express provision that does not -- that states very clearly it does not preempt states from pursuing its remedies for hazardous substance releases in their states.

So I just raise as an example of an issue that I think is really important and that deserves to be briefed.

THE COURT: Okay. And I'm sorry. Counsel for the watershed?

MS. METTE: Yes, Your Honor. We agree we would also like the opportunity to brief these issues.

THE COURT: Okay.

MS. METTE: And have oral argument.

THE COURT: Well, let's do this: I am concerned about proceeding with the hearings that we had scheduled in light of the legal points Mr. Caldwell had raised. It would be certainly unfortunate if I proceeded on that, and then that was appealed and turned out that that was legally improper. And I think Mr. Caldwell makes a good point. I probably would be

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disqualified, and then you'd be starting all over with a judge who has not had the familiarity with this for decades that I had.

So why don't -- when do we have that scheduled? When did we have that scheduled that we were going to do those hearings?

THE CLERK: March 22nd and March 23rd.

THE COURT: And we -- how much time do you need to respond in writing to the motion for reconsideration, counsel?

MR. DAVIS: I would ask for 14 days, Your Honor.

MR. CALDWELL: Your Honor, I would point out that the intervenors' briefs in connection with the hearing that we're now reconsidering or at least looking at our due next Friday, I believe, under the Court's most recent order. And so I think at a minimum, the current order would need to be suspended, vacated, or a new one issued.

THE COURT: Well, I think you're right. I'd rather proceed on this before we go into that. I think that -- you know, I think we need to have the -- a decision on that, because it may well be -- it may well -- well, I will tell you, Mr. Caldwell, of the two options you're posing to me, I would be -- it would be

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unlikely for me to simply dismiss the intervenors. I just -- I'm not going to do that. I'm the one that just, you know, made the order under discretionary. I wanted their voices at the table.

But what legally -- having the right at the table for discussions may not be the same as the rights to prevent the two parties to the lawsuit, Gelman and the State, from modifying agreement. You know, that -- you may be right on that. So I think that we should suspend your filing your intervenors' briefs on that because if we're going to end up litigating those rights, that's a whole different kind of lawsuit. So --

MR. DINDOFFER: Your Honor.

THE COURT: Yeah.

MR. DINDOFFER: And Fred Dindoffer for the City. And in line with Mr. Davis's request, if we could -- now that we're almost done with our briefing and expert reports, if we could shift gears and if we could set our response date out two weeks, you know, to the 18th or 19th, we could probably still have the hearings that you'd scheduled for early the following week, if that's still available.

THE COURT: You mean the ones that are currently scheduled? Those dates that are currently --

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I'd like to -- I'd like to have a decision on this and -- before then.

MR. DINDOFFER: Oh.

THE COURT: Yeah, Mr. Dindoffer.

MR. DINDOFFER: I had anticipated you wouldn't hear the matters you had intended on the 22nd or 23rd.

THE COURT: Right.

MR. DINDOFFER: But rather --

THE COURT: Right.

MR. DINDOFFER: -- the reconsideration motion.

THE COURT: Right. That's what I was thinking, sir. That's what I was thinking because -- because, Mr. Caldwell, if, in fact, I said you're right and we'll have to litigate that, the intervenors will have to file their complaints, you'll have to file the defenses, we're going to litigate what that role and relationship is, I would be doing all of that without ever getting to this proposed hearing that we're going to have.

MR. CALDWELL: Right.

THE COURT: That would become moot be -- and then we would just have to litigate this.

MR. POSTEMA: And Judge, if I may, I

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understand your concern about a worst-case scenario that Mr. Caldwell has set up, but I think that a number of these issues, including the legal issues and the status of the intervenors, that may not have to be fully litigated in the same way that he talks about it. Those may be issues that you could decide immediately on the right of the parties. And so I think there's a way, once we brief it, that you may look at it a different way; that there is a much easier path for you. And we will certainly -- I know you will be open to that since you have not heard -- seen our briefs yet.

And so I plant that seed because I don't think that the litigation of those issues will necessarily prolong the litigation in the way that Mr. Caldwell believes.

THE COURT: Well, one of the problems that I foresee -- and it's an important point that Mr. Caldwell makes -- I -- encouragement and sometimes even having to twist some arms, perhaps, for the parties to enter into good faith negotiations is, you know, something that I did and continue to do because I think it's in everyone's best interests. But the inability to -- well, the fact that that agreement wasn't ratified, that I'm back in the role of just a

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neutral judge having to hear this and litigate it and do that.

And I think his point -- I'm concerned my -- my desire to have a plan and action and some progress in things being done, I have to be careful to temper my eagerness to have that moving on with my role of staying neutral. So it's a -- you know, again, I was not part of those discussions, but I made sure we kept checking in and they were being done, and I didn't take offense when those decisions to order that in went up and with the Court of Appeals and was looked at. That's fine. But I do know that these parties -- I do know how hard you all worked, because I was hounding you. And sometimes you didn't appreciate it, but I appreciated what you tried to do.

So let's do that, then. Why don't we go ahead and kick that date out, and that morning we'll come back in and hear the motion for reconsideration. And I'm certainly open to what you have to say and I want to look at it, but I think -- I think the absence of having an agreement puts me back in the role of the judge who's going to hear these legal arguments, make a call, all of which will be subject to appellate review. You know, Court of Appeals will probably take a look at it, and we all know how long that takes and how

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expensive it is. So it's unfortunate.

MR. DINDOFFER: Well, Your Honor, thank you for your consideration on this. And if you wouldn't mind me just asking something of all the intervenors.

Would you all please call me immediately after this is over on my conference line? And we can talk through what we need to do.

MR. POSTEMA: We'll do.

THE COURT: So let's go through the date. The date, then, we'll come back for oral argument. Why don't you just file a written response and we'll leave for oral argument the date you had put aside for these -- the hearing.

THE CLERK: March 22nd at 9:00 a.m.

MR. POSTEMA: Okay.

MR. CALDWELL: And, Your Honor --

MR. DINDOFFER: What date would you like our briefs before?

THE COURT: If you could get it a week beforehand, I think that's helpful for me to be able to read those and think about them.

MR. DINDOFFER: Okay. So the 15th, Your Honor?

THE COURT: Right.

MR. CALDWELL: Your Honor, would it be asking

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too much if we had the right to file a short reply? You know, five pages.

THE COURT: That -- no. That'd be all right. Although, you can -- you don't really entitled to it under the court rule, and then that's why we'll have oral argument. I'm going to give you time. You're the only case set that morning.

MR. POSTEMA: So when is their reply brief due on that? Or response.

THE COURT: Well, I liked yours the week before, so that's the problem. If he wants to do a reply brief, then I've got to kick up your deadline a week earlier.

MR. POSTEMA: That's fine. We can do it.

MR. DAVIS: But she's pretty quick -- she's pretty quick at doing reply briefs, Judge.

THE COURT: All right. Why don't we put it -- why don't we do that? Intervenors, if you could do it two weeks before that. And then, Mr. Caldwell, if you have it at least a reply a week before.

MR. CALDWELL: (inaudible).

MR. DINDOFFER: Now, Your Honor, two weeks before would put our brief due next Monday.

MR. POSTEMA: No, no, no.

(Crosstalk)

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MR. DINDOFFER: No?

THE COURT: March.

MR. POSTEMA: March.

MR. STAPLETON: No. Ours is in March.

MR. DINDOFFER: I'm sorry. My mistake. Sorry. I can't read my calendar.

THE COURT: You know, the last time we were all kind of able to see each other in court, I remember Mr. Dindoffer, you're the one that put the elbow, and we all kind of --

MR. DINDOFFER: Yeah, that's right.

THE COURT: We all looked at you like --

MR. DINDOFFER: The first elbow shake you got, right?

THE COURT: The first elbow shake, and none of us ever foresee -- foresaw all of this happening to the group.

MR. DINDOFFER: Right.

MR. STAPLETON: Yeah.

THE COURT: Okay. All right, counsel.

MR. DINDOFFER: Fortunately, I got my first shot so I'm ready to meet in person again.

MR. DAVIS: Well, you just told us how old you are, Fred.

MR. DINDOFFER: You knew that already.

THE COURT: Mr. Morad, it's good to see you, sir. I haven't seen you in a long time.

MR. MORAD: Thank you, Judge. It's been a while.

THE COURT: Mr. Morad clerked for my very favorite Supreme Court Justice of all time, William Brennan.

MR. DINDOFFER: Oh, yeah.

THE COURT: All right. I'll see you all then.

MR. DINDOFFER: Thank you, Judge.

THE CLERK: Also, counsel, do not send judge's copies either through the mail or e-mail them to me. Just file your briefs with the clerk's office, please.

MR. DAVIS: Thank you.

MR. DINDOFFER: Thank you.

All right. So everybody call me please.

MR. DAVIS: Thanks to everyone.

MR. DUPES: Thank you.

MR. CALDWELL: Thank you, Your Honor.

MR. DINDOFFER: Thank you.

(Proceedings concluded at or about 9:56 a.m.)

* * *

STATE OF MICHIGAN)
COUNTY OF OAKLAND)

Certificate of Notary Public

I certify that the foregoing transcript, consisting of 18 pages, is a complete, true, and accurate transcript of the video file labeled "2021-02-04_09.41.26.750". I further certify that I am not connected by blood or marriage with any of the parties, their attorneys or agents, and that I am not interested directly, indirectly or financially in the matter of controversy.

In witness whereof, I have hereunto set my hand this day at Davisburg, Michigan, County of Oakland, State of Michigan.

Ginger K. Hoffman, CSMR-9234
Notary Public, Oakland County, Michigan
My Commission expires 12/13/2021

Dated: February 24, 2021

STATE OF MICHIGAN WASHTENAW COUNTY TRIAL COURT	**SCHEDULING ORDER REGARDING MOTION FOR RECONSIDERATION OF ORDER SETTING HEARING ON MODIFICATION OF CONSENT AGREEMENT**	CASE NO. 88-034734-CE JUDGE Timothy P. Connors

Court address
101 E. HURON, P.O. BOX 8645, ANN ARBOR, MI 48107

Court telephone no.
734-222-3001

Kelley, Frank J/attorney vs Gelman Sciences Inc

Plaintiff's attorney, bar no.	Defendant's attorney, bar no.
Brian J. Negele; P41846	Michael L. Caldwell P40554

This matter having come before this Court for hearing on February 4, 2021 with respect to Defendant Gelman Sciences, Inc.'s Motion for Stay of Order Setting Hearing on Modification of Consent Agreement, the Court having reviewed the briefs and being fully advised in the premises:

IT IS THEREFORE ORDERED that this Scheduling Order is issued in lieu of a ruling on the Motion for Stay of Order Setting Hearing on Modification of Consent Agreement.

IT IS FURTHER ORDERED that Intervenors and EGLE shall file responses to Gelman's Motion for Reconsideration on or before March 8, 2021.

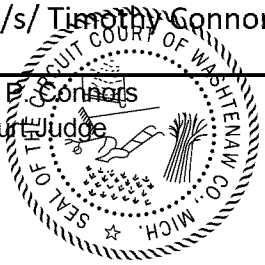
IT IS FURTHER ORDERED that Gelman shall file its reply brief on or before March 15, 2021.

IT IS FURTHER ORDERED that a hearing on Gelman's Motion for Reconsideration shall be held on March 22, 2021 at 9:00 a.m.

This is not a final order and does not close the case.

2/11/2021
Date

/s/ Timothy Connors 2/11/2021
Timothy P. Connors
Trial Court Judge



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

CITY OF ANN ARBOR, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER ELLEN RABINOWITZ, in her official capacity, the HURON RIVER WATERSHED COUNCIL, and SCIO TOWNSHIP,

Intervening Plaintiffs,

-v-

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

Defendant.

Case No. 88-34734-CE
Hon. Timothy P. Connors

INTERVENING PLAINTIFFS' BRIEF IN OPPOSITION TO GELMAN'S MOTION FOR RECONSIDERATION

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INTERVENING PLAINTIFFS' BRIEF IN OPPOSITION TO GELMAN'S MOTION FOR RECONSIDERATION

Defendant Gelman Sciences, Inc. ("Gelman") filed a motion for reconsideration of the Court's order scheduling a hearing on modification to the existing cleanup regime.[1] In its motion, Gelman misleads the Court about the nature and history of judicial oversight in this case, raises meritless due process arguments, falsely claims that possible EPA involvement would divest the Court of jurisdiction (contrary to both law and the EPA's own stated position[2]), and otherwise attempts to obscure the relevant issues before the Court. As set forth below, Gelman's arguments have no basis in fact or law. The Court should reject Gelman's attempt to undermine the Court's authority and to set additional barriers to the effective remediation of the Gelman site.

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[1] The Court entered subsequent orders concerning the hearing and briefing schedule. The most recent version of the scheduling order (the Fourth Amended Scheduling Order) was entered on January 27, 2021.

[2] See **Ex. A**, EPA in Michigan: Gelman Science Frequently Asked Questions, No. 2 ("Even if EPA pursues listing the Site on the NPL, EPA will not require that the State court litigation be ended, or the terms of a Consent Judgment to be changed.").

BACKGROUND

One of the principal driving forces for modifying the cleanup regime in effect in this case was the State's 2016 adoption of new stringent cleanup criteria for 1,4-dioxane, which reduced allowable concentrations by more than an order of magnitude (e.g., from 85 ppb to 7.2 ppb for groundwater to be used for residential drinking water; and from 2,800 ppb to 280 ppb for groundwater venting to surface water).[3] The State, Gelman and the Intervenors negotiated a document to replace the existing amended Consent Judgment. When no more could be achieved through negotiation, the negotiated revised Consent Judgment (the "Proposed Fourth CJ") was made public. Although the Proposed Fourth CJ was a significant improvement over what had been previously negotiated between EGLE and Gelman, the Local Government Intervenors' governing bodies ultimately rejected the Proposed Fourth CJ as insufficient.

On November 19, 2020, this Court conducted a status conference with all attorneys of record at which the Court was advised of the rejection of the Proposed Fourth CJ. Because it was a status conference, no arguments were heard and no pleadings, testimony or evidence was submitted. The Court did not issue any rulings for the record. Instead, the Court exercised its broad and unquestionable authority to manage its docket by issuing a Scheduling Order that set the hearings about which Gelman now complains. The Court described the purpose of the hearings as an opportunity for the parties to present their position regarding terms desired and appropriate to revise and supplement the existing cleanup regime, which could include changes to provisions in the Proposed Fourth CJ. To that end, the Court created a fair and reasonable process by requiring each party to present both the scientific and the legal support for its positions. Thus,

[3] The cleanup criteria are often expressed interchangeably in terms of micrograms per liter (ug/L) or parts per billion (ppb). For simplicity, the term ppb is used in this brief.

the purpose and scope of the hearing set by the Scheduling Order was limited to potential modification of the existing cleanup regime, which all parties agree is appropriate in light of the recent revisions to cleanup criteria. The hearing was not intended to address other issues, such as the varied relief Intervenors would seek if they filed their complaints.

On January 7, 2021, 49 days after the Court issued the Scheduling Order, Gelman filed its Motion for Reconsideration of the Scheduling Order now before the Court. Gelman did not appeal the Scheduling Order to the Michigan Court of Appeals. Gelman did not seek clarification of the Scheduling Order by motion or otherwise. Gelman did not file a motion to set aside the Scheduling Order.

ARGUMENT

I. The Court has broad inherent and equitable powers to enforce its own directives and Gelman should be estopped from arguing otherwise.

Gelman's brief tells a simplistic story of a two-party environmental consent judgment with laissez-faire judicial oversight. Gelman also suggests that any remedial obligation imposed at the site was the product of the parties' consent. The reality of this decades-long cleanup case tells a very different story.

A. The parties frequently have called upon the Court to make rulings and exercise its inherent powers where they have been unable to reach consent.

The current cleanup regime is governed by several orders and judgments—the Consent Judgment entered October 26, 1992 (**Ex. B**[4]), the [First] Amendment to Consent Judgment dated September 23, 1996 (**Ex. C**), the Second Amendment to Consent Judgment dated October 20, 1999 (**Ex. D**), the Third Amendment to Consent Judgment dated March 8, 2011 (**Ex. E**) (collectively with the prior amendments and original Consent Judgment, "Third Amended CJ" or "Consent

[4] Intervenors have not included in the applicable exhibits the attachments to the Consent Judgment or its amendments. Those attachments are not material to the issues before the Court.

Judgment"), the Remediation and Enforcement Order ("REO") dated July 17, 2000 (**Ex. F**), the Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer ("Unit E Order") dated December 17, 2004 (**Ex. G**), the Order Prohibiting Groundwater Use ("Prohibition Zone Order") dated May 17, 2005 (**Ex. H**), and the Stipulated Order Amending Previous Remediation Orders dated March 8, 2011 ("Stipulated Order") (**Ex. I**). None of the foregoing Orders was entered as a consensual amendment to the Consent Judgment.

Over the history of this case, this Court has not hesitated to enter orders to supplement the then-current consent judgment in order to account for changed circumstances or to better achieve the consent judgment cleanup objectives. Similar to the procedure that Gelman currently challenges, the Court entered the REO after briefing and three days of evidentiary hearings in order to resolve a dispute between the parties. The Court ruled:

> Based upon the evidence submitted, this Court is going to grant equitable relief in the sense that the Court will use its equitable powers to enforce the consent judgment to insure that dioxane levels in these water supplies is brought within acceptable standards as soon as possible. Both sides in this dispute appear to need the intervention of the Court to keep them moving toward this goal.

Ex. F, p. 3.

The REO imposed significant additional obligations on Gelman with tight timeframes, including submission of a detailed plan to reduce 1,4-dioxane in all affected water supplies below legally acceptable levels within a maximum period of five years and increased extraction and treatment. *Id.*, p. 4-5. Even though Gelman did not consent to entry of the REO, Gelman notably did not appeal the REO after it was entered.

Shortly after entry of the REO, the Court again had to resolve a significant dispute between the parties, this time over how to handle Gelman's discovery that 1,4-dioxane had migrated into a deeper aquifer called "Unit E." EGLE[5] and Gelman disagreed over numerous issues, including whether the Unit E contamination was subject to the Consent Judgment, the scope of the Court's review of EGLE's determinations, and whether Gelman would be required to comply with EGLE's aquifer protection rules[6] and, if not, what conditions Gelman would need to satisfy.

EGLE insisted that waiver of the aquifer protection rules would require institutional controls to prevent consumption of contaminated groundwater. Gelman argued that the Court had the power to enter an order achieving that purpose based on the Court's inherent authority to enforce its judgments and issue any order to fully execute its directives. **Ex. J**, Supp. Filing in Support of Remedial Alternative, filed October 14, 2000, p. 5-6 (citing MCL 600.611, *Cohen v Cohen*, 125 Mich App 206 (1983), and *Spurling v Battista*, 76 Mich App 350 (1977)).

After briefing and hearings, the Court entered the "Unit E Order". **Ex. G**. The Court first addressed the questions the parties had raised "about the applicability of the Consent Judgment to Unit E, the responsibility of the Court to review [EGLE's] actions, and the scope of the Court's role in this process." *Id*., p. 3. The Court rejected Gelman's argument that the Unit E plume was not subject to the Consent Judgment and concluded that the Court "has the inherent and equitable powers to enforce its judgment with all appropriate measures and sanctions as to Unit E contamination." *Id*., p. 4. Over EGLE's objection, the Court determined it had broad authority to review EGLE's actions and broad powers to assure the cleanup of 1,4-dioxane was achieved "as

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5 "EGLE" is used throughout this brief, in place of the department's former names "MDEQ" or "MDNRE".

6 Simply stated, the aquifer protection rules require remediation of contamination in an aquifer down to cleanup criteria and prohibit expansion of such contamination after the initiation of cleanup. Mich Admin R 299.3.

soon as possible." *Id*. p. 4-5. The Court further ruled that it "has and intends to exercise its inherent powers to enforce its own directives…. It is going to take continued concerted actions by all of the parties to remedy this expanding contamination. The Court is determined to exercise all of its inherent, statutory, and equitable powers to assure that those actions take place as soon as possible." *Id*., p. 5.

The Court proceeded to address the dispute over the conditions EGLE demanded in exchange for a waiver from the aquifer protection rules. One of those conditions was use of an institutional control to restrict groundwater use. The Court adopted Gelman's argument (and cited Gelman's case law) that the Court had the inherent, statutory, and equitable powers to issue an order establishing an area where use of groundwater would be prohibited. *Id*. p. 5, 11. The Court then entered the "Prohibition Zone Order" in 2005. **Ex. H**.

B. A supplemental remediation order is authorized and appropriate to address changed circumstances.

As is evident from the history of this case, the current remedial regime for the Gelman contamination is not a mere bilateral agreement between EGLE and Gelman. It is an amalgamation of various rulings of the Court, many of which dramatically changed the scope of remediation yet were entered without the parties' consent. When negotiations have failed, each party from time to time has asked the Court to invoke its inherent and equitable powers to enforce and achieve the remedial objectives of the then-current orders and judgments.

Against that historical backdrop, it is bewildering to hear Gelman argue that its consent is required for any change in the existing cleanup regime. As a preliminary matter, even Gelman agrees that the existing cleanup regime must be modified. EGLE issued a "finding of emergency" in 2016 after a shallow groundwater investigation revealed the presence of 1,4-dioxane in a residential area just west of downtown Ann Arbor. **Ex. K**, Emergency Rules and Finding of

Emergency. Despite the existence of the current cleanup regime, EGLE concluded that the 1,4-dioxane pollution "pose[d] a threat to public health, safety or welfare of [the State's] citizens and the environment" and that "the current cleanup criteria…are not protective of public health." *Id.* EGLE later dramatically reduced the cleanup criteria for 1,4-dioxane, including a reduction in the residential drinking water standard from 85 ppb to 7.2 ppb. As a result of these actions, EGLE and Gelman began negotiating an amendment to the Third Amended CJ.

Although it concedes that the cleanup regime must be changed to effectuate the new cleanup criteria, Gelman incorrectly suggests that the only way that can be accomplished is if it consents to any proposed modification. The history of this case disproves Gelman's premise—the Court already has altered the cleanup regime multiple times through supplemental orders and rulings, as the Court was fully authorized to do. Gelman itself has argued, "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments," and that this Court has "inherent authority to enforce [its] own directives." **Ex. I**, p. 5-6 (citing *Cohen*). Broadly speaking, the objectives of the Court's existing directives are the delineation, monitoring, remediation, and prevention of expansion of the 1,4-dioxane contamination. See, generally, **Exs. B-I**. This Court has the power to enter orders to fully effectuate those objectives.

Not only is the foregoing a correct statement of the law, Gelman should be judicially estopped from arguing otherwise. "Judicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479–480 (2012) (internal citations omitted); *Paschke v Retool Indus*, 445 Mich 502, 509 (1994) ("Sometimes described as the doctrine against the assertion of inconsistent positions,

judicial estoppel is widely viewed as a tool to be used by the courts in impeding those litigants who would otherwise play 'fast and loose' with the judicial system."). Gelman previously persuaded the Court to impose the Prohibition Zone—now a central component of the cleanup regime—on the premise that such action was within the Court's inherent and equitable powers.[7] Gelman cannot now argue that the Court is without authority to make changes to the cleanup regime unless Gelman approves those changes.

Even if the Court were to modify the Consent Judgment, the standard for doing so is not nearly as narrow as Gelman now suggests. The Consent Judgment itself authorizes the Court to make rulings in order to resolve disputes between the parties. See, e.g., Article XVI – Dispute Resolution. **Ex. B**, p. 46-48 and **Ex. E**, p. 29. Gelman also may be required to perform additional response activities if, for example, EGLE adopts one or more new, more restrictive cleanup criteria and the change in criteria indicate that the existing remedy is not protective of public health, safety, welfare, and the environment. See Section VIII.E.1 – Plaintiffs' Covenant Not to Sue and Reservation of Rights. **Ex. E**, p. 29-30.

Gelman has recognized that a consent judgment may be modified even in the absence of consent or a contract-type defense (e.g., fraud or mistake). In 2007, Gelman filed a unilateral motion to amend the consent judgment because EGLE would not agree to Gelman's proposed changes. Gelman recognized that a consent judgment is no mere contract—"judicial approval of a consent decree places the power and prestige of the court behind the agreement reached by the parties." **Ex. L**, Gelman's Brief in Support of Motion to Amend Consent Judgment, filed July 6, 2007, p. 8, quoting *Vanguards of Cleveland v City of Cleveland*, 23 F3d 1013, 1018 (CA6 1994).

[7] It is worth emphasizing that the Prohibition Zone came at a significant cost: it restricted the water rights of numerous private and public property owners.

Gelman argued that a consent judgment could be modified under the following circumstances:

> (1) when changed factual conditions make compliance with the decree substantially more onerous, (2) when a decree proves to be unworkable because of unforeseen obstacles, or (3) when enforcement of the decree without modification would be detrimental to the public interest.

Id., quoting *Vanguards*, 23 F3d at 1018. Enforcement of the current cleanup regime without modification or supplementation would be detrimental to the public interest in light of EGLE's recent emergency finding and significant reduction of the cleanup criteria for 1,4-dioxane. **Ex. K**.

Simply stated, Gelman knowingly and voluntarily signed a consent judgment in the early stages of this case. By doing so, Gelman subjected itself to the ongoing jurisdiction and authority of the Court over the cleanup regime embodied in that consent judgment. Gelman has invoked the Court's broad powers over the cleanup regime when it has suited Gelman's purposes, even over the objection of EGLE. The inconsistent and legally flawed position that Gelman now asserts should be rejected.

II. Gelman's due process argument is premature, overstates what process is required, and draws a false equivalence between the limited nature of the subject hearings and a final determination on the merits.

Only Gelman, who unsuccessfully appealed this Court's simple, procedural intervention orders to the Michigan Supreme Court, could conjure up a due process problem out of a scheduling order. Gelman's due process complaints are hopelessly premature. The parties have not yet filed briefs, nor has the Court held hearings on those briefs or reached any decision on whether or how much the current cleanup approach might be altered. The Court has not determined whether it will need testimony, supplemental briefs, etc. Gelman's due process arguments are not ripe for review because there has not been even an arguable violation of Gelman's rights. See, *City of Huntington Woods v City of Detroit*, 279 Mich App 603, 615 (2008) ("The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been

sustained. A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (internal quotations and citations omitted).

Even if the Court considers Gelman's unripe arguments, they fail on the merits. Due process requires only notice and an opportunity to be heard. See, e.g., *In re AG for Investigative Subpoenas*, 274 Mich App 696, 705-06 (2007). "[D]ue process is also a flexible concept and calls for such procedural protections as the particular situation demands." *Id.* (internal citation omitted). Because due process is flexible, it does not mandate trial-like proceedings in all situations. *English v Blue Cross Blue Shield*, 263 Mich App 449, 460 (2004).

The Court already has afforded Gelman what due process requires—notice that the Court is considering changes to the existing cleanup regime, the opportunity to file legal briefs and expert reports, and three days of hearings. The nature of the proceeding at issue does not suggest that more is required.[8] At most, the result of the proceeding will be an order modifying or supplementing the existing cleanup orders. The result of the proceeding will not be summary disposition of the Intervenors' claims or a final order on the merits. Intervenors' draft complaints seek broad and varied relief, including past and future response costs and damages. See, e.g., **Ex. M**, City of Ann Arbor Intervening Complaint, p. 16, 18. Those claims and issues would be dealt with later, and not in the hearing about which Gelman complains. The Court has given no indication that it has any intention of doing more than decide what revisions or supplementation is needed to the existing cleanup judgments and orders.

[8] Of course, if the Court has concerns after conducting the procedures described in the scheduling order, it could always order additional procedures or the taking of additional evidence prior to rendering a decision.

Although the Intervenors also seek injunctive relief in their draft complaints, that has nothing to do with the proceeding Gelman challenges. As explained earlier in this brief, the parties—including Gelman—agree the existing judgments and orders should be modified, and the law is clear that the Court has inherent and equitable powers to enter additional orders to fully effectuate its existing directives or to react to changed circumstances. The Court has those powers independent of claims made in the case, let alone claims in draft intervention complaints. Whatever defenses Gelman believes it has to Intervenors' potential claims are irrelevant and certainly need not be litigated before the Court can exercise its unquestionable authority over the Court's *existing* orders and judgments. Although the Court has requested Intervenors' input on improvements to the existing cleanup regime, presumably the Court was animated by the same concerns that led it to allow intervention in the first place:

> When we look at this philosophically then we start to say well, of course, those who have a statutory duty or legal responsibility or the entrustment of the public need to be at that table because the collective wisdom and viewpoints in solving a problem is always preferable to individual views. **Ex. N**, 12.15.16 Transcript, p. 48-49.[9]

The Court is of course free to give whatever weight it chooses to Intervenors' arguments and Gelman will have the opportunity to respond. Indeed, if Gelman is so confident there is no legal or scientific basis to require it to do more than what it negotiated with EGLE prior to the intervention, it is unclear why it is resisting so vigorously the opportunity to explain that to the Court. Nor is it clear why Gelman is resisting the type of procedure in which it has participated without objection multiple times over the course of the case. See, Section I.A, above. Gelman's

[9] Recent case history has demonstrated the wisdom of the Court's decision to allow intervention. Intervention has significantly increased public participation in the process, which was sorely lacking at the time that EGLE and Gelman negotiated a modification to the Consent Judgment behind closed doors. The Proposed Fourth CJ that the Intervenors negotiated also was a significant improvement over the EGLE-Gelman negotiated modification.

due process arguments are meritless.

III. The Intervenors' requests for EPA involvement at the Gelman Site do not divest this Court of jurisdiction and the Intervenors intend to vigorously pursue their claims in this Court.

Gelman's assertion that EPA involvement at the site would strip this Court of jurisdiction is false. The federal Superfund law expressly does not preempt states from regulating releases of hazardous substances pursuant to state law. This Court has jurisdiction over the Gelman site pursuant to Michigan's environmental remediation statute, which is based on the federal Superfund law. EPA recognizes a state's authority to regulate the remediation of hazardous substances and EPA's involvement at the site would not affect this Court's jurisdiction. For years, Intervenors have wanted a more effective remediation and therefore have requested federal resources to support additional monitoring, greater delineation of the plume and more removal of 1,4-dioxane from the environment, all of which have a sound basis in law and science.

In making their requests for EPA involvement at the Gelman site, Local Government Intervenors have no intent of divesting this Court of jurisdiction. To the contrary, the Intervenors all favor pursuing their claims in this Court to achieve improvements to the existing remedial actions at the site under Michigan law and have made this clear in public statements. For example, in its Resolution rejecting the Proposed Fourth CJ and renewing its EPA petition, Scio Township clearly stated its desire to continue with its claims in this Court: "This renewal of Scio Township's 2016 petition for involvement by USEPA does not preclude simultaneous efforts to obtain a thorough clean-up either through negotiations or a court-ordered ruling from the Washtenaw County Circuit Court." **Ex. O**, Scio Resolution. The Resolution also identified several areas of concern regarding the Proposed Fourth CJ and asked "that the Washtenaw County Circuit Court consider these items as it formulates a new plan for remediation of the Gelman site." *Id*.

The Local Government Intervenors' requests for EPA involvement stem from a desire to access the considerable federal resources available for Superfund sites in order to support more effective monitoring and remediation, especially in light of EPA's conclusion made in 2016 that the site would be eligible for a Superfund listing. These resources would be particularly beneficial at this juncture, given that EGLE recently lowered the 1,4-dioxane drinking water criterion from 85 ppb to 7.2 ppb as the contaminant plume continues to spread throughout Scio Township and the City of Ann Arbor.

Requests for EPA involvement and continued pursuit of claims in this Court are not mutually exclusive. EGLE has been the regulatory agency at this site for a long time and, if EPA decided to become involved, it would likely be several years from now in a coordinated effort with the State. Superfund law, the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C 9601 et seq. ("CERCLA") and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR 300.1 et seq. ("NCP"), provides for substantial state involvement at Superfund sites. Section 104(d) of CERCLA provides that states may be authorized to carry out removal or remedial actions at Superfund sites. 42 U.S.C 9604(d). The NCP provides for state involvement in the preliminary assessment and National Priorities List process, the remedial investigation and feasibility process and selection of a remedy. 40 CFR 300.515.

Most Superfund sites in Michigan involve a coordinated effort between EPA and EGLE governed by a Memorandum of Understanding or a Superfund Cooperative Agreement. Local Government Intervenors would like EPA to undertake its thorough evaluation process and possibly implement more comprehensive monitoring and remedial actions to address the environmental risks associated with the large contaminant plume. This would likely occur in coordination with EGLE and would not affect the jurisdiction of this Court.

Gelman's assertion that EPA involvement at this site would divest this Court of jurisdiction is untrue and directly contrary to CERCLA's language. Virtually all courts agree that Congress did not intend to preempt the field of hazardous substance remediation and in fact left considerable room for the states to regulate such activity. Section 114 of CERCLA provides that "nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 USC 9614(a). Similarly, Section 302(d) provides that "nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 USC 9652(d).

Courts analyzing CERCLA have consistently recognized the ability of states to regulate the remediation of hazardous substances. See *Bedford Affiliates v Sills*, 156 F3d 416, 426-27 (CA2 1998) (concluding that "it was not part of the legislative purpose that CERCLA be a comprehensive regulatory scheme occupying the entire filed of hazardous wastes"); *ARCO Environmental Remediation, LLC v Dept of Health and Environmental Quality*, 213 F3d 1108, 1114 (CA 9 2000) ("CERCLA does not completely occupy the field of environmental regulation."); *Board of County Commissioners v Brown Group Retail*, 598 F Supp 2d 1185, 1192 (D Colo 2009) (finding that state law claims including negligence, negligence per se and strict liability for abnormally dangerous activities were not preempted by CERCLA.).

Gelman's argument that EPA involvement would divest this Court of jurisdiction is based on Section 113(b) of CERCLA (42 USC 9613(b)), which grants United States district courts exclusive original jurisdiction over controversies under CERCLA. Courts have made clear, however, that this grant of jurisdiction does not divest state courts of jurisdiction to hear claims

arising under state law which relate to CERCLA sites. Gelman's argument ignores the clear language of Section 114, which gives states wide latitude to regulate hazardous substance remediation. Furthermore, the United States Supreme Court recently rejected Gelman's argument in *Atlantic Richfield Co v Christian*, 140 S Ct 1335; 206 L Ed 2d 516 (2020). The Supreme Court held that Section 113(b) only grants exclusive jurisdiction to federal courts for CERCLA actions and that federal courts are not granted exclusive jurisdiction over actions that may relate to CERCLA sites but arise under state laws. The Court stated "the Act does not strip the Montana courts of jurisdiction over this lawsuit . . . it does not displace state court jurisdiction over claims brought under other sources of law." *Id*. at 533.

EGLE has been the exclusive regulator at the Gelman site for over 30 years. Its regulatory authority is based on Part 201 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.20101 et seq. Part 201 is modeled after CERCLA, and it grants EGLE the authority to identify, investigate and evaluate contaminated sites and order responsible parties to conduct remediation activities, much like EPA does under CERCLA. Furthermore, the Intervenors have brought injunctive, declaratory and cost recovery claims under Part 201, together with common law claims based on nuisance and negligence. The Supreme Court made it clear in *Atlantic Richfield* that CERCLA does not strip this Court of jurisdiction over the State and Intervenor claims brought pursuant to Michigan law.

Intervenor claims not affected by CERCLA include those of Washtenaw County, which has a statutory duty to protect the public health. MCL 333.2433(1). The Public Health Code ("PHC") clearly states that it shall be "liberally construed" for the protection of the health, safety, and welfare of the people of this state. MCL 333.1111(2). The Michigan Supreme Court agrees:

> In fact, the preliminary provisions of the PHC require that the code and each of its various parts 'be liberally construed for the protection of the health, safety, and welfare of the people of this state.' MCL 333.1111(2)." *McNeil v Charlevoix Cnty,* 484 Mich 69, 78 (2009).

The point is simple. The County Health Department's mandatory statutory duty to promote the public health and protect the people of Washtenaw from environmental health hazards such as 1,4-dioxane must be liberally construed for the protection of the people of Washtenaw.

MCL 333.2435 provides the County Health Department with the power to "advise" other agencies and persons as to the water supply and enter into agreements with other governmental entities to carry out its duties under the PHC. Again, this is a statutory mandate. This language makes it clear that the jurisdiction is concurrent with other agencies and underscores the necessity of including the County and local governmental entities in this case to address the significant public health concerns presented by the contaminant plume.

Michigan issued Emergency Rules regarding the establishment of new cleanup criteria for 1,4-dioxane. The Emergency Rules stated that they were promulgated by EGLE in order to establish a "cleanup criteria" under the remediation provisions of the state law. **Ex. K**. Thus, the stated goal for the Emergency Rules is "cleanup". This must be the goal and the objective going forward given the identified public health issue.

The Emergency Rules state that EGLE finds that releases of 1,4-dioxane have occurred and pose a threat to "public health" safety, or welfare of its citizens and the environment. *Id*. This triggers the statutory role of the County Health Department as set forth herein. The Emergency Rules affirmatively state that shallow groundwater investigations in the "Ann Arbor area" have detected 1,4-dioxane in the groundwater in close proximity to residential homes. *Id*. This is a major problem and represents a significant *public health concern*. Again, this unquestionably triggers the statutory duties of the County Health Department as set forth above.

The Emergency Rules state that current cleanup criteria for 1,4-dioxane initially established in 2002 are outdated and are not protective of "public health" with respect to the drinking water ingestion pathway and the vapor intrusion pathway. *Id*. Again, this represents a significant public health concern and triggers the mandatory statutory duty of the County Health Department.

The Emergency Rules then conclude that, because the previous cleanup criteria for 1,4-dioxane are not protective of public health, new emergency rules are demanded and set the residential drinking water cleanup criterion for 1,4-dioxane in groundwater at 7.2 ppb and the residential vapor intrusion criterion at 29 ppb for 1,4-dioxane. *Id*. These are actionable "cleanup" requirements. The Governor executed the Emergency Rules and concurred in the findings of EGLE that circumstances creating an emergency have occurred and the "public interest" requires the promulgation of the Rules.

The County Health Department has a unique interest and a mandatory statutory duty to protect the "public health" of Washtenaw County. By stating that the public health is at risk, the Governor unquestionably triggered the statutory duties of the County Health Department and this Court has unfettered jurisdiction to hear these claims, as well as others brought by Intervenors, as it considers modifications to the existing judgments and orders governing the site.

IV. This Court has never served as mediator or facilitator in this case and has never suggested it intends to do so in future proceedings.

Gelman attempts to create an issue which does not exist with its suggestion that the proposed hearing would put the Court in the position of serving as both mediator/facilitator and trier of fact. The Court has never suggested it would serve as a mediator in this case. Indeed, the parties were engaged in extensive settlement discussions at the courthouse for three years and the Court never once became involved in the substance of the negotiations. The Court has scheduled

a hearing to hear argument from the parties as to the appropriate components of a remediation order for the Gelman site. After the hearing, presumably the Court will issue its findings based on the legal and scientific arguments presented by the parties. Nothing about this proposed hearing suggests that the Court will serve in any capacity other than as trier of fact.

Even if the Court became involved in settlement negotiations, it is unlikely this would lead to disqualification as suggested by Gelman. In support of its argument, Gelman relies on the Michigan Court Rules regarding case evaluation which prohibit a judge from presiding at a trial of any case on which the judge served as a case evaluator. The court hearing that was scheduled is obviously not case evaluation and the rules cited by Gelman have no relevance to possible disqualification under the present circumstances.

The court rule regarding disqualification of a judge does not include participation in settlement discussions as a ground for disqualification. MCR 2.003(C). The most relevant standard for disqualification under these circumstances is MCR 2.003(C)(1), which allows a party to move for disqualification when "the judge is personally biased or prejudiced for or against a party or attorney." The Michigan Supreme Court has set a high bar for proving judicial bias, holding that claims of judicial bias must overcome a "heavy presumption of judicial impartiality." *Cain v Michigan Dept of Corrections*, 451 Mich 470, 497 (1996).

This high standard for establishing judicial bias has been reflected in court decisions which have considered motions for disqualification in the context of a judge participating in settlement discussions. Michigan courts have made it clear that judges who obtain knowledge of the case through participation in settlement conferences, as opposed to an extrajudicial source, should not be disqualified. "Facts learned in a judicial capacity through a review of evidence presented in court, . . . in the course of settlement conferences . . . are not facts gathered from an extrajudicial

source." *Arrowood Indemnification Co v City of Warren*, 54 F Supp 3d 723, 727 (ED Mich 2014), (quoting *McGuire v Warner*, 05-40185, 2009 US Dist LEXIS 100583, 2009 WL 3586527 (ED Mich Oct 29, 2009). See also, *Eyde v Eyde*, No. 243670, 2004 WL 1366007 (Mich Ct App June, 17, 2004) (unpublished) (judge's involvement in settlement discussions not a basis for disqualification). **(Ex. P)**

This Court has not indicated that it intends to participate in settlement discussions. However, since the parties have already engaged in extensive negotiations, resulting in a lengthy document that was made available to the public, it would not be surprising if in the course of conducting hearings the Court were to learn information discussed during these negotiations. Even if that occurred, the Court would gain such information in the course of its normal judicial duties, which would not be a basis for disqualification.

CONCLUSION

The Court made a simple, routine decision to issue a scheduling order. That order set briefing deadlines and scheduled hearings on potential modifications to the Court's own, existing judgments and orders. Such a procedure is unquestionably within the Court's powers. Such a procedure is not going to violate anyone's rights.

Everyone agrees that the existing cleanup regime must be modified. When the Court permitted intervention, it made the reasoned and principled decision that additional voices from the public would improve both the process and the quality of the modifications. The Court was correct—intervention allowed additional participation and insight into what had been a closed-door process and produced a much more robust set of proposed modifications. The fact that the Proposed Fourth CJ was not entered does not mean that intervention failed; it simply means that more work needs to be done. The Court's scheduling order is the next logical step in that process. Gelman's motion should be denied.

Respectfully submitted,

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Date: March 8, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiff,

and

CITY OF ANN ARBOR, WASHTENAW COUNTY, WASHTENAW COUNTY HEALTH DEPARTMENT, WASHTENAW COUNTY HEALTH OFFICER ELLEN RABINOWITZ, in her official capacity, the HURON RIVER WATERSHED COUNCIL, and SCIO TOWNSHIP,

Intervening Plaintiffs,

-v-

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

Defendant.

Case No. 88-34734-CE
Hon. Timothy P. Connors

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INTERVENING PLAINTIFFS' BRIEF IN OPPOSITION TO GELMAN'S MOTION FOR RECONSIDERATION

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EXHIBIT A

Gelman Science Frequently Asked Questions

EPA Role in Cleanup

1. What are EPA and Michigan Environment, Great Lakes, and Energy's (EGLE) roles at the Gelman site?

While cleanup work is conducted at many sites under the State of Michigan's programs, cleanups under EPA's Superfund remedial program is an option to address contaminated hazardous waste sites that are on the federal National Priorities List (NPL). Sites are listed on the NPL after EPA and the State agree that addressing the contamination under the federal Superfund program is the best option. EPA will not generally proceed with listing a site on the NPL absent a formal State request. NPL listing determinations are made by EPA after taking into account comments and input from all appropriate stakeholders.

2. Does EPA have a position on the current negotiations with EGLE and Gelman on the Consent Judgement?

EPA is not a party to the Consent Judgement, and it is not a part of the ongoing negotiations. EPA has not in the past, and is not currently, taking a position in the State court litigation involving the Gelman site. EPA has not taken a position on the specific terms of the Consent Judgment. EPA is not a party to this action and cannot dictate its terms. Even if EPA pursues listing the Site on the NPL, EPA will not require that the State court litigation be ended, or the terms of a Consent Judgment to be changed. It is in the interest of all parties and stakeholders going forward that Michigan and Gelman continue to work together to monitor and control the site releases consistent with State of Michigan enforcement requirements.

EPA's Cleanup Process

3. What is the status of listing the Gelman site onto the National Priorities List?

The Gelman site is not currently on the NPL, though EPA has completed some steps necessary for potential listing on the NPL. In 2016 EPA received a petition to evaluate the Gelman site for potential inclusion on the NPL. In response to this petition, in coordination with EGLE, EPA conducted a Site Preliminary Assessment to gather and assess site data and determine data gaps. In this Preliminary Assessment, the site was determined eligible for further consideration as an NPL candidate. Though the site was determined eligible for further evaluation as an NPL site, at that time Michigan requested to continue addressing the Gelman contamination under its State enforcement authority. As such Michigan reports to EPA annually on the progress of its Gelman cleanup efforts. Another Preliminary Assessment would not need to be conducted if EPA decides to pursue NPL listing of the Gelman site. While EPA has not yet determined whether to pursue listing the site on the NPL, if EPA decides to pursue listing it would take approximately three additional years to proceed through the NPL listing process.

When EPA evaluates a site for NPL listing there is no guarantee that the site will be listed on the NPL. For example, the proposed listing can be challenged in court, preventing EPA from adding the site to the NPL. If the Gelman site is listed on the NPL, at that time, EPA would become the lead enforcement agency and would coordinate with Michigan on how to smoothly transition the enforcement lead to EPA.

4. What steps would EPA take if Gelman were to become a Superfund Site? How long would those steps take?

Once a site is on the NPL, EPA negotiates with any potentially responsible parties (PRPs) to have them conduct the investigation to study the nature and extent of site contamination (remedial investigation [RI]) and evaluate engineering options to address the contamination (feasibility study [FS]). The timeline for these negotiations is variable, but generally it takes several months to a year. After the FS is completed, EPA will select a remedy for the site and issue a Record of Decision (ROD). At the ROD stage, EPA, as enforcement lead, could incorporate appropriate requirements of the State Consent Judgment into its remedy. The next step is the negotiation of a federal consent decree for completion of a Superfund Remedial Design and Remedial Action (RD/RA) with the PRPs to implement the remedy selected in the ROD.

If at any time EPA finds it is necessary to use Superfund Removal enforcement authorities to address an imminent and substantial endangerment from actual or potential releases of contamination, that option is available.

The timeline to conduct RI/FS work is very variable from a few to several years or longer. At this time EPA is not familiar enough with data that has been collected at the Gelman site to determine if it would contribute to efficiencies in our process to evaluate and address site contamination under the Superfund NPL process. The timeline for design and cleanup work at an NPL site is also highly variable, taking from a few years to several decades. At more complex sites, such as Gelman, EPA can evaluate segments of the contamination to identify and implement interim cleanup actions early in the process, followed by additional interim action(s), and a final cleanup action.

LAST UPDATED ON MARCH 3, 2021

EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

FRANK J. KELLEY, Attorney General
for the State of Michigan, ex rel,
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION,
and MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

v

GELMAN SCIENCES, INC.,
a Michigan corporation,

Defendant.

OCT 3 0 1992

File No. 88-34734-CE

Honorable Patrick J. Conlin

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CONSENT JUDGMENT

The Parties enter this Consent Judgment in recognition of, and with the intention of, furtherance of the public interest by (1) addressing environmental concerns raised in Plaintiffs' Complaint; (2) expediting remedial action at the Site; and (3) avoiding further litigation concerning matters covered by this Consent Judgment. The Parties agree to be bound by the terms of this Consent Judgment and stipulate to its entry by the Court.

EXHIBIT 136

The Parties recognize that this Consent Judgment is a compromise of disputed claims. By entering into this Consent Judgment, Defendant does not admit any of the allegations of the Complaint, does not admit any fault or liability under any statutory or common law, and does not waive any rights, claims, or defenses with respect to any person, including the State of Michigan, its agencies, and employees, except as otherwise provided herein. By entering into this Consent Judgment, Plaintiffs do not admit the validity or factual basis of any of the defenses asserted by Defendant, do not admit the validity of any factual or legal determinations previously made by the Court in this matter, and do not waive any rights with respect to any person, including Defendant, except as otherwise provided herein. The Parties agree, and the Court by entering this Judgment finds, that the terms and conditions of the Judgment are reasonable, adequately resolve the environmental issues covered by the Judgment, and properly protect the public interest.

NOW, THEREFORE, upon the consent of the Parties, by their attorneys, it is hereby ORDERED and ADJUDGED:

I. JURISDICTION

A. This Court has jurisdiction over the subject matter of this action. This Court also has personal jurisdiction over the Defendant.

B. This Court shall retain jurisdiction over the Parties and the subject matter of this action to enforce this Judgment and to resolve disputes arising under the Judgment.

II. PARTIES BOUND

This Consent Judgment applies to, is binding upon, and inures to the benefit of Plaintiffs, Defendant, and their successors and assigns.

III. DEFINITIONS

Whenever the terms listed below are used in this Consent Judgment or the Attachments which are appended hereto, the following definitions shall apply:

A. "Consent Judgment" or "Judgment" shall mean this Consent Judgment and all Attachments appended hereto. All Attachments to this Consent Judgment are incorporated herein and made enforceable parts of this Consent Judgment.

B. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday, or a State legal holiday. In computing any period of time under this Consent Judgment, where the last day would fall on a Saturday, Sunday, or State legal holiday, the period shall run until the end of the next working day.

C. "Defendant" shall mean Gelman Sciences, Inc.

D. "Evergreen Subdivision Area" shall mean the residential subdivision generally located north of I-94 and between Wagner and Maple Roads, bounded on the west by Rose Street, on the north by Dexter Road, and on the south and east by Valley Drive.

E. "Gelman" or "GSI" shall mean Gelman Sciences, Inc.

F. "GSI Property" shall mean the real property described in Attachment A, currently owned and operated by GSI in Scio Township, Michigan.

G. "Groundwater Contamination" or "Groundwater Contaminant" shall mean 1,4-dioxane in groundwater at a concentration in excess of 3 micrograms per liter ("ug/l") determined by the sampling and analytical method(s) described in Attachment B.

H. "MDNR" shall mean the Michigan Department of Natural Resources.

I. "Parties" shall mean Plaintiffs and Defendant.

J. "Plaintiffs" shall mean Frank J. Kelley, Attorney General of the State of Michigan, ex rel, Michigan Natural Resources Commission, Michigan Water Resources Commission, and Michigan Department of Natural Resources.

K. "Redskin Well" means the purge well currently located on the Redskin Industries property.

L. "Remedial Action" or "Remediation" shall mean removal, treatment, and proper disposal of groundwater and soil contaminants pursuant to the terms and conditions of this Consent Judgment and work plans approved by the MDNR under this Judgment.

M. "Site" shall mean the GSI Property and other areas affected by the migration of groundwater contamination emanating from the GSI Property.

N. "Soil Contamination" or "Soil Contaminant" shall mean 1,4-dioxane in soil at a concentration in excess of 60 ug/kg, as determined by the sampling and analytical method(s) described in Attachment C, or other higher concentration limit derived by means consistent with Mich Admin Code R 299.5711(2) or R 299.5717.

O. "Spray Irrigation Field" shall mean that area of the GSI site formerly used for spray irrigation of treated process wastewater, as depicted on the map included as Attachment D.

P. "Unit C3 Aquifer" means the aquifer identified as the C3 Unit in reports prepared for Defendant by Keck Consulting.

IV. IMPLEMENTATION OF REMEDIAL ACTION BY DEFENDANT

Defendant shall implement the Remedial Action to address groundwater and soil contamination at, and emanating from, the GSI Property in accordance with (1) the terms and conditions of this Consent Judgment; and (2) work plans approved by the MDNR pursuant to this Consent Judgment.

V. GROUNDWATER REMEDIATION

Defendant shall design, install, operate, and maintain the systems described below to remove, to treat (as required), and to dispose properly of contaminated groundwater. The objectives of these systems shall be to contain the plumes of groundwater contamination emanating from the GSI Property as described below and to extract the contaminated groundwater from the aquifers at designated locations for treatment (as required) and disposal. Defendant also shall implement a monitoring program to verify the effectiveness of these systems.

A. Evergreen Subdivision Area System (hereinafter "Evergreen System")

1. Objectives. The objectives of this system shall be: (a) to intercept and contain the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area; (b) to remove the contaminated

groundwater from the affected aquifer; and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that is not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section VI.

2. Investigation and Design of System.

a. Pump Test Report. Defendant has constructed a purge/test well in the Evergreen Subdivision and conducted a pump test. No later than five days after entry of this Consent Judgment, Defendant shall submit to MDNR a report showing the well construction details and containing pump test and aquifer performance data.

b. Treatment Equipment. Within five days after entry of this Consent Judgment, Defendant shall submit to MDNR specifications for equipment for the treatment of purged groundwater using ultraviolet light and oxidating agents sufficient to remove 1,4-dioxane from goundwater to levels of 3 ug/l or lower. Defendant shall order such equipment within ten days after receiving approval from MDNR.

c. Obtaining Authorization for Groundwater Reinjection. Within 90 days after entry of the Consent Judgment, Defendant shall do one of the following: (i) submit a complete application to the Water Resources Commission for a groundwater discharge permit or permit exemption to authorize the reinjection

of purged, treated groundwater from the Evergreen System; or (ii) submit a plan to MDNR for reinjection of purged, treated groundwater from the Evergreen System that will assure compliance with and be authorized by the generic Exemption for Groundwater Remediation Activites issued by the Water Resources Commission on August 20, 1992.

d. Work Plan. Within 90 days after entry of the Consent Judgment, Defendant shall submit to MDNR for its review and approval a work plan for continued investigation of the Evergreen Subdivision and design of the Evergreen System. At a minimum, the work plan shall include, without limitation, installation of at least one purge well and associated observation well(s) and a schedule for implementing the work plan. The work plan shall specify the treatment and disposal options to be used for the Evergreen System as described in Section V.A.5. The existing test/purge well can be incorporated into the work plan if appropriate.

3. Implementation. Within 14 days after receipt of the MDNR's written approval of the work plan described in Section V.A.2., Defendant shall implement the work plan. Defendant shall submit the following to MDNR according to the approved time schedule: (a) the completed Evergreen System design; (b) a schedule for implementing the design; (c) an operation and maintenance plan for the Evergreen System; and (d) an effectiveness monitoring plan.

4. Operation and Maintenance. Upon approval of the Evergreen System design by the MDNR, Defendant shall install the Evergreen System according to the approved schedule and thereafter, except for temporary shutdowns pursuant to Section V.A.6. of this Consent Judgement, continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate purge well operations pursuant to Section V.D.

5. Treatment and Disposal. Groundwater extracted by the purge well(s) in the Evergreen System shall be treated as necessary using ultraviolet light and oxidizing agents and disposed of in accordance with the Evergeen System design approved by the MDNR. The options for such disposal are the following:

a. Groundwater Discharge. The purged groundwater shall be treated to reduce 1,4-dioxane concentrations to the level required by the Water Resources Commission, and discharged to groundwaters in the vicinity of the Evergreen Subdivision in compliance with the permit or exemption authorizing such discharge referred to in Section V.A.2.c.

b. Sanitary Sewer Discharge. Use of the sanitary sewer leading to the Ann Arbor Wastewater Treatment Plant is conditioned upon approval of the City of Ann Arbor. If discharge is made to the sanitary sewer, the Evergreen System shall be operated and monitored in compliance with the terms

and conditions of the Industrial User's Permit to be issued by the City of Ann Arbor, a copy of which is attached hereto as Attachment G, and any subsequent written amendment of that Permit made by the City of Ann Arbor. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment.

c. Storm Drain Discharge. Use of the storm drain is conditioned upon approval of such use by the City of Ann Arbor and the Allen Creek Drainage District. Discharge to the Huron River via the Ann Arbor stormwater system shall be in accordance with NPDES Permit No. MI-008453 and conditions required by the City and the Drainage District. If the storm drain is to be used for disposal, no later than 21 days after permission is granted by the City and the Drainage District to use the storm drain for continuous disposal of purged groundwater, Defendant shall submit to MDNR, the City of Ann Arbor, and the Drainage District for their review and approval a protocol under which the purge system shall be temporarily shut down: (i) for maintenance of the storm drain; and (ii) during storm events to assure that the stormwater system retains adequate capacity to handle run-off created during such events. The purge system shall be operated in accordance with the approved protocol for temporary shutdown.

6. Monitoring Plan. Defendant shall implement the approved monitoring plan required by Section V.A.3.d. The monitoring plan shall include collection of data to measure the effectiveness of the System in: (a) hydraulically containing groundwater contamination; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring plan shall be continued until terminated pursuant to Section V.E.

B. Core Area System
(hereinafter "Core System")

1. Objectives. For purposes of the Consent Judgment, the "Core Area" means that portion of the Unit C3 aquifer containing 1,4-dioxane in a concentration exceeding 500 ug/l. The objectives of the Core System are to intercept and contain the migration of groundwater from the Core Area and remove contaminated groundwater from the Core Area until the termination criterion for the Core System in Section V.D.1. is satisfied. The Core System shall also prevent the discharge of contaminated groundwater into the Honey Creek Tributary in concentrations in excess of 100 ug/l or in excess of a concentration which would cause groundwater contamination at any location along or adjacent to the entire length of Honey Creek or the Honey Creek Tributary.

2. Evaluation of Groundwater Reinjection Alternative. No later than 35 days after entry of the Consent Judgment, Defendant will complete and submit to MDNR a report on a pilot test for the treatment system using ultraviolet light and oxidizing agent(s) to be used for treatment of extracted groundwater prior to reinjection. No later than 90 days after entry of this Consent Judgment, Defendant may apply to the Michigan Water Resources Commission for authorization for Defendant to reinject treated groundwater extracted from the Core Area. A reinjection program shall consist of the following: (a) installation of a series of purge wells that will control groundwater flow as described in Section V.B.1. and extract water from the Core Area to be treated and reinjected; (b) the system described in the application shall include a groundwater treatment system using ultraviolet light and oxidizing agent(s) to reduce 1,4-dioxane concentrations in the purged groundwater to the level required for a discharge by the Water Resources Commission; (c) the discharge level for 1,4-dioxane in groundwater to be reinjected in the Core Area shall be established based upon performance of further tests by Defendant on the treatment technology and shall in any event be less than 60 ug/l.

3. Groundwater Reinjection. Defendant shall, no later than 120 days after entry of this Consent Judgment: (a) select, verify, and calibrate a model for the groundwater reinjection system; (b) prepare a final report on the model;

and (c) submit to MDNR for review and approval the final report on the model, Defendant's proposed final design for the Core System, a schedule for implementing the design, an operation and maintenance plan for the system, and an effectiveness monitoring plan for the system.

The Groundwater Reinjection System, including the discharge level for 1,4-dioxane, shall be subject to the final approval of the Water Resources Commission and the MDNR. At a minimum, the System shall be designed and operated so as to ensure that: (a) the purged groundwater is reinjected only into portions of the aquifer(s) where groundwater contamination is already present; (b) the concentration of 1,4-dioxane in the aquifer(s) is not increased; and (c) the areal extent of groundwater contamination is not increased.

4. Surface Water Discharge Alternative. In the event that Defendant elects not to proceed with groundwater reinjection as provided in Section V.B.2., or in the event Defendant is denied permission to install such a system, no later than 90 days after the election or denial, Defendant shall submit to the MDNR for its review and approval Defendant's proposed final design of the Core System, a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan for the System. The Core System shall include groundwater purge wells as necessary to meet the

objectives described in Section V.B.1. The Core System also shall include a treatment system using ultraviolet light and oxidizing agent(s) to reduce 1,4-dioxane concentrations in the purged groundwater to the levels required for a discharge described below and facilities for discharging the treated water into local surface waters or sanitary sewer line(s). Discharge to local surface waters shall be in accordance with NPDES Permit No. MI-008453 and any subsequent amendment of that Permit. Use of the sanitary sewer is conditioned upon and subject to an Industrial Users Permit to be obtained from either the City of Ann Arbor or Scio Township, as required by law. If discharge is made to the sanitary sewer, the Core Treatment System shall be operated and monitored to assure compliance with the terms and conditions of the required Industrial User's Permit and any subsequent amendment of that permit. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment.

5. Implementation of Program. Upon approval by the MDNR, Defendant shall install the Core System according to the approved schedule and thereafter continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate operation pursuant to Section V.D. Defendant may, thereafter and at its option, continue purge operations as provided in this Section.

6. Monitoring Plan. Defendant shall implement the approved monitoring plan required by Section V.B. The monitoring plan shall include collection of data to demonstrate the effectiveness of the Core System in: (a) hydraulically containing the Core Area; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring plan shall be continued until terminated pursuant to Section V.E.

C. Western Plume System
(hereinafter "Western System")

1. Objectives. The objectives of the Western System are: (a) to contain downgradient migration of any plume(s) of groundwater contamination emanating from the GSI Property that are located outside the Core Area and to the northwest, west, or southwest of the GSI facility; (b) to remove groundwater contaminants from the affected aquifer(s); and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that are not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section IV.

2. Design of System. The Western System shall include a series of groundwater test/purge wells placed and operated so as to create overlapping capture zones preventing the downgradient migration of groundwater contaminants. The System

also may incorporate one or more existing artesian wells with overlapping capture zones preventing the downgradient migration of groundwater contaminants. The System also may incorporate one or more existing artesian wells with overlapping capture zones to prevent the downgradient migration of groundwater contaminated with 1,4-dioxane. Defendant shall apply for authorization to reinject purged groundwater or for a permit for discharge of the purged groundwater into the Honey Creek if facilities are constructed for such discharge as part of the Western System. The Western System shall also include facilities for treating purged groundwater as necessary to meet applicable permit requirements and facilities for monitoring the effectiveness of the System.

3. Remedial Investigation. No later than 60 days after the effective date of this Consent Judgment, Defendant shall submit to the MDNR for its review and approval a work plan for remedial investigation and design of the Western System and a schedule for implementing the work plan. The work plan shall include plans for installation of a series of test/purge wells, conduct of an aquifer performance test(s), groundwater monitoring operations and maintenance plan, and system design.

4. Implementation of Remedial Investigation. Defendant shall implement the approved work plan according to the approved schedule.

5. Installation of System. Upon approval by the MDNR, Defendant shall install the Western System and thereafter continuously operate and maintain the system according to the approved plans and schedules until Defendant is authorized to terminate operation pursuant to Section V.D. of this Consent Judgment.

6. Monitoring. Defendant shall implement the approved monitoring plan to verify the effectiveness of the Western System in meeting the objectives of Section V.C.1. The monitoring plan shall include collection of data to demonstrate the effectiveness of the Western System in: (a) hydraulically containing groundwater contamination; (b) removing groundwater contaminants from the aquifer; and (c) complying with applicable limitations on the discharge of the purged groundwater. The monitoring program shall be continued until terminated pursuant to Section V.E.

D. Termination Of Groundwater Purge Systems Operation

1. Evergreen System. Except as otherwise provided pursuant to Section V.D.2., Defendant shall continue to operate the Evergreen System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s), including all upgradient monitoring wells in the Core Area, fail to detect the presence

of 1,4-dioxane in groundwater at a concentration which exceeds 3 ug/l.

Western System. Except as otherwise provided pursuant to Section V.D.2., Defendant shall continue to operate the Western System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s), including all upgradient monitoring wells in the Core Area, fail to detect the presence of 1,4-dioxane in groundwater at a concentration which exceeds 3 ug/l.

Core System. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to operate the Core System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration which exceeds 60 ug/l if the Groundwater Reinjection Alternative is selected, or 500 ug/l if Surface Water Discharge Alternative is selected.

2. The termination criteria provided in Section V.D.1. may be modified as follows:

a. At any time two years after entry of this Consent Judgment, Defendant may propose to the MDNR that the termination criteria be modified based upon either or both of the following:

i. a change in legally applicable or relevant and appropriate regulatory criteria since the entry of this Consent Judgment; for purposes of this subparagraph, "regulatory criteria" shall mean any promulgated standard criterion or limitation under federal or state environmental law specifically applicable to 1,4-dioxane; or

ii. scientific evidence newly released since the entry of this Consent Judgment, which, in combination with the existing scientific evidence, establishes that different termination criteria for 1,4-dioxane are appropriate and will assure protection of public health, safety, welfare, the environment, and natural resources.

b. Defendant shall submit any such proposal in writing, together with supporting documentation, to the MDNR for review.

c. If the Parties agree to a proposed modification, the agreement shall be made by written Stipulation filed with the Court pursuant to Section XXIV of this Judgment.

d. If MDNR disapproves the proposed modification, Defendant may invoke the Dispute Resolution procedures contained in Section XVI of this Consent Judgment. Alternatively, if MDNR disapproves a

proposed modification, Defendant and Plaintiffs may agree to resolve the dispute pursuant to subparagraph V.D.3.

3. If the parties do not agree to a proposed modification, Defendant and Plaintiffs may prepare a list of the items of difference to be submitted to a scientific advisory panel for review and recommendations. The scientific advisory panel shall be comprised of three persons with scientific expertise in the discipline(s) relevant to the items of difference. No member of the panel may be a person who has been employed or retained by either party, except persons compensated solely for providing peer review of the Hartung Report, in connection with the subject of this litigation.

a. If this procedure is invoked, each party shall, within 14 days, select one member of the panel. Those two members of the panel shall select the third member. Defendant shall, within 28 days after this procedure is invoked, establish a fund of at least $10,000.00, from which each member of the panel shall be paid reasonable compensation for their services, including actual and necessary expenses. If the parties do not agree concerning the qualifications, eligibility, or compensation of panel members, they may invoke the Dispute Resolution procedures contained in Section XVI of this Consent Judgment.

b. Within a reasonable period of time after selection of all panel members, the panel shall confer and establish a schedule for acceptance of submissions from the parties completing review and making recommendations on the items of difference.

c. The scientific advisory panel shall make its recommendations concerning resolution of the items of difference to the parties. If both parties accept those recommendations, the termination criteria shall be modified in accordance with such recommendations. If the parties disagree with the recommendations, the MDNR's proposed resolution of the dispute shall be final unless Defendant invokes the procedures for judicial Dispute Resolution as provided in Section XVI of the Judgment. The recommendation of the scientific advisory panel and any related documents shall be submitted to the Court as part of the record to be considered by the Court in resolving the dispute.

4. Notification of Termination. At least 30 days prior to the date Defendant proposes to terminate operation of a purge well pursuant to the criteria established in subparagraph V.D.1., or a modified criterion established through subparagraph V.D.2., Defendant shall send written notice to the MDNR identifying the proposed action and the test data demonstrating compliance with the termination criterion.

5. Termination. Within 30 days after the MDNR's receipt of the notice and supporting documentation, the MDNR shall approve or disapprove the proposed termination in writing. Defendant may terminate operation of the well system(s) in question upon: (a) receipt of written notice of approval from the MDNR; or (b) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of the Consent Judgment.

E. Post-Termination Monitoring

1. For systems with a termination criterion of 3 ug/l, for a period of five years after cessation of operation of any purge well, Defendant shall continue monitoring of the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify the MDNR and shall collect a second sample within 14 days of such finding. If the second sample confirms the presence of 1,4-dioxane in excess of the termination criterion:

a. if the confirmed concentrations are in excess of 6 ug/l, Defendant shall restart the associated purge well system; or

b. if the confirmed concentrations are between 3 ug/l and 6 ug/l, Defendant may continue to monitor the well bi-weekly for two months without restart of the associated purge well. At the end of the monitoring period, if concentrations in the monitoring well meet the termination criterion of 3 ug/l, Defendant shall continue to monitor as required by the approved monitoring program; if concentrations do not meet the termination criterion, Defendant shall restart the associated purge well.

2. For all other groundwater systems, for a period of five years after ceasing operation of any purge well, Defendant shall continue monitoring of the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify MDNR and shall collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, Defendant shall immediately restart the purge well system.

VI. GSI PROPERTY REMEDIATION

Defendant shall design, install, operate, and maintain the systems described below to control, remove, and treat (as required) soil contamination at the GSI Property. The overall objective of these systems shall be to: (1) prevent the migration of 1,4-dioxane from contaminated soils into any aquifer in concentrations that cause groundwater contamination; (2) to prevent venting of groundwater contamination into Honey Creek Tributary; and (3) to prevent venting of groundwater contamination to Third Sister Lake. Defendant also shall implement a monitoring plan to verify the effectiveness of these systems.

A. Marshy Area System
(hereinafter "Marshy Area System")

1. Objectives. The objectives of this System are to: (a) remove contaminated groundwater from the Marshy Area located north of former Ponds I and II; (b) reduce the migration of contaminated groundwater from the Marshy Area into other aquifers; and (c) to prevent the discharge of contaminated groundwater from the Marshy Area into the Honey Creek Tributary in concentrations in excess of 100 ug/l or in excess of a concentration which would cause groundwater contamination along or adjacent to the entire length of Honey Creek or Honey Creek Tributary.

2. Design. No later than 150 days after the effective date, Defendant shall submit its proposed design of the Marshy Area System a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan to MDNR for its review and approval.

3. Treatment and Disposal. The Marshy Area System shall include: (a) facilities for the collection of contaminated groundwater (either an interceptor trench or sumps); (b) facilities for disposing of the contaminated groundwater (including disposal to local surface waters in accordance with NPDES Permit MI-008453, Defendant's deep well, or in any other manner approved by MDNR and/or the Water Resources Commission); and (c) if the water is to be discharged to the sanitary sewer for ultimate disposal at the City of Ann Arbor Wastewater Treatment Plant, treatment facilities to ensure that discharge to the sanitary sewer complies with the terms and conditions of the Industrial User's Permit authorizing such discharge, and any subsequent amendment to that Permit. The terms and conditions of the Permit and any subsequent amendment shall be directly enforceable by the MDNR against Gelman as requirements of this Consent Judgment. Use of the sanitary sewer is conditioned on approval of the City of Ann Arbor and Scio Township.

4. Installation and Operation. Upon approval by the MDNR, Defendant shall install the Marshy Area System and thereafter continuously operate and maintain the System according to the approved plans until it is authorized to shut down the System pursuant to Section VI.D. of this Consent Judgment.

5. Monitoring. Defendant shall implement the approved monitoring plan to verify the effectiveness of the Marshy Area System in meeting the requirements of this Remedial Action Consent Judgment. The monitoring plan shall be continued until terminated pursuant to Section VI.D. of this Consent Judgment.

B. Spray Irrigation Field

1. Objectives. The objectives of this program shall be to meet the overall objective of Section VI upon completion of the program and to prevent the discharge of groundwater contamination into Third Sister Lake.

2. Remedial Investigation. Defendant shall, no later than 180 days after the effective date, submit to MDNR for review and approval a work plan for determining the distribution of soil contamination in the former spray irrigation area. Soil characteristics for the area may be extrapolated from results of samples taken from representative spray head locations.

3. Soil Flushing System. Defendant shall, no later than 240 days after the effective date, submit to MDNR for review and approval a work plan for the installation of a system to flush the former spray irrigation field with clean water to enhance removal of 1,4-dioxane from contaminated soils. The work plan shall include Defendant's proposed design of the system, a time schedule for implementation of the system, an operating and maintenance plan, and effectiveness monitoring plan.

4. Structures in the Spray Field. The following structures have been constructed over portions of the former spray irrigation area: (a) the Defendant's warehouse; (b) the parking area south of the Defendant's warehouse; and (c) the parking lot between the Medical Device Division Building and the Defendant's warehouse. These structures are identified in Attachment D. With respect to these structures, during such time as they are kept in good maintenance and repair, the soils beneath such structures need not be sampled nor directly addressed in the soils systems remediation plan. In the event that the structures are not kept in good maintenance or repair, or are scheduled to be replaced or demolished, Defendant shall notify MDNR of such a circumstance, and take the following actions:

a. Defendant shall, within 21 days after notification, submit to MDNR for approval a work plan for investigating the extent of contamination (if any) of the soils beneath the structure, along with a schedule for implementation of the work plan.

b. Within 14 days after approval of the work plan by MDNR, Defendant shall implement the work plan and submit a report of the results to MDNR within the time specified in the approved schedule.

c. If soil contamination is identified in any of the areas investigated, Defendant shall submit, together with the report required in Section VI.B.4.b., a remediation plan for that area that provides for induced flushing of contaminants from the impacted soils. The plan shall include a proposed schedule for implementation. The remediation system shall be installed, operated, and terminated in accordance with the approved plan.

5. Installation, Operation, and Monitoring. Upon approval by MDNR, Defendant shall install, operate, maintain, and monitor the Spray Irrigation Field System in accordance with the approved plans and the termination criteria established in Section VI.D.

C. Soils System

1. Objectives. The objectives of this program are to: (a) evaluate the feasibility and effectiveness of available options for remediation of identified source areas; (b) design and implement remedial systems to achieve the overall objectives of Section VI; and (c) verify the effectiveness of those systems.

2. Soils Remediation Plan. Defendant shall, no later than 210 days after the effective date, submit to MDNR for review and approval a soils remediation plan for addressing identified areas of soil contamination. The areas to be addressed include the burn pit; the former Pond I area; the former Pond II area; the former Lift Station area; and Pond III. These areas are depicted on Attachment E. As part of the remediation plan, Defendant may make a demonstration that with respect to any of these areas, cleanup to a level established under Mich Adm Code R 299.5717 ("Type C") is appropriate by addressing the factors set forth in Mich Adm Code R 299.5717(3). Defendant's proposal for the preferred remedial alternative(s) to be implemented to address each area of soil contamination shall be identified in the soils remediation plan. The proposed remedial alternative(s) to be implemented must attain the overall objectives of Section VI. Based upon their review, the MDNR shall either: (a) approve Defendant's proposed remedial alternative(s); or (b) disapprove the proposed remedial

alternative(s) and select the other remedial alternative(s) to be implemented. A decision by MDNR to disapprove Defendant's remedial proposal is subject to Defendant's rights under the Dispute Resolution provisions of Section XVI of the Consent Judgment.

3. Design. Defendant shall, not later than 60 days after: (a) the MDNR's decision approving the proposed remedial alternative(s); or (b) the final decision in Dispute Resolution pursuant to Section XVI of the Consent Judgment, submit the following to the MDNR for review and approval: Defendant's proposed design of each selected remedial system, a time schedule for implementation of the system, an operating and maintenance plan, and effectiveness monitoring plan.

4. Installation, Operation, and Monitoring. Upon approval by MDNR, Defendant shall install, operate, maintain, and monitor the systems in accordance with the approved plans, and the termination criteria established in Section VI.D. of the Consent Judgment.

D. Termination Criteria for GSI Property Remediation

1. Remedial Systems Collecting or Extracting Contaminated Groundwater.

a. Except as otherwise provided pursuant to Section VI.D.3., Defendant shall continue to operate the Marshy Area System and any groundwater remediation program developed as part of the Soils System required under this Consent Judgment until six consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. Notwithstanding this criterion, Defendant shall continue to operate the portions of the such systems necessary to assure that contaminated groundwater does not vent into surface waters in concentrations in excess of 100 ug/l until such time as Defendant demonstrates to Plaintiff that venting in excess of 100 ug/l is not occurring from the Marshy Areas or Soils Systems and Defendant demonstrates that venting into surface waters will not cause groundwater contamination along or adjacent to the entire length of Honey Creek or the Honey Creek Tributary. These Systems shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

b. Except as otherwise provided pursuant to Section VI.D.3., Defendant shall continue to operate the purge wells for the Spray Irrigation Field System until six consecutive monthly tests of samples from the purge well(s) fail to detect the presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. Notwithstanding this criterion, Defendant

shall continue to operate such purge wells as necessary to assure that contaminated groundwater does not vent into Third Sister Lake. These Systems shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

2. All Other GSI Property Remedial Systems. Except as provided in Section VI.D.3., each GSI Property Remedial System not subject to termination pursuant to Section VI.D.1. shall be operated until Defendant demonstrates, through representative soil sampling and analysis in accordance with the effectiveness monitoring plan approved by the MDNR, that the concentration of 1,4-dioxane in soils in the area in question does not exceed 60 ug/kg or other higher concentration derived by means consistent with Mich Admin Code R 299.5711(2) or R 299.5717.

3. The termination criteria provided in Section VI.D. may be modified in the same manner as specified in Sections V.D.2. and V.D.3.

4. At least 30 days prior to the date Defendant proposes to terminate operation of a system pursuant to Section VI.D., Defendant shall send a written notice to the MDNR identifying the proposed action and shall send test data demonstrating compliance with the termination criterion.

5. Within 30 days after the MDNR's receipt of the written notice and supporting documentation, the MDNR shall approve or disapprove the proposed termination in writing. Defendant may terminate operation of the system(s) in question upon: (a) receipt of written notice of approval from Plaintiffs; or (b) if the Dispute Resolution procedures of Section XVI are invoked, receipt of a final decision pursuant to that Section.

VII. COMPLIANCE WITH OTHER LAWS AND PERMITS

A. Defendant shall undertake all activities pursuant to this Consent Judgment in accordance with the requirements of all applicable laws, regulations, and permits.

B. Defendant shall apply for all permits necessary for implementation of the Consent Judgment including, without limitation, surface water discharge permit(s) and air discharge permit(s).

C. Defendant shall include in all contracts entered into by the Defendant for Remedial Action required under this Consent Judgment (and shall require that any contractor include in all subcontract(s), a provision stating that such contractors and subcontractors, including their agents and employees, shall perform all activities required by such contracts or subcontracts in compliance with and all applicable laws, regulations, and permits. Defendant shall provide a copy of relevant approved workplans to any such contractor or subcontractor.

D. The Parties agree to provide reasonable cooperation and assistance to the Defendant in obtaining necessary approvals and permits for Remedial Action. Plaintiffs shall not unreasonably withhold or delay any required approvals or permits for Defendant's performance of the Remedial Action. Plaintiffs expressly acknowledge that one or more of the following permits and approvals may be necessary for Remedial Action:

1. NPDES Permit No. MI-008453.
2. An Air Permit for discharges of contaminants to the atmosphere for vapor extraction systems, if such systems are part of the remedial design;
3. A Wetlands Permit if necessary for construction of the Marshy Area System or the construction of facilities as part of the Core or Western Systems;
4. An Industrial User's Permit to be issued by the City of Ann Arbor for use of the sewer to dispose of treated or untreated purged groundwater. Plaintiffs have no objection to receipt by the Ann Arbor Wastewater Treatment Plant of the purged groundwater extracted pursuant to the terms and conditions of this Judgment, and acknowledge that receipt of the purged groundwater would not necessitate any change in current and proposed residual management programs of the Ann Arbor Wastewater Treatment Plant;

5. Permit(s) or permit exemptions to be issued by the Water Resources Commission to authorize the reinjection of purged and treated groundwater in the Evergreen, Core, and Western System Areas;

6. Surface water discharge permit(s) for discharge into surface waters in the Western System area, if necessary;

7. Approval of the City of Ann Arbor and the Washtenaw County Drain Commissioner to use storm drains for the remedial programs; or

8. A permit for the use of Defendant's deep well for injection of purged groundwater from the remedial systems required under this Consent Judgment.

VIII. SAMPLING AND ANALYSIS

Defendant shall make available to Plaintiffs the results of all sampling, tests, and/or other data generated in the performance or monitoring of any requirement under this Consent Judgment. Sampling data generated consistent with this Consent Judgment shall be admissible in evidence in any proceeding related to enforcement of this Judgment without waiver by any Party of any objection as to weight or relevance. Plaintiffs and/or their authorized representatives, at their discretion, may

take split or duplicate samples and observe the sampling event. Plaintiffs shall make available to Defendant the results of all sampling, tests, and/or other data generated in the performance or monitoring of any requirement under this Consent Judgment. Defendant will provide Plaintiffs with reasonable notice of changes in the schedule of data collection activities included in the progress reports submitted pursuant to Section XII.

IX. ACCESS

A. From the effective date of this Consent Judgment, the Plaintiffs, their authorized employees, agents, representatives, contractors, and consultants, upon presentation of proper identification, shall have the right at all reasonable times to enter the Site and any property to which access is required for the implementation of this Consent Judgment, to the extent access to the property is owned, controlled by, or available to the Defendant, for the purpose of conducting any activity authorized by this Consent Judgment, including, but not limited to:

1. Monitoring of the Remedial Action or any other activities taking place pursuant to this Consent Judgment on the property;
2. Verification of any data or information submitted to the Plaintiffs;

3. Conduct of investigations related to contamination at the Site;

4. Collection of samples;

5. Assessment of the need for, or planning and implementing of, Response Actions at the Site; and

6. Inspection and copying of non-privileged documents including records, operating logs, contracts, or other documents required to assess Defendant's compliance with this Consent Judgment.

All Parties with access to the Site or other property pursuant to this paragraph shall comply with all applicable health and safety laws and regulations.

B. To the extent that the Site or any other area where Remedial Action is to be performed by the Defendant under this Consent Judgment is owned or controlled by persons other than the Defendant, Defendant shall use its best efforts to secure from such persons access for Defendant, Plaintiffs, and their authorized employees, agents, representatives, contractors, and consultants. Defendant shall provide Plaintiffs with a copy of each access agreement secured pursuant to this paragraph. For purposes of this Paragraph, "best efforts" includes, but is not limited to, seeking judicial assistance to secure such access. If access is not obtained within 30 days after the MDNR approves any work plan or design for which such access is necessary,

Defendant shall notify the Plaintiffs promptly. Plaintiffs thereafter shall assist Defendant in obtaining access. Plaintiffs agree to use appropriate authority available under state law, including authority provided under the Michigan Environmental Response Act, as amended, MCL 229.601 et seq, to obtain access to property on behalf of themselves and Defendant for the purpose of implementing Remedial Action under this Consent Judgment.

X. APPROVALS OF SUBMISSIONS

Upon receipt of any plan, report, or other item that is required to be submitted for approval pursuant to this Consent Judgment, as soon as practicable, but in no event later than 56 days after receipt of any such submission, the Plaintiffs will: (1) approve the submission; or (2) submit to Defendant changes in the submission that would result in approval of the submission. If Plaintiffs do not respond within 56 days after receipt of the submittal, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. Upon receipt of a notice of approval or changes from Plaintiffs, Defendant shall proceed to take any action required by the plan, report, or other item, as approved or as may be modified to address the deficiencies identified by Plaintiffs. If Defendant does not accept the changes proposed by Plaintiffs, Defendant may submit the matter to Dispute Resolution, Section XVI.

XI. PROJECT COORDINATORS

A. Plaintiffs designate Leonard Lipinski as Plaintiffs' Project Coordinator. Defendant designates James Fahrner, Vice President and Chief Financial Officer, as Defendant's Project Coordinator. Defendant's Project Coordinator shall have primary responsibility for implementation of the Remedial Action at the Site. Plaintiffs' Project Coordinator will be the primary designated representative for Plaintiffs with respect to implementation of the Remedial Action at the Site. All communication between Defendant and Plaintiffs, including all documents, reports, approvals, other submissions and correspondence concerning the activities performed pursuant to the terms and conditions of this Consent Judgment, shall be directed through the Project Coordinators. If any Party changes its designated Project Coordinator, that Party shall provide the name, address, and telephone number of the successor in writing to the other Party seven days prior to the date on which the change is to be effective. This paragraph does not relieve Defendant from other reporting obligations under the law.

B. Plaintiffs may designate other authorized representatives, employees, contractors, and consultants to observe and monitor the progress of any activity undertaken pursuant to this Consent Judgment. Plaintiffs' Project Coordinator shall provide Defendant's Project Coordinator

with the names, addresses, telephone numbers, positions, and responsibilities of any person designated pursuant to this section.

XII. PROGRESS REPORTS

Defendant shall provide to Plaintiffs written quarterly progress reports that shall: (1) describe the actions which have been taken toward achieving compliance with this Consent Judgment during the previous three months; (2) describe data collection and activities scheduled for the next three months; and (3) include all results of sampling and tests and other data received by the Defendant, its consultants, engineers, or agents during the previous three months relating to Remedial Action performed pursuant to this Consent Judgment. Defendant shall submit the first quarterly report to MDNR within 120 days after entry of this Consent Judgment, and by the 30th day of the month following each quarterly period thereafter, as feasible, until termination of this Consent Judgment as provided in Section XXV.

XIII. RESTRICTIONS ON ALIENATION

A. Defendant shall not sell, lease, or alienate the GSI Property unless the purchaser, lessee, or grantee provides prior written agreement with Plaintiffs that the purchaser, lessee, or grantee will not interfere with any term or condition of this

Consent Judgment. Notwithstanding any purchase, lease, or grant, Defendant shall remain obligated to comply with all terms and conditions of this Consent Judgment.

B. Any deed, title, or other instrument of conveyance regarding the GSI Property shall contain a notice that Defendant's Property is the subject of this Consent Judgment, setting forth the caption of the case, the case number, and the court having jurisdiction herein.

XIV. FORCE MAJEURE

Any delay attributable to a Force Majeure shall not be deemed a violation of Defendant's obligations under this Consent Judgment.

A. "Force Majeure" is defined as an occurrence or nonoccurrence arising from causes beyond the control of Defendant or of any entity controlled by the Defendant performing Remedial Action, such as Defendant's employees, contractors, and subcontractors. Such occurrence or nonoccurrence includes, but is not limited to: (1) an Act of God; (2) untimely review of permit applications or submissions; (3) acts or omissions of third parties for which Defendant is not responsible; (4) insolvency of any vendor, contractor, or subcontractor retained by Defendant as part of implementation of this Judgment; and (5) delay in obtaining necessary access agreements under Section IX

that could not have been avoided or overcome by due diligence. "Force Majeure" does not include unanticipated or increased costs, changed financial circumstances, or nonattainment of the treatment and termination standards set forth in Sections V and VI.

B. When circumstances occur that Defendant believes constitute Force Majeure, Defendant shall notify the MDNR by telephone of the circumstances within 48 hours after Defendant first believes those circumstances to apply. Within 14 working days after Defendant first believes those circumstances to apply, Defendant shall supply to the MDNR, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by Defendant to avoid, minimize, or overcome the delay, and the timetable for implementation of such measures. Failure of Defendant to comply with the written notice provisions of this paragraph shall constitute a waiver of Defendant's right to assert a claim of Force Majeure with respect to the circumstances in question.

C. A determination by the MDNR that an event does not constitute Majeure, that a delay was not caused by Force, or that the period of delay was not necessary to compensate for Force Majeure may be subject to Dispute Resolution under Section XVI of this Judgment.

D. The MDNR shall respond, in writing, to any request by Defendant for a Force Majeure extension within 30 days of receipt of the Defendant's request. If the MDNR does not respond within that time period, Defendant's request shall be deemed granted. If the MDNR agrees that a delay is or was caused by Force Majeure, Defendant's delays shall be excused, stipulated penalties shall not accrue, and the MDNR shall provide Defendant such additional time as may be necessary to compensate for the Force Majeure event.

E. Delay in achievement of any obligation established by the Consent Judgment shall not automatically justify or excuse delay in achievement of any subsequent obligation unless the subsequent obligation automatically follows from the delayed obligation.

XV. REVOCATION OR MODIFICATION OF LICENSES OR PERMITS

Any delay attributable to the revocation or modification of licenses or permits obtained by Defendant to implement remediation actions as set forth in this Consent Judgment shall not be deemed a violation of Defendant's obligations under this Consent Judgment, provided that such revocation or modification arises from causes beyond the control of Defendant or of any entity controlled by the Defendant performing Remedial Action, such as Defendant's employees, contractors, and subcontractors.

A. Licenses or permits that may need to be obtained or modified by Defendant to implement the Remedial Actions are those specified in Section VII.D. and licenses, easements, and other agreements for access to property or rights of way on property necessary for the installation of remedial systems required by this Consent Judgment.

B. A revocation or modification of a license or permit within the meaning of this section means withdrawal of permission, denial of permission, a limitation or a change in license or permit conditions that delays the implementation of all or part of a remedial system. Revocation or modification due to Defendant's violation of a license or permit (or any conditions of a license or permit) shall not constitute a revocation or modification covered by this section.

C. When circumstances occur that Defendant believes constitute revocation or modification of a license or permit, Defendant shall notify the MDNR by telephone of the circumstances within 48 hours after Defendant first believes those circumstances to apply. Within 14 working days after Defendant first believes those circumstances to apply, Defendant shall supply to the MDNR, in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by Defendant to avoid, minimize, or overcome the delay, and the

timetable for implementation of such measures. Failure of Defendant to comply with the written notice provisions of this paragraph shall constitute a waiver of Defendant's right to assert a claim of revocation or modification of a license or permit with respect to the circumstances in question.

D. A determination by the MDNR that an event does not constitute revocation or modification of a license or permit, that a delay was not caused by revocation or modification of a license or permit, or that the period of delay was not necessary to compensate for revocation or modification of a license or permit may be subject to Dispute Resolution under Section XVI of this Consent Judgment.

E. The MDNR shall respond, in writing, to any request by Defendant for a revocation or modification of a license or permit extension within 30 days of receipt of the Defendant's request. If the MDNR does not respond within that time period, Defendant's request shall be deemed granted. If the MDNR agrees that a delay is or was caused by revocation or modification of a license or permit, Defendant's delays shall be excused, stipulated penalties shall not accrue, and the MDNR shall provide Defendant such additional time as may be necessary to compensate for the revocation or modification of a license or permit.

F. Delay in achievement of any obligation established by the Consent Judgment shall not automatically justify or excuse delay in achievement of any subsequent obligation unless the subsequent obligation automatically follows from the delayed obligation.

XVI. DISPUTE RESOLUTION

A. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under this Consent Judgment and shall apply to all provisions of this Consent Judgment, whether or not particular provisions of the Consent Judgment in question make reference to the dispute resolution provisions of this Section. Any dispute that arises under this Consent Judgment initially shall be the subject of informal negotiations between the Parties. The period of negotiations shall not exceed ten working days from the date of written notice by any Party that a dispute has arisen. This period may be extended or shortened by agreement of the Parties.

B. Immediately upon expiration of the informal negotiation period (or sooner if upon agreement of the parties), the MDNR shall provide to Defendant a written statement setting forth the MDNR's proposed resolution of the dispute. Such resolution shall be final unless, within 15 days after receipt of the MDNR's proposed resolution (clearly identified as such

under this Section), Defendant files a petition for resolution with the Washtenaw County Circuit Court setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Judgment.

C. Within ten days of the filing of the petition, Plaintiffs may file a response to the petition, and unless a dispute arises from the alleged failure of MDNR to timely make a decision, MDNR will submit to the Court all documents containing information related to the matters in dispute, including documents provided to MDNR by Defendant. In the event of a dispute arising from the alleged failure of MDNR to timely make a decision, within ten days of filing of the petition, each party shall submit to the Court correspondence, reports, affidavits, maps, diagrams, and other documents setting forth facts pertaining to the matters in dispute. Those documents and this Consent Judgment shall comprise the record upon which the Court shall resolve the dispute. Additional evidence may be taken by the Court on its own motion or at the request of either party if the Court finds that the record is incomplete or inadequate. Review of the petition shall be conducted by the Court and shall be confined to the record. The review shall be independent of any factual or legal conclusions made by the Court prior to the date of entry of the Consent Judgment.

D. The Court shall uphold the decision of MDNR on the issue in dispute unless the Court determines that the decision is any of the following:

1. Inconsistent with this Consent Judgment;
2. Not supported by competent, material, and substantial evidence on the whole record;
3. Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion; and
4. Affected by other substantial and material error of law;

E. The filing of a petition for resolution of a dispute shall not by itself extend or postpone any obligation of Defendant under this Consent Judgment, provided, however, that payment of stipulated penalties with respect to the disputed matter shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue as provided in Section XVII. Stipulated penalties that have accrued with respect to the matter in dispute shall not be assessed by the Court and shall be dissolved if Defendant prevails on the matter. The Court may also direct that stipulated penalties shall not be assessed and paid as provided in Section XVII upon a determination that there was a substantial basis for Defendant's position on the disputed matter.

XVII. STIPULATED PENALTIES

A. Except as otherwise provided, if Defendant fails or refuses to comply with any term or condition in Sections IV, V, VI, VII, or VIII, or with any plan, requirement, or schedule established pursuant to those Sections, then Defendant shall pay stipulated penalties in the following amounts for each working day for every failure or refusal to comply or conform:

Period of Delay	Penalty Per Violation Per Day
1st through 15th Day	$ 1,000
15th through 30th Day	$ 1,500
Beyond 30 Days	$ 2,000

B. Except as otherwise provided if Defendant fails or refuses to comply with any other term or condition of this Consent Judgment, Defendant shall pay to Plaintiffs stipulated penalties of $500.00 per working day for each and every failure to comply.

C. If Defendant is in violation of this Consent Judgment, Defendant shall notify Plaintiffs of any violation no later than five working days after first becoming aware of such violation, and shall describe the violation.

D. Stipulated penalties shall begin to accrue upon the next day after performance was due or other failure or refusal to comply occurred. Penalties shall continue to accrue until the final day of correction of the noncompliance. Separate penalties

shall accrue for each separate failure or refusal to comply with the terms and conditions of this Consent Judgment. Penalties may be waived in whole or in part by Plaintiffs or may be dissolved by the Court pursuant to Section XVII.

E. Stipulated penalties shall be paid no later than 14 working days after receipt by Defendant of a written demand from Plaintiffs. Defendant shall make payment by transmitting a check in the amount due, payable to the "State of Michigan", addressed to the Assistant Attorney General in Charge, Environmental Protection Division, P.O. Box 30212, Lansing, Michigan 48909.

F. Plaintiffs agree that, in the event that an act or omission of Defendant constitutes a violation of this Consent Judgment subject to stipulated penalties and a violation of other applicable law, Plaintiffs will not impose upon Defendant for that violation both the stipulated penalties provided under this Consent Judgment and the civil penalties permitted under other applicable laws. Plaintiffs reserve the right to pursue any other remedy or remedies to which they may be entitled under this Consent Judgment or any applicable law for any failure or refusal of the Defendant to comply with the requirements of this Consent Judgment.

XVIII. PLAINTIFFS' COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

A. Except as otherwise provided in this Consent Judgment, Plaintiffs covenant not to sue or take administrative action for Covered Matters against Defendant, its officers, employees, agents, directors, and any persons acting on its behalf or under its control.

B. "Covered Matters" shall mean any and all claims available to Plaintiffs under federal and state law arising out of the subject matter of the Plaintiffs' Complaint with respect to the following:

1. Claims for injunctive relief to address soil, groundwater, and surface water contamination at or emanating from the GSI Property;
2. Claims for civil penalties and costs;
3. Claims for natural resource damages;
4. Claims for reimbursement of response costs incurred prior to entry of this Consent Judgment or incurred by Plaintiffs for provision of alternative water supplies in the Evergreen Subdivision; and
5. Claims for reimbursement of costs incurred by Plaintiffs for overseeing the implementation of this Consent Judgment.

C. "Covered Matters" does not include:

1. Claims based upon a failure by Defendant to comply with the requirements of this Consent Judgment;
2. Liability for violations of federal or state law which occur during implementation of the Remedial Action; and
3. Liability arising from the disposal, treatment, or handling of any hazardous substance removed from the Site.

D. With respect to liability for alleged past violations of law, this covenant not to sue shall take effect on the effective date of this Consent Judgment. With respect to future liability for performance of response activities required to be performed under this Consent Judgment, the covenant not to sue shall take effect upon issuance by MDNR of the Certificate of Completion in accordance with Section XXV.

E. Notwithstanding any other provision in this Consent Judgment: (1) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to require Defendant to perform any additional response activity at the Site; and (2) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to reimburse Plaintiffs for response costs incurred by the State of Michigan relating to the Site. Plaintiffs' rights in D.1. and D.2. apply if and only

if the following conditions are met:

1. For proceedings prior to Plaintiffs' certification of completion of the Remedial Action concerning the Site,
   a. conditions at the Site, previously unknown to the Plaintiffs, are discovered after the entry of this Consent Judgment, or new information previously unknown to Plaintiffs is received after the effective date of the Consent Judgment; and
   b. these previously unknown conditions indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment; and
2. For proceedings subsequent to Plaintiffs' certification of completion of the Remedial Action concerning the Site,
   a. conditions at the Site, previously unknown to the Plaintiffs, are discovered or new information previously unknown to Plaintiffs is received after the certification of completion by Plaintiffs; and

b. these previously unknown conditions indicate that the remedial action is not protective of the public health, safety, welfare, and the environment.

F. Nothing in this Consent Judgment shall in any manner restrict or limit the nature or scope of response actions that may be taken by Plaintiffs in fulfilling their responsibilities under federal and state law, and this Consent Judgment does not release, waive, limit, or impair in any manner the claims, rights, remedies, or defenses of Plaintiffs against a person or entity not a party to this Consent Judgment.

G. Except as expressly provided in this Consent Judgment, Plaintiffs reserve all other rights and defenses that they may have, and this Consent Judgment is without prejudice, and shall not be construed to waive, estop, or otherwise diminish Plaintiffs' right to seek other relief with respect to all matters other than Covered Matters.

XIX. DEFENDANT'S COVENANT NOT TO SUE AND RESERVATION OF RIGHTS

A. Defendant hereby covenants not to sue and agrees not to assert any claim or cause of action against Plaintiffs or any other agency of the State of Michigan with respect to environmental contamination at the Site or response activities relating to the Site arising from this Consent Judgment.

B. Notwithstanding any other provision in this Consent Judgment, for matters that are not Covered Matters as defined in Section XVIII.E., or in the event that Plaintiffs institute proceedings as allowed under Section XVIII.E., Defendant reserves all other rights, defenses, or counterclaims that it may have with respect to such matters and this Consent Judgment is without prejudice, and shall not be construed to waive, estop, or otherwise diminish Defendant's right to seek other relief and to assert any other rights and defenses with respect to such other matters.

C. Nothing in this Consent Judgment shall in any way impair Defendant's rights, claims, or defenses with respect to any person not a party to this Consent Judgment.

XX. INDEMNIFICATION AND INSURANCE

A. Defendant shall indemnify and save and hold harmless the State of Michigan and its departments, agencies, officials, agents, employees, contractors, and representatives from any and all claims or causes of action arising from, or on account of, acts or omissions of Defendant, its officers, employees, agents, and any persons acting on its behalf or under its control in carrying out Remedial Action pursuant to this Consent Judgment. Plaintiffs shall not be held out as a party to any contract entered into by or on behalf of Defendant in carrying out

activities pursuant to this Consent Judgment. Neither the Defendant nor any contractor shall be considered an agent of Plaintiffs. Defendant shall not indemnify or save and hold harmless Plaintiffs from their own negligence pursuant to this paragraph.

B. Prior to commencing any Remedial Action on the Gelman Property, Defendant shall secure, and shall maintain for the duration of the Remedial Action, comprehensive general liability insurance with limits of $1,000,000.00, combined single limit, naming as an additional insured the State of Michigan. If Defendant demonstrates by evidence satisfactory to Plaintiffs that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then with respect to that contractor or subcontractor, Defendant need provide only that portion, if any, of the insurance described above that is not maintained by the contractor or subcontractor.

XXI. RECORD RETENTION

Defendant, Plaintiffs, and their representatives, consultants, and contractors shall preserve and retain, during the pendency of this Consent Judgment and for a period of ten years after its termination, all records, sampling or test results, charts, and other documents that are maintained or

generated pursuant to any requirement of this Consent Judgment, including, but not limited to, documents reflecting the results of any sampling or tests or other data or information generated or acquired by Plaintiffs or Defendant, or on their behalf, with respect to the implementation of this Consent Judgment. After the ten year period of document retention, the Defendant and its successors shall notify Plaintiffs, in writing, at least 90 days prior to the destruction of such documents or records, and upon request, the Defendant and/or its successor shall relinquish custody of all records and documents to Plaintiffs.

XXII. ACCESS TO INFORMATION

Upon request, Plaintiffs and Defendant shall provide to the requesting Party copies of or access to all nonprivileged documents and information within their possession and/or control or that of their employees, contractors, agents, or representatives, relating to activities at the Site or to the implementation of this Consent Judgment, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Remedial Action. Upon request, Defendant shall also make available to Plaintiffs, their employees, contractors, agents, or representatives with knowledge of relevant facts concerning the performance of the Remedial Action. The

Plaintiffs shall treat as confidential all documents provided to Plaintiffs by the Defendant marked "confidential" or "proprietary."

XXIII. NOTICES

Whenever under the terms of this Consent Judgment notice is required to be given or a report, sampling data, analysis, or other document is required to be forwarded by one Party to the other, such notice or document shall be directed to the following individuals at the specified addresses or at such other address as may subsequently be designated in writing:

For Plaintiffs:

Leonard Lipinski
Project Manager
Michigan Deptartment
of Natural Resources
Environmental Response Division
301 East Louis Glick Highway
Jackson, MI 49201

For Defendants:

James Fahrner
Vice President
Gelman Sciences, Inc.
600 South Wagner Road
Ann Arbor, MI 48106

and

David H. Fink
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334

Any party may substitute for those designated to receive such notices by providing prior written notice to the other parties.

XXIV. MODIFICATION

This Consent Judgment may not be modified unless such modification is in writing, signed by all Parties, and approved and entered by the Court. Remedial Plans, work plans, or other submissions made pursuant to this Consent Judgment may be modified by mutual agreement of the Parties.

XXV. CERTIFICATION AND TERMINATION

A. When Defendant determines that it has completed all Remedial Action required by this Consent Judgment, Defendant shall submit to the MDNR a Notification of Completion and a draft final report. The draft final report must summarize all Remedial Action performed under this Consent Judgment and the performance levels achieved. The draft final report shall include or refer to any supporting documentation.

B. Upon receipt of the Notification of Completion, the MDNR will review the Notification of Completion and the accompanying draft final report, any supporting documentation, and the actual Remedial Action performed pursuant to this Consent Judgment. After conducting this review, and not later than three months after receipt of the Notification of Completion, the MDNR shall issue a Certificate of Completion upon a determination by the MDNR that Defendant has completed satisfactorily all requirements of this Consent Decree, including, but not limited

to, completion of all Remedial Action, achievement of all termination and treatment standards required by this Consent Judgment, compliance with all terms and conditions of this Consent Judgment, and payment of any and all stipulated penalties owed to Plaintiffs. If the MDNR does not respond to the Notification of Completion within three months after receipt of the Notification of Completion, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. This Consent Judgment shall terminate upon motion and order of this Court after issuance of the Certificate of Completion. Upon issuance, the Certificate of Completion may be recorded.

XXVI. RELATED SETTLEMENT

The Parties' agreement to be bound by this Consent Judgment is contingent upon the stipulation by the Parties to, and the entry by the Court of, the proposed Consent Judgment in the related case State of Michigan v Gelman Sciences, Inc. (E.D. Mich. No. 90-CV-72946-DT), a copy of which is attached hereto as Attachment F. In the event that the related Consent Judgment in Michigan v Gelman Sciences, Inc. is not entered, this Consent Judgment shall be without force and effect.

XXVII. EFFECTIVE DATE

The effective date of this Consent Judgment shall be the date upon which this Consent Judgment is entered by the Court.

XXVIII. SEVERABILITY

The provisions of this Consent Judgment shall be severable. Should any provision be declared by a court of competent jurisdiction to be inconsistent with federal or state law, and therefore unenforceable, the remaining provisions of this Consent Judgment shall remain in full force and effect.

XXIX. SIGNATORIES

Each undersigned representative of a Party to this Consent Judgment certifies that he or she is fully authorized by the Party to enter into this Consent Judgment and to legally bind such Party to the respective terms and conditions of this Consent Judgment.

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

FRANK J. KELLEY
Attorney General for
the State of Michigan
Attorney for Plaintiffs

Robert P. Reichel

A. Michael Leffler (P24254)
Robert P. Reichel (P31878)
Assistant Attorneys General
Environmental Protection Division
P.O. Box 30212
Lansing, MI 48909
Telephone: (517) 373-7780

Dated: 10/23/92

DEFENDANT

GELMAN SCIENCES, INC.

Approved as to form:
Cooper, Fink & Zausmer, P.C.
Attorneys for Defendant
Gelman Sciences, Inc.

David H. Fink (P28235)
Alan D. Wasserman (P39509)
Thomas A. Biscup (P40380)
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334

Dated: 10/16/92

IT IS SO ORDERED AND ADJUDGED this _____ day of OCT 26 1992 _____, 1992.

HONORABLE PATRICK J. CONLIN
Circuit Court Judge

A TRUE COPY

EXHIBIT C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

FRANK J. KELLEY, Attorney General
for the State of Michigan, ex rel,
MICHIGAN NATURAL RESOURCES COMMISSION,
MICHIGAN WATER RESOURCES COMMISSION,
and MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

v

GELMAN SCIENCES, INC.,
a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable ~~Patrick J. Conlin~~

Robert P. Reichel (P31878)
Assistant Attorney General
Natural Resources Division
Knapps Office Centre
300 South Washington
Suite 530
Lansing, MI 48913
Telephone: (517) 335-1488
Attorney for Plaintiffs

David H. Fink (P28235)
Alan D. Wasserman (P39509)
Cooper, Fink & Zausmer, P.C.
31700 Middlebelt Road
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Farmington Hills, MI 48018
Telephone: (313) 851-4111
Attorneys for Defendant

AMENDMENT TO CONSENT JUDGMENT

A Consent Judgment was entered in this case on October 26, 1992. The Consent Judgment requires Defendant, Gelman Sciences, Inc., to implement various remedial actions to address environmental contamination in the vicinity of Defendant's property in Scio Township, subject to the approval of the Michigan Department of Natural Resources ("MDNR").

Since the entry of the Consent Judgment, Executive Order 1995-18 reorganized the MDNR and transferred the MDNR functions relevant to this action to a new Michigan Department of Environmental Quality ("MDEQ").

Since the entry of the Consent Judgment, state environmental laws relevant to this action, including the former Michigan Environmental Response Act, 1982 PA 307, as amended, have been recodified and amended as Part 201 of the Natural Resources and Environmental Protection Act ("NREPA"), 1994 PA 451, as amended, MCL 324.20101 et seq. Those amendments have changed cleanup criteria, MCL 324.20120a, and, in MCL 324.20102a, required the MDEQ to approve requests by persons implementing response activities to change plans for such response activity to be consistent with the new cleanup criteria.

Defendant has requested the MDEQ to approve changes in the Remedial Action Plan attached to the Consent Judgment. The MDEQ has agreed that certain changes to the Remedial Action Plan are appropriate.

The Parties have agreed that it is appropriate to establish schedules for submittal and completion of certain remaining response activities at the site.

THEREFORE, the Parties agree to this Amendment to the Consent Judgment ("Amendment") and such Amendment is ordered, adjudged, and decreed as follows:

FIRST, modify Sections III.G, H, and N to read as follows:

G. "Groundwater Contamination" or "Groundwater Contaminant" shall mean 1,4-dioxane in groundwater at a concentration in excess of 77 micrograms per liter ("ug/l") as determined by the sampling and analytical method(s) described in Attachment B.

H. "MDEQ" shall mean the Michigan Department of Environmental Quality, the successor to the Michigan Department of Natural Resources ("MDNR") and to the Water Resources Commission. All references to the "MDNR" or to the "Water Resources Commission" in this Consent Judgment shall be deemed to refer to the MDEQ.

N. "Soil Contamination" or "Soil Contaminant" shall mean 1,4-dioxane in soil at a concentration in excess of 1500 ug/kg as determined by the sampling and analytical method(s) described in Attachment C or other higher concentration limit derived by means consistent with Mich Admin Code R 299.5711(2) or MCL 324.20120a.

SECOND, modify Section V.A.5 to read as follows:

5. Treatment and Disposal. Groundwater extracted by the purge wells(s) in the Evergreen System shall be treated as necessary using ultraviolet light and oxidizing agents or such other method as approved by the MDEQ and disposed of in accordance with the Evergreen System design approved by the MDNR or MDEQ. The options for such disposal are the following:

THIRD, insert new Section V.A.7 to read as follows:

7. On August 15, 1996, Defendant submitted to the MDEQ a written report based upon groundwater monitoring data and modeling, evaluating whether the existing Evergreen System is intercepting and containing the leading edge of the plume of groundwater contamination in the vicinity of the Evergreen Subdivision area. Unless that report demonstrates to the MDEQ's satisfaction that the existing Evergreen System is meeting that objective, Defendant shall, at MDEQ's written request, install additional monitoring and/or purge wells as needed to ensure that the objectives of the Evergreen System are achieved.

FOURTH, modify Section V.B.1 to read as follows:

1. Objectives. For purposes of the Consent Judgment, the "Core Area" means that portion of the Unit C_3 aquifer containing 1,4-dioxane in a concentration exceeding 500 ug/l. The objectives of the Core System are to intercept and contain the migration of groundwater from the Core Area and remove contaminated

groundwater from the Core Area until the termination criterion for the Core System in Section V.D.1 is satisfied.

FIFTH, modify the last clause of Section V.B.2 to read as follows:

(c) the discharge level for 1,4-dioxane in groundwater to be reinjected in the Core Area shall be established based upon performance of further tests by Defendant on the treatment technology and shall, in any event, be less than 77 ug/l.

SIXTH, modify Section V.B.4 to read as follows:

4. Surface Water Discharge Alternative. Defendant shall, not later than September 30, 1996, submit to MDEQ for review and approval Defendant's design for the Core System, a schedule for implementing the design, an operation and maintenance plan for the System, and an effectiveness monitoring plan for the System. The Core System shall include groundwater purge wells as necessary to meet the objectives described in Section V.B.1. The design shall include, at a minimum, three purge wells.

Purged groundwater from the Core Area System shall be treated with ultraviolet light and oxidizing agent(s) or such other method approved by the MDEQ to reduce 1,4-dioxane concentrations to the level as required by NPDES Permit No. MI-008453, as amended or reissued. Discharge to the Honey Creek tributary shall be in accordance with NPDES Permit No. MI-008453, as amended or reissued.

SEVENTH, modify Section V.B.5 to read as follows:

5. Implementation of Program. Upon approval by the MDEQ, Defendant shall install the Core System according to the approved schedule and thereafter continuously operate and maintain the System according to the approved plans until Defendant is authorized to terminate operation pursuant to Section V.D. Defendant may thereafter, and at its option, continue purge operations as provided in this Section.

In any event, Defendant shall, beginning not later than December 28, 1996, continuously operate groundwater purge wells in the Core Area System at the rate of at least 65 gallons per minute until termination is authorized pursuant to this Judgment. This initial, minimum purging rate requirement is intended solely as a means of assuring progress toward remediation of the Core Area by a date certain and shall not be construed as an indication that the rate is sufficient to meet the objectives of the Core System.

EIGHTH, add a new Section V.B.7 to read as follows:

7. Modification of Program. Defendant may, at its option, propose to MDEQ for review and approval modification(s) to the Core System, provided such modification(s) will satisfy the objectives of the Consent Judgment as defined in Section V.B.1. Any proposed modification involving groundwater reinjection shall satisfy the requirements of Section V.B.3. If approved by the MDEQ, the modification(s) shall be implemented according to MDEQ approval plan(s) and schedule(s).

NINTH, modify Section V.C.3 to read as follows:

3. Remedial Investigation. No later than April 28, 1997, Defendant shall submit to the MDEQ for its review and approval a revised work plan for remedial investigation and design of the Western System and a schedule for implementing the revised work plan. The revised work plan shall include plans for installation of a series of test/purge wells, conduct of an aquifer performance test(s), groundwater monitoring, an operations and maintenance plan, and system design.

TENTH, modify Section V.D.1 as follows:

Change 3 ug/l to 77 ug/l and change 60 ug/l to 77 ug/l.

ELEVENTH, modify Section V.E.1 to read as follows:

1. For systems with a termination criterion of 77 ug/l, for a period of five (5) years after cessation of operation of any purge well, Defendant shall continue monitoring the purge well and/or associated monitoring wells, in accordance with the approved monitoring plan, to verify that the concentration of 1,4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify MDEQ and shall collect a second sample within fourteen (14) days of such finding. If the second sample confirms the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall restart the associated purge well system.

TWELFTH, add a new Section V.F to read as follows:

F. Minimum Monitoring. In the event that any groundwater system provided for in Section V is not operating for any reason other than compliance with the termination criteria of Section V.D, Defendant shall, not later than November 30, 1996, and at least semi-annually thereafter, collect and analyze for 1,4-dioxane samples from groundwater monitoring wells designated MW-15D, MW-16, MW-21, MW-28, MW-40S, MW-40D, MW-41S, MW-41D, and MW-43, and report the results to MDEQ. Such minimum monitoring shall not obligate Defendant to duplicate monitoring required under any MDEQ-approved monitoring plan for a groundwater system.

THIRTEENTH, modify the first paragraph of Section VI to read as follows:

Defendant shall design, install, operate, and maintain the systems described below to control, remove, and treat (as required) soil contamination at the GSI Property. The overall objective of these systems shall be to: (a) prevent the migration of 1,4-dioxane from contaminated soils into any aquifer in concentrations that cause groundwater contamination; (b) prevent venting of groundwater contamination into Honey Creek Tributary of 1,4-dioxane in quantities which cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2000 ug/l; and (c) prevent venting of groundwater contamination to Third Sister Lake in quantities which cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Lake to exceed 2000 ug/l. Defendant also shall implement a monitoring plan to verify the effectiveness of these systems.

FOURTEENTH, modify Section VI.A.1 to read as follows:

1. Objectives. The objectives of this System are to: (a) remove contaminated groundwater from the Marshy Area located north of former Ponds I and II; (b) reduce the migration of contaminated groundwater from the Marshy Area into other aquifers; and (c) prevent the discharge of contaminated groundwater from the Marshy Area into the Honey Creek Tributary in quantities which cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2000 ug/l.

FIFTEENTH, modify Sections VI.A.2 and VI.A.4 to read as follows:

2. Pilot Test and Design. No later than December 28, 1996, Defendant shall begin the Extended Pilot Test according to the plan conditionally approved by MDEQ on July 26, 1995. No later than March 1, 1998, Defendant shall submit to MDEQ for review and approval the Pilot Test Report, final design, and effectiveness monitoring plan. No later than June 13, 1998, Defendant shall submit to MDEQ for review and approval the operation and maintenance plan.

4. Installation and Operation. Upon approval of the final design by MDEQ and in any event not later than September 27, 1998, Defendant shall complete installation of the system according to the approved design and begin operation. Defendant shall thereafter continuously operate the system according to the approved plans until it is authorized to shut down the system pursuant to Section VI.D of the Consent Judgment.

SIXTEENTH. modify Section VI.B.1 to read as follows:

1. Objectives. The objectives of this program shall be to meet the overall objective of Section VI upon completion of the program and to prevent the discharge of groundwater contamination into Third Sister Lake in quantities which cause the concentration of 1,4-dioxane at the groundwater-surface water interface of Third Sister Lake to exceed 2000 ug/l.

SEVENTEENTH. modify Section VI.B.3 by striking the paragraph.

EIGHTEENTH. modify Section VI.C.2 to read as follows:

2. Defendant shall, no later than November 30, 1996, submit to MDEQ for review and approval a revised soils remediation plan for addressing identified areas of soil contamination. The areas to be addressed include the burn pit; the former Pond I area; the former Pond II area; the form Lift Station area; and Pond III. The plan submitted by Defendant shall be consistent with cleanup criteria as provided in MCL 324.20120a.

The Defendant's proposal must attain the overall objectives of Section VI.

NINETEENTH. modify Section VI.D.1.a to read as follows:

(a) Except as otherwise provided pursuant to Section VI.D.3, Defendant shall continue to operate the Marshy Area System until six (6) consecutive monthly tests of samples from the purge well(s) and associated monitoring well(s) fail to detect the

presence of 1,4-dioxane in groundwater at a concentration at or above 500 ug/l. This System shall also be subject to the same post-shutdown monitoring and restart requirements as those Systems described in Section V.E.

TWENTIETH, modify Section VI.D.1.b by deleting the paragraph.

TWENTY-FIRST, modify the last clause of Section VI.D. 2 to read as follows:

2. ... that the concentration of 1,4-dioxane in soils in the area in question does not exceed 1500 ug/kg or other higher concentration derived by means consistent with Mich Admin Code R 299.5711(2) or MCL 324.20120a.

TWENTY-SECOND, modify Section IX.B as follows:

Modify the third sentence to read: "For purposes of this Paragraph, 'best efforts' includes, but is not limited to, seeking judicial assistance to secure such access pursuant to MCL 324.20135a." Delete the remainder of this subsection.

The Parties to the Amendment agree that no changes in the Consent Judgment other than those specified above are intended by this Amendment, that all provisions of the Consent Judgment remain in force to the extent they are not specifically and affirmatively altered by this Amendment, and that -- unless expressly stated otherwise -- all provisions of the Consent Judgment not altered by this Amendment apply to it.

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

Russell J. Harding
Director
Michigan Department of
Environmental Quality

Dated: 9/12/96

Robert P. Reichel

Dated: 8/30/96

A. Michael Leffler (P24254)
Robert P. Reichel (P31878)
Assistant Attorneys General
Natural Resources Division
Knapps Office Centre
300 South Washington
Suite 530
Lansing, MI 48913
Telephone: (517) 335-1488
Attorneys for Plaintiffs

DEFENDANT

GELMAN SCIENCES, INC.

Approved as to form:
Cooper, Fink & Zausmer, P.C.
Attorneys for Defendant
Gelman Sciences, Inc.

Dated: September 3, 1996

David H. Fink (P28235)
Alan D. Wasserman (P39509)
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48018
Telephone: (313) 851-4111

IT IS SO ORDERED AND ADJUDGED this 23 day of September, 1996.

/S/ MELINDA MORRIS

HONORABLE PATRICK J. CONLIN
Circuit Court Judge

cases/9206322 amendment

EXHIBIT D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JENNIFER M. GRANHOLM, Attorney General for the State of Michigan, ex rel, MICHIGAN NATURAL RESOURCES COMMISSION, MICHIGAN WATER RESOURCES COMMISSION, and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs,

v

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable Melinda Morris

SECOND AMENDMENT TO CONSENT JUDGMENT

A Consent Judgment was entered in this case on October 26, 1992. The Consent Judgment requires Defendant, Gelman Sciences, Inc., to implement various remedial actions to address environmental contamination in the vicinity of Defendant's property in Scio Township, subject to the approval of the Michigan Department of Environmental Quality ("MDEQ").

The Consent Judgment was amended by stipulation of the parties and Order of the Court on September 23, 1996 ("First Amendment of Consent Judgment").

In February 1997, Defendant Gelman Sciences, Inc.'s assets and liabilities were purchased by Pall Acquisitions, Inc., and Defendant is now known as Pall/Gelman Sciences, Inc. ("Pall/Gelman").

Defendant has requested the MDEQ to approve two new alternative disposal methods for the purged groundwater from the Evergreen Subdivision Area System.

The first alternative would allow pumping of the purged groundwater from the Evergreen Subdivision Area through an underground pipeline to the Gelman facility at 600 Wagner Road for treatment in the Core Area Treatment System and disposal through the disposal method being employed by the Core Area System at that time. The second alternative would allow pumping water, already treated in the Evergreen Treatment System, to the Core for disposal through the disposal method being employed by the Core Area System at that time.

THEREFORE, the Parties agree to this Second Amendment to the Consent Judgment ("Second Amendment") and such Second Amendment is ordered, adjudged, and decreed as follows:

FIRST, modify Section V.A.5.c. to read as follows:

c. Storm Drain Discharge. Use of the storm drain is conditioned upon issuance of an NPDES permit and approval of such use by the City of Ann Arbor and the Allen Creek Drainage District. Discharge to the Huron River via the Ann Arbor stormwater system shall be in accordance with the NPDES permit and conditions required by the City and the Drainage District. If the storm drain is to be used for disposal, no later than twenty-one (21) days after permission is granted by the City and the Drainage District to use the storm drain for continuous disposal of purged groundwater, Defendant shall submit to MDEQ, the City of Ann Arbor, and the Drainage District for their review and approval a protocol under which the purge system shall be temporarily shut down: (i) for maintenance of the storm drain; and (ii) during storm events to assure that the stormwater system retains adequate capacity to handle run-off created during such events. The purge system shall be operated in accordance with the approved protocol for temporary shutdown.

SECOND, add a new Section V.A.5.d. to read as follows:

d. Pipeline To Core Area System.

(i) Installation of Pipeline. Installation of a pipeline to the Core Area

System is conditioned upon approval of such installation by the MDEQ. If the pipeline is proposed to be installed on public property, the pipeline installation is conditioned upon approval of such installation by the City of Ann Arbor, Scio Township, and the Washtenaw County Road Commission, if required by statute or ordinance, or by Order of the Court pursuant to the authority under MCLA §324.20135a. Defendant shall design the pipeline in compliance with all state requirements and install the pipeline with monitoring devices to detect any leaks. If leaks are detected, the system will automatically shut down and notify an operator of the condition. In the event that any leakage is detected, Defendant shall take any measures necessary to repair any leaks and perform any remediation that may be necessary. To reduce the possibility of accidental damage to the pipeline during any future construction, the location of the pipeline will be registered with MISS DIG System, Inc.

(ii) Transportation of Untreated Groundwater. Defendant's option to use a pipeline to transport untreated groundwater extracted from the Evergreen System well(s) to the Core Area System for treatment and disposal is also subject to the following conditions. Before using such a pipeline for that purpose, Defendant shall submit and receive MDEQ approval of a written demonstration that the Core Area System has continuously operated in full compliance with the requirements of this Consent Judgment and applicable permit(s) in the immediately preceding six (6) months and that the Core Area System has sufficient additional treatment capacity to reliably treat, in full compliance with this Consent Judgment and applicable permit(s), all the additional groundwater Defendant proposes to transmit from the Evergreen System through the pipeline. In addition, Defendant shall submit and receive MDEQ approval of a plan for this use of the pipeline.

(iii) Transportation of Treated Groundwater. Defendant's option to use a pipeline to transport groundwater, already treated by the Evergreen Treatment System, to the Core Area for disposal through the NPDES permit discharge point

into the Honey Creek, is subject to the following conditions. Before using such a pipeline for that purpose, Defendant shall submit and obtain MDEQ approval of a written demonstration that sufficient additional discharge capacity exists to handle the combined discharge flow from the Core Area System and the anticipated discharge flow from the Evergreen System. In addition, Defendant shall submit and obtain MDEQ approval of a plan for this use of the pipeline. Any treated flows from the Evergreen Treatment System being discharged at the Core System shall meet the current NPDES permit limits for the Honey Creek discharge.

(iv) Nothing in this subsection shall relieve Defendant of its obligations to: (a) continuously operate the Evergreen System and to properly treat and dispose of contaminated groundwater in compliance with the Consent Judgment and applicable permit(s), using one or more of the other options for disposal, as necessary; and (b) continuously operate the Core Area System to properly treat and dispose of contaminated groundwater in compliance with the Consent Judgment and applicable permit(s).

The Parties to the Second Amendment agree that no changes in the Consent Judgment other than those specified above are intended by this Second Amendment. The Parties further agree that entry of this Second Amendment shall not constitute a waiver by either party of its respective legal position regarding the applicability of the requirements of Part 201 of the Natural Resources and Environmental Protection Act to the MDEQ's review, consideration and approval of response activities to be performed by Defendant pursuant to the Consent Judgment.

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

Dated: 10/20/99

Russell J. Harding
Director
Michigan Department of
Environmental Quality

Approved as to form:
Assistant Attorneys General
Natural Resources Division
Attorneys for Plaintiff

Dated: 10-19-99

A. Michael Leffler (P24254)
Robert P. Reichel (P31878)
Assistant Attorneys General
Natural Resources Division
Knapp's Office Centre, Suite 530
300 South Washington Square
Lansing, MI 48913
(517) 335-1488
Attorneys for Plaintiffs

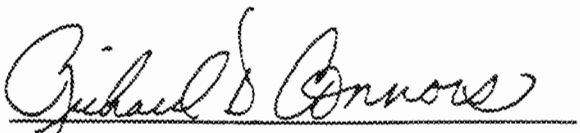
IT IS SO STIPULATED AND AGREED:

DEFENDANT

Dated: 9-13-99

Mary Ann Bartlett, Secretary
PALL/GELMAN SCIENCES, INC.

Approved as to form:
Plunkett & Cooney, P.C.
Attorneys for Defendant
Gelman Sciences, Inc.



Dated: 9-7-99

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IT IS SO ORDERED AND ADJUDGED this 20 day of October 1999.

S/MELINDA MORRIS

HONORABLE MELINDA MORRIS
Circuit Court Judge

8901467/Gelman/Second Amend-clean

EXHIBIT E

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

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, ex rel, MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

v

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable Donald E. Shelton

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THIRD AMENDMENT TO CONSENT JUDGMENT

A Consent Judgment was entered in this case on October 26, 1992. The Consent Judgment requires Defendant, Gelman Sciences, Inc., to implement various response activities to address environmental contamination in the vicinity of Defendant's property in Scio Township, subject to the approval of the Michigan Department of Environmental Quality ("MDEQ").

The Consent Judgment was amended by stipulation of the parties and Order of the Court on September 23, 1996 ("Amendment to Consent Judgment") and October 20, 1999 ("Second Amendment to Consent Judgment").

The Court has also supplemented the Consent Judgment with several cleanup related orders, based on information about the nature and extent of contamination acquired after the Consent Judgment and the Amendments were entered, including, Remediation and Enforcement Order (REO) dated July 17, 2000, the Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer ("Unit E Order"), dated December 17, 2004, and the Order Prohibiting Groundwater Use, dated May 17, 2005.

Since entry of the Second Amendment to Consent Judgment, Executive Order No. 2009-45 was signed and effective January 2010, the MDEQ was abolished as an agency of the State, the Michigan Department of Natural Resources (MDNRE) was created, and all of the authority, powers, duties, functions, responsibilities, and personnel relevant to this action were transferred to the MDNRE.

THEREFORE, the Parties agree to this Third Amendment to the Consent Judgment ("Third Amendment") and such Third Amendment is ordered, adjudged, and decreed as follows:

FIRST, modify Sections III.F G, H, J, and N to read as follows:

F. "GSI Property" shall mean the real property described in Attachment A, currently owned and operated by Defendant in Scio Township, Michigan.

G. "Groundwater Contamination" or "Groundwater Contaminant" shall mean 1,4-dioxane in groundwater at a concentration in excess of 85 micrograms per liter ("ug/l") (subject to approval by the Court of the application of a new criteria) determined by the sampling and

analytical method(s) described in Attachment B to this Consent Judgment, subject to review and approval by MDNRE.

H. "MDNRE" shall mean the Michigan Department of Natural Resources and Environment, the successor to the Michigan Department of Environmental Quality ("MDEQ"), the Michigan Department of Natural Resources ("MDNR"), and to the Water Resources Commission. All references to the "MDEQ," "MDNR," or to the "Water Resources Commission" in this Consent Judgment, as amended, shall be deemed to refer to the MDNRE or any successor agency.

J. "Plaintiffs" shall mean the Attorney General of the State of Michigan, ex rel, Michigan Department of Natural Resources and Environment.

N. "Soil Contamination" or "Soil Contaminant" shall mean 1,4-dioxane in soil at a concentration in excess of 1700 ug/kg as determined by the sampling and analytical method(s) described in Attachment C, or other higher concentration limit derived by means consistent with Mich Admin Code R 299.5718 or MCL 324.20120a.

SECOND, delete Section III.P and insert new Sections III.P., Q., R., S., T, and U.:

P. "Prohibition Zone Order" shall mean the Court's Order Prohibiting Groundwater Use, dated May 17, 2005, which established a judicial institutional control.

Q. "Prohibition Zone" shall mean the area that is subject to the institutional control established by the Prohibition Zone Order.

R. "Expanded Prohibition Zone" shall mean the area that shall be subject to the institutional control established by the Prohibition Zone Order pursuant to this Third Amendment to the Consent Judgment. A map depicting the Prohibition Zone and the Expanded Prohibition Zone is attached as Attachment E.

S. "Unit E Order" shall mean the Court's Opinion and Order Regarding Remediation of the Contamination of the Unit E Aquifer dated December 17, 2004.

T. "Eastern Area" shall mean the part of the Site that is located east of Wagner Road and the areas encompassed by the Prohibition Zone and Expanded Prohibition Zone.

U. "Western Area" shall mean that part of the Site located west of Wagner Road, excepting the Little Lake Area System described in Section V.C.

THIRD, modify the first paragraph of Section V to read as follows:

Defendant shall design, install, operate, and maintain the systems described below. The objectives of these systems shall be to extract the contaminated groundwater from the aquifers at designated locations for treatment (as required) and proper disposal to the extent necessary to prevent the plumes of groundwater contamination emanating from the GSI Property from expanding beyond the current boundaries of such plumes, except into and within the Prohibition Zone and Expanded Prohibition Zone (subject to paragraph 9 of the Prohibition Zone Order, as modified by Section V.A.2.b., of this Consent Judgment with regard to the northern boundaries of the Prohibition Zone and Expanded Prohibition Zone), as described below. Defendant also shall implement a monitoring program to verify the effectiveness of these systems.

FOURTH, modify Section V.A. to read as follows:

A. Eastern Area System

1. Objectives. The remedial objectives of the Eastern Area System ("Eastern Area Objectives") shall be:

a. Maple Road Containment Objective. The current Unit E objective set forth in the Unit E Order of preventing contaminant concentrations above the groundwater-surface water interface criterion of 2,800 ug/l (subject to approval by the Court of

the application of a new criteria) from migrating east of Maple Road shall apply to the Eastern Area System, regardless of the aquifer designation, or depth of groundwater or groundwater contamination.

b. Prohibition Zone Containment Objective. Use of groundwater in the Prohibition Zone and Expanded Prohibition Zone will be governed by the Prohibition Zone Order regardless of the aquifer designation or the depth of the groundwater or groundwater contamination. MDNRE-approved legal notice of the proposed Prohibition Zone expansion shall be provided at Defendant's sole expense.

2. Eastern Area Response Activities. The following response actions shall be implemented:

a. Maple Road Extraction. Defendant shall continue to operate TW-19 as necessary to meet the Maple Road containment objective.

b. Verification Plan. Defendant shall implement its June 3, 2009 Plan for Verifying the Effectiveness of Proposed Remedial Obligations ("Verification Plan"), as modified by this Sections V.A.2.b. and c., to ensure that any potential migration of groundwater contamination outside of the Expanded Prohibition Zone is detected before such migration occurs. Defendant shall install four additional monitoring well clusters in the Evergreen Subdivision area at the approximate locations indicated on the map attached as Attachment F. If concentrations of 1,4-dioxane in one or more of the three new monitoring wells installed at the perimeter of the Expanded Prohibition Zone or the existing MW-120s, MW-120d, MW-121s, and MW-121d exceed 20 ug/l, Defendant shall conduct a hydrogeological investigation to determine the fate of any groundwater contamination in this area as described in the Verification Plan. This investigation will be conducted pursuant to a MDNRE-approved work plan. The

work plan shall be submitted within 45 days after the first exceedence. If concentrations in any of the perimeter wells exceed 85 ug/l (or any other criteria approved by the Court) or if the Defendant's investigation or monitoring indicates that the plume of groundwater contamination will migrate outside of the Prohibition Zone or Expanded Prohibition Zone, Defendant shall conduct a Feasibility Study of available options for addressing the situation pursuant to a MDNRE-approved format. The Feasibility Study shall be submitted within 90 days after a determination by the Defendant or a written notification by the MDNRE that one is required. This Feasibility Study shall include options other than simply expanding the Prohibition Zone or Expanded Prohibition Zone, although that option may be included in the analysis. The parties agree that any further expansion of the northern boundaries of the Prohibition Zone or Expanded Prohibition Zone to address migration of groundwater contamination outside of the Prohibition Zone or Expanded Prohibition Zone should be avoided, unless there are compelling reasons to do so. The Defendant's Feasibility Study shall identify a preferred alternative. The MDNRE shall review the Feasibility Study and either approve the Defendant's preferred alternative or submit changes as provided in Section X of the Consent Judgment. The Defendant shall implement the approved alternative, or any changes submitted by the MDNRE unless the Defendant initiates Dispute Resolution under Section XVI of the Consent Judgment.

c. Additional Evergreen Monitoring Wells. Defendant shall install the new well clusters described in Section V.A.2.b. according to a schedule to be approved by the MDNRE . Each of the new well clusters will include two to three additional monitoring wells, and the determination of the number of wells shall be based on the Parties' evaluation of the geologic conditions present at each location, consistent with past practice. The easternmost of these well clusters shall be installed last and the data obtained from the other newly installed

well clusters and existing wells will be used to determine the location of the easternmost well cluster. The easternmost well cluster will be installed approximately one year after the other well clusters are installed and after the Parties have been able to evaluate at least four quarters of data from the new wells and existing well, unless the Parties agree that it should be installed sooner.

d. Drilling Techniques. Borings for new wells installed pursuant to Section V.A.2. shall be drilled to bedrock unless a different depth is approved by MDNRE or if conditions make such installation impracticable. The MDNRE reserves the right to require alternate drilling techniques to reach bedrock if standard methods are not able to do so. If the Defendant believes that drilling one or more of these wells to bedrock is not practical due to the geologic conditions encountered and/or that such conditions do not warrant the alternative drilling technique required by the MDNRE, Defendant may initiate dispute resolution under Section XVI of the Consent Judgment. The wells shall be installed using Defendant's current vertical profiling techniques, which are designed to minimize the amount of water introduced during drilling, unless the MDNRE agrees to alternate techniques.

e. Downgradient Investigation. The Defendant shall continue to implement its Downgradient Investigation Work Plan as approved by the MDNRE on February 4, 2005, to track the groundwater contamination as it migrates to ensure any potential migration of groundwater contamination outside of the Prohibition Zone or Expanded Prohibition Zone is detected before such migration occurs.

f. Continued Evergreen Subdivision area Groundwater Extraction as Necessary. The Defendant shall continue to operate the Evergreen Subdivision area extraction wells LB-1 and LB-3 (the "LB Wells") at a combined purge rate of 100 gallons per minute

(gpm), in order to reduce the migration of 1,4-dioxane, until such time as it determines that the Eastern Area cleanup objectives will be met at a reduced extraction rate or without the need to operate these extraction wells. Before significantly reducing or terminating extraction from the LB Wells, the Defendant shall consult with Plaintiffs and provide a written analysis, together with the data that supports its conclusion. MDNRE will review the analysis and data and provide a written response to Defendants within 56 days after receiving Defendant's written analysis and data. If the MDNRE disagrees with the Defendant's decision to reduce or terminate extraction, it may dispute the decision in Court within 15 days of its written response. Within 15 days of the filing of MDNRE's dispute, Defendant may file a response to the petition. The Parties may agree to extend these time frames to facilitate resolution of the dispute. The Defendant shall not significantly reduce or terminate extraction from the LB Wells while MDNRE is reviewing or disputing the Defendant's determination. MDNRE will make all reasonable efforts to have the motion resolved in a reasonable timeframe. If extraction from the LB Wells is terminated either by the agreement of the Parties or an order of the Court, the Defendant shall continue to maintain the LB Wells in an operable condition until such time as the Parties agree (or the Court decides) that the well(s) may be abandoned. Defendant shall abandon the Allison Street (AE-3) extraction well operation upon entry of this Third Amendment.

g. Well Identification. Defendant shall implement the Expanded Prohibition Zone Well Identification Work Plan as approved by MDNRE on February 4, 2011, pursuant to the approved schedule, unless Defendant files a Petition with the Court by March 16, 2011, seeking clarification of the scope of this Court's Prohibition Zone Order.

h. Plugging of Private Water Supply Wells. The Prohibition Zone Order's requirement that Defendant plug and replace any private drinking water wells by connecting those properties to municipal water shall apply to the Expanded Prohibition Zone. Defendant shall also properly plug non-drinking water wells in the Expanded Prohibition Zone unless it petitions the Court to clarify whether the Prohibition Zone Order requires Defendant to plug such wells and the Court determines it does not.

3. Future Inclusion of Triangle Property in the Expanded Prohibition Zone. MDNRE may request that the triangle piece of property located along Dexter/M-14 (Triangle Property) be included in the Expanded Prohibition Zone if the data obtained from the monitoring wells installed pursuant to Section V.A.2.c., above, (specifically, the Wagner Road and Ironwood/Henry monitoring wells) and other nearby wells indicate that the chemical and hydraulic data does not support Defendant's conceptual model regarding groundwater and contaminant flow in the area. Defendant may dispute such request pursuant to Section XVI of this Consent Judgment.

a. If the Triangle Property is later included in the Expanded Prohibition Zone, any further expansion beyond the Triangle Property shall be subject the same Feasibility Study requirements of Section V.A.2.b.

b. If a drinking water supply well is installed on the Triangle Property in the future, Defendant shall take the necessary steps to obtain permission to sample the well on a schedule approved by the MDNRE. Defendant shall monitor such wells on the MDNRE-approved schedule unless or until that property is included in the Expanded Prohibition Zone, at which time, the water supply well(s) shall be addressed as part of the well identification process.

4. Operation and Maintenance. Subject to Section V.A.2.f and V.A.7., Defendant shall operate and maintain the Eastern Area System as necessary to meet the Eastern Area Objectives. Defendant shall continuously operate, as necessary, and maintain the Eastern Area System according to MDNRE-approved operation and maintenance plans until Defendant is authorized to terminate extraction well operations pursuant to SectionV.D.1.a.

5. Treatment and Disposal. Groundwater extracted by the extraction well(s) in the Eastern Area System shall be treated (as necessary) using methods approved by the MDNRE and disposed of using methods approved by the MDNRE, including, but not limited to, the following options:

a. Groundwater Discharge. The purged groundwater shall be treated to reduce 1,4-dioxane concentrations to the level required by the MDNRE, and discharged to groundwaters at locations approved by MDNRE in compliance with a permit or exemption authorizing such discharge.

b. Sanitary Sewer Discharge. Use of the sanitary sewer leading to the Ann Arbor Wastewater Treatment Plant is conditioned upon approval of the City of Ann Arbor. If discharge is made to the sanitary sewer, the Eastern Area System shall be operated and monitored in compliance with the terms and conditions of an Industrial User's Permit from the City of Ann Arbor, and any subsequent written amendment of that permit made by the City of Ann Arbor. The terms and conditions of any such permit and any subsequent amendment shall be directly enforceable by the MDNRE against Defendant as requirements of this Consent Judgment.

c. Storm Drain Discharge. Use of the storm drain is conditioned upon issuance of an NPDES permit and approval of such use by the City of Ann Arbor and the

Allen Creek Drainage District. Discharge to the Huron River via the Ann Arbor stormwater system shall be in accordance with the NPDES Permit and conditions required by the City and the Drainage District. If the storm drain is to be used for disposal, no later than twenty-one (21) days after permission is granted by the City and the Drainage District to use the storm drain for disposal of purged groundwater, Defendant shall submit to MDNRE, the City of Ann Arbor, and the Drainage District for their review and approval, a protocol under which the purge system shall be temporarily shut down: (i) for maintenance of the storm drain and (ii) during storm events to assure that the stormwater system retains adequate capacity to handle run-off created during such events. The purge system shall be operated in accordance with the approved protocol for temporary shutdown.

d. Existing or Additional/Replacement Pipeline to Wagner Road Treatment Facility. Installation of an additional pipeline or a pipeline replacing the existing pipeline to the Wagner Road Treatment Facility is conditioned upon approval of such installation by the MDNRE. If the pipeline is proposed to be installed on public property, the pipeline installation is conditioned upon approval of such installation by the City of Ann Arbor, Scio Township, and the Washtenaw County Road Commission, if required by statute or ordinance, or by Order of the Court pursuant to the authority under MCL 324.20135a. Defendant shall design the pipeline in compliance with all state requirements and install the pipeline with monitoring devices to detect any leaks. If leaks are detected, the system will automatically shut down and notify an operator of the condition. In the event that any leakage is detected, Defendant shall take any measures necessary to repair any leaks and perform any remediation that may be necessary. To reduce the possibility of accidental damage to the pipeline during any future construction, the location of the pipeline will be registered with MISS DIG System, Inc. Nothing

in this subsection shall relieve Defendant of its obligations to properly treat and dispose of contaminated groundwater in compliance with the Consent Judgment and applicable permit(s), using one or more of the other options for disposal, as necessary.

e. Additional Pipeline from Maple Road Extraction Well(s). Installation and operation of a proposed pipeline from the Maple Road Area to Evergreen area is conditioned upon approval of such installation and operation by the MDNRE. If the pipeline is proposed to be installed on public property, the pipeline installation is conditioned upon approval of such installation by the appropriate local authorities, if required by statute or ordinance, or Order of the Court pursuant to the authority under MCL 324.20135a. Defendant shall design any such pipeline in compliance with all state requirements and install it with monitoring devices to detect any leaks. In the event any leakage is detected, Defendant shall take any measures necessary to repair any leaks and perform any remediation that may be necessary. The pipeline shall be registered with the MISS DIG System, Inc., to reduce the possibility of accidental damage to the pipeline. Defendant may operate such pipeline to, among other things, convey groundwater extracted from TW-19 to the Wagner Road treatment systems, where it can be treated and disposed via the Defendant's permitted surface water discharge (capacity permitting).

6. Monitoring Plans. Defendant shall implement a MDNRE-approved monitoring plan for the Eastern Area. The monitoring plans shall include the collection of data to measure the effectiveness of the System in (a) ensuring that any potential migration of groundwater contamination outside of the Prohibition Zone or Expanded Prohibition Zone is detected before such migration occurs; (b) tracking the migration of the groundwater contamination to determine the need for additional investigation to ensure that there are adequate monitoring points to meet objective in Subsection (a) of this Section, including the determination

of the fate of groundwater contamination when and if it reaches the portion of the Huron River that is the easternmost extent of the Prohibition Zone; (c) verifying that concentrations of 1,4-dioxane greater than the groundwater-surface water interface criterion of 2800 ug/l (or any other criterion approved by the Court) does not migrate east of Maple Road; (d) complying with the applicable limitations on the discharge of the purged groundwater; and (e) evaluating capture areas for extraction wells and potential changes in groundwater flow from changes in extraction rates and locations.

To satisfy the objectives of this Section V.A.6, Defendant shall implement the following monitoring plans:

a. The portion of Defendant's Comprehensive Groundwater Monitoring Plan, May 4, 2009, amended June 2, 2009 (ACGMP), relevant to the Eastern Area, upon approval of the MDNRE as provided in Section X. Defendant shall continue to implement the currently approved monitoring plan until MDNRE approves the final ACGMP for the Eastern Area.

b. Defendant's Performance Monitoring Plan for Maple Road, which shall include the existing MW-84d as a monitoring point in lieu of the previously requested additional monitoring well closer to Maple Road, which shall be incorporated into the ACGMP for the Eastern Area.

The monitoring plans shall be continued until terminated pursuant to Section V.E.

7. Wagner Road Extraction. TW-18 and TW-21 (the "Wagner Road Wells") shall be considered part of the Eastern Area System even though they are located just West of Wagner Road. The Defendant shall initially operate the Wagner Road Wells at a combined 200 gallons per minute (gpm) extraction rate (with a minimum extraction rate of 50 gpm for each of

the wells). The Defendant shall continue to operate its Wagner Road Wells in order to reduce the migration of 1,4-dioxane east of Wagner Road at this rate until such time as it determines that the Eastern Area cleanup objectives will be met with a lower combined extraction rate or without the need to operate these wells. Before significantly reducing or terminating extraction from the Wagner Road Wells, Defendant shall consult with Plaintiffs and provide a written analysis, together with the data that supports its conclusion. MDNRE will review the analysis and data and provide a written response to Defendants within 56 days after receiving Defendant's written analysis and data. If the MDNRE disagrees with the Defendant's decision to reduce or terminate extraction, it may dispute the decision in Court within 15 days of the date of its written response. Within 15 days of the filing of MDNRE's dispute, Defendant may file a response to the petition. The Parties may agree to extend these time frames to facilitate resolution of the dispute. The Defendant shall not significantly reduce or terminate the Wagner Road extraction while MDNRE is reviewing or disputing the Defendant's determination. MDNRE will make all reasonable efforts to have the motion resolved in a reasonable timeframe.

8. Options Array for Transmission Line Failure/Inadequate Capacity.

The Defendant has provided the MDNRE with documentation regarding the life expectancy of the deep transmission line and an Options Array (attached as Attachment G). The Options Array describes the various options that may be available if the deep transmission line fails or the 200 gpm capacity of the existing deep transmission line that transports groundwater from the Eastern Area System to the treatment system located on the GSI Property proves to be insufficient to meet the Eastern Area Objectives.

FIFTH, delete the existing Section V.B. and replace with the following:

B. Western Area System

1. Western Area System Non-Expansion Cleanup Objective. The Defendant shall prevent the horizontal extent of the groundwater contamination in the Western Area from expanding. The horizontal extent shall be the maximum horizontal areal extent of groundwater contamination regardless of the depth of the groundwater contamination (as established under Section V.B.2.c. of this Consent Judgment). Continued migration of groundwater contamination into the Prohibition Zone or Expanded Prohibition Zone shall not be considered expansion and is allowed. A change in the horizontal extent of groundwater contamination resulting solely from the Court's application of a new cleanup criterion shall not constitute expansion. Nothing in this Section prohibits the Plaintiffs from seeking additional response activities pursuant to Section XVIII.E of this Consent Judgment. Compliance with the Non-Expansion Cleanup Objective shall be established and verified by the Compliance Well Network to be developed by the Parties as provided in Sections V.B.2.c and d., below ("Compliance Well Network"). There is no independent mass removal requirement or a requirement that the Defendant operate any particular extraction well(s) at any particular rate beyond what is necessary to prevent the prohibited expansion, provided that Defendant's ability to terminate all groundwater extraction in the Western Area is subject to Section V.D.1.c. and the establishment of property use restrictions as required by Section V.B.2.e. If prohibited expansion occurs, Defendant shall undertake additional response activities to return the groundwater contamination to the boundary established by the Compliance Well Network (such response activities may include recommencement of extraction at particular locations).

Plaintiffs agree to modify the remedial objective for the Western Area as provided herein to a no expansion performance objective in reliance on Defendant's agreement to comply with a no expansion performance objective for the Western Area. To ensure compliance with this

objective, Defendant acknowledges that in addition to taking further response action to return the horizontal extent of groundwater contamination to the boundary established by the Compliance Well Network, Defendant shall be subject to stipulated penalties for violation of the objective as provided in Section XVII. Nothing in this paragraph shall limit Defendant's ability to contest the assessment of such stipulated penalties as provided in this Consent Judgment.

2. Western Area Response Activities. The following response activities shall be implemented:

a. Extraction Wells. The Western Area response activities shall include the operation of groundwater extraction wells as necessary to meet the objective described in Section V.B.1. Purged groundwater from the Western Area System shall be treated with ozone/hydrogen peroxide or ultraviolet light and oxidizing agent(s), or such other method approved by the MDNRE to reduce 1,4-dioxane concentrations to the level as required by NPDES Permit No. MI-0048453, as amended or reissued. Discharge to the Honey Creek tributary shall be in accordance with NPDES Permit No. MI-0048453, as amended or reissued.

b. Decommissioning Extraction Wells. Within 14 days after entry of this Third Amendment, Defendant shall submit to MDNRE a list of Western Area extraction wells that it intends to decommission (take out-of-service) in 2011. The MDNRE has the right to petition the Court to stop the Defendant from taking such extraction well(s) out-of-service within 60 days of receiving the list identifying such extraction well(s). The Defendant shall maintain all other extraction wells, including, but not limited to, TW-2 (Dolph Park) and TW-12, in operable condition even if it subsequently terminates extraction from the well(s) until such time as the Parties agree (or the Court decides) that the well(s) may be abandoned.

c. Western Area Delineation Investigation. Defendant shall complete the following investigation, as may be amended by agreement of the Parties to reflect data obtained during the investigation, to address gaps in the current definition of the plume and to further define the horizontal extent of groundwater contamination in the Western Area:

i. Install monitoring wells screened to monitor the intermediate (Unit D2) and deep (Unit E) zones at/near the existing MW-20. An additional monitoring well at or near existing MW-36 will not be necessary unless the results from the wells installed at/near MW-20 are inconsistent with the Defendant's conceptual flow model (that the contamination in the shallower unit does not continue migrating to the west, but instead drops into the deeper unit and flows east into the Prohibition Zone or Expanded Prohibition Zone).

ii. Install a monitoring well cluster just west of Wagner Road and South of I-94.

iii. Install a monitoring well cluster in the Nancy Drive/MW-14d area, to define the extent of groundwater contamination from surface to bedrock, with final placement of the cluster to be determined after the Wagner Road/I-94 well cluster is installed or as otherwise agreed.

iv. Install a monitoring well screened to monitor the deep (Unit E) zone near/at MW-125, with location to be approved by MDNRE. PLS will vertically profile every ten feet throughout the deep (Unit E) saturated interval.

Defendant shall promptly provide the data/results from the investigation to the MDNRE so that the MDNRE receives them prior to Defendant's submission of the Monitoring Plan described in Subsection V.B.2.d, below. MDNRE reserves the right to request the installation of additional borings/monitoring wells, if the totality of the data from the wells to be installed indicate that the horizontal extent of groundwater contamination has not been completely defined.

d. Compliance Monitoring Well Network/Performance Monitoring Plan. Within 15 days of completing the investigation described in Subsection V.B.2.c , above, Defendant shall submit a Monitoring Plan, including Defendant's analysis of the data obtained during the investigation for review and approval by the MDNRE. The Monitoring Plan shall include the collection of data from a compliance monitoring well network sufficient to verify the

effectiveness of the Western Area System in meeting the Western Area objective set forth in Section V.B.1. The locations and/or number of the compliance monitoring wells for the Monitoring Plan will be determined based on the data obtained from the investigation Defendant shall conduct pursuant to Section V.B.2.c. The MDNRE shall approve the Monitoring Plan, submit to Defendant changes in the Monitoring Plan that would result in approval, or deny the Monitoring Plan within 35 days of receiving the Monitoring Plan. Defendant shall either implement the MDNRE-approved Monitoring Plan, including any changes required by MDNRE, or initiate dispute resolution pursuant to Section XVI of this Consent Judgment. Defendant shall implement the MDNRE (or Court)-approved Monitoring Plan to verify the effectiveness of the Western Area System in meeting the Western Area objective. Defendant shall continue to implement the current MDNRE-approved monitoring plan(s) until MDNRE approves the Monitoring Plan required by this Section. The monitoring program shall be continued until terminated pursuant to Section V.E.

e. Property Restrictions. The Defendant shall have property use restrictions that are sufficient to prevent unacceptable exposures in place for any properties affected by Soil Contamination or Groundwater Contamination before completely terminating extraction in the Western Area.

3. Internal Plume Characterization. Additional definition within the plume and/or characterization of source areas, except as may be required under Section VI of this Consent Judgment, is not necessary based on the additional monitoring wells to be installed as provided in Section V.B.2.c. MDNRE reserves the right to petition the Court to require such work if there are unexpected findings that MDNRE determines warrants additional characterization.

SIXTH, modify Section V.C. to read as follows:

C. Little Lake Area System

1. Little Lake Area System Non-Expansion Objective. The objective of the Little Lake Area System is to prevent expansion of the horizontal extent of any groundwater contamination located in this area.

2. Response Activities. Defendant shall implement some form of active remediation in this area until the termination criterion is reached under Section V.D.1.d. or appropriate land or resource use restrictions on the affected property(ies) approved by the MDNRE are in place. Defendant shall continue its batch purging program from the extraction well located on the Ann Arbor Cleaning Supply property pursuant to MDNRE-approved plans unless some other form of active remediation is approved by the MDNRE. Defendant may resubmit a proposal to temporarily reduce the frequency of the batch purging of this well so that the effects of batch purging can be evaluated. Defendant shall also have the option of obtaining appropriate land use or resource use restrictions on the affected property(ies) as an alternative to active remediation in this area, conditioned on MDNRE's approval.

3. Monitoring Plan. Within 45 days of entry of this Third Amendment, Defendant shall submit to the MDNRE for approval under Section X of this Consent Judgment a revised Monitoring Plan that identifies which of the existing monitoring wells will be used as compliance wells to verify the effectiveness of the Little Lake Area System in meeting the non-expansion objective of Section V.C.1. Defendant shall continue to implement the current MDNRE-approved monitoring plan until MDNRE approves the Monitoring Plan required by this Section. If a form of active remediation other than batch purging or land use or resource use

restrictions are approved by the MDNRE, Defendant shall submit a revised monitoring plan, modified as necessary to verify the effectiveness of such response activities.

The monitoring plan shall be continued until terminated pursuant to Section V.E.

SEVENTH, modify Section V.D.1 to read as follows:

D. Termination of Groundwater Extraction Systems

1. Defendant may only terminate the Groundwater Extraction Systems listed below as provided below:

a. Termination Criteria for LB Wells/Wagner Road Wells. Except as otherwise provided pursuant to Section V.D.2, Defendant may only significantly reduce or terminate operation of the LB Wells and the Wagner Road Wells as provided in Sections V.A.2.f. and V.A.7., respectively.

b. Termination Criteria for TW-19. Except as otherwise provided pursuant to Section V.D.2, Defendant shall maintain TW-19 in an operable condition and operate as needed to meet the groundwater-surface water interface criterion containment objective until all approved monitoring wells upgradient of Maple Road are below the groundwater surface water interface criterion for six consecutive months or until Defendant can establish to the satisfaction of MDNRE that additional purging from TW-19 is no longer necessary to satisfy the containment objective at this location. If Defendant requests to decommission TW-19, Defendant's request must be made in writing for review and approval pursuant to Section X of the Consent Judgment. The request must include all supporting documentation demonstrating compliance with the termination criteria. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if the DNRE does not approve Defendant's request. Defendant may decommission TW-19 upon: (i) receipt of notice of approval from MDNRE; or

(ii) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of this Consent Judgment. Defendant shall not permanently plug TW-19 until completion of the post-termination monitoring pursuant to Section V.E.1.b.

c. Termination Criteria for Non-Expansion Objective for Western Area. Except as otherwise provided pursuant to Section V.D.2, and subject to Section V.B.1., Defendant shall not terminate all groundwater extraction in the Western Area until:

i. Defendant can establish to Plaintiffs' satisfaction that groundwater extraction is no longer necessary to prevent the expansion of groundwater contamination prohibited under Section V.B.1. Defendant's demonstration shall also establish that any remaining 1,4-dioxane contamination in the Marshy and Soil Systems will not cause any prohibited expansion of groundwater contamination; and

ii. Defendant has the land use or resource use restrictions described in Section V.B.2.e. in place.

Defendant's request to terminate extraction in the Western Area must be made in writing for review and approval pursuant to Section X of the Consent Judgment. The request must include all supporting documentation demonstrating compliance with the termination criteria. Defendant may initiate dispute resolution pursuant to Section XVI of the Consent Judgment if the MDNRE does not approve the Defendant's request/demonstration. Defendant may terminate Western Area groundwater extraction upon: (i) receipt of notice of approval from MDNRE; or (ii) receipt of notice of a final decision approving termination pursuant to dispute resolution procedures of Section XVI of this Consent Judgment.

d. Termination Criteria for Little Lake Area Well (a/ k/a Ann Arbor Cleaning Supply Well). Except as otherwise provided pursuant to Section V.D.2., Defendant

shall continue to operate the Ann Arbor Supply Well on a batch purging basis (or implement another form of MDNRE-approved active remediation) until six consecutive monthly tests of samples from the extraction well and associated monitoring wells, fail to detect the presence of groundwater contamination or until appropriate land use restrictions are placed on the affected property(ies).

EIGHTH, delete Sections V.D.4 and V.D.5 .

NINTH, modify Section V.E. to read as follows:

E. Post-Termination Monitoring

1. Eastern Area

a. Prohibition Zone Containment Objective. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to monitor the groundwater contamination as it migrates within the Prohibition Zone and Expanded Prohibition Zone until all approved monitoring wells are below 85 ug/l or such other applicable criterion for 1,4-dioxane for six consecutive months, or Defendant can establish to MDNRE's satisfaction that continued monitoring is not necessary to satisfy the Prohibition Zone containment objective. Defendant's request to terminate monitoring must be made in writing for review and approval pursuant to Section X of the Consent Judgment. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if the MDNRE does not approve its termination request.

b. Groundwater/Surface Water Containment Objective. Except as provided in Section V.E.1.a., for Prohibition Zone monitoring wells, post-termination monitoring is required for Eastern Area wells for a minimum of 10 years after purging is terminated under Section V.D.1.b. with cessation subject to MDNRE approval. Defendant's request to terminate monitoring must be made in writing for review and approval pursuant to

Section X of the Consent Judgment. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if the MDNRE does not approve its termination request.

c. Maple Road Extraction. If Defendant has decommissioned TW-19 based on monitoring well results showing that upgradient monitoring wells are below the groundwater/surface water interface criterion (rather than a demonstration) as provided in Section V.D.1.b and the monitoring conducted pursuant to Section V.E.1.b. reveal that the termination criterion is no longer being met, Defendant shall immediately notify MDNRE and collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, then Defendant shall take the steps necessary to put TW-19 in an operable condition and operate the well as necessary to satisfy the groundwater/surface interface water containment objective unless it can establish to Plaintiffs' satisfaction that such actions are not necessary to meet the groundwater/surface water interface containment objective.

2. Western Area. Post-termination monitoring will be required for a minimum of ten years after termination of extraction with cessation subject to MDNRE approval. Except as otherwise provided pursuant to Section V.D.2, Defendant shall continue to monitor the groundwater in accordance with approved monitoring plan(s), to verify that it remains in compliance with the no expansion performance objective set forth in Section V.B.1. If any violation is detected, Defendant shall immediately notify MDNRE and take whatever steps are necessary to comply with the requirements of Section V.B.1.

3. Little Lake Area System. Post-termination monitoring will be required for a minimum of ten years after termination of active remediation in the Little Lake Area with cessation subject to MDNRE approval. Defendant shall continue to monitor the Ann Arbor

Cleaning Supply extraction well and/or associated monitoring wells, in accordance with approved monitoring plans to verify that:

a. the concentration of 1.4-dioxane in the groundwater does not exceed the termination criterion. If such post-termination monitoring reveals the presence of 1,4-dioxane in excess of the termination criterion, Defendant shall immediately notify MDNRE and shall collect a second sample within 14 days of such finding. If any two consecutive samples are found at or above the termination criterion, Defendant shall immediately restart the previously-approved method of active remediation, unless Defendant has obtained appropriate land use or resource use restrictions on the affected property(ies) pursuant to Section V.C.2, (in which case subsection b, below shall apply); or

b. 1,4-dioxane in excess of the termination criterion is not migrating outside the MDNRE-approved area of land use or resource use restrictions.

TENTH, delete Section V.F.

ELEVENTH, modify the first paragraph of Section VI to read as follows:

Defendant shall design, install, operate, and maintain the systems described below to control, remove, and treat Soil Contamination at the GSI Property and remove and treat groundwater from the Marshy Area located north of former Ponds I and II as necessary to: (a) prevent the migration of 1,4-dioxane from contaminated soils into any aquifer in concentrations that cause the expansion of groundwater contamination in violation of Section V.B.1 of this Consent Judgment; (b) prevent venting of groundwater into Honey Creek Tributary with 1,4-dioxane in quantities that cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2800 ug/l; and (c) prevent venting of groundwater to Third Sister Lake with 1,4-dioxane in quantities that cause of the concentration of 1,4-dioxane at

the groundwater-surface water interface of the Lake to exceed 2800 ug/l. Defendant also shall implement a monitoring plan to verify the effectiveness of these systems.

TWELTH, modify Section VI.A. to read as follows:

1. Objectives. The objectives of this System are to: (a) prevent expansion of groundwater contamination prohibited under Section V.B.1.; and (b) prevent the discharge of contaminated groundwater from the Marshy Area into the Honey Creek Tributary in quantities that cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary to exceed 2800 ug/1.

2. Response Activities. Defendant shall operate the Marshy Area System described in Defendant's May 5, 2000 Final Design and Effectiveness Monitoring Plan, as subsequently modified and approved by the MDNRE as necessary to meet the objectives of the Marshy Area System until its operation may be terminated under Section VI.D. of this Consent Judgment.

3. Monitoring. Defendant shall implement the MDNRE-approved monitoring plan to verify the effectiveness of the Marshy Area System in meeting the requirements of this Consent Judgment. The monitoring plan shall be continued until terminated pursuant to Section VI.D. of this Consent Judgment.

THIRTEENTH, modify Section VI.B.1 by replacing "2000 ug/l" with "2800 ug/l".

FOURTEENTH, renumber Sections VI.B.4 and VI.B.5 to VI.B.3 and VI.B.4, respectively, and modify new Section VI.B.3.c. to read as follows:

c. If Soil Contamination is identified in any of the areas investigated, Defendant shall submit, together with the report required in Section VI.B.3.b., an analysis of whether such Soil Contamination will cause the expansion of Groundwater Contamination prohibited under Section V.B.1. or venting of groundwater to Third Sister Lake with 1,4-dioxane

in quantities that cause of the concentration of 1,4-dioxane at the groundwater-surface water interface of the Lake to exceed 2800 ug/l. If either will occur, Defendant shall submit a remediation plan for that area that achieves the overall objectives of Section VI. The plan shall include a proposed schedule for implementation. The remediation system shall be installed, operated, and terminated in accordance with the approved plan.

FIFTEENTH, modify Section VI.C.1. to read as follows:

1. Objectives. The objectives of this program are to: (a) evaluate the necessity, feasibility and effectiveness of available options for remediation of identified source areas; (b) design and implement remedial systems, if necessary, to achieve the overall objectives of Section VI; and (c) verify the effectiveness of those systems.

SIXTEENTH, modify Section VI.C.2. to read as follows:

2. Soils Remediation Plan. Defendant shall, no later than November 30, 1996 submit to MDEQ for review and approval a revised soils remediation plan for addressing identified areas of soil contamination. The areas to be addressed include the burn pit; the former Pond I area; the former Pond II area; the former Lift Station Area; and Pond III.

The Defendant's proposal must attain the overall objectives of Section VI.

SEVENTEENTH, modify Section VI.D.1 to read as follows:

1. Termination Criteria for GSI Property Remediation. Defendant shall continue to operate each of the GSI Property Remedial Systems, including the Marshy Area System until Defendant can make a demonstration to Plaintiffs' satisfaction that 1,4-dioxane remaining in any of the areas addressed would not cause: a) any expansion of groundwater

contamination in the Western Area as prohibited in Section V.B.1; or b) venting of groundwater into the Honey Creek Tributary or to the Third Sister Lake in quantities that cause the concentration of 1,4-dioxane at the groundwater-surface water interface of the Tributary or Lake to exceed 2800 ug/l. The demonstration described in this Section must be made in writing for review and approval by MDNRE pursuant to Section X of the Consent Judgment, and approved by MDNRE before Defendant terminates all groundwater extraction in the Western Area. Defendant may initiate dispute resolution pursuant to Section XVI of this Consent Judgment if MDNRE does not approve Defendant's demonstration. These Systems shall also be subject to the same post-termination monitoring as the Western Area System, described in Section V.E.2.

EIGHTEENTH, delete Sections VI.D.2., 4., and 5, and renumber VI.D.3 as VI.D.2

NINTEENTH, modify Section VII.D.1 by replacing "MI-008453" with MI-0048453"

TWENTIETH, modify Sections VII.D.5. and 6. to read as follows:

5. Permit(s) or permit exemptions to be issued by the MDNRE to authorize the reinjection of purged and treated groundwater in the Eastern Area, Western Area, and Little Lake Area;

6. Surface water discharge permit(s) for discharge into surface waters in the Little Lake System Area, if necessary;

TWENTY-FIRST, modify Section X to read as follows:

Upon receipt of any plan, report, or other items that is required to be submitted for approval pursuant to this Consent Judgment, as soon as practicable, but in no event later than 56 days after receipt of such submission, except for a feasibility analysis or plan that proposes a risk based cleanup or requires public comment submitted pursuant to Section V.A.2.b., of this Consent Judgment, the Plaintiff will: (1) approve the submission; or (2) submit to Defendant changes in the submission that would result in approval of the submission. Plaintiff will (1) approve a Feasibility Study or plan that proposes a risk based cleanup or a remedy that requires public comment; or (2) submit to Defendant changes in such submittal that would result in approval in the time provided under Part 201 of the Natural Resources and Environmental Protection Act, as amended, [MCL 324.20101 *et seq.*]. If Plaintiffs do not respond within 56 days, or 180 days, respectively, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI. Upon receipt of a notice of approval or changes from the Plaintiffs, Defendant shall proceed to take any action required by the plan, report or other item, as approved or as may be modified to address the deficiencies identified by Plaintiffs. If Defendant does not accept the changes proposed by Plaintiffs, Defendant may submit the matter to Dispute Resolution pursuant to Section XVI.

TWENTY-SECOND, modify the first two sentences of Section XI.A., to read as follows:

A. Plaintiffs designate Sybil Kolon as Plaintiffs' Project Coordinator. Defendant designates Farsad Fotouhi, Vice President of Corporate Environmental Engineering, as Defendant's Project Coordinator.

TWENTY-THIRD, modify Section XIII.A. as follows:

A. Defendant shall not sell, lease, or alienate the GSI Property until: (1) it places an MDNRE approved land use or resource use restrictions on the affected portion(s) of the GSI

Property; and (2) any purchaser, lessee, or grantee provides to Plaintiffs its written agreement providing that the purchaser, lessee, or grantee will not interfere with any term or condition of this Consent Judgment. Notwithstanding any purchase, lease, or grant, Defendant shall remain obligated to comply with all terms and conditions of this Consent Judgment.

TWENTY-FORTH, modify Section XVI.A. by adding the following clause to the beginning of the section:

A. Except as provided in Sections V.A.2.f., V.A.7., and V.D.1.a., the dispute resolution procedures of this Section shall …

TWENTY-FIFTH, modify Section XVII.E as follows:

E. Stipulated penalties shall be paid no later than 14 working days after receipt by Defendant of a written demand from Plaintiffs. Defendant shall make payment by transmitting a check in the amount due, payable to the "State of Michigan", addressed to the Revenue Control Unit; Finance Section, Administration Division; Michigan Department of Natural Resources and Environment; P.O. Box 30657; Lansing, MI 48909-8157. Via Courier to the Revenue Control Unit; Finance Section, Administration Division; Michigan Department of Natural Resources and Environment; Constitution Hall, 5th Floor South Tower; 525 West Allegan Street; Lansing, MI 48933-2125. To ensure proper credit, include the settlement ID - ERD1902 on the payment.

TWENTY-SIXTH, modify Section XVIII.E to read as follows:

E. Notwithstanding any other provision in this Consent Judgment: (1) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to require Defendant to perform any additional response activity at the Site; and (2) Plaintiffs reserve the right to institute proceedings in this action or in a new action seeking to reimburse Plaintiffs for

response costs incurred by the State of Michigan relating to the Site. Plaintiffs' rights in E.1. and E.2. apply if the following conditions are met:

1. For proceedings prior to Plaintiffs' certification of completion of the Remedial Action concerning the Site,

a. (i) conditions at the Site, previously unknown to the Plaintiffs, are discovered after entry of this Consent Judgment, (ii) new information previously unknown to Plaintiffs is received after entry of the Consent Judgment, or (iii) MDNRE adopts one or more new, more restrictive cleanup criteria for 1,4-dioxane pursuant to Part 201 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 et seq., after entry of the Consent Judgment; and

b. these previously unknown conditions, new information, and/or change in criteria indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment; and

2. For proceedings subsequent to Plaintiffs' certification of completion of the Remedial Action concerning the Site,

a. (i) conditions at the Site, previously unknown to the Plaintiffs, are discovered after certification of completion by Plaintiffs, (ii) new information previously unknown to Plaintiffs is received after certification of completion by Plaintiffs, or (iii) MDNRE adopts one or more new, more restrictive cleanup criteria for 1,4-dioxane pursuant to Part 201 of NREPA, after certification of completion by Plaintiffs; and

b. these previously unknown conditions, new information, and/or change in criteria indicate that the Remedial Action is not protective of the public health, safety, welfare, and the environment.

If Plaintiffs adopt one of more new, more restrictive, cleanup criteria, Plaintiffs' rights in E.1. and E.2. shall also be subject to Defendant's right to seek another site specific criterion(ia) that is protective of public health, safety, welfare, and the environment and/or to argue that Plaintiffs have not made the demonstration(s) required under this Section.

TWENTY-SEVENTH, modify Section XX by changing the heading and adding new subsection C, as follows:

XX. INDEMNIFICATION, INSURANCE, AND FINANCIAL ASSURANCE

C. Financial Assurance

1. Defendant shall be responsible for providing and maintaining financial assurance in a mechanism approved by MDNRE in an amount sufficient to cover the estimated cost to assure performance of the response activities required, to meet, the remedial objectives of this Consent Judgment including, but not limited to investigation, monitoring, operation and maintenance, and other costs (collectively referred to as "Long-Term Costs"). Defendant shall continuously maintain a financial assurance mechanism (FAM) until MDNRE's Remediation Division (RD) Chief or his or her authorized representative notifies it in writing that it is no longer required to maintain a FAM. Defendant shall provide a FAM for MDNRE's approval within 45 days of entry of this Third Amendment.

2. Defendant may satisfy the FAM requirement set forth in this Section by satisfying the requirements of the financial test and/or corporate guarantee, attached as Attachment H, as may be amended by the Parties or by the Court upon the motion of either Party (Financial Test). Defendant shall be responsible for providing to the MDNRE financial information sufficient to demonstrate that Defendant satisfies the Financial Test. If Defendant utilizes the Financial Test to satisfy the financial assurance requirement of this Consent

Judgment, Long-Term Costs shall be documented, at Defendant's discretion, on the basis of either: a) an annual estimate of maximum costs for the response activities required by the Consent Judgment as if they were to be conducted by a person under contract to the MDNRE (MDNRE-Contractor Costs); or b) an annual estimate of maximum costs for the response activities required by the Consent Judgment as if they were to be conducted by employees of Defendant and/or contractors hired by Defendant, as applicable (Defendant's Internal Costs). In addition, Defendant shall resubmit the Financial Test and the associated required documents annually within 90 days of the end of its fiscal year or any Guarantor's fiscal year, subject to Section XX.C.4. Defendant is not required to provide another type of FAM so long as Defendant continues to meet the requirements for the Financial Test.

3. Ninety (90) days prior to the five (5)-year anniversary of the effective date of this Third Amendment to Consent Judgment, and each subsequent five (5)-year anniversary, Defendant shall provide to the MDNRE for its approval, a report (Long-Term Cost Report) containing the following:

a. If Defendant is required to provide a FAM other than the Financial Test or if Defendant's estimate of the long term costs for the Financial Test is based on Defendant's Internal Costs, then the Long-Term Cost Report shall contain the actual costs of the response activities required to meet the remedial objectives of this Consent Judgment at the Site for the previous five-year period and an estimate of the amount of funds necessary to assure the performance of the response activities required to meet the remedial objectives of this Consent Judgment at the Site for the following thirty (30)-year period given the financial trends in existence at the time of preparation of the report (Long-Term Cost Report). The Long-Term Cost Report shall also include all assumptions and calculations used in preparing the necessary

cost estimate and be signed by an authorized representative of Defendant who shall confirm the estimate is based upon actual costs. Defendant may only use a present worth analysis if an interest accruing FAM is selected; or

b. If Defendant's estimate of the Long Term Costs for the Financial Test is based on MDNRE-Contractor Costs, and the actual costs are less than the estimate, the Long-Term Cost Report shall contain a certification from Defendant that the total actual costs Defendant incurred to implement the required response activities for the previous five-year period was less than the previously provided cost estimate based on MDNRE-Contractor Costs. If actual costs are more than the estimate, then Defendant shall provide the actual cost incurred to meet the remedial objectives of this Consent Judgment for the previous five years. The Long-Term Cost Report shall also include an estimate of the amount of funds necessary to assure the performance of the response activities required to meet the remedial objectives of this Consent Judgment at the Site for the following thirty (30)-year period given the financial trends in existence at the time of preparation of the Long-Term Cost Report. The Long-Term Cost Report shall also include all assumptions and calculations used in preparing the necessary cost estimate and be signed by an authorized representative of Defendant.

4. Within 30 days of receiving MDNRE's approval of the Long-Term Cost Report, or within 90 days of the end of Defendant's (or any Guarantor's) fiscal year, whichever is later, Defendant shall resubmit its Financial Test, which shall reflect Defendant's (or, at its option, its parent corporation, Pall Corporation's) current financial information and the current estimate of the costs of the response activities required by the Consent Judgment. If this or any Financial Test indicates that Defendant (and its parent corporation, Pall Corporation if Defendant chooses to include Pall Corporation as a corporate guarantor) no longer satisfies the Financial

Test, Defendant will be required to provide to MDNRE for its approval a revised current estimate of the costs of the response activities required by the Consent Judgment to reflect the costs needed for the MDNRE to perform the necessary work using MDNRE contractors. The Parties shall negotiate a mutually acceptable alternative FAM. If the Parties are unable to reach an agreement, Plaintiffs shall provide Defendant with the FAM that will be required, which Defendant must provide unless Defendant initiates dispute resolution pursuant to Section XVI of the Consent Judgment, however during the dispute resolution process, Defendant may not challenge the underlying requirement that some type of FAM is required.

TWENTY-EIGHTH, modify Section XXIII by replacing the individual representatives of the Parties with the following individuals:

For Plaintiffs:

Sybil Kolon
Project Coordinator
Michigan Department
of Natural Resources
and Environment
Remediation Division
301 East Louis Glick Highway
Jackson, MI 49201

For Defendants:

Farsad Fotouhi
Vice President of Corporate Environmental
Engineering
Gelman Sciences, Inc.
600 South Wagner Road
Ann Arbor, MI 48106

and

Michael L. Caldwell
Zausmer, Kaufman, August, Caldwell & Tayler,
P.C.
31700 Middlebelt Road, Ste. 150
Farmington Hills, MI 48334

TWENTY-NINTH, modify Section XXVI by replacing "Attachment F" in the fourth line of that Section with "Attachment I".

IT IS SO STIPULATED AND AGREED:

PLAINTIFFS

Dan Wyant

Dated: 3.4.11

Dan Wyant, Director
Michigan Department of Natural
Resources and Environment

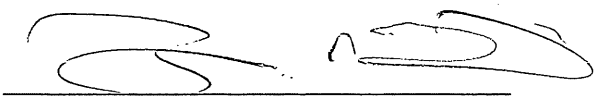
Approved as to form:

Dated: 3-4-11

Celeste R. Gill (P52484)
Assistant Attorney General
Environment, Natural Resources and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorney for Plaintiffs

IT IS SO STIPULATED AND AGREED:

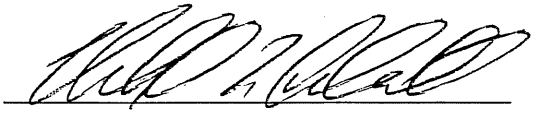
DEFENDANT



Dated: 3/3/11

Roberto Perez
President
Gelman Sciences, Inc.

Approved as to form:



Dated: 3/3/11

Michael L. Caldwell (P40554)
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(248) 851-4111

Alan D. Wasserman (P39509)
Williams Acosta, PLLC
535 Griswold St. Suite 1000
Detroit, MI 48226
(313) 963-3873
Attorneys for Defendant

IT IS SO ORDERED AND ADJUDGED this ____ day of MAR - 8 2011.

/S/DONALD E. SHELTON

HONORABLE DONALD E. SHELTON
Circuit Court Judge

LF/Gelman/88-34734-CE/Third Amendments to Consent Judgment

EXHIBIT F

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JENNIFER GRANHOLM, Attorney General for the State of Michigan, ex rel, MICHIGAN NATURAL RESOURCES COMMISSION, MICHIGAN WATER RESOURCES COMMISSION, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Plaintiff,

vs

GELMAN SCIENCES, INC.,

Defendant.

Case No. 88-34734-CE

Honorable Donald E. Shelton

OPINION AND REMEDIATION ENFORCEMENT ORDER

At a Session of the Court held in the Washtenaw County Courthouse in the City of Ann Arbor, on July 17, 2000

PRESENT: HONORABLE DONALD E. SHELTON, Circuit Judge

This case was originally filed in 1988 by the State to require Gelman Sciences, Inc. to clean up pollution of local water supplies caused by the discharge of dioxane from its manufacturing facility. A consent judgment identifying the required remediation actions was agreed to by the parties and entered on October 22, 1992. In the 12 years this case has been pending, many things have changed, including the identity if the participants. The successor to the plaintiff agency is now called the Michigan Department of Environmental Quality ("MDEQ"). The defendant corporation has been acquired by another company and is now known as Pall/Gelman Sciences, Inc. ("PGSI).

The original judge retired and the case was reassigned and has subsequently been reassign to this Court as companion to other litigation involving this issue. The original consent judgment was amended by the parties and the Court on September 23, 1996 and again on October 20, 1999.

On February 14, 2000 plaintiff filed a motion to enforce the consent judgment. The MDEQ claims that PGSI has not complied with the terms of the consent judgment as amended and seeks equitable relief in the form of an order requiring PGSI to perform specific "environmental response activities" to achieve the cleanup requirements of the consent judgment. The MDEQ also seeks to an order requiring the payment of certain "stipulated penalties" provided in the consent judgment. PGSI asserts that it has actively sought to remediate the pollution and that no penalties are due under the terms of the judgment. The issues were defined in a Joint Prehearing Statement filed by the parties on June 21, 2000. An evidentiary hearing was conducted on July 6, 7 and 10, 2000. The parties were also given the opportunity to respond to the Court's proposed Order. The Court's findings and conclusions, in part, are set forth below in this Opinion and Order.

The monitoring and purging of dioxane from the aquifers flowing under and around the Gelman facility is an ongoing process. The defendant, particularly since the change in ownership, has acted in good faith to meet its obligations to identify and clean up the polluted water supplies. It is also clear, however, that the purging of dioxane has not occurred fast enough to provide the public, or the Court, with assurance that the plume of dioxane was contained as early as it should have been or that there is an ongoing approved plan that will lead to the removal of unlawful levels of this pollutant from the area's water supplies. In part this appears to be because Gelman, especially

early on, did not know how to detect or remove the pollutant or act quickly enough to find out and do so. In part, however, this also appears to be because the MDEQ itself did not know how to monitor or purge the pollutant or it just acted far too slowly in its "reactive only" mode to Gelman's proposed work plans. It also appears that some of the delay has been the result of the inability to obtain land and other access to install the necessary monitoring, purging and treating equipment.

Assigning responsibility for these delays however is not this Court's priority. The fact is that the consent judgment of the Court, as subsequently amended, was intended to bring about a cleanup of this pollution and it has not yet done so. It is far less important to fix blame for that failure than it is to enforce its terms to bring about the cleanup. Based upon the evidence submitted, this Court is going to grant equitable relief in the sense that the Court will use its equitable powers to enforce the consent judgment to insure that dioxane levels in these water supplies is brought within acceptable standards as soon as possible. Both sides in this dispute appear to need the intervention of the Court to keep them moving toward this goal.

The Court's remediation order is designed first to require PGSI to submit an enforceable long range plan which will reduce all dioxane in these water supplies below legally acceptable levels and second to order immediate measures to move that process along faster than it has moved in the past. As to the request for monetary penalties, there has been considerable testimony about whether PGSI is liable for stipulated penalties under the amended consent judgment. The Court will take these requests for penalties under advisement. However, the parties are advised that the Court intends to enforce the consent judgment and the equitable

remediation measures in this order by virtue of its contempt powers and all of the sanctions available thereunder.

Remediation Enforcement Order

1. PGSI shall submit a detailed plan, with monthly benchmarks, which will reduce the dioxane in all affected water supplies below legally acceptable levels within a maximum period of five years from the date of this Order. The plan will also provide for subsequent monitoring of those water supplies for an additional ten year period thereafter. This plan will be submitted to the MDEQ for review within 45 days of this Order. MDEQ will respond within 75 days of this Order and the parties will confer and discuss the issues raised by the MDEQ review, if any. The plan will then be submitted to this Court within 90 days of this Order, for review and adoption as an Order of the Court.
2. As to the area in which monitoring well "10d" is located, the additional monitoring wells requested by the MDEQ will be installed within 60 days of this Order. An additional two purging wells in the monitoring well 10d area will be also be installed and operational within 60 days of this Order.
3. PGSI will install an additional ultraviolet treatment unit which shall be operational within 75 days of this Order. The capacity of the unit shall be consistent with the Court's maximum total remediation period of 5 years described in paragraph 1 of this Order.

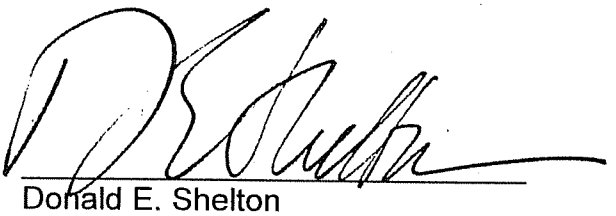
4. Purging from the horizontal well in the Evergreen area shall commence within 30 days after the additional ultraviolet treatment unit is installed.

5. The combined pumping rate of the LB1, LB2 and AE1 purging wells will be increased to 200 gpm within 30 days after the additional ultraviolet treatment unit is installed.

6. Monitoring wells in the Dupont section of the Evergreen area will be installed as requested by the MDEQ. These wells will be operational within 45 days after access is obtained. PGSI shall secure access for those wells within 30 days of this Order or, if necessary, commence legal action to do so within that time.

7. In the Western area, PGSI shall install monitoring wells as requested by MDEQ. These wells will be operational within 45 days after access is obtained. PGSI shall secure access for those wells within 30 days of this Order or, if necessary, commence legal action to do so within that time. In the event that monitoring of those wells for five months thereafter shows an increasing concentration of dioxane above legally acceptable levels, then a purging well will be installed and be operational within 60 days after that five month period. The Court reserves judgment as to any other remedial measures in this area in the event that there is no evidence of such increasing levels.

IT IS SO ORDERED.



Donald E. Shelton
Circuit Judge

EXHIBIT G

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JENNIFER GRANHOLM, Attorney General for the State of Michigan, ex rel, MICHIGAN NATURAL RESOURCES COMMISSION, MICHIGAN WATER RESOURCES COMMISSION, and MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Plaintiff,

vs

GELMAN SCIENCES, INC.,

Defendant.

Case No. 88-34734-CE

Honorable Donald E. Shelton

OPINION AND ORDER REGARDING REMEDIATION OF THE CONTAMINATION OF THE "UNIT E" AQUIFER

At a Session of the Court held in the Washtenaw County Courthouse in the City of Ann Arbor, on December 17, 2004

PRESENT: HONORABLE DONALD E. SHELTON, Circuit Judge

Background

Gelman Sciences makes filters for medical purposes and employs several hundred people at a facility located on Wagner Road in Scio Township, adjacent to the City of Ann Arbor. For several years in its production of these filters Gelman used a man-made compound known as 1,4 dioxane, a solvent used in a number of products and industries. It is classified by the Environmental Protection Agency as a "possible" human carcinogen. Gelman had been storing waste water containing dioxane in unlined lagoons near its plant and had apparently also sprayed the wastewater on the ground around the plant. In the mid 1980's, it was discovered that this waste water had seeped

through the ground and contaminated the ground water supply in the area. Gelman ceased using dioxane in 1986.

This case was originally filed in 1988 by the State to require Gelman to clean up pollution of local water supplies caused by the discharge of dioxane. The original judge conducted a trial in 1991 and found that the contamination was the result of waste disposal practices by Gelman but that those practices had been done in accordance with State approved procedures. Eventually, a Consent Judgment identifying the required remediation actions was agreed to by the parties and entered on October 26, 1992. In the 16 years this case has been pending, many things have changed, including the identity if the participants. The successor to the plaintiff agency is now called the Michigan Department of Environmental Quality ("MDEQ"). The defendant corporation was acquired by another company in 1997 and is now known as Pall Life Sciences, Inc. ("Pall"). The original judge retired, the case was reassigned, and then was subsequently reassigned to this Court.

The original Consent Judgment was amended by the parties and the Court on September 23, 1996 and again on October 20, 1999. In early 2000, the MDEQ filed a motion to enforce the Consent Judgment and for monetary sanctions. This Court conducted a lengthy evidentiary hearing. On July 17, 2000 the Court entered its Remediation Enforcement Order which ordered the development and implementation of a detailed plan to reduce the dioxane in all affected water supplies below legally acceptable levels within a period of five years. The Court ordered plan also provided for subsequent monitoring of water supplies for an additional ten year period. The parties

were advised that the Court intended to vigorously enforce the Consent Judgment and its remedial orders with all of its statutory and equitable powers.

The parties have complied with the basic provisions of Court's Remediation Enforcement Order. By pumping and treating over a billion gallons of contaminated water at a treatment facility constructed on its Wagner Road site, over 37,000 pounds of 1,4 dioxane has been removed from the aquifer covered by this Court's five year order. Pall has complied with the terms of that Order.

However, in 2001 it was discovered that the contaminant had somehow seeped below the shallower aquifer and had contaminated a much deeper aquifer denominated by the parties as "Unit E". Test wells revealed that the plume of dioxane in that aquifer had spread Eastward under the City of Ann Arbor. The parties have been testing throughout the area to determine the spread of the plume and have been trying to develop a plan to treat the contamination of that aquifer. While there is apparent agreement on several aspects of the proposed remedial action, MDEQ and Pall disagree about important parts of the plan. The Court ordered the parties to submit their view of the proposals and to respond to questions posed at the last hearing so that the Court could resolve the outstanding issues and expedite the decontamination process for Unit E.

Procedural Posture

Initially, the parties have raised questions about the applicability of the Consent Judgment to Unit E, the responsibility of the Court to review MDEQ actions, and the scope of the Court's role in this process.

The Court finds that the Unit E contamination is subject to the Consent Judgment in this case. While this particular area of contamination had not been discovered at the time of the Consent Judgment, that judgment was intended to address the entire issue of the remediation of 1,4 dioxane emanating from the Gelman property on Wagner Road. Technically, the Court agrees with the MDEQ assertion that Unit E falls within the "Western System" as that phrase was used in the Consent Judgment. Its subsequent migration in an easterly direction does not negate that finding. The Court has the inherent and equitable powers to enforce its judgment with all appropriate measures and sanctions as to Unit E contamination.

The MDEQ, however, also questions the scope of the Court's powers and responsibilities regarding enforcement of the Consent Judgment and the Court's statutory powers and responsibilities pursuant to Part 201 of the NREPA, MCL 324.20101 *et seq*. As MDEQ asserts, the Court's determination of appropriate remedial action under both the Consent Judgment and the statute should normally be based on the administrative record, including all materials submitted by the defendant. *Consent Judgment*, Sec. XVI.C; MCL 324.20137(5). The Consent Judgment also provides for the taking of additional evidence "by the Court on its own motion or at the request of either party if the Court finds that the record is incomplete or inadequate". *Consent Judgment*, Sec. XVI.C.

The Court's review of MDEQ actions is not solely limited to a determination of whether those actions are "arbitrary and capricious". The standard for review under the statute is whether the "decision was arbitrary and capricious or 'otherwise not in accordance with law'". MCL 324.20137(5). The standard for review of MDEQ remedial

action proposals under the Consent Judgment in this case is broader as well. It provides that MDEQ actions are reviewed by this Court to determine if the decision is either (1) inconsistent with the Consent Judgment, or (2) not supported by competent, material, and substantial evidence on the whole record, or (3) arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion, or (4) affected by any other substantial and material error of law. *Consent Judgment*, Section XVI.D.

Additionally, the Court has and intends to exercise its inherent powers to enforce its own directives. Circuit courts have the jurisdiction and the power to make any order to fully effectuate the circuit courts' jurisdiction and judgments. See *St. Clair Commercial & Savings Bank v. Macauley*, 66 Mich App 210 (1975); *Schaeffer v. Schaeffer*, 106 Mich App 452 (1981); *Cohen v. Cohen*, 125 Mich App 206 (1983); MCL 600.611. This case ended up in Court initially because no clean up of significant pollution had even begun without Court intervention. The MDEQ, and subsequently the defendant, sought to invoke the equitable and statutory powers of the Court to bring about remediation of a dangerous contamination of the public's water supply. Eventually a judgment was entered and remediation orders have been made by the Court to effectuate that judgment and the goal of cleaning up this pollution. Despite the best efforts of the parties, it is not done. The extent of the contamination is deeper and greater than originally known, perhaps aggravated many years ago both by the initial resistance of Gelman and the initial ineffectiveness of the State agency. It is going to take continued concerted actions by all of the parties to remedy this expanding contamination. The Court is determined to exercise all of its inherent, statutory, and equitable powers to assure that those actions take place as soon as possible.

The Unit E Disputes

The Unit E aquifer is extremely deep, apparently over 200 feet underground. It appears to flow in an easterly direction eventually depositing water into the Huron River, which runs through Washtenaw County and the City of Ann Arbor. Test wells have indicated the presence of 1,4 dioxane under the City with the leading edge of the plume more than two miles from the Wagner Road facility. The plume is continuing to spread. At this point, the aquifer is not a source of drinking water. The City of Ann Arbor services all of its citizens with a municipal water system which draws its water primarily from the Huron River but at a point well upstream of the point at which the Unit E aquifer vents into the river. One City well did draw water from the aquifer but it has been taken out of service. There are no private wells drawing from the affected portion of the aquifer.

The MDEQ and Pall have diligently been pursuing a plan to control the contamination plume in the Unit E aquifer. Test wells have been put in place. Working in conjunction with the MDEQ, Pall has designed new technologies to arrest the contamination. The parties have cooperated in the exchange of technical data and other information. There is significant public interest and several public hearings have been held. Input has been received from public interest organizations as well as from the City of Ann Arbor. MDEQ made a decision on September 1, 2004 outlining its plan for Unit E remediation. The parties agree on much of that plan but disagree on two important elements: (1) the actions to be taken at the Wagner Road facility to prevent further contamination of the aquifer, and (2) the approach to be used to remove contaminants

from the plume in the aquifer that is already migrating East of the Wagner Road facility. The disputes as to those issues are properly before the Court.

Actions to be Taken at the Wagner Road Facility

The MDEQ calls for Pall to do test borings and then install extraction wells into the Unit E aquifer at the Wagner Road site and to purge the water from those wells at the treatment facility Pall has built and operates on that property. The purged water would then be discharged into Honey Creek in the same manner as Pall has successfully treated and discharged water from shallower sources. Pall agrees with the test borings, including one with the "rotosonic" technique required by MDEQ.

Pall disputes the MDEQ requirement that extraction wells and treatment then be undertaken with a goal to "capture the entire width of the Unit E plume at Wagner Road" and to "create a hydraulic barrier near Wagner Road to prevent further migration of groundwater contamination above 85 ppb east of Wagner Road". Pall proposes that any extraction wells would be designed to reduce the mass of contaminants but claims that the objective of capturing the entire width of the plume at that point is not feasible, not supported by the evidence, and would be inconsistent with its obligations under the Consent Judgment.

It appears to the Court that much of this dispute is semantic, or at least premature. The goal set by the MDEQ of total capture of the width of the plume is certainly appropriate - if it can be done. Whether it is feasible or not depends on a number of factors that will not be known until the test borings are complete. That portion of the MDEQ rationale relating to protecting non-existent private wells and protecting the non-operational City Northwest Supply well is not supported by the evidence on the

record. However, the primary MDEQ rationale is that controlling groundwater contamination at or near its source is more efficient than trying to capture it later as it spreads through the aquifer. There is ample support for that position. Pall does not seriously contest that proposition but disagrees with MDEQ's projection of the degree to which such interception will prove successful. Pall may well be right but the reality is that we will simply not know how much reduction is possible until the test wells are complete and extraction wells placed into operation.

One portion of the Pall objection to the Wagner Road plan deserves more serious consideration. Pall maintains that if it extracts and treats all of the Unit E water that MDEQ wants at Wagner Road, it will not be able to discharge that water into Honey Creek because, when combined with the other required treatment already underway, the total will exceed the NPDES discharge permit levels allowed by MDEQ. To the extent that this proves to be true, the MDEQ will either have to expeditiously increase the discharge permit level or forego its goal of complete Unit E capture at Wagner Road. To the extent that there is a "competition" for permitted discharge, priority must be given to the water currently being treated from shallower levels.

Subject to the limitations expressed above, Pall shall:

1. Perform the investigation described in the August 1, 2004 Work Plan for Test Boring/Well installation and Aquifer Testing in the Wagner Road Area, as modified by MDEQ's letter of August 19, 2004, including the use of rotosonic drilling for at least one boring.
2. Submit a report of the investigation to MDEQ within 30 days of the completion of the aquifer performance test.

3. Within 60 days after completion of the aquifer performance test, submit a work plan to MDEQ which will, to the maximum extent feasible, prevent further migration of groundwater contamination above 85 ppb of 1,4 dioxane eastward into the Unit E aquifer. The plan will identify any required increase in the NPDES discharge permit to accommodate such additional treatment.
4. If the parties do not agree on a Unit E Wagner Road work plan within 30 days after submission, it will be brought before the Court on motion by MDEQ for resolution.

Actions to be Taken in the Eastern Portion of Unit E

The other major issue is how to remove contaminants from the plume that has already spread eastward into the Unit E aquifer. It will never be possible to extract all of the 1,4 dioxane from this deep aquifer and the geology is such that it will ultimately end up in the Huron River and be diluted far below currently acceptable standards. But the goal must be to remove as much of the contaminant as possible, as quickly as possible, so that the ultimate dilution will take place with minimal impact on the water resource.

Pall has proposed remediation by means of a reinjection system in which water is extracted from the aquifer, treated on the Maple Road site, and immediately reinjected into the aquifer at that location. This system is one which has been developed over the last many months and has been the subject of much investigation by the parties as well as review hearings by the Court. The MDEQ has, with the conditions and qualifications discussed below, agreed with the Pall reinjection plan. The Court believes that treatment and reinjection of Unit E water

should commence forthwith in accordance with that plan. Pall shall submit its detailed work plan to MDEQ not later than thirty days from this Order. The work plan will be designed to purge enough water so that any water escaping from the purging zone in Unit E will not exceed 2,800 ppb recommended by the MDEQ.

The MDEQ qualified its approval of the Pall plan on six conditions, some of which form the basis of the disputes now before the Court. The first MDEQ condition is that the City of Ann Arbor formally abandon the Northwest Water Supply ("Montgomery") well. The City closed the well in February of 2001. The cause for the closing is being disputed between the City and Pall in a separate lawsuit. The City there claims that it closed the well because dioxane from the Gelman site had contaminated it. Pall claims that the level of 1,4 dioxane alleged to be in the well was 2 ppb, well below the 85 ppb standard. Pall also claims that the well is closed because the City found 18 ppb of arsenic, unrelated to any Gelman contamination, in the well. The outcome of those allegations, and any compensation claims, will be decided in that separate action. As far as this case is concerned, the closed well has no bearing on the remediation plan for Unit E. There is no basis to include it as a condition to the clean up plan.

The third condition imposed by MDEQ relates to the administrative requirements of the statute. Since the proposed remedial plan contemplates levels above 85 ppb, provisions of the rules require an administrative "waiver". Pursuant to MCL 324.20118(6)(d), such a waiver would require "other institutional controls necessary to prevent unacceptable risk from exposure to the hazardous substances". MCL 324.20120b(5) states the mechanisms for such institutional

controls “include, but are not limited to, an ordinance that prohibits the use of groundwater or an aquifer in a manner and to a degree that protects against unacceptable exposures as defined by the cleanup criteria approved as part of the remedial plan”. Applied to this case, this means that there must be enforceable restrictions on the human use of water from the Unit E aquifer during remediation. Pall asserts that the Washtenaw County Rules and Regulations for the Protection of Groundwater adopted on February 4, 2004, if supplemented by an appropriate order from this Court, meet that statutory requirement. The Court agrees. Under the circumstances of this case it would be arbitrary and unreasonable to delay the cleanup of the Unit E aquifer pending the drafting and potential adoption of an ordinance or other legislative action to supplement the Washtenaw County Rules and Regulations already in place. The parties are directed to submit a proposed order to this Court which will include at least the following controls:

1. A map that identifies the area that would be covered by the judicial institutional control, including a buffer zone.

2. A prohibition against the installation of new water supply wells for drinking, irrigation, or commercial or industrial use, within the zones shown on the map.

3. A prohibition directed to the County Health Officer prohibiting permits for well construction in those zones.

4. A prohibition against consumption or use of groundwater from within the zones.

5. A requirement that PLS provide, at its expense, connection to the City of Ann Arbor municipal water supply for any existing private drinking water wells within the zones.

6. A requirement that the Order be published and maintained in the same manner as a zoning ordinance.

7. A provision that the Order shall remain in effect until such time as it is amended or rescinded by further Order of the Court, with a minimum 30 days notice to all parties.

8. A provision to allow either party to move to amend the boundaries of the prohibition zone to reflect material changes in the boundaries or fate of the plume as determined by future hydrogeological investigations and/or monitoring.

Next, the MDEQ conditions its approval of the remediation plan on the retention by Pall of a person to do "stochastic modeling" of Unit E. Based on the record, there is no substantial evidence to indicate that such a model would assist the remediation of this area in any way. The field data required by the MDEQ has served to develop the model for remediation and will continue to do so. It is this field data that allows the MDEQ, and then the Court, to review whether the remediation is working. There is no indication that "stochastic modeling" will add anything to those remediation efforts and it is not required. MDEQ has properly required that Pall conduct future monitoring of the plume path and plume concentration. Pall has agreed and has submitted a work plan to meet that requirement.

Finally, and most importantly, the MDEQ has conditioned its approval of the remediation plan on the development of an alternative plan that would require construction of a large treatment facility at Maple Road and the piping of water from significant distances through Unit E back to Maple Road for treatment and then discharge into the Huron River via another pipeline. The alternative insisted upon by MDEQ would require the installation and operation of a treatment system large enough to accommodate 1150 gallons per minute in the commercial area near Maple Road. Pall contends that such a facility is not feasible and would not be safe. The feasibility of the MDEQ proposal is subject to serious question. The acquisition and rezoning of enough

land to site both the treatment facility and the required ponds in this congested area would take considerable time, if it ever could be done. Such a facility would require location and storage of an amount of liquid oxygen equal to that currently used at the Wagner Road treatment facility and five times the amount used at the current Maple Road mobile facility. Locating such a facility in this retail commercial area does pose significant dangers.

Most importantly, the alternative in this MDEQ condition means that thousands, perhaps millions, of gallons of contaminated water would need to be piped under the City to be treated at the proposed Maple Road facility. This would require the installation of three to four miles of pipelines, including at least 1½ miles of pipelines in residential Ann Arbor neighborhoods. To say that the residents in the affected areas would be reluctant to agree to have pipelines containing 1,4 dioxane running through their neighborhoods is an understatement by several degrees of magnitude. Public hearings have demonstrated overwhelming opposition to such a plan. While the City of Ann Arbor has filed a pleading agreeing with the construction a Maple Road facility, notably missing from its brief is any commitment to facilitate the location of the required dioxane-bearing pipelines in Ann Arbor neighborhoods. In 1998 it took months, and this Court eventually had to intervene with an Order, to force the installation of 1000 feet of a pipeline near the Wagner Road facility--and that pipeline was only running under a freeway.

Whether the concerns of residents about such pipelines are scientifically justified or not, the political and practical reality is that the required pipeline rights-of-way and construction could not begin to take place for years, if ever. This contamination was

discovered twenty years ago and this lawsuit to get it cleaned up has been pending for sixteen of those years. The water in the Unit E aquifer continues to flow and the plume of 1,4 dioxane continues to expand within it. We simply do not have the years it would take for the MDEQ alternative to begin to remove any contamination from the leading edge of the Unit E. plume. After careful examination of the MDEQ alternative set forth in its conditions, the Court finds that it is not feasible, is unwarranted, and is not supported by competent, material, and substantial evidence.

Conclusion

The parties have worked diligently to address the question of how the contamination of the Unit E aquifer should be addressed and have investigated several alternatives. The process has been exhaustive but not expeditious. In the meantime the plume of 1,4 dioxane continues to spread. It is not the role of this Court to devise or fashion remedies for the spreading pollution of this deep aquifer. It is the role of this Court to enforce the Consent Judgment and to assure that whatever remedy is implemented conforms to that Judgment and to the pollution statutes of the State. The overriding guideline for that enforcement is the health and welfare of the public. The health and welfare of the public demands that the cleanup of the contamination of this large body of underground water begin, and proceed, as soon as humanly possible. The parties are ordered to implement the holdings in this Opinion and Order forthwith.

IT IS SO ORDERED

_____
Donald E. Shelton
Circuit Judge

EXHIBIT H

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

JENNIFER M. GRANHOLM, Attorney General for the State of Michigan, *ex rel*, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs,

v

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable Donald E. Shelton

ORDER PROHIBITING GROUNDWATER USE

At a session of said Court held in the City of Ann Arbor, County of Washtenaw, Michigan, on the 17th day of May, 2005.

PRESENT: HONORABLE DONALD E. SHELTON
Circuit Court Judge

On December 17, 2004, this Court issued its Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer. That Opinion and Order resolved a dispute between the Parties regarding the September 1, 2004 Decision Document issued by the Michigan Department of Environmental Quality (MDEQ) regarding remediation of the "Unit E" groundwater contamination emanating from the Pall Life Sciences (PLS) (formerly known as Gelman Sciences, Inc.) facility in Scio Township, Washtenaw County.

Among other things, this Court determined that in order to satisfy the requirements of MCL 324.20118(6)(d) and MCL 324.20120b(5) for institutional controls preventing

unacceptable exposure to 1,4-dioxane in the groundwater, it is necessary and appropriate to supplement the Washtenaw County Rules and Regulations for the Protection of Groundwater adopted February 4, 2004, with a legally enforceable order of this Court prohibiting certain groundwater uses in specifically defined areas and addressing the relevant conditions identified in the MDEQ's September 1, 2004 Decision Document.

ACCORDINGLY, pursuant to the December 17, 2004 Opinion and Order, based upon further information provided by the Parties, for the reasons stated by the Court in its May 4, 2005 ruling on Plaintiffs' Motion to Enter Order Prohibiting Groundwater Use, and in the exercise of this Court's statutory and inherent authority to enforce its orders and judgments,

IT IS HEREBY ORDERED:

1. The prohibitions imposed by this Order apply to the zone identified in the map attached hereto as Figure 1 (Prohibition Zone).

2. The installation by any person of a new water supply well in the Prohibition Zone for drinking, irrigation, commercial, or industrial use is prohibited.

3. The Washtenaw County Health Officer or any other entity authorized to issue well construction permits shall not issue a well construction permit for any well in the Prohibition Zone.

4. The consumption or use by any person of groundwater from the Prohibition Zone is prohibited.

5. The prohibitions listed in paragraphs 2, 3, and 4 do not apply to the installation and use of:

(a) groundwater extraction and monitoring wells as part of response activities approved by MDEQ or otherwise authorized under Parts 201 or 213 of NREPA, or other legal authority.

(b) dewatering wells for lawful construction or maintenance activities, provided that appropriate measures are taken to prevent unacceptable human or environmental exposures to hazardous substances and comply with MCL 324.20107a.

(c) wells supplying heat pump systems that either operate in a closed loop system, or if not, are demonstrated to operate in a manner sufficient to prevent unacceptable human or environmental exposures to hazardous substances and comply with MCL 324.20107a.

(d) emergency measures necessary to protect public health, safety, welfare or the environment.

(e) any existing water supply well that has been demonstrated, on a case-by-case basis and with the written approval of the MDEQ, to draw water from a formation that is not likely to become contaminated with 1,4-dioxane emanating from the PLS facility. Such wells shall be monitored for 1,4-dioxane by PLS at a frequency determined by the MDEQ.

6. PLS shall provide, at its expense, connection to the City of Ann Arbor municipal water supply to replace any existing private drinking water wells within the Prohibition Zone. Within thirty (30) days after entry of this Order, PLS shall submit to MDEQ for review and approval a work plan for identifying, or verifying the absence of, any private wells within the Prohibition Zone, for the abandonment of any such private wells and for replacement of private drinking water wells with connection to the municipal water supply. Well abandonment and replacement shall be performed in accordance with all applicable regulations and procedures at the expense of PLS. PLS shall implement the work plan and schedule approved by MDEQ.

7. This Order shall be published and maintained in the same manner as a zoning ordinance.

8. This Order shall remain in effect in this form until such time as it is amended or rescinded by further order of this Court, with a minimum of thirty (30) days prior notice to all Parties.

9. Either Party may move to amend the boundaries of the Prohibition Zone to reflect material changes in the boundaries or fate of the groundwater contamination plume as described by future hydrogeological investigation or MDEQ approved monitoring of the fate of the groundwater contamination.

10. In the event the boundary of the Prohibition Zone is expanded, PLS shall, within thirty (30) days after entry of such an Order, submit to the MDEQ for review and approval, a work plan for identifying, or verifying the absence of any private wells within the modified Prohibition Zone, for the abandonment of any such private wells, and for the connection to the municipal water supply to replace any drinking water wells within the modified Prohibition Zone.

11. Either Party or a local unit of government having jurisdiction within the Prohibition Zone may seek enforcement of this Order by the Court.

12. This Order shall not affect the rights, liabilities, or defenses of any party in any other legal or administrative proceeding, nor shall it constitute evidence of either the presence or absence of 1,4-dioxane at any location inside or outside the Prohibition Zone in any such proceeding.

/s/DONALD E. SHELTON

HONORABLE DONALD E. SHELTON
Circuit Court Judge

APPROVED AS TO FORM:

Robert P. Reichel

Robert P. Reichel (P31878)
Assistant Attorney General
Attorney for Plaintiffs

Michael L. Caldwell by RPR with consent

Michael L. Caldwell (P40554)
Alan D. Wasserman (P39509)
Attorneys for Defendant

Gelman/1989001467/Order3

EXHIBIT I

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel*, MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

v

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable Donald E. Shelton

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Attorney for Defendant

STIPULATED ORDER AMENDING PREVIOUS REMEDIATION ORDERS

At a session of said Court, held in the County of Washtenaw
City of Ann Arbor, State of Michigan, on _____

PRESENT: Hon. _____
CIRCUIT COURT JUDGE

RECITALS

A. A Consent Judgment was entered in this case on October 26, 1992. The Consent Judgment requires Defendant, Gelman Sciences, Inc., to implement various response activities to address environmental contamination in the vicinity of Defendant's property in Scio Township, subject to the approval of the Michigan Department of Natural Resources and Environment ("MDNRE"). The original Consent Judgment was amended by stipulation of the Plaintiffs and Defendant (collectively the "Parties) and Order of the Court on September 23, 1996 and October 20, 1999 (collectively the "Consent Judgment").

B. On November 15, 2010, counsel for the Parties presented the Court with a Notice of Tentative Agreement on Proposed Modifications to Remedial Objectives for Gelman Site ("Notice"), which described proposed changes that the parties had tentatively agreed to make to the remediation program for the Gelman Site.

C. During a hearing held on November 22, 2010, the Court instructed the parties to prepare an amendment to the October 26, 1992 Consent Judgment that was consistent with the proposed changes described in the Notice.

D. Contemporaneously with this Stipulated Order, the Parties are submitting the proposed Third Amendment to the Consent Judgment ("Third Amendment"), which memorializes the changes to the cleanup program described in the previously submitted Notice. By their signatures on the Third Amendment, the Parties stipulate and agree to its entry by the Court.

E. The Court has also supplemented the Consent Judgment with several cleanup related orders, based on information about the nature and extent of contamination acquired after the Consent Judgment and the Amendments were entered, including, Remediation and

Enforcement Order ("REO") dated July 17, 2000, the Opinion and order Regarding Remediation of the Contamination of the "Unit E" Aquifer ("Unit E Order"), dated December 17, 2004, and the Order Prohibiting Groundwater Use ("Prohibition Zone Order"), dated May 17, 2005.

F. Since entry of the REO and the Unit E Order, the parties have further refined their understanding of the nature and extent of contamination at the Gelman Site, which is reflected in the Third Amendment.

The Parties, through their legal counsel, stipulate and agree:

1. To the extent the Third Amendment is inconsistent with any of the requirements of the REO and/or the Unit E Order, the Third Amendment shall govern. In particular, the Third Amendment eliminates and supersedes the following remedial objectives of the REO and Unit E Order:

a. The REO's requirement that Defendant maintain a combined purge rate for the Evergreen System extraction wells of at least 200 gpm.

b. The REO's requirement that Defendant implement a plan to reduce the 1,4-dioxane in all affected water supplies below legally acceptable levels within five years.

c. The Unit E Order's requirement that Defendant prevent, to the extent feasible, groundwater in the Unit E aquifer containing 1,4-dixoane in concentrations above 85 parts per billion (ug/l) from migrating east of Wagner Road.

2. The Court's Prohibition Zone Order will continue in force and is incorporated by reference by the Third Amendment and shall now apply to the "Expanded Prohibition Zone" as described in the Third Amendment, provided that the ability of the Parties under Paragraph 9 of

the Prohibition Zone Order to move the Court to alter the boundaries of the Prohibition Zone (and now Expanded Prohibition Zone) is modified as described in Section V.A.2.b. of the Third Amendment with regard to the northern boundaries.

APPROVED AS TO FORM AND SUBSTANCE:

CELESTE R. GILL (P52484)
Attorney for Plaintiffs

MICHAEL L. CALDWELL (P40554)
Attorney for Defendant

IT IS SO ORDERED.

CIRCUIT COURT JUDGE

LF/Gelman/88-34734-CE/Stip and Order Amending Previous Remediation Orders

EXHIBIT J

Pall Life Sciences' Supplemental Filing In Support Of Pall Life Sciences' Remedial Alternative

I. Introduction

On June 1, 2004, Pall Life Sciences ("PLS") submitted its Final Feasibility Study ("FS") to the DEQ. The FS was intended to provide a framework for evaluating the need for, and the potential benefit of, various response action alternatives for addressing the Unit E contamination. PLS' analysis revealed a number of significant factors that PLS considered in designing its preferred remedy. These factors included:

- All available groundwater data indicate that the Unit E plume will migrate to the Huron River at a point that is well downstream of the City's Barton Pond water intake.
- There are no private drinking water wells between the leading edge of the Unit E plume and the Huron River. The entire area is already serviced by the City of Ann Arbor's municipal water system, which obtains the majority of its water from the Huron River, well upstream from the Unit E plume.
- The only municipal drinking water well in the vicinity of the plume – the Northwest Supply Well – has already been taken out of service due to "water quality concerns" either because of the trace levels of 1,4-dioxane detected in the well in February 2001 or because arsenic is also present in the well at levels almost twice the legal limit.
- Arsenic has also been detected in other areas of the Unit E at levels far above the legally permissible level, calling into question the usefulness of this aquifer as a source of drinking water.
- The recently adopted Washtenaw County Rules and Regulations for the Protection of Groundwater ("Washtenaw County Rules") effectively prevent the installation of any new drinking water wells in the migration pathway of the plume.
- The "groundwater/surface water interface" ("GSI") criterion of 2,800 ppb is the next most restrictive cleanup criterion once the drinking water pathway is eliminated.
- Even without any active remediation, it is extremely unlikely that concentrations in the plume would even approach the GSI criterion by the time the plume reaches the Huron River.
- Any attempt to capture the entire width of the Unit E plume, either at the leading edge or another location, would require the installation of miles of pipeline, which would disrupt the congested residential neighborhoods and retail businesses in the area.
- The incredible disruption associated with capturing the plume would serve no purpose because the water is "unsafe" only if it is going to be consumed, and it is already illegal to do so.

Based on these considerations, PLS identified a remedy that was both protective of human and environmental receptors and respectful of the community. PLS' remedy

focused on reducing concentrations at two locations so that the plume will pose no threat to receptors by the time it reaches the Huron River. In PLS' judgment, the location of this plume makes it inappropriate to blindly adhere to Part 201's default prohibition on allowing the plume to expand. PLS' focus on protecting receptors through mass reduction rather than containment allowed PLS to minimize the infrastructure associated with the remedial system and to locate the reduced infrastructure away from congested residential areas.

After reviewing the FS, the DEQ submitted its Decision Document to this Court on September 1, 2004. While the formality of the document and the excessive use of mandatory language can give the impression that the parties are at loggerheads, the reality is not so dire. The DEQ concluded that, as a legal matter, it could not approve PLS' alternative as a *final remedy* based on the current state of affairs. But the DEQ agreed that PLS' remedy could be a legal, approvable, and protective final remedy if six identified conditions could be met. The most significant issues that prevented the DEQ from approving PLS' remedy are legal in nature rather than technical. The DEQ gave PLS one year to resolve these issues. In the event PLS was unable to satisfy these conditions, the DEQ concluded that PLS should be required to implement the much more invasive and controversial remedy described in the Decision Document.[1]

After reviewing the DEQ Decision Document and PLS' status report, this Court indicated that it did not believe that it was appropriate to wait a year before determining what would be done as a final response for addressing the Unit E. This Court indicated that it would modify its REO to address the Unit E contamination within 60 days of the September 8, 2004 hearing. The Court invited the parties to submit additional materials if they wished, particularly to address the questions raised by the Court during the hearing. PLS appreciates the opportunity to submit the following report and attached materials.

II. Questions Raised by the Court.

This Court asked the parties to address four specific questions raised during the September 8, 2004 Status Conference. The first three inquires relate to several of the six conditions that the DEQ indicated PLS would have to satisfy before PLS' remedy could be approved. The fourth concerns the parties' respective positions regarding the work at Wagner Road. PLS' response to each is indicated below.

A. <u>What is the Technical Basis for the DEQ's Concerns Regarding PLS' Plan to Reinject Treated Groundwater near Maple Road?</u>

[1] PLS has submitted detailed comments on DEQ's plan, and has provided in Attachment A a list of disputed conclusions in the Decision Document along with explanations as appropriate. As noted in Attachment A, DEQ's contingency is subject to several significant unknowns, which it should also have identified as conditions to its own plan. These include the layout of the pipelines, the limits of an NPDES permit to the Huron River, and the feasibility of siting, constructing and operating a 1300 gpm treatment system in the Maple Road area.

PLS is proposing to reinject the purged groundwater after treatment via two injection wells located to the north and to the south of the extraction well along Wagner Road. The DEQ has responded that PLS must provide "sufficient hydrogeological information to resolve **concerns** about reinjection" and that PLS must identify an acceptable method of disposing of the treated groundwater.

During the recent status hearing, the Court asked the DEQ to identify the technical basis for its concerns. PLS has met twice with DEQ's technical staff, once in person just prior to the status conference and once after the conference via a conference call. The DEQ has been unable to identify what additional information it wants PLS to submit in this regard.

PLS strongly believes that it is not necessary to "study this to death" and that the available information provides a sufficient basis for approving this disposal method. PLS has numerous monitoring wells in the Maple Village area and has conducted two aquifer pump tests to determine aquifer characteristics in this area. PLS has submitted all of this data to DEQ. PLS has also submitted its Modeling Report (Exhibit 1) that addresses the DEQ's original concerns and demonstrates that the proposed reinjection will not adversely affect the plume. The modeling also shows that the proposed extraction will significantly reduce the contaminant levels that might otherwise migrate past Maple Road. PLS agrees with the DEQ that, given the size of the plume, it would be very problematic and likely impossible to reliably reinject the volume of water needed to capture the entire width of the plume, let alone the volume needed to capture it twice as the DEQ has proposed. The existing information, however, demonstrates that PLS' more realistic plan is technically feasible. Therefore, PLS believes this condition has already been met.

PLS' work plan for implementing its proposed interim response is ready to be submitted to the DEQ for approval. PLS is simply waiting for DEQ to identify what additional information it needs in order to satisfy DEQ's unarticulated technical concerns in this regard. If necessary, PLS will attempt to address any reasonable data requests, but PLS believes that its work plan is currently approvable.

B. <u>Can a Judicial Order be Used to Satisfy the DEQ's Institutional Control Requirement?</u>

The DEQ contends that in order for PLS' remedy to be protective, an institutional control must be in place that would prevent use of the groundwater in the "relevant areas" of the site.[2] To the extent an institutional control under Section 18 of Part 201 (MCL 324.20118) is required in order for the DEQ to approve PLS' remedy, the current Washtenaw County Rules already substantively accomplish this. The Washtenaw County Rules already reliably restrict the installation of new water supply wells in the areas affected by the Unit E plume under the following provisions:

[2] As set forth in PLS' FS, the DEQ has authority under Section 18 to waive its aquifer control rules without the need for institutional controls. PLS attempted to demonstrate how this could be done in its FS, but the DEQ has declined to use that authority.

- No one can construct or drill any well (including a drinking water well) without first obtaining a permit from the County Health Office (Sec. 2:1);

- No municipality within the county may issue a building permit where a well is necessary or allow construction to commence on any land where an approved public or private water supply is not available until issuance of a permit by the Health Officer (Sec. 2:4);

- No permit can be issued by the Health Officer if it is not in compliance with the Rules or if it would create a dangerous or unsafe condition (Sec. 2:5);

- It is unlawful for any person to occupy or permit to be occupied any premise in Washtenaw County not equipped with an adequate supply of potable water as determined by the Health Officer (Sec. 6:1);

- The rules apply to all non-community and private groundwater supplies within Washtenaw County (Sec. 6:2);

- Water supplies intended for human consumption that are not "potable" must either be abandoned, identified at the outlet as unfit for human consumption, or treated by methods approved by DEQ or the County Health Officer so as to make the water potable (Secs. 6:2, 6:3). "Potable" water is defined as water that is free of contaminants in concentrations that may cause disease or harmful physiological effects, is safe for human consumption and meets the State drinking water standards set forth in the Michigan Safe Drinking Water Act (Sec. 1:15);

- Newly drilled wells cannot be used for human consumption until approved by the Health Officer and after they have been tested for bacteriological or chemical contaminants (Sec. 6:6); and

- No well can be located within at least 100 feet of a source of contamination, or within such increased distance as determined necessary by the Health Officer (Sec. 6:7).

This existing institutional control already prohibits the installation of water wells in the affected areas. The DEQ acknowledges that the County Rules already prohibit property owners between the plume and the river from installing new water supply wells.[3]

[3] DEQ staff explained the issues they have with the ordinance in a memorandum attached as Appendix C to DEQ's Decision Document. DEQ staff acknowledged, however, that many of the specific issues appear to be easily addressed (*e.g.*, provide a map, limit variances to isolation zones, provide more clarity in decision standards). The primary concern expressed in the memo arises from the author's understanding that there are existing drinking water wells that would be in the area threatened or impacted by "the PLS plumes." DEQ district staff members more familiar with the site agree that this is not the case with Unit E,

To the extent it is necessary to supplement the existing institutional control, PLS has suggested that this Court could issue an order that would address the minor deficiencies in the existing Washtenaw County Rules. Such an order could also constitute a stand alone institutional control that would meet the requirements of Part 201.

As was acknowledged during the status hearing, Part 201 does not preclude such an order from serving as an acceptable form of institutional control. Part 201 provides, in relevant part:

> If the department determines that exposure to hazardous substances may be reliably restricted by an institutional control in lieu of a restrictive covenant, and that imposition of land use or resource use restrictions through restrictive covenants is impractical, the department may approve of a remedial action plan under section 20120a(1)(f) to (j) or (2) that relies on such institutional control. Mechanisms that may be considered under this subsection include, but are not limited to, an ordinance that prohibits the use of groundwater or an aquifer in a manner and to a degree that protects against unacceptable exposures as defined by the cleanup criteria approved as part of the remedial action plan. An ordinance that serves as an exposure control pursuant to this subsection shall be published and maintained in the same manner as zoning ordinances and shall include a requirement that the local unit of government notify the department at least 30 days prior to adopting a modification to the ordinance, or to the lapsing or revocation of the ordinance.

MCL 324.20120b(5) (emphasis added). Similarly, the Part 201 rules define "institutional control" as a "measure" that reliably prevents unacceptable exposures to contamination:

> (j) "Institutional control" means a measure which is approved by the department, which takes a form other than a restrictive covenant, and which limits or prohibits certain activities that may interfere with the integrity or effectiveness of a remedial action or result in exposure to hazardous substances at a facility, or which provides notice about the presence of a hazardous substance at a facility in concentrations that exceed only an aesthetic-based cleanup criterion.

Mich Adm Code R. 299.5101(j). Thus, under both Part 201 and the Part 201 rules, a judicial order could be an institutional control provided it was crafted in such a way that it satisfies the identified requirements.

Issuance of such a judicial institutional control is well within this Court's authority to enforce its judgments. The Michigan Revised Judicature Act provides that "[c]ircuit

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and indicated that the staff person who reviewed the ordinance may have also been looking at other portions of the site that do not need the institutional control.

courts have jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments." MCL 600.611. Michigan case law provides that courts possess inherent authority to enforce their own directives. See Cohen v Cohen, 125 Mich App 206 (1983). In addition, courts have stated that circuit courts have broad powers, including the power to make an order to fully effectuate their jurisdiction and judgments. See Spurling v Battista, 76 Mich App 350 (1977).

This Court's authority under the RJA is analogous to the authority granted to federal courts under the federal All Writs Act, 28 USC 1651, which states that "courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Federal case law has held that "the All Writs Act provides district courts with the authority to bind nonparties in order to prevent the frustration of consent decrees that determine parties' obligations under the law." United States v City of Detroit, 329 F 3d 515 (CA 6 2003); see also Grand Traverse Band of Ottawa & Chippewa Indians v Director, Michigan Dep't of Natural Resources, 141 F 3d 635 (CA 6 1998) (affirming district court order barring non-parties from interfering with consent judgment). In City of Detroit, the Sixth Circuit held that the district court acted properly in ordering the United States Army Corps of Engineers to accept dredged sediment in connection with a consent judgment between the United States and the City of Detroit requiring the City of Detroit to bring its wastewater treatment system into compliance with its NPDES permit. Id.

Thus, this Court has authority to bind third parties as part of a enforceable judicial institutional control. Based on a review of these requirements and comments made by DEQ staff on the Washtenaw County Rules, PLS recommends that the following elements be included as part of an order imposing institutional controls:

1. The requirement that the parties confer and submit to the Court within a specified period of time a map that identifies the agreed upon area that would be covered by the judicial institutional control, including a buffer zone (the "Protected Area"), or if agreement cannot be reached, the parties' respective positions.

2. A prohibition against the installation of new water supply wells for drinking, irrigation, or commercial or industrial use, within the Protected Zone shown on the map.

3. Service of the Order on the Washtenaw County Health Department with the instruction prohibiting the County Health Officer from issuing permits for well construction in the Protected Zone. It should be noted that this prohibition is completely consistent with the existing County Rules governing issuance of permits.

4. A prohibition against consumption or use of groundwater from within the Protected Zone.

5. A requirement that PLS provide, at its expense, connection to the City of Ann Arbor municipal water supply for any existing private drinking water wells within the Protected Zone.

6. A requirement that the Order be published and maintained in the same manner as a zoning ordinance.

7. A provision that the Order shall remain in effect until such time as it is amended or rescinded by further Order of the Court, with a minimum 30 days notice to all parties, including specifically DEQ.

8. A provision to allow either party to move to amend the boundaries of the prohibition zone to reflect material changes in the boundaries or fate of the plume as determined by future hydrogeological investigations and/or monitoring.

An order that contains these elements would appear to be sufficient to reliably restrict groundwater use consistent with PLS's proposed response.

C. What Water Supply Wells Should PLS be Required to Monitor?

PLS agrees that its remedy should include a monitoring plan for any water supply wells outside the area covered by the institutional control that are conceivably threatened with contamination. The number and location of the wells that would need to be monitored would be dependant on the area to be covered by the judicial institutional control. PLS would anticipate, however, that wells on the east side (and in the vicinity of) the Huron River would eventually be monitored. PLS' monitoring plan would also include "sentinel wells" near the Huron River. PLS also anticipates that the Northwest Supply Well would be monitored (as it would be under the DEQ's contingent remedy). PLS' remedy includes a contingency plan to prevent unacceptable exposures if any such water supply wells are threatened. PLS has also, consistent with its proposal (and with one of DEQ's conditions), submitted a work plan for a downgradient investigation of the Unit E plume. (Exhibit 2). These wells may also be available for monitoring as a way of confirming the boundaries of an institutional control.

D. What Should be Done at Wagner Road?

The one aspect of PLS' proposed remedy on which the parties are in clear disagreement is the Wagner Road element. PLS has proposed to continue its on-site purging and to conduct an investigation in the Wagner Road area to determine if concentrations in this area are high enough to justify an additional purge well. PLS is not proposing to capture the entire width of the plume at this location because it serves no useful purpose to do so. Rather, PLS has proposed to reduce concentrations at this location, depending on the results of the pending investigation. The DEQ initially approved this mass reduction objective, but later asserted that PLS should attempt to capture the entire width of the plume at this location.

Capturing the width of the plume using conventional pump and treat technologies is, according to DEQ, a preferable remedy because DEQ "believes" it will accelerate groundwater cleanup horizons. As will be explained in more detail below, pump and treat technologies are not suitable for this objective. There is no basis for DEQ's assumption that its proposal would result in attaining the cleanup criteria any sooner than PLS' proposal. The most efficient mid-plume remedial technique is mass reduction in areas of high concentration, not containment. This is what PLS is doing in the C3/D2 plume (*e.g.*, the horizontal well).

PLS also is very concerned that a "capture" objective cannot be directly verified. Currently, hydraulic capture at other areas of the site is enforced through minimum purge rates and by monitoring verification wells to show that the plume is not "escaping" hydraulic capture. Monitoring downgradient of the barrier, however, cannot be used to verify compliance for Wagner Road. This is because there are significant concentrations of 1,4-dioxane in the ground on both sides of the hypothetical barrier. Monitoring wells installed ahead of the barrier will not be able to verify that the barrier is operating as designed. This puts PLS in a perilous position if capture becomes an enforceable objective. Relying only on minimum purge rates is really no different than mass reduction, which is what PLS has proposed.

The unilateral change in performance objectives would also directly conflict with PLS' obligations under this Court's REO. Although the exact capture volume is unknown, it will undoubtedly exceed the available capacity under the NPDES permit unless more capacity is diverted from the D2/C3 cleanup effort. PLS has already allocated approximately 180 gpm of the 1300 gpm capacity allowed under the permit to its on-site extraction wells. Because of decreasing water levels in the C3 and D2 aquifers (and resulting decrease in purge rates), there is still a small amount of capacity that can be allocated to mass removal at Wagner Road if concentrations in this area justify that response. What the DEQ has proposed, however, will greatly exceed the available capacity and would require PLS to choose between attempting to comply with the Court's REO and complying with the DEQ's proposed interim response.

PLS urges the Court to allow PLS to move forward with its groundwater quality investigation. If concentrations justify additional mass removal, PLS will install an additional well and connect it to the existing treatment system. There is, however, no basis for the DEQ's plume capture performance objective.

III. Satisfaction of DEQ Conditions.

PLS urges this Court to address the most problematic prerequisite to approval of PLS' remedy – the institutional control requirement (Condition 3). Issuance of a judicial institutional control would greatly benefit the community as a whole and spare residents the disruption and safety concerns associated with any other plan. If this condition is satisfied judicially, PLS' plan is readily approvable now, not a year from now. PLS has already agreed to Condition 2 (containment of 2800 ppb contour at Maple Road as a

performance objective) and Conditions 4 and 5 (monitoring of potential receptors and contingency plans). As discussed above, PLS believes that Condition 6 (acceptable disposal option for treated water at Maple Road) has already been met and is willing to attempt to address any reasonable requests for additional data to confirm that reinjection is feasible at this location. The only remaining condition, then, is the DEQ's insistence that the Northwest Supply Well be abandoned (Condition 1).

PLS strongly disagrees with DEQ's conclusion that formal abandonment of the Northwest Supply Well is a legal barrier to approval of PLS' proposed remedy. This condition arises from the DEQ's unpromulgated internal policy against allowing expansion of the plume within a designated wellhead protection area. This should not be considered a condition of approving PLS' plan for the simple reason that the City has effectively abandoned the well already. The City discontinued operation of this well in February 2001when it detected concentrations of 2 ppb of 1,4-dioxane. Given the City's very public position that any detectable levels of 1,4-dioxane are not acceptable, it cannot reasonably be expected that the City will ever use that well. Moreover, the well is independently contaminated with naturally occurring arsenic at levels above the allowable limit of 10 ppb. The City's own sampling data from 2002 confirms that the well contained 18 ppb of arsenic. (Exhibit 3). The City claims to have abandoned its well because it detected 1,4-dioxane – a "suspected carcinogen" – at levels 40 times lower than the cleanup standard. It necessarily follows that the presence of arsenic – a "known carcinogen" – at levels well above the cleanup standard would independently cause the City to abandon its well.[4] Under these circumstances, the DEQ's internal policy is irrelevant and should not drive remedial decisions.

In addition, the City has already sued PLS and is contending that PLS must pay to replace the well because it is no longer useable. The issue of proper compensation, if any, will be resolved shortly in that litigation. It would be inappropriate to reject a proposed remedial alternative that is otherwise protective based on the existence of a well that has in fact been abandoned. Certainly, PLS would urge the Court to refrain from ordering PLS to implement the DEQ's draconian and unsafe remedial alternative before the significance of this well is decided in the pending litigation.

IV. Additional Factors that Militate in Favor of PLS' Suggested Remedy.

PLS would ask the Court to also consider the factors discussed below when determining the proper course of action.

A. Timeliness

PLS' plan has the advantage of being timely. In addition to avoiding the multi-year effort needed to build pipelines three to four miles long, PLS' proposed plan incorporates the only discharge method that would not require a discharge permit and that

[4] The City's sampling arsenic result is consistent with preliminary sampling PLS conducted in other monitoring wells in the Unit E aquifer, which showed elevated arsenic levels well above the federal MCL at multiple locations.

can be implemented without requiring access to significant numbers of properties. PLS' proposed groundwater reinjection is authorized under Mich Adm Code R. 323.2210(u)(ii) and does not require a NPDES, deepwell injection, or groundwater discharge permit. DEQ's proposal, and any other discharge scenario, requires issuance of a permit that can and, given the history of this site, will be challenged in a contested case proceeding.

Once access for the treatment system and the limited amount of necessary infrastructure is obtained, PLS can install its Maple Road purge system within 4-6 months. PLS' ability to promptly address the Maple Road area is important because it allows PLS to prevent the much higher concentrations west of Maple Road from migrating into the congested residential areas to the east.

Moreover, it is unlikely that the DEQ's contingent plan would achieve the applicable cleanup criterion any sooner than PLS' plan. The DEQ claims that by segmenting the plume, its plan will shorten the cleanup horizon. This theoretical advantage has been repudiated by the experience of experts in the field. It is well known in the professional community that pump and treat approaches in all but very simple situations typically cannot fully attain groundwater restoration (health based goals) throughout a plume no matter how long the system is operated. The main reason is the phenomena of "tailing" and "rebound." This is described in guidance for pump and treat systems put out by USEPA for superfund sites. *Pump and Treat Groundwater Remediation, A Guide for Decisionmakers*, USEPA, July 6, 1996 (EPA/625/R-95/005), available at http://www.epa.gov/ORD/NRMRL/pubs/625r95005/625r95005.pdf. Tailing and rebound will, in situations such as this one, which involves multilayered heterogenous geology, frustrate any cleanup goal for Unit E that is based on attaining criteria throughout the aquifer. Thus, there is no basis for DEQ's assertion that more pumping at the interior of the plume will attain criteria "faster" than PLS' plan.

B. The DEQ's Contingent Remedy is Not Legally Required or Feasible.

1. There is no legal basis for DEQ's Plan.

The DEQ has taken the position that PLS is required to remediate the Unit E under the 1992 Consent Judgment. Specifically, the DEQ asserts that PLS is required to remediate the Unit E plume, which has migrated ***east*** from the Wagner Road facility under the Consent Judgment provisions regarding the ***Western*** System, which provide:

> **Western Plume System**
> (hereinafter AWestern System@)
>
> 1. Objectives. The objectives of the Western System are: (a) to contain downgradient migration of any plume(s) of groundwater contamination emanating from the GSI Property that are located outside the Core Area and to the **northwest, west, or southwest** of the GSI facility; (b) to remove groundwater contaminants from the affected aquifer(s); and (c) to remove all groundwater contaminants from the

> affected aquifer or upgradient aquifers within the Site that are not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section IV.

Consent Judgment, Section V.C.1 (emphasis added).

PLS does not concede that the Consent Judgment requires PLS to remediate the Unit E. To this point, PLS has been willing to move forward with the investigation and remediation of the Unit E without engaging a legal effort to contest responsibility.[5] But even if the Consent Judgment was applied to this new area of contamination, it provides no support for a plan that requires three separate capture zones. The only interim response/source control required by the Consent Judgment is contained in Section V.B.1, which relates to the "Core Area" – the portion of the shallow $\mathbf{C_3}$ aquifer that contains contamination above 500 ppb. The Consent Judgment contains no interim response requirements that could possibly apply to the Unit E. There is no remedial objective or other requirement in the Consent Judgment that could be construed to require the type of program envisioned by DEQ. The most the Consent Judgment could be interpreted to require would be containment of the leading edge – a remedial objective that neither the City of Ann Arbor nor its citizens want implemented.

DEQ also claims that its proposal is supported by Part 201.[6] To the extent it applies, Part 201 does not require interim response on the grand scale suggested by DEQ. The releases at issue all took place well before 1995. Therefore, the source control measures suggested by DEQ would not be required by Section 14(1)(d), MCL 324.20114(1)(d), even if they were "technically practical, cost effective, and [protective of] the environment."[7] This is particularly true where PLS has already proposed appropriate interim response measures.

Moreover, PLS cannot be required to undertake ***any*** response activity under Part 201 because the releases that are alleged to have caused the Unit E contamination were "permitted releases." Part 201 defines a "permitted release" as "a release in compliance with an applicable, legally enforceable permit issued under state law." MCL 324.20101(aa)(i). After a six-month long trial, this Court's predecessor, Hon. Patrick J. Conlin, determined that the state authorized the very releases currently at issue pursuant to a series of state-issued wastewater discharge permits. His July 25, 1991 Opinion is attached as Exhibit 4. Therefore, the "permitted release" issue has already been adjudicated as between the parties in favor of PLS. That decision would be binding on

[5] PLS reserves the right to contest the applicability of the Consent Judgment to the Unit E in the event the DEQ or a Court attempts to compel PLS to implement the DEQ's proposed remedy.

[6] PLS notes that Part 201 gives a party to a consent judgment entered prior to the 1995 amendments the right to proceed under the consent judgment or under Part 201. MCL 324.20102a(3). Thus, Part 201 would only be relevant to the extent the Consent Judgment does not apply to the Unit E or, if it does, only to the extent PLS chooses to proceed under that statute.

[7] As PLS explained in its FS, interim response activities beyond what PLS has proposed would not satisfy any of these criteria.

the parties under the doctrines of *res judicata* and *collateral estoppel*. Dart v Dart, 460 Mich 573 (1999) (res judicata); Hawkins v Murphy, 222 Mich App 664 (1997) (collateral estoppel).

Part 201 does not require PLS to undertake any response activities to address such permitted releases:

> A person shall not be required under this part to undertake response activity for a permitted release. Recovery by any person for response activity costs or damages resulting from a permitted release shall be pursuant to other applicable law, in lieu of this part.

MCL 324.20126a(5) (emphasis added).

Thus the DEQ cannot compel PLS to implement the response activities that it asserts must be undertaken in the event PLS is unable to obtain approval of PLS' proposed remedy.

2. DEQ's plan is not feasible.

PLS has gone to great lengths and expense to avoid embroiling this community in a legal battle over the responsibility for the Unit E. Despite strong legal arguments in its favor, PLS has proposed a responsible and protective remedial alternative and is committed to implement it. What PLS is unwilling to do is to spend tens of millions of dollars to prove what should be clear on its face: the DEQ's contingent remedy is neither feasible nor appropriate.

a. Treatment System

DEQ's contingent remedy would require a Maple Road-based treatment system approximately the same size as the one PLS operates at its facility. To give the Court some perspective on the scale of operation the DEQ's proposal would require, the operational requirements of PLS' current system are instructive.

At the PLS facility, the UV-H202 system occupies a dedicated building that is 60 x 115 ft. and can treat 1300 gpm of groundwater contaminated with 1,4-dioxane. It receives shipments via tanker truck every three to four days of sulfuric acid, sodium bisulfite, caustic, and hydrogen peroxide in approximately 20-ton lots. The facility has its own transformer, which consumes approximately 530,000-kilowatt hours of electricity every month. PLS utilizes two 1,000,000-gallon equalization ponds to insure continuous operation and compliance with its stringent NPDES permit requirements. While an ozone/H2O2 system would consume a somewhat smaller volume of chemicals, a system sized to meet DEQ's requirements can be expected to be on a scale of the one that is located already at PLS and, in any event, to be far larger and to consume far more raw materials than the system proposed by PLS for its more realistic Maple Road purging

program.[8]

It is not feasible to place a treatment system large enough to accommodate 1150 gpm required by DEQ's plan in a commercial area. Installing and operating a system that could accommodate 1150 gpm anywhere in the vicinity of Maple Road is not feasible primarily because of three factors: i) the significant health and safety issues associated with liquid oxygen; ii) the physical size of the system; and iii) the absence of any properties in the area that are available and properly zoned for this type of industrial operation.

i. It is Not Safe to Site a Liquid Oxygen-Based Treatment Unit in the Maple Road Area.

A treatment system of this size would require liquid oxygen. PLS does not believe that it is safe to use and store the volume of liquid oxygen that would be needed to treat 1150 gpm of contaminated groundwater in the Maple Road area.[9] PLS estimates that such a treatment unit would require 40,000 cubic feet of liquid oxygen per day. This usage would require construction of a large liquid oxygen storage tank and frequent refilling by a liquid oxygen tanker truck. This use is not appropriate for a highly utilized retail commercial area. That is precisely why PLS designed the mobile ozone treatment unit to utilize a oxygen generator rather than liquid oxygen. Mr. Fotouhi convinced PLS management to adopt this design even though it would have been much cheaper to implement its proposed interim response with a liquid oxygen-based treatment system. (Compare the FS unit cost of treating 1000 gallons for the mobile unit ($2.64/1000gallons) with the on-site liquid oxygen-based treatment costs ($0.91/1000 gallons)).

Nor is it feasible to generate enough oxygen (with an oxygen generator) from the atmosphere to reliably treat 1150 gpm. PLS' current **200 gpm** system already utilizes the second biggest oxygen generator on the market. It is not technically feasible to string together six or seven of these units to generate the oxygen needed to treat 1150 gpm. Each oxygen generator would require its own compressor, air dryers, and other associated equipment. From an engineering standpoint, it is not possible to reliably operate such a system on anything approaching a continuous basis.

[8] DEQ's consultant estimated that their system would be of similar size. The "footprint" for the packaged system and supply equipment was estimated to be a total of 640 square feet, plus a large liquid oxygen tank with vaporizers (which will need containment and security) plus sufficient ground space for trucks to make chemical deliveries and additional ground space to secure the system (fencing, on-site security). (Email from Anne Turne to Mike Pozniak, August 25, 2004, attached as part of Appendix B, Attachment B, to DEQ's Decision Document). This is actually somewhat larger than PLS' facility.

[9] DEQ's vendor acknowledged that liquid oxygen presents significant health and safety issues, but claimed the concerns could be managed by securing the site and following proper liquid oxygen handling procedures. PLS submits this is an appropriate response only if the land is industrial. Zoning prohibits, for health and safety reasons, the location of this type of storage unit in a retail area.

ii. The Treatment System, Including Ponds, Required by the DEQ's Remedy is Too Large to be Accommodated by any Properties in the Wagner Road Area.

For a host of engineering reasons, a system sized to accomplish DEQ's proposed remedial objectives would require the construction of both an equalization ("Red") pond and a discharge ("Green") pond. Without such ponds it is PLS judgment that it would not be able to continuously purge the groundwater (as required to capture) or to meet the stringent discharge requirements of a NPDES permit. Again, this point is driven home by the fact that the treatment system would be essentially the same size as the system PLS operates on site. PLS currently utilizes two 1,000,000-gallon ponds. While it would not be absolutely necessary to have ponds with that volume at an off-site location, it would be prudent to have ponds with a volume of at least 500,000 gallons to accommodate a treatment volume of 1150 gpm. If the performance objective is to capture the entire width of the plume, ponds of this size would be needed to allow for continuous purging during maintenance of the treatment system. Even ponds this large would only provide storage capacity for approximately six hours of continuous operation.

These ponds would be necessary to meet the technical challenges associated with operating a treatment system that would have to meet NPDES discharge limits, 24 hours a day, 7 days a week, and 365 days a year – challenges with which PLS is well familiar. For example, the equalization or "Red" pond would be required so that the entity operating the system could precipitate out the iron in the water. If the iron is not removed prior to treatment, the treatment process would cause the iron to precipitate. In that condition, the iron would readily adhere to the interior of the lengthy pipelines associated with DEQ's proposal. Because of the extreme length of pipeline contemplated, it would not be practical to clean the iron residue from the pipeline to the River. The only practical way to address the iron issue is to precipitate the iron out prior to treatment, and that requires a pond.[10]

Moreover, much of PLS' success in operating a continuous purging/treatment operation is achieved because of the stability its on-site ponds provide. With such ponds, it is possible to maintain the steady volume of water needed to avoid constantly readjusting the calibration of the system, which would prevent the operator from meeting the discharge criteria. An equalization pond is particularly necessary under DEQ's proposal since water will be purged from multiple locations with varying concentrations and water chemistry.

It would also be necessary to have a discharge or "Green" pond to provide assurance that stringent NPDES permit requirements could be met by the treatment system. If effluent sampling shows that limit not satisfied, the operator would be able to re-circulate through the treatment system. Consistent compliance with a hypothetical

[10] DEQ's vendor acknowledged it had not field-tested its equipment where there is high iron, although it claimed it should not interfere with functioning of its unit. Even if this claim holds true, the iron would still have to be removed to control discharge to the Huron River through a long pipeline.

NPDES permit could not be achieved without such a pond. The Green pond also allows for further iron removal prior to being placed in a three-mile long pipeline.

Under DEQ's proposal, the resulting footprint of the required 1150 gpm treatment system would be far too large to be placed on any property in the vicinity of Maple Road. The treatment unit (even if it was feasible to configure a system that could generate the required amount of oxygen from the atmosphere) would at a minimum replicate PLS' current treatment building, which is approximately 60 X 115 ft. Treatment ponds would require an area of at least 120 X 140 ft. Therefore, even if it was safe to locate a system big enough to accommodate DEQ's remedial objectives it would not be possible to do so in the congested commercial area available.

iii. The DEQ's Proposed Remedy is Not Consistent with Existing Zoning.

Part of DEQ's response plan requires PLS to construct and operate a treatment plant of approximately 1300 gpm capacity in the vicinity of Maple Village Shopping Center ("MVSC") in Ann Arbor. A plant of this size would be an industrial use under Chapter 55 of the Ordinances of the City of Ann Arbor. Attached as Exhibit 5 are maps of the zoning above the Unit E plume from PLS' facility through the leading edge of the plume and beyond. These maps show that no property within the vicinity of MVSC (approximately 1000 foot radius from the proposed capture areas) is properly zoned for the DEQ's treatment plant. Even if one were to expand a search to cover more of the West Side of Ann Arbor, only two small parcels (near Liberty) have an industrial zoning classification. Both properties are too far away to be of practical use, are developed, occupied, and not for sale, and both are too small for a treatment plant that would meet DEQ's requirements. (See Map of Section 930).

Part 201 of NREPA requires that remedies selected by DEQ be consistent with zoning. This question most often arises when a response activity is intended to attain a criterion other than the most restrictive (residential) criterion. However, it is also a significant issue here, where in order to attain residential criteria, DEQ is ordering that property be put to non-residential use for a treatment plant, inconsistent with local zoning and current activity patterns. In this case, it is patently inconsistent for DEQ to insist that local ordinances controlling groundwater use must be made consistent with PLS' remedy, while ignoring zoning ordinances of these same local units of government in the case of its own remedy. Land use controls, including zoning and groundwater use ordinances, must both be examined in evaluating the appropriateness of a response activity plan, both in concept and in attaining cleanup objectives.

Section 20a of Part 201, MCL 324.20120a(6), provides in pertinent part that "the department shall not grant final approval for a remedial action plan that relies on a change in zoning designation until a final determination of that zoning change has been made by the local unit of government." That section also requires that a remedial action plan include documentation that the current property use is consistent with the current zoning or is a legal nonconforming use. While the shopping center use is consistent with

the current zoning, the DEQ's plan is manifestly not, and cannot be legally approved as a final remedy for the site unless and until there is a zoning change approved by the local unit of government. DEQ's administrative rules similarly emphasize that zoning must be consistent with the selected response activity. See Mich Adm Code R. 299.526(6)(b) (final interim responses must be consistent with zoning and land use activity patterns); R. 299.522(7)(d) (requiring DEQ to consider comments from neighbors or the local unit of government that a proposed response activity is inconsistent with current zoning); R. 299.532(8)(b) (a remedial action plan must contain statements and representations regarding current zoning to show consistency with proposed response actions).

DEQ's "Decision Document", its "Public Comment Responsiveness Summary" and the "Executive Summary" say nothing about zoning. The only comments regarding land-use that it responded to were in connection with PLS's plan, where DEQ did not dispute the relevance of this factor but only said it was "premature" with respect to evaluating PLS' contingency plan along the river. (Decision Document at 9). The record is otherwise devoid of any consideration of this issue.

b. Pipelines

Given the history of this site, it is capricious for DEQ to assume that PLS could implement a remedial alternative that requires construction of three to four miles of pipeline (about 1.5 miles of which would be installed within congested neighborhoods). As documented in the FS, these pipelines would cause tremendous disruption in the community, without any corresponding environmental or human health benefit. Recent public hearings/meetings have made clear that there is no public support for such construction among the affected homeowners (to the extent they even received notice of the project). Over 500 homeowners signed declarations and petitions opposing the disruption of their neighborhoods that would be caused by attempting to implement the DEQ's contingent remedy. These petitions were only from persons mobilized by DEQ's incomplete conceptual pipeline map. DEQ acknowledges that it is in fact not possible to know the extent of opposition or disruption until a complete design (all the way to the River) is proposed.

In the Evergreen subdivision, PLS sued the City to obtain access to City right-of-ways to install approximately 1000 feet of pipe. Even though this took place in a situation that demanded the utmost urgency, and even with this Court's intervention, it took over a year to get that 1000 feet of pipe installed. DEQ's proposal would require approximately 16,000 feet of pipeline to be installed in front of hundreds of homes and businesses, through right-of-ways owned by at least three different governmental units. The contemplated pipeline construction would not be feasible or even remotely timely. Even if such a series of pipelines were feasible and access to pipelines voluntarily granted, the construction would take years to complete.

LIST OF ATTACHMENTS AND EXHIBITS

Exhibit 1	Modeling Report for Reinjection
Exhibit 2	Work Plan for Downgradient Investigation
Exhibit 3	Arsenic data for Northwest Supply Well
Exhibit 4	Opinion and Order of Judge Conlin
Exhibit 5	Zoning Maps

Attachment A: PLS Response to MDEQ September 1, 2004 Decision Document
Attachment B: Decision Matrix

ATTACHMENT A
Pall Life Sciences Response to
DEQ's September 1, 2004 Decision Document

Introduction

DEQ issued its Decision Document on September 1, 2004. To the extent this document represents a final decision of DEQ, PLS is disputing that decision. This document lists conclusions set forth in DEQ's decision document which PLS disputes, the reason for the dispute, and additional supporting materials.

Cover Letter, Robert Reichel to Honorable Donald E. Shelton, September 1, 2004

- PLS disputes the conclusion that its proposed remedy as outlined in the FS "cannot be approved by DEQ, based upon the requirements of Part 201 of the Natural Resources and Environmental Protection Act." (Par. No. 1).

- PLS disputes (for the reasons stated below) the remedial alternative suggested by DEQ if PLS cannot meet the six specified conditions within one year. (Par. No. 3).

- PLS disputes (for the reasons stated below) that it must concurrently with pursuing its proposal begin to implement DEQ's alternative. (Par. No. 5).

Gelman Site Enforcement Activities

- PLS disagrees with DEQ's characterization of the disposition by this Court of the February 2000 motion by the Michigan Department of Attorney General ("DAG"). (Decision Document, at 3). PLS incorporates by reference its responsive pleadings and testimony in court in connection with its defense of the motion. PLS specifically denies, for the reasons set forth in the referenced documents, the statement in the Decision Document that PLS had not complied with the Consent Judgment. It is not appropriate to present this as a fact when it was contested and this Court did not decide the underlying contentions.

Unit E Plume

- PLS disagrees with the DEQ's characterization of the historic data regarding Unit E. Specifically, there is an implication that PLS or other parties knew of, but did not disclose, Unit E contamination before it was found in May, 2001. (Decision Document, at 4). This is not accurate.

- PLS does not agree that the test it conducted on in-situ treatment at MVSC proved that the technology was infeasible. (Decision Document, at 5). PLS agrees the results of the test ruled out use of the technology in the MVSC area based on the conditions of the test. PLS is

still reviewing the potential for in-situ to work in other locations, for other applications at the site, and under different conditions than those imposed by DEQ for the MVSC test.

DEQ Analysis of PLS's Proposed Response Action

- PLS disputes DEQ's characterization of the time that it would take PLS to achieve cleanup criteria using its proposed method. (Decision Document, at 9). Any remedy that involves pump and treat technology to address the Unit E suffers from the same uncertainty in predicting cleanup horizons due to the phenomenon of tailing and rebound. (See note 2). The statute and rules do not require DEQ to balance estimated cleanup times in evaluating options, nor is it possible to do so where both options involve pump and treat. It is arbitrary to rely on guesses as to cleanup horizons as a basis for selecting an option in this context.

- PLS disputes DEQ's conclusion that the WCRRPG is not adequate under Part 201. (Decision Document, at 9). The contours of the Unit E contamination (as defined by the 85 ppb iso-concentration line) are fairly well established. No one has identified existing drinking water supply wells in this zone. There are also no industrial wells within this zone. The "deficiencies" identified by DEQ are, therefore, speculative and should not disqualify an otherwise useable institutional control.

- PLS disagrees with DEQ's analysis of the viability of the Northwest Supply Well. (Decision Document, at 9). The analysis arbitrarily ignores the fact that the City of Ann Arbor has publically stated it will not turn on that well, and that it has sued PLS for, among other things, the replacement value of the well. Use of the well would be inconsistent with the City's lawsuit. Moreover, there is nothing in the record or the Decision Document that suggests that the City needs the well for water supply or otherwise intends to use the well under any circumstances.

- DEQ's application of its "policy" (Decision Document, at 9) to deny a waiver request when a plume is in a wellhead protection area is arbitrary and capricious and not supported by the record. No such written policy has, in fact, been produced. There is no way for PLS to comment upon, or for the Court to determine if the rationale for that policy (if it indeed exists independent of this particular site) applies to the circumstances of the Northwest Supply Well.

- DEQ's determination that the WCRRPG does not meet the requirements for acceptable institutional controls is also arbitrary and not supported by the record. There are no rules or written guidance that elaborate on the elements of an institutional control. Section 18 of Part 201 provides only that an institutional control that is proposed as part of a remedy be adequate "to prevent unacceptable risk from exposure to the hazardous substances, as defined by the cleanup criteria approved as part of the remedial action plan." Section 20b of Part 201 provides: "mechanisms that may be considered under this subsection include, but are not

limited to, an ordinance that prohibits the use of groundwater or an aquifer in a manner and to a degree that protects against unacceptable exposures as defined by the cleanup criteria approved as part of the remedial action plan. An ordinance that serves as an exposure control pursuant to this subsection shall be published and maintained in the same manner as zoning ordinances and shall include a requirement that the local unit of government notify the department at least 30 days prior to adopting a modification to the ordinance, or to the lapsing or revocation of the ordinance." It should be noted that neither statute prohibits exposure to *any* risk. The ordinance must be sufficient to prevent *unacceptable* exposure. With the exception of the Northwest Supply Well (discussed above) there are no water supply wells currently in the Unit E. While other Unit E wells exist, they are not near the plume and are located either cross-gradient or very far downgradient from the leading edge of the plume. There is, therefore, no basis in the record for concluding that the WCRRPG is insufficient merely because it does not require abandon of wells that actually do not exist within the plume boundaries or within any area that the plume could reasonably reach for many years.[1]

- DEQ's observation that the WCRRPG does not restrict operation of industrial wells (Record of Decision, at 9) is also misplaced. Current zoning does not allow industrial uses along the projected flow path, except in limited areas adjacent to the Huron River that is far downgradient of the leading edge. Also, the basis for this objection is stated to be that an industrial well "could change the configuration of the plume." DEQ fails to explain why it matters if the configuration of the plume changes, provided the plume remains subject to the WCRRPG. Finally, while it is "possible" that zoning may change, that land uses may change in Ann Arbor, that a heretofore non-existent hypothetical industrial user might then move to Ann Arbor and want to install a well notwithstanding that its due diligence should show that the Unit E is contaminated, this is not a risk that is significant enough to be a basis for rejecting PLS's plan. The statute only requires protection against unacceptable risk.

- PLS rejects as inaccurate and misleading DEQ's contention that there is no provision to monitor or protect existing private water supply wells east of the Huron River if the plume does underflow the Huron River. (Decision Document, at 9). The nearest such well is *three miles away*. PLS has already proposed a downgradient investigation that will answer DEQ's concern many years before the plume could ever reach that well, even assuming it took a bee-line under the river. In addition, as DEQ elsewhere acknowledges but omits in its analysis, PLS has proposed a contingency plan to intercept contaminated groundwater *before* the water

[1] The wells generally downgradient are in Ann Arbor Township. As part of its proposal, DEQ acknowledges that PLS has agreed to further demonstrate through investigation that these wells are not threatened by continued migration of a portion of the Unit E plume. In the interim, the WCRRPG is more than adequate to control actual exposures within the current plume boundaries and projected flowpath for the foreseeable future.

reaches receptors. There is, therefore, no basis in fact for DEQ's suggestion that PLS's plan would allow downgradient wells to become contaminated. One other observation – PLS is aware of one well, three miles away, that is on the other side of the river along the projected flow path. All other residential wells in that general direction are four miles away. While PLS, this Court, and DEQ all share in a goal to get started in addressing Unit E, there is no imminent threat to the public health or safety. The Decision Document is flawed to the extent it suggests that DEQ must reject PLS's proposal as inadequate to protect the public health and safety.

- DEQ also rejects PLS's proposal on the basis that there is a substantial degree of long-term uncertainty associated with assumptions about groundwater flow and that there is currently not enough information to predict the exact route the plume will follow. (Decision Document, at 9). PLS disagrees with this assessment. PLS' projected the plume flow path using available geologic information and analysis. The projection was not a mere "assumption." Nothing in the record shows that DEQ has in any way attempted to quantify the "uncertainty" it references, and DEQ ignores the WCRRPG, the current flowpaths delineated in the DEQ-approved wellhead protection report, the available hydrogeologic information, and logic. PLS submitted information to support its proposed flow path, including model runs that show the dramatic decline in concentrations in the projected plume as PLS's mass removal strategy is implemented. While it is always possible to claim, as DEQ does here, that there is not enough information to determine "exactly" where the plume goes, there is nothing in the record that suggests it is necessary to know this to such a degree of certainty. To the contrary, the record evidence suggests that concentrations will be low enough to not present an unacceptable risk, even if the exact flowpath is not yet known. Moreover, DEQ's finding ignores three components of PLS's plan: (1) collection of additional information downgradient to verify the information PLS has submitted (which will provide more certainty, even if not "exact"); (2) the WCRRPG, which controls risk of exposure; and (3) PLS's contingency plan to intercept the plume near the river should (1) and (2) prove inadequate to control risks.

- PLS acknowledges that a hydrogeologic study is necessary to add certainty to its plan. It has submitted a work plan to accomplish this to DEQ. PLS disputes that the current uncertainty is any more significant than the uncertainty in DEQ's alternative proposal. If and until an NPDES permit is issued, for example, neither PLS nor DEQ can know if it is feasible to discharge to the river or to treat extracted water at MVSC.

- PLS disagrees with DEQ's position that it need not evaluate "as premature" the claim made by PLS that its proposal would be more compatible with existing land uses than the leading edge alternatives. (Decision Document, at 9). It is not premature to make this evaluation. PLS has submitted information to DEQ, as have other commentators, regarding these issues.

Public Involvement – Responsiveness Summary

Comment 28 (Responsiveness Summary at 7): PLS strongly objects to and disputes statements made by DEQ to the public that suggests PLS is responsible to third parties in any respect. This statement is inappropriate in the context of the Decision Document and is not accurate as a matter of law.
Comment 29 (Responsiveness Summary at 7): PLS disputes that a pipeline to the Huron River is the only feasible method of discharge for treated groundwater from the Unit E.

Comments 31 and 32 (Responsiveness Summary at 7): PLS disputes the technical objections DEQ has interposed to reinjection as proposed by PLS.

DEQ's Preliminary (July 2004) Proposed Remedial Alternative and Evaluation

This section of the Decision Document (Page 11 to 17) reiterates the position taken in July 2004. PLS has already submitted comments on that document which is part of the record here, and PLS incorporates by reference those comments.

In addition, PLS disputes that it is necessary to design a conveyance system to transport water downstream of the City's water intake in the Huron River. (Decision Document, at 13). PLS has operated a 1300 gpm groundwater treatment system at its facility for years without any incident that threatens the City's water supply. There are numerous controlled and uncontrolled industrial, agricultural and residential discharges to the Huron River upstream of the water supply intake that in comparison are far greater threats than the strictly controlled discharge from PLS. In fact, PLS has added significant volumes of clean water to the Huron River. There is no basis on the record for designating a location downstream of the intake as the only acceptable surface water discharge point into the Huron River.

DEQ's September 1, 2004 Selected Remedial Alternative for the Unit E Plume

- PLS does not agree with the conclusion of DEQ that its proposed plan "is necessary to comply with Part 201 and the CJ." (Decision Document, at 13). This is not correct as a matter of law. The CJ does not require capture of the width of any of the identified plumes, except at the leading edge.

- PLS disputes that the balance of the criteria favor DEQ's alternative over PLS's selected remedial action. (Decision Document, at 13). A matrix comparing PLS's remedial action with DEQ's alternative is included as Attachment B. As shown on that matrix, none of the factors favor DEQ's alternative, and several factors favor PLS's remedial action.

- PLS also disputes the viability of verifying compliance with DEQ's approach. DEQ would require at each location the prevention of further migration at each location of concentration of 1,4-dioxane above 85 ppb in the downgradient or easterly direction. No method is suggested by DEQ, nor does PLS know of one, that can verify that this performance objective is being met, even if such a system were installed. That is because it is expected

that interior concentrations of the plume will continue to be at levels above 85 ppb for an undetermined time following initiation of DEQ's response. It does not appear feasible to directly verify whether the hydraulic barrier actually functions. Since PLS can be subject to penalties for failing to meet this directive, it is impermissible for the DEQ to establish an unattainable (or at least an unverifiable) performance objective. To the extent DEQ specifies some indirect measurement (such as purge rate) as the only way to document performance, DEQ's remedy in effect becomes only a more vigorous mass reduction strategy. DEQ cannot, and has not attempted to, justify their proposal on that basis.

- PLS disputes DEQ's conclusion that a new 1300 gpm groundwater treatment facility can be located at or near the MVSC. (Decision Document at 14). PLS submitted significant information on the needs and risks of such a system in support of its contention that it is not feasible to build nor safe to operate at that location. DEQ, without any contrary information on specifications, research into existing property uses, or available property in the area, has dismissed PLS's information and simply stated it "believes" such a system to be feasible. This is patently insufficient. There is no support in the record for the DEQ's belief. Belief will not change zoning requirements; it will not create vacant land where there is none; it will not force owners of property to give up ownership for a cleanup; nor it will make a project feasible that is not. The very fact that DEQ suggests that alternative locations be explored illustrates that a suitable location may, in fact, not exist at all. Additionally, this decision is arbitrary. There is no legal distinction between the type of uncertainty associated with the groundwater plume direction and the uncertainty associated with whether the DEQ's treatment plant could be sited and constructed. On the contrary, PLS has made a record in support of its plan and explaining in detail the infeasibility of DEQ's treatment system. Yet DEQ has rejected the former as unacceptable (for the time being) because of lack of precision, while accepting the uncertainty of its own proposal on the basis of "belief."

- PLS disputes DEQ's assertion that its plan would "significantly reduce" the amount of time needed to clean up the contaminated aquifer, and that this time difference (if it exists) reduces the threat to the public health, safety and welfare. (Decision Document, at 14, 15). There is no record on this. DEQ's position is once again based on belief instead of data. More importantly, there is no identified threat to the public health, safety and welfare presented by the Unit E that is time sensitive so there is absolutely no basis for the conclusion that a faster remedy is somehow a better one, even if DEQ's remedy could be

faster.[2]

- PLS disputes that DEQ need not consider balancing costs of PLS and DEQ's proposals because PLS's proposal is not protective. (Decision Document, at 14). The response actions are both protective and this balancing should occur.

- PLS disputes DEQ's conclusion that there is a need for a stochastic groundwater model. (Decision Document, at 15). This model is wholly unnecessary for DEQ's proposed remedy because the leading edge of the plume (not to mention two other locations) will have to be contained, leaving no need to do anything other than conventional performance monitoring outside of the plume and no need to do anything at all interior to the plume using a model.
- PLS disputes DEQ's assertion that its proposal reduces uncertainties associated with PLS proposal (Decision Document, at 14). As stated here and in earlier comments, the record shows that the uncertainties regarding risk are comparable for each remedy. The uncertainties regarding implementation are, however, far greater for DEQ's proposal.

- PLS disputes DEQ's conclusion that its remedy is "more readily implementable" than PLS's proposed remedy. (Decision Document, at 15). PLS and other commentators provided significant information to DEQ calling into question the implementability of its remedy. There is no substantive record response to these concerns. DEQ has, instead, dismissed them. Without limitation, DEQ has not responded substantively to the following facts regarding implementation of their remedy: (1) no available proximate property, suitable zoned and sized for DEQ's treatment system; (2) resistance expressed by the citizens of Ann Arbor, and even the City itself, to DEQ's plan to the extent it involves bringing contaminated groundwater to the surface in residential neighborhoods and disrupting those neighborhoods with infrastructure; (3) no NPDES permit has been issued for discharge to the Huron River; and (4) no transmission pipeline routes have been proposed by DEQ, making it impossible to

[2] It has been well known in the professional community that pump and treat approaches in all but very simple situations typically cannot fully attain groundwater restoration (health based goals) throughout a plume no matter how long the system is operated. The main reason is the phenomenon of "tailing" and "rebound." This is described in guidance for pump and treat systems put out by USEPA for superfund sites. *Pump and Treat Groundwater Remediation, A Guide for Decisionmakers,* USEPA, July 6, 1996 (EPA/625/R-95/005), available at http://www.epa.gov/ORD/NRMRL/pubs/625r95005/625r95005.pdf. Tailing and rebound will, in situations such as this one, involving multilayered heterogenous geology, frustrate any cleanup of Unit E that is based on attaining criteria throughout the aquifer. There is no basis for DEQ's assertion that more pumping at the interior of the plume will attain criteria "faster."

know if a feasible route in fact exists at this time.

- PLS disputes DEQ's "recommendation" that it pursue use of the sanitary and/or storm sewer for disposal of treated groundwater from the Maple Road area. (Decision Document at 14). The record shows that the City cannot accept enough capacity to make this worthwhile, and has imposed conditions that make effective use of the sanitary impossible. The treatment system operational records at the Wagner Road facility show that it cannot be reliably switched on and off in response to weather conditions and still attain treatment limits. The calibration needed to assure that the right combination of energy, oxidants, contaminants, and balancing chemicals are maintained to meet cleanup limits is upset when the system is brought up and down.

- PLS disputes that it has not already met with its proposal, conditions 2, 3, 4, and 6 as outlined by DEQ in its Decision Document at 15-16. PLS also maintains, for the reasons discussed above, that condition 1 (Northwest Supply well elimination) is moot, unnecessary, and hence arbitrary.

- PLS disputes all of the elements of DEQ's proposal. (Decision Document, at 16).

Appendix B, Attachment A: Response to Summary Comments (Weston)

- PLS disputes Weston's response to PLS's comments regarding construction of pipelines. Based on the record and this response, Weston acknowledges that the full extent of the difficulties that will be encountered during the construction of the pipelines along the final pathway can only be determined as the design of the proposed alternative is refined. It is arbitrary and capricious, then, to make a judgment that the difficulties would be acceptable or surmountable without a final design. DEQ's solution, which is also arbitrary, is to make this PLS' problem. This is a further example of how DEQ is prepared to make judgements on inadequate information (or none at all) in support of its proposal, but requires PLS to make additional demonstrations as a condition to approval PLS's response action. So, for example, if there is not enough information to make decisions on the feasibility of reinjection (despite information provided in support to DEQ), then there is also not enough information to determine the feasibility of lengthy pipelines until a design is put forward.

- PLS disputes Weston's conclusions about the feasibility of treating 1300 gpm at Maple Village. In order to answer PLS's comments, Weston went back to a system vendor and asked for additional information. This information does not support DEQ's or Weston's conclusion as to feasibility, however. The record shows that the vendor acknowledged that it did not have data related to iron content or other characteristics of area groundwater, making their conclusions regarding the necessity of detention ponds unreliable. The record shows that the vendor acknowledged that "there are potentially significant health and safety issues associated with the handling and storage of liquid oxygen." The record shows that the neither DEQ nor the vendor can say reliably that treatment ponds would not be necessary

because the NPDES limits are not known. In particular, background concentrations of iron, bromide and arsenic may all create significant problems for the vendor's system.

- PLS also disputes Weston's conclusion that ponds will not be needed to assist the treatment system. First, it is not disputed that PLS's existing UV-H202 system does use and need such ponds. DEQ stated in its decision document that PLS might have to use this system at MVSC if the proposed hydrogen-peroxide and ozone system will not meet (as yet undetermined) NPDES permit requirements. (Decision Document, at 14). While PLS is confident that it will be able to switch technologies DEQ apparently does not share that view and so cannot, as a basis of its decision, assume that UV-H202 will not be used. Second, until NPDES permit limits are known and a large scale H202/ozone system can be field tested using the Unit E water chemistry it cannot be said that ponds will not be necessary. There may be other engineering solutions to water quality problems, but these may involve additional cost, additional space, and may have other unintended or unforeseen consequences that preclude reliably selecting a treatment location that does not have room for ponds. This is particularly true where past experience has shown that these ponds are very useful in managing treatment efficiency and compliance with permit limits at the PLS plant.

Attachment 2: Decision Matrix

Rule 603 Criteria for Evaluation of Remedial Alternatives	Comments	Favors PLS Plan	Favors DEQ Alternative
The effectiveness of protecting the public health, safety, and welfare and the environment	Both remedies are equally protective.	--	--
Long-term uncertainties associated with proposed remedial action	For PLS plan, uncertainty is with projected pathway and fate of plume; for DEQ uncertainty is NPDES permit conditions and feasibility of treatment at MVSC and of construction of pipelines	--	--
The toxicity, mobility, and propensity to bio-accumulate of the hazardous substance	Not evaluated. Same for both.	--	--
The short and long-term potential for adverse health effects from human exposure	There are no current exposures. Both plans prevent future exposures	--	--
The costs of the remedial action, including long-term maintenance	DEQ did not balance the costs, although it did review the estimates. PLS estimates its plan will be much less costly.	Yes	No
The reliability of alternatives	Both rely on "pump and treat."	--	--
The potential threat to public health, safety and welfare and the environment associated with the excavation, transportation, and re-disposal or containment	PLS's plan is low (reinjection into aquifer). DEQ's alternative considerably higher (large scale treatment, oxygen storage, materials transportation, construction and operation of pipelines)	Yes	No
The ability to monitor remedial performance	Both require extensive monitoring	--	--
The reliability of the alternatives	Large scale system proposed by DEQ is more prone to long term operation and maintenance problems; no way to directly verify internal "capture" requirement. PLS has proposed reinjection, which is well established technology.	Yes	No
The public's perspective about the extent to which the proposed remedial action effectively addresses Part 201 and the Part 201 Rules.	Public comments went both ways. However, residents at the leading edge and the City of Ann Arbor do not favor "leading edge" capture.	--	--
The potential for future remediation if the alternative fails	Same for both.	--	--

EXHIBIT K

DEPARTMENT OF ENVIRONMENTAL QUALITY

REMEDIATION AND REDEVELOPMENT DIVISION

ESTABLISHMENT OF CLEANUP CRITERIA FOR 1,4-DIOXANE

EMERGENCY RULES

Filed with the Secretary of State on

These rules take effect upon filing with the Secretary of State and shall remain in effect for 6 months.

(By the authority conferred on the Department of Environmental Quality by 1994 PA 451, 1969 PA 306, MCL 324.20104(1), MCL 324.20120a(17), and MCL 24.248)

FINDING OF EMERGENCY

These rules are promulgated by the Department of Environmental Quality to establish cleanup criteria for 1,4-dioxane under the authority of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended. The Department of Environmental Quality finds that releases of 1,4-dioxane have occurred throughout Michigan that pose a threat to public health, safety, or welfare of its citizens and the environment. Recent shallow groundwater investigations in the Ann Arbor area have detected 1,4-dioxane in the groundwater in close proximity to residential homes. The known area of 1,4-dioxane groundwater contamination in Ann Arbor covers several square miles defined by a boundary of 85 parts per billion, the current residential cleanup criteria. The extent of 1,4-dioxane groundwater contamination that is less than 85 parts per billion, but greater than 7.2 parts per billion, is unknown; and 1,4-dioxane contamination is expected to be present beneath many square miles of the city of Ann Arbor occupied by residential dwellings. The current cleanup criteria for 1,4-dioxane, initially established in 2002, are outdated and are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway.

These rules establish the 1,4-dioxane cleanup criterion for the drinking water ingestion pathway at 7.2 parts per billion and the vapor intrusion screening criterion at 29 parts per billion. These criteria are calculated using the latest United States Environmental Protection Agency toxicity data for the chemical 1,4-dioxane and the Department of Environmental Quality's residential exposure algorithms to protect both children and adults from unsafe levels of the chemical.

The Department of Environmental Quality, therefore, finds that the current cleanup criteria for 1,4-dioxane are not protective of public health with respect to the drinking water ingestion pathway and the vapor intrusion pathway, which, therefore, requires

the promulgation of emergency rules without following the notice and participation procedures required by sections 41, 42, and 48 of 1969 PA 306, as amended, MCL 24.241, MCL 24.242, and MCL 24.248 of the Michigan Compiled Laws.

Rule 1. The residential drinking water cleanup criterion for 1,4-dioxane in groundwater is 7.2 parts per billion.

Rule 2. The residential vapor intrusion screening criterion for 1,4-dioxane is 29 parts per billion.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

C. Heidi Grether

C. Heidi Grether
Director

Pursuant to Section 48(1) of 1969 PA 306, as amended, MCL 24.248(1), I hereby concur in the finding of the Department of Environmental Quality that circumstances creating an emergency have occurred and the public interest requires the promulgation of the above rule.

Governor

10-27-16

Date

EXHIBIT L

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL for the
STATE OF MICHIGAN, et al,
MICHIGAN NATURAL RESOURCES
COMMISSION, MICHIGAN WATER
RESOURCES COMMISSION, and
MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

Case No. 88-34734-CE

vs

Hon. Donald E. Shelton

GELMAN SCIENCES INC.,
a Michigan corporation,

Defendant.
_____/

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BRIEF IN SUPPORT OF
MOTION TO AMEND CONSENT JUDGMENT

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
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INTRODUCTION

Pall Life Sciences ("PLS") seeks to amend the Consent Judgment to clarify its obligations with regard to the Evergreen System. Specifically, PLS asks that the Consent Judgment be amended to clarify that the objectives of the Evergreen groundwater extraction system do not apply to the plume of contamination in the Unit E aquifer. As the Court is aware, contamination in the Unit E was discovered in 2001, well after the parties drafted the October 1992 Consent Judgment. The proposed amendment to the Consent Judgment will make it consistent with the current state of knowledge and this Court's December 17, 2004 Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer (the "Unit E Order"). This amendment is necessary because operation of the Evergreen System, which is designed to meet the current objective of capturing the "leading edge" of the groundwater contamination "in the vicinity of" the Evergreen Subdivision, has unintentionally distorted the Unit E plume and drawn additional groundwater contamination from the Unit E aquifer into the Evergreen Subdivision. Continued adherence to the original Consent Judgment objectives will negatively affect both the Evergreen Subdivision cleanup and the institutional control established by this Court's "Unit E Order" to protect the public from the Unit E plume. In particular, continued operation of the Evergreen System will continue to pull the Unit E plume north, beyond the current boundary of the Prohibition Zone.[1]

[1] As set forth in PLS' Motion to Amend Consent Judgment, PLS is also proposing to modify the cleanup criteria set forth in the Consent Judgment to make them consistent with the current DEQ regulations. This type of amendment is specifically required by State law, and the parties have previously stipulated to a much more significant modification of the cleanup criteria based on earlier revisions to the State-wide cleanup criteria. PLS does not expect the State to oppose these modifications. Consequently, PLS will not address these changes in this brief, but reserves the right to do so if they are, in fact, opposed.

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FACTUAL AND PROCEDURAL BACKGROUND

A. Consent Judgment Objectives for the Evergreen System.

The parties to this action entered a Consent Judgment in this matter on October 26, 1992. The Consent Judgment has been amended on two occasions since that time. (Relevant portions of the Consent Judgment are attached as Exhibit 1.) The Consent Judgment requires PLS to implement various remedial actions to address environmental contamination in the vicinity of PLS' property.

The Consent Judgment addresses each of the known areas of groundwater contamination, including the plume of contamination that migrated into the "Evergreen Subdivision Area."[2] The plume of contamination located in the Evergreen Subdivision has generally been referred to as the D_2 plume, so named after the aquifer within which the plume has migrated to the subdivision.

At the time the parties entered into the Consent Judgment, the parties were unaware of any contamination in what is now known as the "Unit E" aquifer. Accordingly, the parties drafted the Consent Judgment objectives for the Evergreen System broadly, based on the assumption that the only contamination "in the vicinity of the" Evergreen Subdivision was contamination known to be present in the D_2 aquifer:

> (a) to intercept and contain *the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area*; (b) to remove the contaminated groundwater from the affected aquifer; and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that is not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section VI.

(Exhibit 1, § V.A.1 (emphasis added).) In 2001, the parties discovered that the assumption underlying this provision was inaccurate.

[2] The Consent Judgment defines the "Evergreen Subdivision Area" as the "residential subdivision generally located north of I-94 and between Wagner and Maple Roads, bounded on the west by Rose Street, on the north by Dexter Road, and on the south and east by Valley Drive." (Exhibit 1, § III.D.)

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B. Interaction of Unit E and D_2 Plumes.

Contamination in the Unit E aquifer was discovered for the first time in 2001. (Unit E Order, Exhibit 2, p. 3.) After extensive briefing and public debate, the Court issued its Unit E Order. The Unit E Order sets forth how PLS will be required to address the groundwater plume present in the Unit E aquifer. Among other protections, the Unit E Order establishes a "Prohibition Zone" within which the use of, and exposure to, the groundwater is generally prohibited. PLS is also required to prevent groundwater contamination in excess of 2800 parts per billion ("ppb") from migrating east of Maple Road. Less contaminated portions of the Unit E plume are allowed to migrate safely to the Huron River, subject to the protections of the Prohibition Zone. Although concentrations in the Maple Road area have not approached 2800 ppb, PLS has been operating its Maple Road groundwater extraction/treatment/reinjection system since March of last year.

Historically, the parties understood that Unit E plume and the D_2 plume were two distinct plumes of contamination. However, based on newly collected data, it is now clear that there is no geologic separation between the two aquifers in certain areas and that they can hydraulically communicate in the areas where they are not physically separated. (Affidavit of James W. Brode ("Brode Aff."), Exhibit 3, ¶ 19.) It is also clear that, as a result of this connection, operation of the Evergreen System has unintentionally pulled in a portion of the Unit E plume into the Evergreen Subdivision from the south and into the capture zone of the Evergreen System extraction wells. (Brode Aff., Exhibit 3, ¶¶ 18, 19.)

Pumping the Evergreen System at the current rates has caused a significant hydraulic depression in the area of LB-1 and LB-3 as well as a steep hydraulic gradient from south to north along the southern flank of the Evergreen System area. (Brode Aff., Exhibit 3, ¶ 19.) This has

caused the plume at that location to be drawn into the Evergreen Subdivision Area and beyond the northern boundary of the Prohibition Zone. (Brode Aff., Exhibit 3, ¶ 20.) The evidence that this is occurring is overwhelming. Among other things, recent data show that the concentration of 1,4-dioxane in groundwater samples from wells LB-1, LB-2 and LB-3 (which has replaced LB-2) has remained stable. (Brode Aff., Exhibit 3, ¶ 19.) On the other hand, concentrations of 1,4-dioxane in the upgradient portion of the D_2 plume – the Evergreen System's only known source of contamination other than contribution from the Unit E plume – *have been declining since 2001.* (Brode Aff., Exhibit 3, ¶ 19.) Similarly, the concentration of 1,4-dioxane has steadily increased in samples from wells located southeast of the LB extraction wells (see, e.g., 440 Clarendon and 456 Clarendon), even though the LB wells have prevented groundwater contamination from migrating east of Evergreen Street since 1996. (Brode Aff., Exhibit 3, ¶ 19.) These data, and the other evidence described in Mr. Brode's affidavit, indicate that the capture zone for LB-1, LB-3 and AE-1 includes a portion of the "Unit E" plume and that operation of those wells at the current rates (LB-1 at 90 gpm and LB-3 at 80 gpm) has pulled the northern portion of the Unit E plume toward those wells and into the Evergreen Subdivision. (Brode Aff., Exhibit 3, ¶¶ 18, 19.)

C. The Allison Street Extraction Well Is No Longer Necessary to Satisfy the Consent Judgment.

Moreover, data gathered by PLS indicate that further operation of the Allison Street extraction well (currently AE-3) is not necessary to satisfy the original intent of the parties with regard to the objectives of the Evergreen System remediation, *i.e.*, capture and containment of the D_2 plume. As this Court will recall, PLS installed an extraction well along Allison Street (after extensive litigation) in order to capture a small portion of the plume that may have escaped beyond the LB extraction location on Evergreen Street in 1996, during the period PLS was

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forced to stop extraction because the injection well used to dispose of the treated water became inoperable. PLS restarted the LB extraction and reestablished capture at the Evergreen Street location within a few months, after PLS obtained permission to dispose of its treated water via the City's sanitary sewer. PLS has captured the entire width of the D_2 plume at the Evergreen Street location since that time. (Brode Aff., Exhibit 3, ¶ 18.)

Because the upgradient source of contamination was quickly cut off, the escaped portion of the plume the Allison Street extraction well was intended to capture was quite small – PLS estimates the mass of this plume fragment to be approximately 60 pounds. (Brode Aff., Exhibit 3, ¶ 19.) Despite the fact that PLS' Evergreen Street extraction has cut off the upgradient source of contamination reaching the Allison Street extraction wells, PLS has removed approximately 100 pounds of 1,4-dioxane from the AE wells to date. In addition, concentrations in a small area in the immediate vicinity of the AE wells have also remained slightly above the cleanup criterion, even though the upgradient contaminant source was cut off in 1996. (Brode Aff., Exhibit 3, ¶ 19.) The only plausible explanation for these data is contribution from the Unit E aquifer. Accordingly, and contrary to the original purpose of the Allison Street extraction, the small amount of contaminant mass currently being captured by AE-3 (concentrations in AE-3 have been below 85 ppb since July, 2005) is primarily, if not entirely, Unit E contamination, not the leading edge of the D_2 plume. (Brode Aff., Exhibit 3, ¶ 19.) Therefore, continued operation of an extraction well at Allison Street is no longer necessary to achieve the Consent Judgment objectives for the Evergreen System, as the parties originally envisioned them. Indeed, operation of the Allison Street extraction well only exacerbates the distortion of the Unit E plume and the extent to which that plume is being pulled beyond the Prohibition Zone boundary.

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D. Proposed Amendment to Consent Judgment.

Accordingly, PLS seeks to amend the Consent Judgment to clarify that it obligations with regard to the Evergreen System do not unintentionally require it to operate the Evergreen System in such a way that it draws contamination from the Unit E aquifer into the Evergreen Subdivision. PLS proposes to amend the Consent Judgment as follows:

> A. Evergreen Subdivision Area System
> (hereinafter "Evergreen System")
>
> 1. Objectives. The objectives of this system shall be: (a) to prevent groundwater contamination that is present north of Valley Street and west of Evergreen Street within the Evergreen Subdivision area from migrating east of Evergreen Street, except to the extent such groundwater contamination may migrate east of Evergreen Street, but remains within the capture zone of the extraction well or wells located in the immediate vicinity of Evergreen Street; (b) to remove the contaminated groundwater from the affected aquifer; and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that is not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section VI. The objectives of the Evergreen System shall not apply to groundwater contamination that is addressed by this Court's December 17, 2004 Order and Opinion Regarding Remediation of the Contamination of the "Unit E" Aquifer.

(Proposed changes highlighted.)

By removing the reference to intercepting the "leading edge" of groundwater contamination in the "vicinity of" the Evergreen Subdivision area, the proposed modification eliminates the ambiguity caused by the intrusion of Unit E contamination and the confusion between what constitutes the leading edge of the D_2 plume versus the northern edge of the Unit E plume. The proposed amendment unequivocally requires PLS to capture the entire width of the D_2 plume at the LB extraction well location on Evergreen Street, consistent with the DEQ's past interpretation of the Consent Judgment. These modifications will allow PLS to design the Evergreen System in a way that minimizes if not eliminates the unintended distortion of the Unit E plume, allowing that plume to resume its natural migration pathway within the Prohibition

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Zone. Amending the Consent Judgment objectives to allow PLS to terminate the Allison Street extraction will not cause any significant environmental harm or danger to the public. If AE-3 were to be permanently shut off, any such contamination beyond the capture zone of LB-1 and LB-3 would migrate a short distance (about 500 feet), then enter the existing boundaries of the Prohibition Zone. The contamination would then merge with the existing Unit E plume in the area of Maple Road. (Brode Aff., Exhibit 3, ¶ 16.)

LEGAL STANDARDS FOR AMENDING THE CONSENT JUDGMENT

A consent decree is a judicial "hybrid," with characteristics of both a voluntary settlement agreement and a final judicial order. *Vanguards of Cleveland v City of Cleveland*, 23 F3d 1013, 1017 (CA6 1994). "[J]udicial approval of a consent decree places the power and prestige of the court behind the agreement reached by the parties." *Id.* at 1018. Accordingly, "[t]he injunctive quality of a consent decree compels the approving court to: (1) retain jurisdiction over the decree during the term of its existence, (2) protect the integrity of the decree with its contempt powers, and (3) modify the decree is 'changed circumstances' subvert its intended purpose." *Id.*

Modification of a consent decree is appropriate "(1) 'when changed factual conditions make compliance with the decree substantially more onerous,' (2) 'when a decree proves to be unworkable because of unforeseen obstacles,' or (3) 'when enforcement of the decree without modification would be detrimental to the public interest.'" *Vanguards,* 23 F3d at 1018; *Rufo v Inmates of Suffolk County Jail*, 502 US 367, 384 (1992). The moving party has the burden of establishing a "significant change in circumstances." *Vanguards,* 23 F3d at 1018; *Rufo,* 502 US 367 at 383. A party satisfies this burden "'by showing either a significant change in factual conditions or in law.'" *Vanguards*, 23 F3d at 1018, *quoting Rufo*, 502 US at 384.

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A. Amendment is Necessary Because of Changed Circumstances.

Here, a significant change in factual circumstances has occurred with regard to the Evergreen System that was unknown to the parties at the time they entered into the Consent Judgment. At time of Consent Judgment, the parties were not aware that the Unit E plume existed. PLS' continued investigation of the Unit E plume and its relationship to the D_2 plume only recently revealed that a portion of the Unit E plume was being drawn into the Evergreen Subdivision area by the unnecessarily high purge rates of the extraction wells.

When the Consent Judgment was drafted, there was no reason to distinguish between the known contamination migrating to this area in the D_2 aquifer and contamination from some other location because the D_2 aquifer was the only known source of contamination in the area. In light of the existence of the Unit E plume and the recent discovery that it is being artificially drawn into the Evergreen Subdivision area, the existing requirement to generally "intercept and contain the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area" no longer makes sense. This is particularly true with regard to the operation of AE-3. That purge well is not capturing the "leading edge" of the D_2 plume any longer – it is distorting the "side edge" of the Unit E plume. This is not what the parties intended when the Consent Judgment was drafted. The Consent Judgment needs to be amended so that its requirements for the Evergreen System are consistent with both the parties' original intent and the current factual circumstances.

B. Amendment of the Consent Judgment is Necessary to Effectuate this Court's Unit E Order and to Protect the Public Interest.

PLS' current obligation under the current Consent Judgment to capture and remove any contamination "in the vicinity of the Evergreen Subdivision area" is endangering the effectiveness of this Court's Unit E Order and the protections put in place to protect the public

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from that area of contamination. The excessive purging required to meet this objective has already distorted the Unit E plume and drawn the northern edge of that plume beyond the original boundary of the Prohibition Zone. PLS and the DEQ have already begun the process of revising the Prohibition Zone boundary, and further amendment will likely be necessary unless the excessive Evergreen purging is reduced. Continued distortion of the Unit E plume could potentially cause the plume to flow in an unanticipated direction, which would further endanger the ability of the Unit E Order to protect the public.

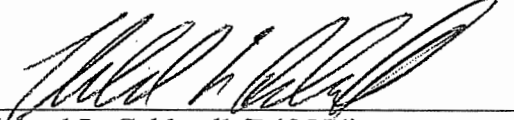
Finally, as set forth in Mr. Fotouhi's affidavit, the currently required level of groundwater extraction is having, and will continue to have, a detrimental effect on the groundwater cleanup as a whole. (Affidavit of Farsad Fotouhi, Exhibit 4, ¶ 33.)

CONCLUSION

For the reasons stated above, and for the reasons set for in the Petition for Dispute Resolution filed contemporaneously with this motion, PLS asks this Court to enter the Third Amendment to Consent Judgment attached to PLS' motion in order to clarify PLS' obligations under the Consent Judgment with regard to the Evergreen Subdivision area.

Respectfully submitted,

ZAUSMER, KAUFMAN, AUGUST
CALDWELL & TAYLER, P.C.



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Dated: July 6, 2007

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EXHIBIT M

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF MICHIGAN, *ex rel.* MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT,

Plaintiffs,

and

CITY OF ANN ARBOR

Intervening Plaintiff

vs.

GELMAN SCIENCES, INC., d/b/a PALL LIFE SCIENCES, a Michigan Corporation,

Defendant.

Case No. 88-34734-CE

Hon. Timothy P. Connors

_____/

BODMAN PLC
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_____/

INTERVENOR CITY OF ANN ARBOR'S COMPLAINT

The City of Ann Arbor, a municipal corporation ("Ann Arbor" or the "City") states as follows for its complaint as intervenor:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to MCL 324.1701, MCL 324.20135 and MCL 324.20137, and because damages sought by Ann Arbor exceed $25,000. Ann Arbor also seeks injunctive relief.

2. Venue is proper in this court pursuant to MCL 324.1701(1), MCL 324.20135(7), MCL 324.20137(3) and MCL 600.1629 because the release (within the meaning of MCL 324.20101) of Hazardous Substances that is the subject of this complaint, and the acts, omissions, injuries and damages complained of herein, occurred in Washtenaw County.

THE PARTIES

3. The City is a municipal corporation located in Ann Arbor, Michigan.

4. Defendant Gelman Sciences, Inc. d/b/a Pall Life Sciences ("Pall" or "Defendant") is a Michigan corporation that conducts business in Washtenaw County.

5. Defendant Pall is the successor of the 1997 merger between Gelman Sciences, Inc. and Pall Acquisition Corporation through a stock purchase agreement and merger.

6. Defendant Pall owns real property located at 600 South Wagner Road, Ann Arbor, Michigan, 48103 ("Source Property").

7. Defendant operates the Source Property.

8. In 2013 Defendant ceased commercial operations at the Source Property, but continues to occupy and operate the Source Property and utilize it.

NATURE OF THE CLAIM

A. Introduction.

9. In 2004 and 2005, the City filed actions in state and federal courts against Defendant regarding Hazardous Substances[1] [principally 1,4 dioxane, which according to EPA is a probable carcinogen] Released[2] by Defendant at and migrating from Defendant's property, as well as a petition for a contested case hearing to challenge Defendant's permit to discharge treated water to Honey Creek.

10. In 2006, the parties entered into a settlement agreement ("Settlement Agreement") in which Defendant agreed to, among other things, compensate the City, monitor water quality, and provide the City with extensive and detailed reports on its sampling activities and other data. In exchange the City granted Defendant a limited release of claims.

11. The City entered into the Settlement Agreement under the belief that Defendant would undertake and successfully complete its obligations under the then-existing consent judgment, among them to contain the spread of the contaminated 1,4 dioxane plumes.

12. In the Settlement Agreement, the City reserved the right to assert future claims with respect to among other things: (A) Claims for response costs and response activity costs to address new plumes of contamination; and (B) All Claims related to the unforeseen change in the migration pathway of a known plume, which results in contamination above the applicable cleanup criteria (as they might be amended in the future) and which causes City property to be considered a Facility under Part 201 of Michigan's Natural Resources and Environmental Protection Act ("NREPA").

[1] As "Hazardous Substance" is defined by MCL 324.20101(1)(x).
[2] As "Release" is defined by MCL 324.20101(1)(pp).

13. The City disclaims any attempt to make a claim in this suit which exceeds what is allowed by the Settlement Agreement.

B. Current Conditions

14. Among other things, MCL 324.20114 requires that the Owner or Operator of a "facility" who is liable for a "Release" of hazardous substances must: (i) "…determine the nature and extent of the Release at the facility"; (ii) "Immediately stop or prevent an ongoing release at the source"; and (iii) "diligently pursue response activities necessary to achieve the cleanup criteria established under [Part 201]…"

15. Despite the requirements of MCL 324.20114, Defendant's releases of 1,4 dioxane have not been stopped at the source, but instead have been allowed to continue to migrate away from Defendant's property.

16. On October 27, 2016, the Michigan Department of Environmental Quality ("MDEQ") declared that Defendant's releases of hundreds of thousands of pounds of 1,4 dioxane into groundwater in and around Ann Arbor constitutes an emergency threatening the public health, safety and welfare of local citizens and the environment.

17. In declaring an emergency, MDEQ pointed to, among other things, "[r]ecent shallow groundwater investigations" that "have detected 1,4 dioxane in close proximity to residential homes."

18. This latest discovery of 1,4 dioxane in shallow groundwater near Huron and Seventh Streets in the City of Ann Arbor is simply one of many recent findings demonstrating the continued spread of 1,4 dioxane in and around the City.

19. In fact, dozens of monitoring wells have recently recorded their highest ever levels of 1,4 dioxane. And monitoring wells that for many years tested clean of 1,4 dioxane are now recording measurable concentrations of it.

20. MDEQ stated that the known area of 1,4 dioxane contamination "covers several square miles." In addition, even after 30-years of remediation efforts and despite the requirements of MCL 324.20114, MDEQ further determined that the extent of the 1,4 dioxane groundwater pollution is still "unknown".

21. Between 2002 and October 27, 2016, the 1,4 dioxane cleanup criteria for drinking water was 85 parts per billion. MDEQ now has concluded that standard "outdated and not protective of public health."

22. Therefore, MDEQ promulgated, on an emergency basis, an emergency rule establishing a residential drinking water cleanup criterion for 1,4 dioxane in groundwater of 7.2 parts per billion, effective October 28, 2016.

23. MDEQ also promulgated, on an emergency basis, an emergency rule establishing a residential vapor intrusion screening criterion for 1,4 dioxane of 29 parts per billion.

24. The new cleanup and screening criteria will require additional, more stringent enforcement actions, potentially including the amendment of the current consent judgment between the State of Michigan and Gelman, which would be necessary if Defendant is to satisfy the requirement of MCL 324.20114 to achieve the amended cleanup criteria and screening levels.

25. On information and belief, the Attorney General and Gelman already have been negotiating proposed amendments to the current consent judgment.

26. The consent judgment, as currently amended, has not sufficiently protected the public or the City. Contamination has been allowed to spread for decades and, despite numerous court orders and promises from Gelman, has not even been controlled, contained, or even delineated, let alone cleaned up.

27. Many of the burdens of prior "containment" approaches have fallen on the City of Ann Arbor and its residents, along with residents of surrounding communities.

28. The City seeks to recover from Defendant Response Activity Costs that the City has incurred already, and that it will incur in the future, that relate to Hazardous Substances Released by Defendant to the environment at, and which have migrated away from the Source Property, relating to claims that were reserved in the prior settlement with Defendant.

29. The City also seeks injunctive relief that would compel Defendant to clean up Hazardous Substances, and to prevent future migration of such Hazardous Substances, that exceed cleanup criteria recently promulgated by the state of Michigan, beyond the Prohibition Zone as it existed in the Settlement Agreement.

C. History of Gelman's Contamination.

30. For many years, Defendant Released Hazardous Substances to the environment at the Source Property.

31. More specifically, between about 1966 and 1986, Defendant unlawfully discharged the chemical 1,4 dioxane at the Source Property by several methods, including spray-irrigating fields located at the Source Property and pumping contaminated water to unlined lagoons adjacent to Defendant's manufacturing facility.

32. 1,4 dioxane is a probable human carcinogen and a Hazardous Substance. According to the Environmental Protection Agency, exposure to high concentrations of 1,4

dioxane may also result in nausea, drowsiness, headache, and irritation of the eyes, nose and throat. Exposure typically occurs through inhalation, ingestion of contaminated food or water, or dermal contact.

33. Defendant's Hazardous Substances entered the soil and groundwater at the Source Property, and have migrated, and continue to migrate, away from the Source Property and into several aquifers in Washtenaw County.

34. Drinking water wells have been contaminated by the Hazardous Substances Released at the Source Property and those Hazardous Substances have migrated into surface water bodies, including Honey Creek and its tributary, which is an intermittent stream traversing the Source Property.

35. Defendant's unlawful activity was discovered in 1984, and Defendant has made numerous representations, promises and agreements to remediate the Hazardous Substances over the years.

36. Defendant discharged approximately 850,000 pounds of 1,4 dioxane into the environment. Only about 110,000 pounds of the 1,4 dioxane, or about 13% of the amount Released, has been extracted and treated.

37. The 1,4 dioxane released by Defendant infiltrated the groundwater and has and continues to spread under and through the City of Ann Arbor and surrounding communities.

38. The City suffered damages and incurred Response Activity Costs because of the Release, threatened release and disposal of Hazardous Substances, including 1,4 dioxane that has migrated from Defendant's Source Property.

39. In 1992, Defendant entered into a consent judgment with the State of Michigan, and promised to remediate the 1,4 dioxane contamination with the objectives of both containing

the plumes of groundwater contamination emanating from the Source Property and fully extracting all contaminated groundwater for treatment and disposal.

40. In particular, contaminated groundwater was to be removed from affected aquifers, treated to eliminate the 1,4 dioxane contamination, and then returned to the environment.

41. Despite the entry of the consent judgment, Defendant did not remove and treat all of the contaminated groundwater from the Source Property or from other aquifers in Ann Arbor and surrounding communities. Nor did Defendant successfully contain the 1,4 dioxane plumes. Instead, the contaminated groundwater continued to spread.

42. In 1996, an amendment to the consent judgment was entered, under which Defendant was ordered to change its Remedial Action Plan. Among other things, Defendant was required to install additional monitoring and/or purge wells to ensure that the clean-up objectives in the original consent judgment were achieved.

43. By 1999, fifteen years after Defendant's releases were first discovered, not only was Defendant's promised remediation of the 1,4 dioxane pollution not complete, but the contaminated plumes continued to spread through Ann Arbor and surrounding communities, endangering the integrity of drinking water systems and the public health. In 1999, Defendant sought to adopt new disposal methods to purge groundwater from impacted aquifers.

44. In 2005, Defendant gave up attempting to remove all of the 1,4 dioxane-polluted groundwater. Rather than conducting the remediation required by the original consent judgment, Defendant and MDEQ agreed to seek an amendment to the consent judgment, which allowed Defendant to adopt a program that Defendant insisted would "contain" the toxic plumes and prevent them from spreading outside a court-ordered "Prohibition Zone." The purpose of the

Prohibition Zone was "to prevent human exposure to groundwater that is or may become contaminated at 1,4 dioxane at levels that exceed acceptable criteria." A map depicting the Prohibition Zone is attached as **Exhibit A**. A new amendment to the consent judgment was entered.

45. The Prohibition Zone encompassed the areas of known contamination and then-foreseeable migration pathways of known 1,4 dioxane plumes at concentrations exceeding the then-existing cleanup criteria.

46. Cleanup criteria are set and periodically revised by the Michigan Department of Environmental Quality ("MDEQ") for various Hazardous Substances in various environmental exposure pathways (e.g., groundwater used for drinking).

47. Because of the health risk posed by concentrations of 1,4 dioxane that exceed the cleanup criteria, the installation of new drinking water and irrigation wells and the maintenance of existing drinking water and irrigation wells was prohibited within the Prohibition Zone, existing wells were abandoned, and households that were previously able to use private wells were required to convert to piped municipal water supplied by the City of Ann Arbor water system. The City was required to supply water to those residents.

48. Despite Defendant's renewed promise to contain the spread of the plumes, its efforts again failed. In 2011, Defendant and MDEQ agreed to seek a further amendment to the consent judgment, to delineate an Expanded Prohibition Zone in new areas where the plumes had spread and/or were expected to spread.

49. A third amendment to the consent judgment was entered, the objectives of which were to extract groundwater for treatment and disposal to the extent necessary to prevent the

contaminated groundwater plumes from expanding beyond their then-current boundaries, except within the Prohibition Zone and Expanded Prohibition Zone.

D. The Contamination Persists and Continues to Spread as Defendant Reduces its Cleanup Efforts.

50. Despite Defendant's repeated promises to remedy or at least contain the contamination, 30 years into the cleanup, 1,4 dioxane is still present in groundwater at concentrations hundreds of times the applicable cleanup criterion. And the plumes continue to expand.

51. For example, monitoring well MW121d, which lies on the northern boundary of a plume on Dexter Road east of Wagner Road, was established in 2008. At that time, tests showed no measurable concentrations of 1,4 dioxane. However, more recent samples from MW121d have measurable 1,4 dioxane. Moreover, just 750 feet to the southeast, a monitoring well at 465 DuPont had1,4 dioxane concentrations as high as 1700 ppb in 2015 tests. As another example, test results from monitoring well MW54d, which is sited outside of the Prohibition Zone and the foreseeable 1,4 dioxane pathway as of the date of the Settlement Agreement, showed concentrations of 1,4 dioxane exceeding 85 ppb beginning in 2014.

52. Indeed, many monitoring wells in the Expanded Prohibition Zone are showing new or increased levels of 1,4 dioxane.

53. Recently, a shallow groundwater investigation found 1,4 dioxane in two test wells located near Huron and Seventh Street in the City of Ann Arbor. Groundwater in this area is less than twenty feet from the surface.

54. The presence of 1,4 dioxane in shallow groundwater opens up a new potential exposure pathway. The 1,4 dioxane in shallow groundwater can volatilize, and then migrate up through soil, entering buildings, where those vapors can be inhaled, exposing persons to these

Hazardous Substances. This possible pathway can be of special concern when the groundwater can leak into basements or be exposed by digging or construction activities under buildings.

55. Despite the continued spread of the plumes, Defendant has actually reduced the volume of water it treats on an annual basis, and has decreased monitoring efforts.

56. In addition, Defendant has not been transparent about its cleanup activities. Among other things, Defendant seeks to keep secret its latest plan to monitor and remediate the 1,4 dioxane plumes. It has not provided a copy of its plan to the City. Defendant even cut off MDEQ's access to Defendant's internal database that had allowed MDEQ real-time information on the plumes.

E. The City's Settlement Agreement with Defendant.

57. Unfortunately, this complaint does not mark the first time that the City has been forced to take legal action against Defendant for its contamination of groundwater and surface water.

58. As noted above, in 2004 and 2005, the City filed actions in state and federal courts against Defendant, as well as a petition for a contested case hearing to challenge Defendant's permit to discharge treated water to Honey Creek.

59. In 2006, the parties entered into a settlement agreement ("Settlement Agreement") in which Defendant agreed to, among other things, compensate the City, monitor water quality, and provide the City with extensive and detailed reports on its sampling activities and other data. In exchange the City granted Defendant a limited release of claims.

60. The City entered into the Settlement Agreement under the belief that Defendant would undertake and successfully complete its obligations under the then-existing consent judgment, among them to contain the spread of the contaminated 1,4 dioxane plumes.

61. In the Settlement Agreement, the City reserved the right to assert future claims with respect to among other things: (A) Claims for response costs and response activity costs to address new plumes of contamination; and (B) All types of Claims related to an unforeseen change in the migration pathway of a known plume, which results in contamination above the applicable cleanup criteria (as they might be amended in the future) and which causes City property to be considered a Facility under Part 201 of NREPA.

62. There have been unforeseen changes in the migration pathways of 1,4 dioxane contamination, resulting in groundwater contamination above the current 7.2 ppb cleanup criterion. For example, test results from monitoring well MW54d, which is sited outside of the Prohibition Zone and the foreseeable 1,4 dioxane pathway as of the date of the Settlement Agreement, showed concentrations of 1,4 dioxane exceeding 85 ppb beginning in 2014. As another example, Monitoring Well MW 110 has tested at 66 ppb.

63. The City did not release Defendant from any of the claims it asserts herein.

F. The Current Threat to Public Health and the Costs to the City.

64. The continued spread of the 1,4 dioxane plumes threatens the health, safety and welfare of Ann Arbor citizens and exposes Ann Arbor to response costs and response activity costs.

65. For example, there are approximately 83 homes that are within 600 feet of the estimated1,4 dioxane plume boundary. Approximately 62 of those homes do not currently have access to municipal water supplies.

66. Defendant's groundwater pollution threatens to impair dozens, if not hundreds, of homes both inside and outside the Prohibition Zone and Expanded Prohibition Zone by causing

1,4 dioxane levels in water under those homes to exceed the current and/or proposed cleanup criteria, for inhalation and drinking water.

67. In the past, when 1,4 dioxane has impaired drinking water wells, affected property owners have been forced to connect to the City's municipal water system.

68. In addition, Defendant's failure to contain the plumes, the continued spread of 1,4 dioxane through the groundwater in unforeseen ways, and the lack of knowledge concerning the extent of the 1,4 dioxane pollution and its future pathways endanger the City's water supplies, and the City's ability to obtain new sources of drinking water.

69. Furthermore, the continued and uncontained spread of 1,4 dioxane, and the fact that the MDEQ has concluded that, even after a 30-year cleanup effort, the extent of contamination at levels above the current cleanup criteria is "unknown," threatens the drinking water supplies of the City of Ann Arbor.

70. In particular, continued migration of 1,4 dioxane to the Huron River upstream of Barton Dam threatens Ann Arbor's primary drinking water supply. Currently, there is a lack of groundwater monitoring wells between known groundwater contamination and the Huron River upstream of Barton Dam.

71. City personnel have devoted significant time and effort, at the City's cost, to necessary monitoring, planning, and analysis activities.

72. The City has engaged consultants and attorneys to assist it in these activities, at the City's cost.

COUNT I

INJUNCTION, COST RECOVERY AND DECLARATORY JUDGMENT UNDER PART 201 OF THE MICHIGAN NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT, M.C.L. 324.20201, et seq.

73. The City incorporates all preceding paragraphs of this Complaint by reference.

74. Certain areas within the City limits, including areas impacted by unforeseen changes in the migration pathway of the Hazardous Substances outside of the Prohibition Zone that have resulted in the presence of 1,4 dioxane at concentrations that exceed the applicable cleanup criteria and/or State of Federal Maximum Contaminant Level, are "Facilities," as that term is defined by MCL 324.20101(1)(o), due to Releases of Defendant's Hazardous Substances that originated at and from the Source Property owned or operated by Defendant.

75. Defendant owned the Source Property from which those Hazardous Substances (including 1,4 dioxane) were Released.

76. Defendant operated the Source Property from which those Hazardous Substances (including 1,4 dioxane) was Released.

77. Defendant arranged to treat or to dispose of those Hazardous Substances (including 1,4 dioxane) that were Released at and from Defendant's Source Property.

78. The Releases of Hazardous Substances by Defendant have migrated to and under the City's property in concentrations that either exceed the cleanup criteria for unrestricted residential use, or threaten to continue to be Released to and under the City's property (by migration) in higher concentrations, which prevent the City from continuing to use water under that property in its public supply system, until Defendant's Hazardous Substances are cleansed from the aquifers.

79. Pursuant to MCL 324.20126(4)(c), the City is not liable under Part 201 of NREPA with respect to the Hazardous Substances Released by Defendant because the Hazardous Substances have migrated to the City's property.

80. Defendant is liable under Part 201 of NREPA with respect to the Releases of the Hazardous Substances described above, in accordance with one or more of the following: MCL

324.20126(1)(a) (as an owner or operator who is responsible for the activity that caused the Releases); MCL 324.20126(1)(b) (as an owner or operator at the time of the disposal of Hazardous Substances, who is responsible for the activity that caused the Releases).

81. The City has incurred, and will continue to incur, Response Activity Costs with respect to the Hazardous Substances Released at and from Defendant's Source Property, and that have migrated to and under, and that threaten to continue to migrate to and under, the City's property.

82. The City is entitled to recover from Defendant the Response Activity Costs the City has incurred, and that the City will incur in the future, under MCL 324.20126a.

83. In accordance with MCL 324.20114, Defendant is required, among other things, to (i) "…determine the nature and extent of the release at the facility"; (ii) "Immediately stop or prevent an ongoing release at the source"; and (iii) "diligently pursue response activities necessary to achieve the cleanup criteria established under [Part 201]…"

84. Defendant has failed and refused to undertake the Response Activities required by MCL 324.20114. Defendant has further failed to comply with the terms of the consent judgments, and has failed to contain the 1,4 dioxane plumes.

85. Instead, Defendant has allowed the contaminated plumes to continue to spread in previously unforeseen ways, such that the extent of the current contamination and potential future pathways are unknown.

86. An actual, substantial legal controversy now exists between the City and Defendant, and the City is entitled to a judicial declaration of its rights and legal relationship with Defendant. The City is entitled to a declaratory judgment pursuant to Part 201 of NREPA, that as between the City and Defendant, Defendant is solely responsible and liable for all costs of

Response Activities, removal actions and remediation of the City's property, underlying aquifers, and any other property that has been contaminated by the Releases or disposal of Hazardous Substances originating at Defendant's Property, for damages to the City's property, and for payment of all costs, including attorney fees, incurred by the City in conjunction with this litigation.

WHEREFORE, the City respectfully requests that this Court enter a judgment in its favor and against Defendant that, at a minimum:

1. Enjoins Defendant and requires Defendant: (i) to undertake necessary actions to determine the full nature and extent of Defendant's 1,4 dioxane in all areas; (ii) to take all actions necessary to stop further spread of 1,4 dioxane beyond the boundaries of the Prohibition Zone that was established under the Settlement Agreement, including, as appropriate to achieve that result, stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanse 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels established by MDEQ in all areas outside of the Prohibition Zone established in the Settlement Agreement, such that there no further Hazardous Substances will remain in the soil or groundwater at and under the City's property;

2. Orders Defendant to pay to the City an amount equal to all Response Activity Costs that the City has incurred to date;

3. Declares that Defendant is liable to, and must pay, all past and future Response Activity Costs incurred by the City in response to the Hazardous Substances that have or in the future may contaminate the City's property, and underlying aquifers;

4. Orders Defendant to pay to the City all costs, including attorney fees, incurred by the City; and

5. Awards to the City its costs, attorney fees and expert witness fees incurred in bringing this action.

COUNT II
NEGLIGENCE

87. The City incorporates all preceding paragraphs of this Complaint by reference.

88. Defendant owed the City a duty not to cause, and a duty not to allow, Defendant's Hazardous Substances to contaminate aquifers beneath the City that the City may use to supply potable water via the municipal water supply system.

89. Defendant owed the City a duty not to cause, and a duty not to allow, Defendant's Hazardous Substances to contaminate the aquifers from which the City actually withdraws water to supply potable water via the City's municipal water supply system.

90. Defendant has breached the duties it owed to the City: (i) by allowing the Release and disposal of Hazardous Substances at Defendant's Source Property; (ii) by failing to stop the migration of those Hazardous Substances away from Defendant's Source Property through soil and groundwater to and under the City's property; (iii) by failing to take actions to adequately investigate and clean up the subject Hazardous Substances; (iv) by allowing its Hazardous Substances to contaminate the aquifers discussed above; and (v) by allowing greater concentrations of its Hazardous Substances to continue to migrate toward and to threaten to increasingly contaminate the aquifers used by the City's municipal water supply system.

91. The City has been damaged by Defendant's Hazardous Substances that have contaminated aquifers underlying the City's property and regional aquifers lying upgradient from same.

92. Defendant's breach of the duties owed to the City is both the cause in fact and the proximate cause of the damages already suffered, and to be suffered in the future, by the City.

93. Defendant's failure to contain and remove the Hazardous Substances it Released to the environment that have now contaminated the soil and groundwater at, under, and migrating to, the City's property constitutes negligence by Defendant.

94. Defendant is therefore liable to the City for all damages arising out of Defendant's negligence, including but not limited to: (i) damages to the City's property; (ii) loss of value of the City's property; (iii) the City's loss of use and enjoyment of its property caused by the Release of Hazardous Substances that have contaminated the soil and groundwater; (iv) costs of investigations, response, removal or remediation costs and costs associated with the replacement of water supplies that the City must incur to cleanse its property for use as a source of water for its municipal supply system; and (v) costs the City has incurred and will incur to upgrade its municipal water supply system in order to meet the demands for potable water caused by Defendant's Release of Hazardous Substances.

WHEREFORE, the City respectfully requests that this Court enter a judgment in its favor and against Defendant that, at a minimum:

1. Requires Defendant to pay to the City damages that the City has suffered as a consequence of Defendant's negligence;

6. Enjoins Defendant and requires Defendant: (i) to undertake necessary actions to determine the full nature and extent of Defendant's 1,4 dioxane in all areas; (ii) to take all actions necessary to stop further spread of 1,4 dioxane beyond the boundaries of the Prohibition Zone that was established under the Settlement Agreement, including, as appropriate to achieve that result, stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanse 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels established by MDEQ in all areas outside of the Prohibition Zone established in the Settlement Agreement, such that there no further Hazardous Substances will remain in the soil or groundwater at and under the City's property; and

2. Awards to the City interest, costs and attorney fees incurred in this litigation.

COUNT III

NUISANCE AND TEMPORARY NUISANCE

95. The City incorporates all preceding paragraphs of this Complaint by reference.

96. By allowing the Release and disposal of Hazardous Substances at Defendant's Source Property, by failing to stop migration of those Hazardous Substances through soil and groundwater away from Defendant's Source Property to the City's property, and by failing to take actions to adequately investigate and clean up the subject Hazardous Substances, Defendant has created and is maintaining a nuisance and a temporary nuisance that has damaged, and continues to damage, the City's property, among other things.

97. Defendant has continued to maintain and has failed to abate the nuisance and temporary nuisance it created.

98. It is possible for Defendant to abate the temporary nuisance through remedial efforts.

99. The value and the City's use and enjoyment of its property have been impaired and damaged by the nuisance and temporary nuisance Defendant has created, maintained and failed to abate.

100. The City has suffered damages as a consequence of the nuisance and temporary nuisance for which Defendant is responsible, in the form of impaired property value, the loss of use and enjoyment of property, investigative costs, costs associated with identifying and developing alternative water supplies that are not threatened by Defendant's Hazardous Substances, litigation costs, and other costs and damages set out herein.

WHEREFORE, the City respectfully requests that this Court enter a judgment in its favor and against Defendant that, at a minimum:

1. Orders Defendant to pay to the City all damages the City has suffered as a consequence of the nuisance that Defendant has created, has maintained and has failed to abate;

2. Enjoins Defendant from releasing or allowing the continued migration of its Hazardous Substances;

3. Orders Defendant to abate the nuisance;

4. Enjoins Defendant and requires Defendant: (i) to undertake necessary actions to determine the full nature and extent of Defendant's 1,4 dioxane in all areas; (ii) to take all actions necessary to stop further spread of 1,4 dioxane beyond the boundaries of the Prohibition Zone that was established under the Settlement Agreement, including, as appropriate to achieve that result, stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanse 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels established by MDEQ in all areas outside of the Prohibition Zone established in the Settlement Agreement, such that there no further Hazardous Substances will remain in the soil or groundwater at and under the City's property; and

5. Awards to the City all interest costs and attorney fees incurred in this litigation.

COUNT IV

PUBLIC NUISANCE

101. The City incorporates all preceding paragraphs of this Complaint by reference.

102. By allowing the release and disposal of Hazardous Substances at Defendant's Source Property, by failing to stop migration of those Hazardous Substances from Defendant's Source Property, through and under property of others and to and under the City's property, and by failing to take actions to adequately investigate and clean up the Hazardous Substances,

Defendant has unreasonably interfered with the property rights of the public in the vicinity of Defendant's property, thereby creating a public nuisance.

103. The City, as a governmental unit, is not required to show that it has suffered harm different from the general public as a result of the nuisance created by Defendant.

104. Even if it were required to make such a showing, the City has suffered harm that is different from and in addition to that suffered by the general public because: the City has incurred and will continue to incur costs to develop alternative water supplies and to upgrade its public water system to service the additional demand caused by Defendant's activities; the City's property value has been impaired and the City has incurred costs associated with Response Activities and this litigation.

105. Defendant is liable to the City for the costs incurred by the City and the damages suffered by the City as a consequence of the public nuisance Defendant has created, has maintained and has failed to abate.

WHEREFORE, the City respectfully requests that this Court enter a judgment in its favor and against Defendant that, at a minimum:

1. Orders Defendant to pay to the City all damages the City has suffered as a consequence of the nuisance Defendant has created, has maintained and has failed to abate;

2. Enjoins Defendant and requires Defendant: (i) to undertake necessary actions to determine the full nature and extent of Defendant's 1,4 dioxane in all areas; (ii) to take all actions necessary to stop further spread of 1,4 dioxane beyond the boundaries of the Prohibition Zone that was established under the Settlement Agreement, including, as appropriate to achieve that result, stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanse 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels established by MDEQ in all areas outside of the Prohibition Zone established in the Settlement Agreement, such that there no further Hazardous Substances will remain in the soil or groundwater at and under the City's property;

3. Enjoins Defendant from releasing or allowing the continued migration of Hazardous Substances; and

4. Awards to the City all interest costs and attorney fees incurred in this litigation.

COUNT V

VIOLATION OF MICHIGAN'S ENVIRONMENTAL PROTECTION ACT

106. The City incorporates all preceding paragraphs of this Complaint by reference.

107. By allowing the release and disposal of Hazardous Substances at Defendant's Property, by allowing migration of those Hazardous Substances through the soil and groundwater to the City's property, and by failing to take timely and appropriate actions to adequately investigate and clean up the Hazardous Substances, Defendant has impaired and destroyed groundwater and surface waters of the State and has violated the public trust in those resources.

108. Defendant does not have a permit or other authorization to contaminate surface or groundwater with Hazardous Substances to the City's detriment.

109. The Releases or disposals of Hazardous Substances that have caused the impairment and destruction of these resources are in violation of federal, state and local law, and in particular, Michigan's Environmental Protection Act, MCL 324.1701 et seq., and Part 201 of NREPA.

110. In accordance with Part 201 of NREPA, Defendant has affirmative obligations to take a number of actions with respect to the contamination. Those actions include, but are not limited to:

(a) Determining the nature and extent of the Release;

(b) Stopping or preventing the continuing Release at the source;

(c) Preventing exacerbation of the contamination caused by the Release;

(d) Diligently pursuing response activities necessary to meet the cleanup criteria specified in Part 201 of NREPA; and

(e) Taking other actions specified in Part 201 of NREPA.

111. Defendant has failed to satisfy its affirmative obligations to clean up the Hazardous Substance contamination it has caused, including but not limited to those required under Part 201 of NREPA. Defendant's failure has caused Hazardous Substances to migrate beyond its property, causing regional pollution, impairment and destruction of surface and groundwater resources of the state which are utilized by the City and direct damage to the City's property.

WHEREFORE, the City respectfully requests that this Court enter judgment in City's favor and against Defendant that, at a minimum:

1. Enjoins Defendant and requires Defendant: (i) to undertake necessary actions to determine the full nature and extent of Defendant's 1,4 dioxane in all areas; (ii) to take all actions necessary to stop further spread of 1,4 dioxane beyond the boundaries of the Prohibition Zone that was established under the Settlement Agreement, including, as appropriate to achieve that result, stopping the release at the Source Property and in downgradient portions of the plume; and (iii) to take all necessary actions to cleanse 1,4 dioxane from groundwater to achieve the cleanup criterion and screening levels established by MDEQ in all areas outside of the Prohibition Zone established in the Settlement Agreement, such that there no further Hazardous Substances will remain in the soil or groundwater at and under the City's property;

2. Declares that Defendant has failed to comply with state and federal environmental cleanup statutes, sets forth the legal responsibilities that Defendant has with respect to the City and determines the validity, applicability and reasonableness of the cleanup criteria applicable to Defendant's cleanup of Hazardous Substances; and

3. Awards to the City its costs, attorney fees and expert witness fees incurred in bringing this action.

Respectfully Submitted,
BODMAN PLC

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EXHIBIT N

Attorney General For State Of Michigan v. Gelman Sciences, et al

Deponent:

Taken: **12/15/2016**

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TRANSCRIPTION OF A VIDEOTAPED COURT HEARING

HELD THURSDAY, DECEMBER 15, 2016

BEFORE HON. TIMOTHY P. CONNORS

WASHTENAW COUNTY CIRCUIT COURT

CASE: ATTORNEY GENERAL FOR STATE OF MICHIGAN v GELMAN SCIENCES, et al

ATTORNEYS SPEAKING ON VIDEO:

BRIAN J. NEGELE, Appearing for State of Michigan
THOMAS P. BRUETSCH, Appearing for City of Ann Arbor
STEPHEN K. POSTEMA, Appearing for City of Ann Arbor
FREDRICK J. DINDOFFER, Appearing for City of Ann Arbor
MICHAEL L. CALDWELL, Appearing for Gelman Sciences
ROBERT C. DAVIS, Appearing for Washtenaw County Defendants
ODAY SALIM, Appearing for Huron River Watershed Council

Ann Arbor, Michigan
Thursday, December 15, 2016
Approx. 9:11 a.m.

(The case was called and the attorneys introduced themselves.)

THE COURT: Let me say if I may to help guide the oral arguments on your motion, first let me say that I have read the briefs, I took them home, read them all last night (INDECIPHERABLE) so I'm familiar with this case first of all, so you don't need to just repeat what you have in the written brief. All your records are available for public view and it's available for (INDECIPHERABLE).

Secondly, you don't need to say by way of background about the case, you know, go to the beginning of the world and tell me all about it. I'm familiar with the case.

In its very initial inception in the 1980s I was actually in this courtroom when Judge Conlin (sp) handled it. I was appointed as the Special Master by Judge Conlin on discovery issues, so I've been with it two decades.

The reason that it is assigned to me now is with the retirement I guess of the various

judges before me that handled it so I have it now and I'll have it for the next eight years.

Third, I am familiar, I'm aware, that there are multiple audiences in the case like this. Of course, there's your client, of course there's public interest, of course there's appellate audience which you have, but today we're going to be talking about what is the status of the case as it currently exists and whether or not different entities should be a part of that case by way of intervention, so we're just focused on that aspect of the case and we're aren't -- that's really where I want to stay focused.

Third, on oral argument there are three rhetorical questions that I have in my head and so therefore your arguments when you focus it in that structure, you become more effective. Even whether I agree with you or not, you won't get lost in terms of I'll hear you.

The first thing, of course, is what it is you want me to do today (INDECIPHERABLE). Secondly, how I can do it and (INDECIPHERABLE) statute, case law and court rule, and then third why.

So in reading the briefs and so forth, you know, sometimes when you say here's a long recitation of facts, etc, in the recitation of facts (INDECIPHERABLE), and then we start getting off into disagreement about a particular fact and then we're arguing all about that and never get to really the underlying core issue.

It seems to me the underlying core issue is the quality of the water. If there is a problem, what is the problem and to what degree, what should be done about it and who should be responsible for carrying it out.

And in that sense I do want to emphasize that this is a matter of interest to everybody and we need you to speak to us here as adults with on average about 50 to 65 percent water and babies it's 78 percent water, so it was about each of us and the decisions we make will affect those that come after us.

So when I read the briefs -- let me just (INDECIPHERABLE) with summation -- my understanding is there's three separate entities who are seeking intervention. There are two avenues leading to intervention. One is intervention by right and one is permissive

intervention.

The two parties who are involved in the case currently, some of them are in agreement or has no objection to permissive intervention. They take affront (INDECIPHERABLE) or concerns with the finding at this stage by the Court (INDECIPHERABLE) adequately represented, but they don't have any objection to permissive intervention.

One of the parties does object to any intervention, so rather than getting into findings or arguments or defensiveness about whether an institution or an entity is being adequate in their representation, which I think sidetracks this from the real issue, can get us off on a path that I think is not particularly helpful, I would like to focus your arguments today on permissive intervention and so let's see where are those who would disagree with permissive intervention, give me your arguments why and then I'll make a decision for you.

All right, so with that, first at the podium, boy, you got to that podium, you didn't give it up, did you.

MR. BRUETSCH: I'm not going to.

THE COURT: All right. Your name again, so tell me who you are and who you represent and what you're seeking today.

MR. BRUETSCH: Certainly, your Honor. My name is Tom Bruetsch, Thomas Bruetsch, and I represent the City of Ann Arbor, one of the parties that seeks intervention into this case, and I'll deal with your questions first.

Also, just in case, I brought a big blowup of what we submitted as Exhibit A which is the big map that shows where the plumes are. And you've indicated your history with the case, so I don't know if you'll need it, but if there comes a time where you want additional explanation about why is the quality of the groundwater in this area that you're claiming an interest in -- why does that matter, you know, we're happy to break out the big map and try to explain that and work through it.

What do we want you to do today? That's probably the easiest question that you've posed to us, and the answer to that question is we'd like you to allow the City of Ann Arbor to intervene in this case.

There are a number of reasons for that.

One of them is that as I think everyone has stated in their briefs there are ongoing negotiations right now as I understand it about a fourth amendment to the consent order that's to be brought before this court and to date those negotiations are between the State through the Attorney General and the Defendant Gelman, and we would like to participate in those negotiations.

We would like to influence those negotiations and we would like, you know, the proverbial seat at the table in those negotiations so that we can protect the City's interests and hopefully advance this clean-up to a better stage.

The unfortunate part about those negotiations is that even though we've asked, we've not been allowed the proverbial seat at the table and we've not even been allowed to understand or know what's going on in them.

These negotiations are being done in secret and despite the fact that we've asked the parties would you please share with us your proposals, would you please share with us what you're thinking so that we know how much or how little we need to be concerned, they haven't

shared that with us.

And I think the Attorney General would, but the Attorney General I think feels bound by a confidentiality of settlement discussions and unless Gelman gives its approval for that dialog to occur, they can't do anything is what they're telling us and so that's one of the reasons we've asked the Court to allow us to intervene so that we can get that seat at the table.

How do -- how can you, how can the Court make that happen, that was your second question, and you focus rightly on the intervention court rule. There's also the statute though that I want to make sure is on the Court's radar.

Under Part 201 which is the environmental statute at interest here, there is actually a specific intervention provision which is fairly rare. Usually we just rely on the court rule, but Part 201 has an intervention provision which does not have a time limit by the way and it says that when the Attorney General has brought a suit like this, any party may intervene if it's got an interest and that interest is at risk unless the Court finds that

the State or another party adequately represents the party seeking to intervene's interests.

So it's similar to the intervention-by-right rule with a couple of twists. I think that either the statute which the Court can rely on the statute to allow us to intervene, the Court can rely on either the intervention by right or, as you have indicated, the permissive intervention provisions of the court rule.

Why should you allow us to intervene? That's the question that we probably would need to spend the most time on. Ann Arbor has a number of interests in this case and a number of reasons why it wants to intervene.

The first is because the City's interests are threatened by the continued expansion of the plumes of 1.4 dioxane that are under the city and the surrounding communities and I'll get into that a little bit more in a moment.

Second is because the continued expansion of these plumes has caused a public health emergency which the State actually expressed on October 27th when it issued its new

rules on the clean-up standards for 1.4 dioxane and declared that a public emergency existed which allowed them to do this outside the regular administrative process.

Third, as I've mentioned, there are current negotiations that we very much want to be a part of to protect our own interests and fourth -- and we won't focus on this one so much given what you said is -- we've got a great deal of concern about how the interests of Ann Arbor have been represented in the past and how they might not be represented going forward in the future.

And I think, your Honor, the critical point is that Ann Arbor and other critical stakeholders here deserve a voice in the future remediation of these plumes and another consent order amendment, and this would be the fourth, should not be entered without these participants' approval.

The City's interests I think here are extreme. Ann Arbor is the only source of municipal water in this area. There are wells out there. You know, some of the wells have had to have been abandoned because of the pollution. We are the only source of municipal water and we

need to be able to protect our sources of clean safe drinking water.

The primary source for the city is up at Barton Pond and if you looked at Exhibit A, you'd see that the Barton Pond is kind of to the north, northeast of where the plume of 1.4 dioxane is currently. And one of the things that we have seen is that the plume has expanded in the north area which is very concerning for us.

There is a prohibition zone that you're, I'm sure, familiar with. The prohibition zone in the north is in the area of the Evergreen Subdivision and we've seen now two of the wells, the monitoring wells, which are on the far north border of that prohibition zone test positive for 1.4 dioxane at small levels. So the plume is reaching the border of the prohibition zone.

In addition, if you move a little bit south from the border we're seeing increased concentrations at other monitoring wells, concentrations above the new 7.2 ppb standard, concentrations even above the old 85 ppb standard. So there's more 1.4 dioxane going into that area and it's even hitting the border of the prohibition zone at at least two wells.

So we're concerned because as that plume continues to go north, if that's what it does, it starts potentially impacting Barton Pond. And they've said well, you know, you hired a consultant and your own consultant said, "No, I think it's going to go east", and that's exactly what he didn't say. He said yes, in the area of a couple of wells I think it's going to go east. We've seen these increased clusters of concentration that may go east, it may go north.

And a bigger problem is, you've got too much separation between the wells to the northeast and we don't know if 1.4 dioxane is going to be able to get through there or not. So that's one area of concern of ours.

We also have an area of concern just to the west of downtown, so if you recall kind of the plume is shaped like a long cigar and 1.4 dioxane is generally traveling west to east and the leading edge of the plume by all accounts I believe is somewhere east of 7th Street roughly. It's being detected in wells.

And the MDEQ did a shallow groundwater investigation recently and they published the results just this past October. And the results

were that they found 1.4 dioxane in two wells, shallow water wells, on 7th Street between Huron and Liberty. That's again on the leading area or leading edge area of the dioxane plume.

This is an area where the groundwater is very shallow, so, you know, it's one thing if you're out at Maple Road and Jackson Road where your water level may be 130 feet underground. It's another thing at 7th Street where the water table is 5 or 6 feet underground.

And you remember the concept that we've been operating under since about 2005 is we've got this prohibition zone or pollution zone, whatever you want to call it, where we're just going to let the dioxane flow east and the thinking is it's going to kind of take a little bit of a left turn and vent out into the Huron River.

So we're not really trying to so much clean it up, we're letting it flow and it's going to turn and go into the Huron River and vent out over a period of decades or centuries or however long it takes. Certainly longer than anyone in this courtroom is going to be around to see it.

The problem is, as I said, out at Maple

and Jackson if it's 130 feet underground and you ban drinking water wells, the theory is it will never come into contact with human beings and it's okay. At 7th Street, now that we've seen test results where dioxane is in the water, and the water table is 5 to 6 feet below ground in an area where, as you go down the hill -- I'm sure the Court know to topography.

If you leave the Court and you drive out Huron Street or you drive out Liberty Street, you do down the big hill towards 1st and then slowly start sloping up and rolls a little bit out towards Maple.

You've got that big valley down there. You've got Allen Creek down there, and so there's a sink down there where this could collect and then perhaps turn to the river.

So now you've got 1.4 dioxane in an area of very shallow groundwater and the response to that was but it's only at 1.5 ppb, it's only at 3.3 ppb. But you only have to look at the map to understand what is coming. If you look at Exhibit A and you see that six blocks to the west of 7th you're measuring at 85 ppb or more. At 10 blocks away, monitoring wells are recording 330

ppb. The design of this plan is that that's all going to travel towards 7th, towards 1st where the shallow groundwater is.

And so we think that steps need to be taken now to prevent that from happening, and the City would like to be a part of that.

As I indicated just briefly, your Honor, and this is one of our other concerns, the State, the DEQ and documents signed by the governor, indicated that there was presently a public health emergency. They issued their orders on October 27th, so just less than two months ago. And we had some concerns obviously coming from that order.

They mention the shallow groundwater investigation when they issued their order and a couple of the things that came out of that and then in the briefing, one of the things was that the extent of the plumes in that 7.2 ppb to 85 ppb, the extent of the plume is not known.

Well, that's one of the things that the statute in Part 201 requires is that you delineate the extent of the plume. We're 25 years into the investigation.

A second thing that we saw in one of

Gelman's -- in Gelman's response filed Monday was that there's still 1.4 dioxane coming out of the source property out at Wagner Road. That's what they said on Page 5 of their brief. That they've diminished the amount that's coming out, but it's still coming out, which is another thing covered by the statute.

You're supposed to stop the releases from the source property. We want to be a part of the solution that stops the pollution from flowing from the source property, that stops it from doing downhill toward the shallow groundwater area, that stops it moving north and potentially impacting our source of water at Barton Pond.

So that's why we think that you should allow us to intervene and allow other important stakeholders to intervene. We'd rather not litigate this case. We'd rather not go through another several years of litigation with Gelman. We've done that before. We will if we have to, but what we really want to do and why we're really here today is because we want that seat, that proverbial seat at the table, and I know that's kind of a -- you know, one of those abject

constructions, but we think that Ann Arbor can offer quite a bit.

We think that Washtenaw County and other important stakeholders can offer quite a bit to the negotiations because this really is our future.

This is not just the DEQ's future or the State's future, this is really our future and we want to be allowed to intervene and actually protect ourselves.

Just to wrap up, we don't believe this is just an intervention of right or an intervention of permissive -- permissive nature. We think this is an intervention of necessity. The consent order that's negotiated over the next months or, if necessary, the litigation that follows to enforce the new clean-up standards will determine what happens with this plume or these plumes or the next decade or more and to say that this public health emergency is going to be rectified by some negotiations that are done outside the public view without the participation of the key stakeholders I think would be unconscionable, so I would ask that you grant our motion and I'm happy to answer any questions you

have.

THE COURT: (INAUDIBLE) parties to the case and then any rebuttal that each of you (INAUDIBLE).

MR. DAVIS: Judge, my name is Robert Davis and I represent the County entities including the Health Department and the director, health officer.

I know you've indicated that you've read the briefs and I appreciate the opening to help us frame these arguments for you I think is wise.

2.209(b) allows for permissive intervention. I'll focus on (b) because I think it is the least restrictive method of intervention for you to grant and I would say that I'm asking you for an order under permissive intervention to allow my County Defendants to be in this litigation for two reasons, Judge.

One, because my County Health Department has a statutory duty that is now triggered and has been presented to you in the briefs you read until the twilight of last evening and, Number 2, because of my argument on standing if there were a challenge to standing, I

think that I meet the test with my County clients as having standing in this litigation.

How do I want you to go about that? By way of a court order, a court order that would grant permissive intervention by the County Defendants and why -- I want to adopt by reference all of the factual issues that you just heard from the City. If they're happening in the city, I think the judge can draw the conclusion they're happening in the county.

This entire issue is centered in Washtenaw County and that's why my clients are here. So without repeating the plume and the testing and all that, I just want to punctuate, Judge, for you my statutory obligation coming down from the State Legislature to my Health Department.

There is no dispute that the emergency rules comes out in October of 2016 and there's no dispute that in pronouncement of those rules there was a clear indication that the prior rules had been insufficient to protect public health. The new rules establish what I consider to be an actionable clean-up standard for both groundwater and residential vapor intrusion.

So what we're talking about here, Judge, is we've got new standards with respect to drinking water ingestion pathways and vapor intrusion pathways and maybe what I should say at the beginning is if we put those clean-up standards right in the middle of your courtroom here, Judge, and we said they're brand new, they're emergency, they're important, it's a declared public health concern, then why aren't all these parties sitting at a table trying to just address those clean-up standards?

We should not be standing here at odds with you or with the issues, we should be focused on those clean-up standards and my Health Department has a statutory duty coming down from the State of Michigan that says she has to be involved in that health protection. And we all should have a common goal here.

We shouldn't be fighting about the -- although I like the words the proverbial seat at the table, the table should be open and in the middle of the table should be 7.2 and other standard for vapor intrusion 20 -- 29. Thank you, Mr. Dindoffer.

And that's what we should be focused

on, Judge. Everybody here -- this is a Washtenaw County issue. The City of Ann Arbor is in Washtenaw County. The plume is entirely in Washtenaw County. The clean-up standards are directly related to the plume and the stuff, the 1.4 dioxane.

So we all have a common interest here, okay, and so when I go through the statute, for the first time the governor who is now going on break I guess into the wee hours of last night, but he said -- he said to us, we now have a public health concern. And when you use those words, it's a declared public health concern.

So you go to the other statutes that haven't been mentioned before you yet, but are in my brief, and it says that the state law concurrent says that the County has to have a Health Department and it creates a full-time health director or health officer who's in the courtroom, Judge, listening intently because she -- she's come to me and said, "I have an absolute statutory responsibility to address environmental health concerns. The governor just said there's an environmental health concern. I need to get involved" and that's why we're here.

Nobody has argued, even brother counsel from Gelman has not argued that well, there's a statute somewhere out there that says my health director, well, you can just sit on the sidelines because the State is taking care of it, or that there's a preemption. There's jurisdiction here from my Health Department. My County health officer has a statutory duty. I've outlined for you, MCL 333.2433. It's a "shall" duty.

The Supreme Court, you know, has ruled that "shall" means mandatory. She can't ignore her duty, she can't be sidelined. So when I go through the statutes that I've laid out for you in my brief, she -- it anticipates that the County health officer via the County will work with other agencies including the DEQ on matters that come down as public health concerns and that's what we have here, Judge.

It's as simple as that. And, you know, the County meets the test for intervention. I gave you some case law that said under permissive intervention (b), just because there's been a judgment entered it's not untimely. There's cases that say that and I pointed those out to you in the latter part of my brief starting at

Page 15.

So nobody has responded to me, Judge, with respect to the statutory duties of my health officer saying, "Oh, no, it's preemptive, the state law preempts your health director. Oh, no, she can sit on the sidelines. We'll indemnify her and hold her harmless in case she gets sued for not doing anything." That's not what we're hearing.

At Page 11 of the response to my motion Gelman says we -- the County may have these duties as argued. The County may have a duty to prevent and control environmental health hazards, but nothing precludes the DEQ from sharing in those goals. I kind of agree, and I think what we're saying is that in the middle of your courtroom should be those clean-up standards.

Around the table should be those with a duty to address public health concerns. My public health director, my public health officer, my County, has a duty under a separate set of statutes that have not been contested in any of the arguments before you, Judge.

And I think that if we work together we can do what you said at the beginning, clean up

the impacted groundwater to the new standard, clean up the vapor intrusion to the new standard and address as a group this public health issue.

I'm triggered statutorily and I would ask that you consider that. Thank you.

MR. SALIM: Good morning, your Honor, my name is Oday Salim, I'm with the Great Lakes Environmental Law Center and I represent the Huron River Watershed Council.

THE COURT: Tell me about your center. I'm not as familiar with it as I am some of the other entities.

MR. SALIM: Sure thing, your Honor. So Professor Noah Hall as Wayne State University Law School founded the center when I was a law student there. I was actually one of the first students to intern at it.

The Great Lakes Environmental Law Center exists to do two things. One, it exists to help government. We produce and develop policy, we provide recommendations and findings to local county, state and other kinds of government entities.

And we also try to get involved in permit comments, sometimes permit challenges and

enforcement litigation such as this.

The center is a separate non-profit entity, but it actually serves as the practical experience for the environmental law clinic students at Wayne State University Law School, so I'm the senior attorney at the center. Some of my legal work is my own, but much of the legal work at the center we do in conjunction with our students at Wayne State Law School.

So that's the background of the center.

Let me, your Honor, begin just by addressing your three questions, then I can get into the council and the interests in this matter.

What we would like this court to do, your Honor, is grant a motion for the Huron River Watershed Council to intervene, not just any motion, your Honor. We would be happy for the Court to grant a narrowing motion to use its plenary trial court authority to tell us, if you're going to intervene because there are already two parties in the matter, there may be four -- by the way, we support the City and the County in their attempts to intervene -- in order to manage the case appropriately, we want you to

intervene in a limited manner, the manner being to protect the surface water interests here.

So we'd like a grant of -- an order granting us the ability to intervene and we're happy to have that intervention narrowed to surface water interests so that we're not working too much in the areas of vapor intrusion and drinking water quality where we don't need to.

How can you do it? Certainly we would be happy for you to do it under any of the standards that are mentioned in our brief, the City's and the County's briefs, whether it's intervention by right or the statute, but of course I'll focus today on intervention -- permissive intervention as you've suggested.

Why? Well, your Honor, the Huron River Watershed Council literally only cares about the Huron River. Well, i shouldn't say it only cares, it cares about all kinds of other natural resources, but its focus is exclusively on the Huron River.

Whether it's interested in the groundwater or soils, natural resource management, it's only interested in those things with respect to the protection of the Huron

River, not only for the aquatic life in the river, the macroinvertebrates, the fish, the other species that may use the river, but also for the human beings who enjoy hiking by the river, recreating inside of the river and appreciating the river.

Our interests are incredibly narrow, your Honor. They're not only narrow, but we think that they're -- it's necessary for us to care for the surface water in a situation where the other parties understandably care a lot about vapor intrusion, drinking water quality and the kind of public health issues that come from groundwater directly.

I thought that the presentations today by the City -- the counsel for the City and the County were excellent and we certainly adopt the facts that they brought up and I think the Court will notice that one thing that was mentioned, but perhaps not emphasized is the interests of the surface water itself.

That's why we want a seat at the table, that's why we want to be part of the negotiating process and I will emphasize, your Honor, that not only do we have a narrow interest that we

want to address through intervention, we want to be part of a solution that comes more -- that comes sooner than later.

In other words, I am not here to litigate this case for the next five years unless I absolutely have to. Our primary focus is entering the negotiating realm and not working against the State and Gelman and the other parties, but working with them. There's no doubt that we all want some level of protection of groundwater, public health and the river.

The question is, what does everybody bring to the table, what kinds of areas of expertise and interest do we all bring to the negotiations.

And I think that having someone at the table who can be focused on well, understandably we think this material will vent to the river, where will it vent, in what concentrations, how can we detect it to ensure that it's venting in the places we expect it to vent, when it vents what will be acutely affected and what may be chronically affected.

I can't remember whether it was counsel for the City of the County who said this may be

venting for many, many, many years to come on an ongoing basis. So what are the chronic impacts to the aquatic life who may be in the area of the venting.

Will there be monitoring to make sure that the concentrations that we assumed would enter the river are there and are managed. We never say that the substance won't get to the river or that -- you know, we wish that it wouldn't at all, but we understand that it may, so all we're saying is let's make sure that if it gets there at all, it gets there in a manner that is not injurious to recreational interests and aquatic life interests.

And I think, you Honor, that we need to be there in this forum as opposed to other fora. For example, I understand that there may be more permits that have to be issued to the company. It's possible that they'll have to get a Part 31 permit for a discharge later, it's possible that these emergency clean-up standards that were issued will ultimately be issued in the more normal way through public notice and comment and month long administrative process.

And it's true, it's possible that we'll

get involved in those procedures as well, but the point is the two parties already in this case have been at the negotiating table ready to go for that fourth consent judgment before those potential Part 31 permits are issued, before these clean-up standards go through public notice and comment, so we need to be here now.

We got involved as soon as we reasonably could after we heard about the -- the threat to the river, after we heard about the public emergency rules and after we heard that the negotiations were -- were ongoing and leading potentially to a fourth proposed consent judgment.

That's why I think it's crucial that we not -- that it's not -- that this forum is not considered some alternative forum that if this doesn't work out for us, well, we can always come around later. It should be the opposite. We should be in this forum now and try to take care of these standards here and now so that we don't have to belabor the processes of future discharge permits and future clean-up standards.

So, your Honor, I think I'd like to just keep it brief. I think the City and

County's attorneys said a lot of what I was going to say anyway and, again, just to say one more time, our interests are narrow. We're happy to be held to that through a court order and we want to be helpful in the negotiating process and contribute to the surface water aspects of that process so that hopefully we can get at that fourth consent judgment and that it will be the appropriate one and that we won't need to get to a fifth and sixth or a seventh in years to come.

Thank you.

THE COURT: Who would like to respond first from the parties who are already in the case?

MR. CALDWELL: Your Honor, this is Mike Caldwell on behalf of Gelman. I think if it's all right, Mr. Negele, I'll go right.

MR. NEGELE: Go ahead.

MR. CALDWELL: Thank you, your Honor. The Court has had the pleasure of reviewing the extensive briefs and I'm not going to go through and even respond to what has been put forth here today. I think our briefs adequately respond to those issues and I think the Court is more interested in solutions than argument and I'd

like to provide that proposed solution to you.

First of all, the problem with the relief being sought by the proposed interveners is that if these interveners are added as parties it will unavoidably delay the important work that the parties, the DEQ and Gelman, have been undergoing for the last year in terms of negotiating the consent judgment modifications.

We have -- in anticipation of the new drinking water standard we have been proactively addressing that as far back as 2014 when we did a pretty intensive investigation of the Honey Creek area out in Scio Township to ensure that even though we had no legal obligation to do it at the time, to make sure that the plume, even when measured at detectable levels, 1 ppb, was not expanding and we did confirm that, so there's no well that -- we wanted to make sure that there were no wells that would be threatened in that area.

Over the last year we've been actively negotiating terms of consent judgment modifications with the State. We have exchanged drafts of proposed consent judgment modifications and, frankly, if it wasn't for the necessity of

having to respond to these motions to intervene, we would probably be very close if not having completed the process of drafting a document for the Court and the community's consideration.

And bringing the -- you know, the truth is the existing program is quite protective, but obviously with new standards, 10-fold decrease in the drinking water standard, although nobody is drinking the water anywhere close to that level, there are some needed modifications that we are perfectly willing to move forward with and that's what we've been discussing with the State and we'd like to move forward with that process.

Adding the interveners as parties would, even if it was just the proverbial seat at the table as counsel for the City suggests, would require a restart of those negotiations, but more important as a party any party -- any of the interveners that's added would essentially have a veto over any consent judgment that the parties and even the Court may feel is protective and makes sense.

We're going to potentially be stuck in litigation. We'd have to respond to the complaints. If one or more of the interveners

was not satisfied with the outcome of the negotiations that were initially delayed by their addition, they could simply refuse to concur in any consent judgment and we'd actually have to resolve those claims either by motion or, in a worst case scenario, by trial.

So that's the problem with allowing intervention, so -- and that's the prejudice in terms of permissive joinder, prejudice to the parties -- frankly, prejudice to the community and to this court is the delay and the potential hijacking of the whole consent judgment modification process and those are very real concerns for I think, I would hope, all involved.

So in terms of what relief we seek, the relief we would ask is that these motions be denied for the reasons set forth in our brief and I'm not going to repeat them now regarding timeliness and prejudice that I just outlined a little bit, but if the Court has any concerns in that regard, I'd like to propose an alternative that I think addresses the concerns of the proposed interveners and their desire -- an understandable desire to have a voice in the outcome of the consent judgement modifications,

but avoids the downside risk of allowing them to become parties to the action.

And, frankly, I've been practicing environmental law for quite a while, I know Mr. Davis has and all of counsel here have been and I would think that there's not one situation in Michigan where we've had an environmental consent judgment that's had parties other than the agency and the responsible party to it, so this is very unusual type relief that they're seeking.

But the idea that I would like to propose to the Court is, A, deny the motions -- you know, I'm asking you to deny them with prejudice -- but if the Court has concerns about the possibility that maybe they should have additional input into this, deny them without prejudice today, let us finish the consent judgment modifications.

This is not going to be a long process. I mean, obviously we've missed a key window between Thanksgiving and Christmas, so with the holidays it may take six to eight weeks to finish -- to have a document.

My understanding is that the State

plans to -- and Mr. Negele can speak to this in more detail -- that the State plans to when we submit this to the Court we wouldn't be asking for immediate approval, that the State plans to publish the proposed consent judgment modifications and put it out for public comment so that the entire community, not just the three proposed interveners, can comment on the revised clean-up program and the DEQ would respond -- you know, would respond to those comments, and there may be some, you know, additional modification that the parties could agree on.

And at that point we would submit the comments received, the DEQ's response to those comments, the actual document that we've put together that describes the revised clean-up program, submit that all to the Court with that kind of record.

And then if the proposed interveners have -- still feel that their concerns have not been adequately represented or that there are still deficiencies in the program, we can have a real conversation. We can talk about specifics.

Right now, the interveners don't know what they're objecting to and we don't have the

ability to explain to the Court how the concerns of the interveners have been addressed by these three modifications that take care of this interest.

These interests over here, well, this is why, you know, these were not addressed -- you know, we can't have a concrete discussion. Right now we're -- this is all speculation and hypothetical concerns.

Let us have an actual document to debate and at that point the Court could either entertain renewed motions to intervene if -- and I would like a more productive and frankly less costly method of participating would be to accept amicus briefs from the parties that are now trying to intervene.

And I think that process avoids the potential downsides of granting the intervention motions at this point when we're really talking about hypothetical concerns, hypothetically whether the DEQ is adequately representing the interests of the community, and I think that makes a lot more sense.

Now, obviously, your Honor, I'm happy to answer any questions you have about either in

briefs or that have been raised in your mind by the arguments at this point, but that's my suggestion.

THE COURT: Thank you very much.

MR. NEGELE: Good morning, your Honor. Mr. Caldwell took a lot of my talking points away, but that's fine. You know, part of an observation that he made is an observation that I want to make too is that I've been in environmental practice for quite a while. I have a number of colleagues at the State that have been in environmental practice for quite a while and in our experience we've never seen a circumstance where an environmental policy group or, you know, a public interest group basically has intervened and been a participant in the negotiation of a consent judgment, whether it's the very first negotiation of a consent judgment, or in this case the fourth amendment to a consent judgment.

It may have happened, but it must be extremely rare and, you know, I expect that if such a situation had existed that counsel would have pointed out that situation as justification for intervention.

And I would point out too I'm really focusing on one case -- or one portion I filed a brief on which is the Watershed Council's motion to intervene because our filings for the City and the County speak for themselves.

So this has been going on for, you know, 28 years and why is -- with the Watershed Council on the sidelines, so what's happened that warrants intervention now? We have new clean-up criterion for drinking water and for vapor intrusion, but where were they for the two prior criteria revisions which were the Number 1 up. Now it's gone down to the lowest level that's only like slightly more than twice what it was back in 1992.

They seem to suggest that due to their narrow interests really all they're interested in is the -- what we refer to as the GSI criterion, it's the criterion that applies to where groundwater enters to the surface water through like the bottom of a lake or a stream and that criterion is currently 2,800 ppb.

The rules right now for Part 201 are up for amendment and that's part of where this emergency rule came from because those rules are

still being considered. And the GSI criterion is one of the criteria that could be possibly considered.

So really the Watershed Council, where they really belong right now is not at the table trying to negotiate a site-specific possibly GSI criterion for this plume, but is presenting scientific evidence and information to the DEQ rule making process.

And I'd point out too that the City of Ann Arbor has one of its employees as part of a stakeholder group that is working on the rule amendments. I'd also point out too that a site-specific standard usually is used to have a higher standard rather than a lower standard because the generic criteria are presumed to be protective of whatever they're designed to protect, in this case the groundwater/surface water interface.

So really, you know, what would normally happen is there would be a showing that 2,800 is protective and a higher number is still protective in a given circumstance. We've made -- you know, in our brief we've said that we believe that we are fully protecting the

interests of the public and here the clean-up criteria are designed to specifically address the uses that the council seeks to protect.

They bring no special expertise to the table. In fact, they pointed out that they're looking for an expert to assist them in this. And while they may care more about the water in the Huron River than the, you know, other members of the public, I point out that there are, you know, quite a few number of people and I'm surprised that there aren't more of them in the audience, but I expected to see a number of members of the people we regularly see at CARD (sp) meetings in the audience that care very deeply about this, this matter.

And, you know, I'm only using this as, you know, like a purely theoretical or hyperbolic sense, but shouldn't they also be granted intervention? You know, how many cooks do we need in the kitchen here?

The State is specifically charged with protection of the environment and water resources and, you know, we fully believe that we are protecting those interests. And, you know, again, as the point was made by counsel for

Gelman is that intervention by the Watershed Council will help -- will serve to kind of -- more than kind of, to derail the negotiations that we were so close to having finished at this point.

And I'll fill in in a little more detail on what we're proposing as far as this public comment period. First, it's not required and -- but it does fit in with the -- we've made a commitment to more public engagement with respect to our involvement with this site. And so it's consistent with our public outreach commitment.

So mechanically the way we would envision this working is provide notice in the DEQ environmental calendar. It's a calendar that DEQ publishes monthly and seek public comments there and, as Mr. Caldwell pointed out, it would be public comments, it would not be just our three proposed interveners, but it would give the opportunity for the public to provide their comments.

DEQ staff, we're thinking -- you know, what I've looked at -- I don't know how long the period it would be. Typically looking at the

calendar for mostly it's air cases that are published -- public commented -- or public noticed. They typically have a 30-day period in which to provide comments. Another time period may be more appropriate, I'm not sure.

But that would still delay us, but I think the public input would be valuable. DEQ will provide responses to those comments. This is similar to what's done on a federal level too for superfund cases when they're lodging a consent judgment.

The agency will basically assemble all the comments into certain categories and provide responses to those comments, and that way we can look at whether there would be a reason to like modify certain provisions or add certain provisions and possibly make those revisions. And as I believe Mr. Caldwell explained that we would submit our proposed amended consent judgment to you along with those comments so the Court would have the benefit of those comments too and proceed from there.

THE COURT: And was I correct in my summation at the beginning that I understood that you were not objecting to permissive intervention

by either the council or the City?

MR. NEGELE: That is correct.

THE COURT: Thank you, sir. Let me say as to the interveners -- go ahead and sit down, I haven't asked you to stand up here.

I recognize and I said at the beginning that it is your motion, under the court rules you have the right if you wish to rebuttal argument.

What I find in fact is what happens is you say that and then the other side, "May I just --", and (INDECIPHERABLE) and then you say a few more.

COUNSEL: We've never done that before, your Honor.

THE COURT: Well, we'll see. I believe having read the briefs and hearing the arguments from each of you I think you have articulated your viewpoints and I have enough that I can do (INDECIPHERABLE) this motion, but if you insist, I will give you that opportunity, but I would love to (INDECIPHERABLE) opportunity to --

MR. BRUETSCH: Your Honor, we're prepared to let you move, thank you.

MR. DAVIS: Your Honor, Robert Davis for the County, same.

MR. SALIM: Oday Salim for the Huron River Watershed Council, same, your Honor.

THE COURT: There are three entities which are seeking intervention in a case involving two parties that relates to the quality of the water in Washtenaw County.

And obviously the quality of the water in Washtenaw County can have an effect on the quality of the water well beyond the geographic borders of the county. There has been in the discussion today and in the briefs a lot about process and philosophy.

The legal avenue that the parties who are seeking intervention was focused primarily at my urging under the Court Rule 2.209 intervention (b) (INDECIPHERABLE) intervention.

I acknowledge for the record that there are other avenues by statute that could grant the relief that the parties have requested, but not every path is necessary and (INDECIPHERABLE) interveners so let's focus on 2.209(b).

That court rule says that on timely application a person may intervene in an action (b)(1) when a statute, Michigan statute, or court rule confers a conditional right to intervene or

(2) when an applicant's claim or defense in the main action have a question of law or fact in common. In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In the responses against intervention in whole or in part or at some level as to some or all of the interveners their argument is that it is not timely since this matter has been going on for 28 years, and that there really -- it should have been done earlier and was not done earlier.

There are arguments about delay. There are arguments about prejudice against that.

In weighing those arguments and the reason I mentioned process and philosophy at the beginning, a lot of the discussion is talking related to process about undue delay or about prejudice.

The proposals against intervention had talked about alternative processes that would still address the concerns of those seeking to intervene. Of all of the descriptions of process I will tell you the one I find the most

persuasive is that advanced by the County.

I think that your literal description of how we should approach this is right on, and that being the notion that at the center of this room is the quality of the water in these new standards, and philosophically what we all concurred, that is the charge with which we are to address, that's the thing we should be keeping in the middle at all times and those around the table then philosophically, it's an issue of stewardship.

Whether we are public entities or private entities, that by our actions may have affected the quality of water there is this responsibility of stewardship.

When we look at this philosophically then we start to say well, of course, those who have a statutory duty or a legal responsibility or the entrustment of the public need to be at that table because the collective wisdom and viewpoints in solving a problem is always preferable to individual views.

So I think absolutely, the questions of the City and the County both have similar but different obligations, it makes all the sense in

the world that you have (INDECIPHERABLE) of the collective wisdom that you bring in looking at a solution and I would grant that and I'll address the arguments against it in a minute.

The Huron River Watershed Council is different in its request both in terms of the nature of the request because you're asking or accepting a more limited rule and as pointed out, at least in the experience of the attorneys involved for the two parties, this would be unusual and a first.

What's wrong with that? If you have a problem, I don't see what's inherently wrong because it hasn't been done before. I do think that the Huron River Watershed Council -- and this is why I asked about the background -- I think one of the things that this county is blessed with is institutions of higher learning as our neighbors and we should be always seeking the help of those who spend their lives in the advancement of thinking about things, so I welcome in the courts and in our county the wisdom of those who spend their lives thinking about these issues.

As to undue delay or prejudice, this

case as we said has been going on, I was with it at the beginning in this courtroom. It's been going on for decades and it will go on for decades until it's cleaned up and we know it's safe.

So I don't think a few more months to incorporate collective wisdom is undue delay. I think it's being thorough and careful, transparent and open and considering. I think it is time well spent as opposed to undue delay and even procedure is delayed.

As to any prejudice, this notion of veto power and that, for example, you would only be coming in by the way, as you said, for protection of surface water.

MR. SALIM: That's correct, your Honor.

THE COURT: I'm confirming that with you, that you understand that.

MR. SALIM: Confirmed.

THE COURT: But this notion that somehow there would be a veto power at the table, etc, well, again, if consensual agreement is always good in and of itself, but I don't see anybody hijacking the process, particularly when we keep this as centered (INDECIPHERABLE).

And if it goes astray, then we have a process to determine that, so I think courts are exactly the place that provides and space and the place for the resolutions of these disputes.

We start with that philosophy, we nurture that philosophy that the County has done, we try to stay on course with that philosophy and if any entity strays from that philosophy, we bring it back and assert in another mode (INDECIPHERABLE) as opposed to litigation and an independent fact-finder hears all those arguments and makes the determination.

So motion for intervention are granted as to the City, as to the County and its entities and as to the Huron River Watershed Council for that limited purpose of protection of the surface water interests.

I will be available to all of you. You think about what are the challenges going forward in line with this philosophical approach and to the extent you need my active involvement, you probably will pick a time different than the Thursday morning motion docket (INDECIPHERABLE).

Think about that. If you want to come back to me, come back and meet with me soon just

to talk about where do we go forward from here, I am available and I will assist you in that regard.

ALL COUNSEL: Thank you, your Honor.

(Proceedings concluded at 10:18 a.m.)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I HEREBY CERTIFY that I transcribed this video recording and that this is a full, true, complete and correct transcription of said audio recording (to the best of my ability to hear and understand said recording).

DALE E. ROSE,
CSR-0087

EXHIBIT O

Scio Township Board Of Trustees
Resolution Rejecting The 4th Amended Consent Judgment And
Renewing The Petition For the Gelman Sciences, Inc. Site
To Be Designated As A USEPA Superfund Site

Whereas, From 1966 and continuing into the 1980s, Gelman Sciences, Inc. (Gelman), generated many tons of 1,4-dioxane as a waste material of its production process at its plant located in Scio Township and, through various means, dumped this hazardous chemical into the natural environment where it contaminated the surface and groundwaters of the State; and

Whereas, Members of the public and environmental advocates have worked for decades to document the problem and seek State of Michigan action to require Gelman to clean up its toxic pollution, but Gelman has evaded responsibility by repeatedly concealing the extent of the contamination, opting for less-effective clean-up methods, and using legal strategies to delay and thereby allow the plume of 1,4-dioxane pollution to spread through the groundwater, contaminating wells and potentially intruding into residential basements; and

Whereas, The State of Michigan has for decades litigated against and attempted to regulate Gelman to enforce the State of Michigan environmental laws, but the dioxane plume continues to spread in multiple directions and toward the Huron River; and

Whereas, Scio Township, Ann Arbor Charter Township, and the Sierra Club joined together in 2016 to petition for action by the United States Environmental Protection Agency (USEPA) to designate the Gelman site a Superfund site; and

Whereas, The Scio Township official position supporting the designation of Gelman site as a USEPA Superfund site was approved by a unanimous vote of the board of trustees on June 14, 2016, and remains in effect; and

Whereas, Scio Township intervened, together with others, in the State's ongoing lawsuit against Gelman pending in Washtenaw County Circuit Court; and

Whereas, Settlement negotiations have occurred since 2017, with Scio Township's participation, toward a new consent judgment that would result in better cleanup of the contamination; and

Whereas, Scio Township is dissatisfied with progress on the delineation, containment and remediation of the contamination under the current third or proposed fourth consent judgment; and

Whereas, The USEPA completed the Preliminary Assessment in 2017 and indicated that the Gelman Site was eligible for the National Priorities List (NPL) but a State Concurrence Letter was required to continue the NPL designation process; and

Whereas, The delineation, containment and remediation of the contamination will be bolstered by USEPA's active involvement and enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the "Superfund" Act, as it applies to the contamination.

Whereas, This renewal of Scio Township's 2016 petition for involvement by USEPA does not preclude simultaneous efforts to obtain a thorough clean-up either through negotiations or a court-ordered ruling from the Washtenaw County Circuit Court;

Resolved, That the Scio Township Board of Trustees rejects the fourth amended consent judgment based on the following specific areas of concern raised by members of the public and asks that the Washtenaw County Circuit Court consider these items as it formulates a new plan for remediation of the Gelman site:

1. Revise the 500 ppb standard for termination of extraction wells to a lower standard of continuing to pump and treat as long mass removal is still occurring.

2. Make explicit the right of the Intervenors to participate in the NPDES permitting process, including the process for any required wetland permits.

3. Do NOT allow the discharge of treated wastewater to First Sister Lake, instead require alternative discharge sites for any water pumped and treated from the Parklake well, either by piping back to the Gelman site or piping to a site east of the Ann Arbor water intakes unless treated to non-detect and in quantities not to exceed 500 gallons a day.

4. Prohibit the expansion of the Prohibition Zone beyond the boundaries established in the third amended consent judgement.

5. Re-establish the Maple Road Containment Objective with the new generic GSI of 280 ppb

6. Re-establish the Little Lake Area System Non-expansion Objective and operation of the Ann Arbor Cleaning Supply Well.

7. Require that Gelman and EGLE perform Method 522 dioxane analytical analysis on all drinking water wells, Sentinel Wells and Compliance Wells samples.

8. Lower the trigger levels for all the delineation/sentinel wells in the Western Area and along the northern boundary of the Prohibition Zone from 7.2 ppb to a level half of the whatever the current State drinking water standard is, to ensure that remedial action takes effect before the measured level exceeds the allowable amount.

9. Require Gelman to conduct quarterly surface water sampling of all the Allen Creek storm water drains east of Maple Road, Honey Creek, First Sister Lake, etc.

10. Establish metrics/standards for the phytoremediation in the source area. For example, specify what action would be triggered if plant detritus is found to contain dioxane rather than to have dispersed it. State how long the phytoremediation will last, how it will be maintained, and under what conditions it will be discontinued.

11. Mandate additional monitoring wells for delineation, particularly toward Barton Pond so that expansion of the contamination plume will be detected well before it reaches Barton Pond, whatever direction it is traveling.

12. Make the three optional extraction wells in the source area mandatory for a total of 6 extraction wells.

13. Perform a Remedial Design Investigation across the plume area to to determine how many extraction wells are required and at what pumping rate to control and capture the dioxane groundwater plume.

14. Locate enough additional Sentinel and Compliance Wells along the northern boundary of the Prohibition Zone, east of Maple Road and across M-14 in the northwestern area near the Wagner Road and Dexter/Ann Arbor Road intersection to ensure that expansion of the contamination plume won't escape detection.

15. Require that the Municipal Water Connection Contingency Plan provide a private land owner with a municipal water supply when the dioxane concentration reaches one-half of the drinking water criterion.

16. Do not permit Gelman to apply a Mixing Zone-Based GSI to attain compliance with the GSI Objective.

17. Change the definition of GSI to the new 280 ug/L dioxane from the old 2,800 ug/L dioxane without placing any preconditions such as the omission of the Maple Road Containment Objective.

18. Require that Gelman provide public, Quarterly Reports including: analytical trends; compliance with CJ objectives and criteria; compliance with Verification Plans, Monitoring Plans, and Down-gradient Investigations; discussion of quarterly analytical results and protocols; extraction system requirement compliance; plume migration compliance; and recommendations for follow-up actions.

19. Protect the ongoing rights of local government to intervene in court processes related to the Gelman contamination so that they can effectively advocate on behalf of the health and safety of their residents.

Resolved, That the Scio Township Board of Trustees supports USEPA active involvement, as the lead agency, and enforcement of CERCLA, the "Superfund" Act, as it applies to the contamination;

Resolved, That the Scio Township Board of Trustees reaffirms its request the USEPA to list the Gelman Site a "Superfund" Site on the National Priorities List under CERCLA;

Resolved, That the Scio Township Board of Trustees authorizes the Township Supervisor to write to the Governor enclosing this resolution and soliciting a Concurrence Letter to USEPA in support of making the Gelman Site into a National Priorities List site;

Resolved, That the Scio Township Board of Trustees authorizes the Township Clerk to send this resolution and any such State Concurrence to the Washtenaw County delegation to the Michigan Legislature, the Director of the Michigan Department of Environment, Great Lakes, and Energy; and Congresswoman Debbie Dingell; and

Resolved, That the Scio Township Board of Trustees authorizes the Supervisor to take such further actions that are consistent with the purposes of this resolution.

The foregoing preamble and resolution were offered by Trustee Kathleen Knol, and supported by Trustee Jacqueline Courteau at the Regular Meeting of the Board of Trustees, Township of Scio, County of Washtenaw, State of Michigan, at the Regular Meeting held remotely at 7:00 p.m. on Tuesday, December 8, 2020.

ROLL CALL VOTE:
Ayes: Supervisor William Hathaway, Treasurer Donna E. Palmer, Trustee Jacqueline Courteau, Trustee Alec Jerome, Trustee Kathleen Knol, Trustee Jane Vogel.
Nays: Clerk Jessica M. Flintoft.

RESOLUTION DECLARED ADOPTED.

Jessica M. Flintoft
Clerk, Township of Scio

EXHIBIT P

EYDE v. EYDE

Court of Appeals of Michigan

June 17, 2004, Decided

No. 243670

Reporter
2004 Mich. App. LEXIS 1636 *; 2004 WL 1366007

MARY ANN EYDE, Plaintiff-Appellee/Cross-Appellant, v MICHAEL EYDE, Defendant-Appellant/Cross-Appellee.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Eaton Circuit Court. LC No. 98-000153-CB.

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

settlement agreement, parties, settlement, trial court, salary, partnership, proceeds, bias, appears, negotiations, capital account, final order, cable, insurance proceeds, disposed, motions, recusal, argues, matrix, rights, split, terms, defense counsel, claimants', one-third, assigned, loans, terms of the settlement, accrued interest, closing date

Judges: Before: Sawyer, P.J., and Bandstra and Smolenski, JJ.

Opinion

PER CURIAM.

This suit arose as the result of a partnership dissolution. Michael (defendant) and Patrick Eyde, who were brothers, had a successful partnership that was involved in real estate development. Among its holdings were Eyde Brothers Development, Michigan Farms, and Westbay Management. This litigation also involves the PMS Company, a partnership between defendant, Patrick and Sam, another Eyde brother. In 1992, Patrick died and his interest in the partnership was transferred to the Patrick Eyde Trust. Michael became the trustee of Patrick's trust and the partnership continued with the consent of Patrick's widow, plaintiff Mary Ann Eyde.

In 1996, the partnership was dissolved and reformed between defendant and the Mary Ann Eyde Trust. In 1997, plaintiff decided to dissolve this partnership as well. She filed a complaint in February 1998, seeking a **[*2]** winding up of the partnership. An agreement (the "Settlement Agreement") was reached which divided most of the partnership's assets and liabilities, and plaintiff agreed to pay defendant $ 2,660,000. This agreement was placed on the record December 23, 1998, and was signed by the parties in March 1999. All unresolved issues were submitted to the court. The parties agreed that the partnership would be wound up by March 31, 1999. What followed was over three years of litigation, resulting in this appeal. Defendant appeals as of right and plaintiff filed a cross-appeal, each dissatisfied with certain court rulings. We affirm in part, reverse in part and remand.

I. Judicial Disqualification

A. Standard of Review

Defendant's first argument is that the court erred in denying its motions to recuse the trial judge, Judge Calvin Osterhaven.

Defendant appealed only two of his motions for recusal to the chief judge, Judge Eveland. MCR 2.003(C)(3). Therefore, these are the only two motions properly before this Court. *In re Forfeiture of $ 1,159,420*, 194 Mich. App. 134, 151; 486 N.W.2d 326 (1992). Generally, a trial court's findings of fact regarding a motion **[*3]** to disqualify the judge are reviewed for an abuse of discretion and the determination of the applicability of the facts to relevant law is reviewed de novo. *Cain v Dep't of* Corrections, 451 Mich. 470, 503 n 38; 548 N.W.2d 210 (1996); Armstrong v Ypsilanti Twp, 248 Mich. App. 573, 596; 640 N.W.2d 321 (2001). But defendant's motions did not follow the procedures delineated in MCR 2.003. Defendant failed to file his motions within fourteen days after discovering the grounds for disqualification and did not include an affidavit. Failure to comply with the procedural requirements of MCR 2.003, such as timely filing of the motion and the inclusion of its supporting affidavit, render the motions defective, and thus, the issue is not preserved for appellate review. People v Bettistea, 173 Mich. App. 106, 123; 434 N.W.2d 138 (1988). Accordingly, review is for plain error only affecting defendant's substantial rights. People v Carines, 460 Mich. 750, 763; 597 N.W.2d 130 (1999).

B. Recusal Based on MCR 2.003 and Due Process Principles

MCR 2.003(B) provides:

> **[*4]**
> A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
> (1) The judge is personally biased or prejudiced for or against a party or attorney.
> (2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> * * *
>
> (5) The judge knows that he . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

MCR 2.003(B)(1) requires a showing of *actual* bias for a judge to be disqualified pursuant to this section. *Cain, supra* at 495; emphasis in original. It also requires "personal bias." *Id.* "Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding" or the favorable or unfavorable predisposition must spring from "facts or events occurring in the current proceeding [that] may deserve to be characterized as 'bias' or 'prejudice.'" Id. at 495-496. However, these opinions will not constitute a basis for disqualification "*unless they display* **[*5]** *a deep-seated favoritism or antagonism that would make fair judgment impossible.*" Id. at 496 (emphasis in original; citations omitted in original), quoting Liteky v United States, 510 U.S. 540, 555; 114 S. Ct. 1147; 127 L. Ed. 2d 474 (1994). Additionally, defendant must overcome a heavy presumption of judicial impartiality. *Cain, supra* at 497.

Defendant also argues that his due process rights were violated in so far as it was improper for Judge Osterhaven to preside over the proceedings based on the appearance of bias or prejudice. In *Cain, supra* at 498, quoting *Crampton v Dep't of* State, 395 Mich. 347, 351; 235 N.W.2d 352 (1975), the Court stated,

> The United States Supreme Court has disqualified judges and decisionmakers without a showing of actual bias in situations where "*experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.*" Among the situations identified by the Court as presenting that risk are where the judge or decisionmaker
>
> (1) has a pecuniary interest in the outcome;
>
> **[*6]**
> (2) "has been the target of personal abuse or criticism from the party before him";
> (3) is "enmeshed in [other] matters involving petitioner . . ."; or
> (4) might have prejudged the case because of prior participation as an
> accuser, investigator, fact finder or initial decisionmaker.
> [Emphasis in original; citations omitted in original.]

This list is not exclusive, but the examples given are to be construed narrowly. *Cain, supra* at 500 n 36. Judicial disqualification for bias or prejudice based on due process principles is found only in the most extreme cases. Id. at 498.

Defendant contends that Judge Osterhaven should have been disqualified from presiding over this case because of (1) his involvement in the settlement negotiations, the subject matter of which was before the court; (2) his direct competitive pecuniary interest, by virtue of a piece of property that he and his wife owned, in a piece of defendant's property that was at issue in the litigation; and (3) his prejudice against defendant and his first attorney.

In regards to Judge Osterhaven's participation in any settlement negotiations on December 23, 1998, the **[*7]** day the Settlement Agreement was placed on the record, we find that there is insufficient evidence on the record to conclude that Judge Osterhaven acted as more than a "messenger boy,"

as the court termed it. Judge Osterhaven specifically denied that there were discussions regarding the PMS debt. And the only evidence to the contrary was the testimony of defendant and defense counsel, who both asserted that Judge Osterhaven was "deeply" and "intimately" involved in the negotiations by making offers and suggesting counter-offers.

However, this testimony is suspect given that defendant initially testified that there were "no face to face negotiations with the other side," rather the "shuttle man was Judge Osterhaven." Defendant continued and stated that the negotiations were "conducted by an offer from one side to the other side carried by Judge Osterhaven." Even defense counsel initially stated that he didn't "think that the court had a specific discussion about PMS," and that offers were tendered by plaintiff "through Judge Osterhaven." Importantly, defendant did not raise this basis for recusal until the court was on record addressing the issue of the PMS debt, five months after **[*8]** the settlement negotiations. And then, its oral motion was contingent on whether the court decided to take extrinsic evidence, including evidence from the settlement negotiations, on the issue. Accordingly, defendant has not shown plain error affecting his substantial rights.

With respect to the court's competitive pecuniary interest, Chief Judge Eveland concluded, "Any potential rivalry with the defendant as competitors in bidding with the Drain Commission is at best speculation on a highly unlikely scenario." The only evidence that the Drain Commission was considering defendant's property for its project was defendant's own statement, which was presented to the court through defense counsel during oral argument on the motion for recusal. Judge Osterhaven revisited this issue whenever it was raised, and, at all points, had no affirmative information that there was any "competition." Defendant never provided the court with an affidavit or testimony from the Drain Commissioner to confirm his statements. Thus, without more than defendant's self-serving statement, it cannot be said that Judge Osterhaven was "enmeshed" in a matter with defendant, *Cain, supra* at 498, and there is no **[*9]** basis on which to conclude that Judge Eveland's ruling constituted plain error.

Lastly, we address whether Chief Judge Eveland erred in determining that there was no "actual bias" or "appearance of bias" sufficient to warrant Judge Osterhaven's recusal. From all accounts, the proceedings were fraught with disrespect shown by and to both parties' counsel and the court. Inappropriate language was used and discourteous behavior was shown. However, the court's opinions only constitute a basis for disqualification under *MCR 2.003(B)(1)* if the comments display a "deep-seated antagonism" towards defendant, and violate defendant's due process rights only if the appearance of bias is "too high to be constitutionally tolerable."

It is clear that most of the court's less than temperate expressions were the result of defense counsel's poor courtroom behavior. Among other conduct, defense counsel continually interrupted opposing counsel and the court, called opposing counsel a "liar" and declared "Jesus Christ" in response to a statement by opposing counsel, as well as filed a consistent stream of motions which the court viewed as a delaying or harassing tactic. However, we do note that defense **[*10]** counsel was the focal point of several unprofessional diatribes by Judge Osterhaven as well.

This case is strikingly similar to *In re Forfeiture of $ 1,159,420, supra at 153-154*, in which this Court concluded:

> After carefully reviewing the entire record in this case, we conclude that reversal is not warranted on this basis. It appears that throughout the trial the atmosphere was rather tense as a result of the bickering between counsel and between claimants' counsel and the trial court. It appears to us that claimants' counsel provoked the trial court with their comments and conduct in general. In addition to being disrespectful to the court in many instances, claimants' counsel resorted to attacking a prosecutor by apparently stating that her conduct "typified the basest kind of projection as described in psychiatric literature." This type of conduct was uncalled for. The trial judge also appeared to be agitated by the tactics of claimants' counsel, such as what appeared in the judge's eyes to be attempts to create appellate parachutes and reliance on what clearly appears to be a fraudulent lawsuit as an explanation for some of claimants' extensive assets. As a result, **[*11]** the judge was apparently becoming frustrated and was losing his patience. Although the judge may not have displayed the utmost courtesy, being courteous is the ideal, not the requirement. What is required is that the parties receive a fair trial. Here, claimants have failed to show that the judge's views controlled his decision-making process.

Likewise, here, while we do not condone Judge Osterhaven's comments, under the circumstances, they are understandable. Chief Judge Eveland did not err in concluding that defendant could not show that the court's comments displayed a "deep-seated antagonism," or that any of the court's adverse rulings were controlled by an apparent bias. Accordingly, defendant has failed to show plain error affecting his substantial rights.

II. PMS Debt

Defendant contends that the trial court erred in finding a latent ambiguity and taking parol evidence regarding the parties' intent to divide the PMS debt, thereby ignoring the clear

terms of the Settlement Agreement. A settlement agreement is a contract governed by general contract legal principles. *Mikonczyk v Detroit Newspapers, Inc, 238 Mich. App. 347, 349; 605 N.W.2d 360 (1999).* **[*12]** Questions of contract interpretation are reviewed de novo by this Court. *Quality Products & Concepts Co v Nagel Precision, Inc, 469 Mich. 362, 369; 666 N.W.2d 251 (2003)*.

The primary purpose in interpreting a contract is to determine the parties' intent. *Id. at 375*. Generally, a contract that is clear on its face must be enforced as written. *Id.* An unambiguous contract is reflective of the parties' intent as a matter of law. *Id.* But "where a latent ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid to the construction of the contract. A latent ambiguity is one 'where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among 2 or more possible meanings.'" *Scholz v Montgomery Ward & Co, Inc, 437 Mich. 83, 103; 468 N.W.2d 845 (1991)* (Levin, J.; concurring in part, dissenting in part), quoting *Black's Law Dictionary* (4th ed), p 105. It is on this basis that the trial court decided to allow extrinsic evidence as **[*13]** to the parties' intent regarding the PMS debt, taking into account plaintiff's position that she never intended to assume any of this debt and no negotiations on the subject had been held.

The Settlement Agreement contained a "Re:" line on its first page that identified the parties and the subject matter. It read as follows:

> Re: Mary Ann Eyde/Micha
> Dissolution or Resolution of Eyde Brothers Development and Related Companies, Michigan Farms, Westbay Management Company, and PMS Company (collectively, the "Company")

The Settlement Agreement further provided that the parties would "split equally any other debts of the Company, including, but not limited to" the Michigan National Bank debt, which indisputably included the PMS debt. Thus, defendant argues that the Settlement Agreement unambiguously provides that the PMS debt was to be equally divided and should have been enforced as written.

The Settlement Agreement also specifically stated:

> The parties acknowledge that this Letter Agreement reflects the Phase I Settlement of the Parties, as stated in their agreement placed upon the record in open Court. The parties agree to abide by the terms of this **[*14]** Letter Agreement. Execution of this Letter Agreement by Mr. Eyde and Mrs. Eyde constitutes ratification of the Phase I Settlement as placed on the record in open Court and acceptance of the terms of this Letter Agreement. The Parties acknowledge that a binding settlement agreement has already been reached and that this Letter Agreement merely constitutes written confirmation of the Agreement.

Both parties signed the Settlement Agreement, and by doing so agreed to its terms. The record does not reflect any mention of the PMS debt at the hearing where the agreement was placed on the record, and, therefore, no indication of the parties' intent can be derived from it.

After reviewing the record and the terms of the Settlement Agreement, we find that the trial court erred in allowing parol evidence regarding the parties' intent to split the PMS debt. The contract was clear on its face. PMS was specifically included in the "Company" definition and the Settlement Agreement provided for the Company's debt to be divided equally. We recognize that parol evidence indicated defendant was aware of the fact that plaintiff did not appreciate the significance of these Settlement Agreement **[*15]** terms regarding the PMS debt; however, plaintiff reviewed the Settlement Agreement with her attorney and ultimately signed the document. By doing so, plaintiff agreed that the draft embodied by the March 2, 1999 letter accurately represented the terms of the Settlement Agreement.

Plaintiff's counsel testified that to the extent he noted the PMS reference in the "Re:" line, he believed it referred only to the provision providing for the one-third PMS interest transfer to defendant. Regardless, plaintiff, through her counsel, was obliged to review the document in its entirety and is charged with the effect of the terms *as explicitly written*, particularly given that the final Settlement Agreement was written on plaintiff's counsel's stationery. While this may be an inequitable result, such is often the case where the only evidence indicating a contrary intent from that clearly expressed in the written document is a party's own statement of belief.

Plaintiff asserts that this provision cannot be enforced because PMS was not a party to this lawsuit, and thus, the trial court did not have jurisdiction over PMS. However, parties are free to enter into any contract at will. While plaintiff **[*16]** could not purport to give away any rights in PMS, because she had none, she could certainly contract with defendant, who by virtue of his two-thirds interest in PMS had the ability to enter into binding contracts on PMS' behalf, and agree to pay a portion of its debt.

Yet we do find that a latent ambiguity does exist with regard to the amount of the PMS debt to be divided. It is undisputed that the PMS Company was not a partnership asset. The three Eyde brothers, Pat, Mike, and Sam, owned it in equal shares.

Per the Settlement Agreement, Patrick's children transferred their one-third interest to defendant. Therefore, as defendant concedes in his appellate brief, one-half of the PMS debt subject to the Settlement Agreement would be one-half of the debt associated with defendant's two-thirds interest, or, in other words, one-third of the overall debt. However, the Settlement Agreement also provides that the Michigan National Bank debt, which includes all of the PMS debt, was to be split equally. On its face then, this appears to also include Sam Eyde's debt portion.

Basic contract principles establish that one cannot affect the rights of a person not a party to the contract. Thus, **[*17]** we conclude that the Settlement Agreement must be interpreted as providing for the equal division of two-thirds of the PMS debt. But because of the factually intensive nature of this case, we nonetheless remand this issue for the trial court to determine how our decision impacts the division of the Michigan National Bank debt, if at all.

III. Security Deposit Liability

The next issue as framed by defendant asks whether the trial court correctly determined that defendant was responsible for one-half of the security deposit liability. We decline to address the merits of this issue because defendant concedes on appeal that the trial court's ruling was correct. Regarding the "inconsistency" of the trial court's rulings, which appears to be the actual crux of defendant's argument, defendant simply announces his position without explaining his argument and cites no authority in support of his argument regarding the relief sought. A party may not simply announce its position and leave it to this Court to discover or rationalize its argument and then search for authority to support or reject it. *Mudge v Macomb Co, 458 Mich. 87, 105; 580 N.W.2d 845 (1998).* **[*18]**

IV. Accrual of Loan Interest

This issue involves the division of interest accrued on loans held by Michigan National Bank. The Settlement Agreement specifically provided that the Michigan National Bank debt was to be divided equally. The debt was comprised of various loans. The outstanding balance of any loan is equal to the principal balance plus any interest accrued. And testimony established that the bank continued to charge the accrued interest on the loans to the partnership until the loans were paid in full.

At a hearing on September 14, 1999, the trial court ruled that the parties equally shared the blame for the delay in closing. [1] **[*19]** Despite defendant's statements assigning sole blame to plaintiff, defendant does not ask this Court to review the trial court's decision. Enforcing the clear terms of the Settlement Agreement, the trial court was obligated to divide equally not only the principal debt, but also the accrued interest. [2]

In regards to P17 of the Settlement Agreement, the benefits of this provision were only available to a "non-breaching party." Any discussion on the record at the December 23, 1998 hearing regarding the necessity of an unwinding if the settlement was not concluded by March 31, 1999, was subject to the modifier in P17, but only a "non-breaching" party could enforce the provision. Because the trial court concluded that both parties were responsible for the delay, plaintiff cannot be said to be a "non-breaching party." Accordingly, the trial court did not err in denying defendant's motion for disengorgement of profits.

V. Capital Accounts

Paragraph 1 of the Settlement Agreement indicates that the properties listed under each party's name in **[*20]** the Settlement Matrix constitute that party's portfolio. Paragraph 3 provides that the $ 2.66 million payment is "to equalize the Parties' portfolios . . . . Amounts due for capital account differential or any other miscellaneous claims of the Company or either of the Parties not addressed in this Letter Agreement against Mr. Eyde, Mrs. Eyde, or any related entities are not settled by this payment." Defendant asserts that P3, when read in conjunction with P6, clearly indicates that what was being equalized by the $ 2.66 million payment was the value of the assets retained by each party, i.e., the value of each party's "portfolio" under the Settlement Agreement. Paragraph 6 also specifically stated that "other matters not addressed in the Phase I Settlement Matrix, including, but not limited to: (a) capital accounts" were to be "accounted for separately." We believe that the clear language of the Settlement Agreement indicates that the $ 2.66 million payment was not intended to equalize the capital accounts.

However, we do not conclude that the language of the Settlement Agreement definitively entitles defendant to an accounting or to an equalization. As to what the unsettled issues **[*21]** are regarding the capital accounts, those are

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[1] Plaintiff's reference to the court's "finding" that defendant was solely to blame is misleading. It appears that the court belatedly stated its true belief regarding the situation, but it did not revise any of its rulings nor base future rulings on this belief.

[2] Defendant also alludes to the fact that until the closing, the Company's profits were to be split equally. Defendant appears to argue that the effect of this Settlement Agreement term combined with the court's ruling regarding the accrued interest unjustly enriched plaintiff. However, defendant does not develop this argument nor support it with authority.

factual questions for the trial court to resolve. Notably, at the settlement hearing, defendant's attorney stated, "And--well the only thing I think that's left below the line is that each party will account for capital accounts and any miscellaneous accounting matters which have not been specifically dealt with above the line." Plaintiff's attorney responded, "Correct. And I would note that there are a number of items . . . which have not been dealt with above the line. If they are unable to be resolved we will request that the court resolve them forthwith in a short hearing." Therefore, a remand is necessary to allow the trial court to determine the outstanding capital account issues and resolve them.

VI. Closing Date of the Company's Books

The Settlement Agreement provided that "the closing of the books date (either 12/31/98 or 1/5/99) is to be resolved by the court." The company books were to be closed when plaintiff tendered payment of $ 2.66 million to defendant. Because defendant would not accept the payment on December 31, 1998, the court ordered defendant to accept the payment on January 5, 1999. Given these circumstances, the **[*22]** court decided to "pick a date in the middle," choosing a closing date of January 3, 1999, because "there's money going out and money coming in on Mr. Eyde's part depending on when he gets that check. And the reality of the situation is, he didn't get it until January 5th, rightly or wrongly." Both parties assert on appeal that the court erred in choosing January 3, 1999, as the date of the closing, with plaintiff arguing in favor of December 31, 1998, and defendant arguing in favor of January 5, 1999, as the correct closing date.

It is undisputed that defendant refused to accept the payment on December 31, 1998. But there was much dispute over the circumstances. What is clear from the record is that plaintiff's son tendered payment after business hours--plaintiff stated that she was at the bank until 5:30 p.m.--and that a verbal altercation occurred between defendant and him, perhaps regarding the pending assignment of plaintiff's children's interest in PMS. Given these circumstances, the trial court did not clearly err in not assigning December 31, 1998, as the date of closing for the company books.

The question then becomes whether the court erred in choosing January 3, 1999, over **[*23]** January 5, 1999. As part of the Settlement Agreement, the parties agreed that this issue would be decided by the court and noted that the dispute was whether December 31st or January 5th should be the closing date. By agreeing to have the court decide this issue, we believe the dates listed in the Settlement Agreement simply constituted the parameters of the issue. The dates aided the court in narrowing the issue, but did not contractually confine the court to choosing only one date or the other. Therefore, it was within the court's equitable powers to choose an intermediate date. Given the circumstances of the tender as noted above, we find that the court's ruling was not clearly inequitable.

VII. Jurisdiction

Plaintiff's first cross-appeal argument pertains to this Court's jurisdiction to hear this appeal. Plaintiff asserts that the June 28, 2002 order was the final order as defined by *MCR 7.202(7)(a)(i)* and that the order subsequently entered on August 20, 2002, was not a final order because the "issue" the latter order disposed of had already been decided pursuant to an oral ruling from the bench two years earlier. Thus, plaintiff argues, the claim of appeal filed on September 10, 2002, was **[*24]** untimely filed. We conclude that plaintiff's jurisdictional challenge is without merit.

A party may appeal by right from a final order. *MCR 7.203(A)(1)*. In a civil action, a final order is the first order that disposes of all the claims and adjudicates the rights and liabilities of all the parties. *MCR 7.202(7)*. For two reasons we find that plaintiff's jurisdictional challenge must fail. First, it is a basic legal principle that a court speaks through its written orders and not its oral statements from the bench. *Tiedman v Tiedman, 400 Mich. 571, 576; 255 N.W.2d 632 (1977)*. Therefore, even though the trial court may have orally indicated a disposition in 2000, the actual claim was not disposed of until the order was entered on August 20, 2002. The August 20, 2002 order, in conjunction with the other orders, is the order that disposed of all of the claims of all of the parties. [3] It was the final order from which defendant's claim of appeal was properly taken. Because defendant's appeal was filed within twenty-one days of the final order's entry, this appeal was timely filed. *MCR 7.204(A)*.

[*25] The second reason plaintiff's jurisdictional challenge must fail is that even if the June 28, 2002 order was the final order as defined by *MCR 7.202(7)(a)(i)*, defendant's claim of appeal was still timely filed on September 10, 2002, because defendant filed a motion for clarification on July 18, 2002 (twenty days after the June 28, 2002 order). That motion was not disposed of until entry of the August 20, 2002 order. Under *MCR 7.204(A)(1)(b)*, the July 18, 2002 motion tolled the time period in which to file the claim of appeal until after the disposition of the July 18, 2002 motion. [4] Thus, defendant

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[3] Plaintiff responds that if this Court relies on the above reasoning, then defendant should be barred from appealing any issues that were not codified in a lower court order. Plaintiff's assertion has arguable technical merit. Nevertheless, because defendant's claim of appeal was timely filed even if the June 28, 2002 order is considered the final order, this argument is irrelevant.

[4] Plaintiff counters that defendant's motion to clarify should not be

had twenty-one days after August 20, 2002, to timely file his claim of appeal. Because the claim of appeal was filed within the twenty-one day period, the claim of appeal was timely filed even if the June 28, 2002 order was considered the final order. There is no requirement, and plaintiff does not cite any legal authority stating otherwise, that the claim of appeal must correctly identify which order is the final order as defined by the court rules.

[*26] VIII. Division of Assets

To the extent that the remaining issues involve the trial court's equitable power to divide the partnership assets, we review for clear error a trial court's findings of fact, while its holdings are reviewed de novo. [5] *Slatterly v Madiol, 257 Mich. App. 242, 248-249; 668 N.W.2d 154 (2003)*.

A. Fire-Loss Insurance Proceeds

Defendant argues that the trial court erred in not dividing the insurance proceeds equally on an accrual accounting basis. [6] We initially note that the Settlement Agreement specifically states that this issue was reserved for the court to decide, and thus, the agreement's provision for equally splitting assets does not apply. And, based on defendant's appellate argument, this Court is left with many questions pertaining to the accounting method and its **[*27]** applicability to the insurance proceeds, mainly as to the basis for defendant's assertion that an accrual method of accounting equates to an equal division of the insurance proceeds. But this Court's task is not to unravel or decipher a party's argument and then search for authority to either support or reject it. *Mudge, supra at 105*. Therefore, we decline to further address the merits of this issue because defendant failed to explain his argument and support it with authoritative law.

[*28] Next, we turn to plaintiff's cross-appeal argument regarding this issue--that the trial court erred in awarding defendant any portion of the insurance proceeds for personal property stored at Ramblewood Apartments, but not used for the Ramblewood complex, because the clear terms of the insurance policy stated that it only covered personal property used to maintain or service Ramblewood's clubhouse. In support of her argument, plaintiff cites to the record and references the insurance policy. However, a transcript of the May 17, 2000 proceedings was not part of the appellate record, nor was the insurance policy. Therefore, while plaintiff's argument may have merit, this Court does not have sufficient sources from which to decide the merits of this issue. Consequently, for differing reasons, both parties have waived appellate review of this issue. Accordingly, we find that the court did not clearly err in awarding defendant $ 7,500 of the insurance proceeds.

B. Equipment Proceeds/Litigation Settlement

Under the Settlement Agreement matrix, all equipment of the partnership, except equipment owned by Westbay Management ("Westbay") and two other non-disputed pieces of equipment, was **[*29]** assigned to defendant. The agreement did not contain any specifics. In the lower court, defendant argued that it was understood that the "Equipment" assigned to defendant pursuant to the Settlement Agreement was worth $ 484,000. Plaintiff countered that there was no such understanding and no evidence of such an agreement. Plaintiff asserted that the only equipment defendant was to receive, save for those items specifically excepted out, was all the equipment owned by the partnership at the time of dissolution.

From the last proposals exchanged by the parties, it appears that both parties contemplated defendant taking the tractor/chainsaw and Komatsu excavator. Plaintiff knew before she submitted her November 1998 proposal that the Komatsu litigation had been settled and that the tractor/chainsaw had been sold, yet still attached a dollar value of $ 484,589.37 to the equipment category. It is possible that at the time of the settlement hearing, plaintiff simply assumed that the "equipment" would include only tangible items in the company's possession at the time of dissolution, however, plaintiff's counsel's comments at an April 2000 hearing tends to belie such an understanding. [7] **[*31]** **[*30]**

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deemed a motion for "other postjudgment relief" under ***MCR 7.204(A)(1)(b)*** because no "relief" was sought, only a clarification. In this context, we believe that "relief" must be construed in its general sense, referring to the assistance sought from the court regarding the disposition of issues that affect the parties' rights. *Black's Law Dictionary* (6th ed), p 1292.

[5] The Uniform Partnership Act provides that cases, which are not specifically covered under the act, are governed by the rules of law and equity. *MCL 449.5*.

[6] Pursuant to a March 29, 1999 order, the parties agreed that all partnership accounting on unresolved matters would be done according to an accrual method. The accrual method is "[a] method of keeping accounts which shows expenses incurred and income earned for a given period, although such expenses and income may not have been actually paid or received." *Black's Law Dictionary* (6th ed), p. 19. Under this method, the right to receive mandates its inclusion in gross income, not the actual receipt. *Id.* Thus, when the account receivable amount becomes fixed, the right accrues. *Id.*

[7] At a hearing regarding two other pieces of equipment, a Hydro-ax and a forklift that defendant was arguing were included in the equipment category of the settlement matrix, plaintiff's counsel stated,

Because it is just as likely that plaintiff was trying to reap whatever benefits she could from such an argument, we find that the trial court did not commit clear error in determining that the tractor/chainsaw and Komatsu excavator were included in the equipment category of the settlement matrix. Thus, the parties' agreement snperceded any right plaintiff had to the sale and litigation proceeds being put back into the partnership's account. Although defendant's actions of disposing of the tractor/chainsaw violated the court's order not to dispose of any assets during the winding up of the partnership, [8] the evidence indicates that defendant would have received this property in the settlement anyway. Accordingly, the court did not clearly err in allowing defendant to keep the sale proceeds totaling $ 23,400, and the litigation settlement totaling $ 58,000.

C. Cable Contract Proceeds

Plaintiff contends that the trial court erred in awarding a portion of the cable contract proceeds to Sam Eyde, who held a one-third interest in PMS. Plaintiff correctly points out that the clear terms of the Settlement Agreement provided that the parties were to split equally the cable contract proceeds, even though plaintiff retained ninety percent of the apartment units that the contracts serviced.

In deciding this issue, the conrt felt that the Settlement Agreement language should control, but also thought "we have to take into consideration Sam Eyde's situation." Thus, the court ordered the portion of the contract proceeds assignable to Whispering Pines to be subtracted from the cable contract payments and divided, one-third going to Sam Eyde and the remaining two-thirds split between the parties per the Settlement Agreement. We hold that there is no legal basis for the court's ruling.

> On page nineteen of the settlement agreement that was placed on the record, Your Honor, December 23, 1998, Mr. Tomblin makes specific reference to what was discussed at that time and he refers to the equipment which is already accounted for in the $ 484,000 that he is being figured for his equipment. I suggest, Your Honor, that that is the heavy-duty earth moving equipment that was part of the 1996 acquisition by the company and *that's what the parties had discussed.* [Emphasis added.]

Moreover, in arguing on appeal that the court erred in awarding defendant the Hydro-ax and forklift, plaintiff states, "Although not explicitly stated on the record, the 'equipment' discussed at the time of the settlement was heavy earth-moving equipment purchased by the company in 1996."

[8] We note that plaintiff did not petition the court to impose sanctions and the court chose not to do so sua sponte.

These contracts were between the cable company and Eyde **[*32]** Brothers Development Company. Defendant was fully aware of the contracts' substance when he negotiated the Settlement Agreement, yet never divulged that a portion of those payments were going to PMS. And plaintiff was not provided with copies of the cable contracts at the time of the Settlement Agreement. Although it may have been past practice for the partnership to distribute to PMS a portion of the proceeds attributable to its sole holding Whispering Pines, no written agreement was produced. Plaintiff should not be bound to a non-existent contract. If defendant desires to continue to give Sam Eyde one-third of the cable contract proceeds attributable to Whispering Pines, he is free to do so out of his portion of the proceeds. Therefore, the Settlement Agreement should have been enforced as written, and the trial court erred in concluding otherwise. On remand, the court is to determine the proper payment amounts to be allocated to plaintiff and defendant.

D. Hydro-ax/Forklift Disposition

Plaintiff argues that the Settlement Agreement contemplated defendant receiving the heavy earth-moving equipment purchased by the company in 1996. Plaintiff asserts that because the hydro-ax and **[*33]** forklift were purchased a few years earlier and were not included in the settlement matrix, the court erred by not equally dividing the value of the equipment between the parties. Defendant counters that he was to receive this equipment under the terms of the Settlement Agreement. We agree with defendant.

The Settlement Agreement matrix listed the category "Equipment." Under this category, assigned to defendant, was "All equipment, except below (incl Westbay)." On the next line of the matrix, the "D4, Rubber Tire, Kubota & Case Loader (already in Westbay)" were assigned to plaintiff. Paragraph 2 of the agreement provided, "The reference to 'Equipment' refers to earth moving equipment, construction, maintenance, and other heavy equipment." Furthermore, in a November 12, 1998 settlement proposal drafted by plaintiff, the equipment specifically listed as defendant's included the hydro-ax and forklift. This was in addition to the $ 484,589.37 worth of equipment plaintiff proposed defendant take. Plaintiff has not presented sufficient evidence for us to conclude that the trial court clearly erred in finding that the hydro-ax and forklift were given to defendant under the terms of the Settlement **[*34]** Agreement. The court properly awarded these pieces of equipment to defendant.

E. Defendant's 1998 Salary/Award of Interest on the $ 100,000 Loan

The preliminary injunction order that was entered in April 1998 provided that no consideration, including salary, was to

be paid to either party until further order of the court. The court acknowledged that these payments may have violated its order, but allowed defendant to keep the nearly $ 55,000 in salary defendant paid himself in 1998 in order to "wash out" the 1998 salary paid to Robert Kuncaitis, Westbay's accountant. Plaintiff argues that this ruling completely ignores the fact that the parties agreed to split the expenses of the company until the "above the line" settlement was finalized. Plaintiff asserts that Kuncaitis' salary was an expense of the company and should have been shared equally by the parties until the books were closed. Defendant argues that the court's ruling was just given that it found that defendant earned this salary and, therefore, it was also an expense of the company.

We find that the court's ruling was erroneous. Paragraph 9 of the court's preliminary injunction order stated, "That during the pendency **[*35]** of this action, there shall be no consideration, including salary, paid to any partner, nor shall there be any draws, withdrawals, or loans by or on behalf of any partner until further order of the Court." The court, however, inexplicably stated that "if we went through things with a fine tooth comb [defendant's actions] may have violated a court order." Clearly, defendant's monthly draw to himself of $ 5,000 for work he allegedly performed for Westbay was a direct violation of the preliminary injunction order.

Instead of imposing a fine, sanctions, and/or ordering defendant to return the money, the court decided to consider defendant's salary to "wash out" the salary the company paid to Mr. Kuncaitis. However, the court made no findings as to how much work defendant actually performed on behalf of Westbay. The court simply said, "You [defendant] did have some responsibilities there and if I were in your shoes I probably would have maybe felt that I was entitled to compensatiou too." But from the existing record it appears that during 1998 defendant undertook virtually no business actions regarding Westbay, yet paid himself his full monthly salary of $ 5,000 from that company **[*36]** for most of 1998.

The court also made no findings in regards to the amount of work Kuncaitis performed. It is undisputed that his salary was an expense of the company. However, at the beginning of 1998, defendant wanted to fire Kuncaitis, but at plaintiff's request the court ordered that he continue working. There are indications that after this point Kuncaitis may have been partial to plaintiff's interests and the parties disputed how much of his work benefited both parties and Westbay. [9] Yet without making any of these findings, the court concluded that the two salaries cancelled each other out.

[*37] Intertwined in this ruling is the court's decision to award defendant repayment of interest he accrued on a loan he made to the company. In November 1997, defendant removed nearly $ 800,000 from an escrow account and placed it in his own personal account. As a result, the partnership did not have enough cash on hand to pay expenses at the end of 1997 and defendant loaned the partnership $ 100,000 to cover those expenses. [10] Defense counsel suggested, "Since Mr. Kuncaitis' salary and benefits, Your Honor, is a little larger than Mr. Eyde's $ 55,000 [1998 salary], it would seem that if we're going to wash out maybe that's a fair way to compensate Mr. Eyde is at least he gets the interest that he paid the bank." The court responded, "That's what I'm going to do." Implicit in the court's ruling was that it found the decision to be "fair." However, the interest calculation had not been done, and the court did not know the amount it represented when it made its ruling. Therefore, we question how "fair" the decision was when no exact numbers were presented regarding the deficiency between defendant's and Kuncaitis' salary that the interest award was curing or the interest award amount **[*38]** itself. This error is compounded by our assessment of the court's decision to "wash out" defendant's salary with Kuncaitis'. Such equitable decisions are certainly within the court's power; however, we find that the court did not have sufficient facts before it to make these decisions.

We sympathize with the court's plight in this case. The sheer number of issues presented to the court and the factually intensive nature of them surely would wear on the most patient of judges. But we simply cannot let the court's rulings stand, despite its equitable powers, in the face of no factual basis to support it. Therefore, on remand, we instruct the court to hold a hearing to determine how much work during 1998 defendant performed on behalf of Westbay and award an apportioned amount. Half of the portion of defendant's 1998 salary in excess of this amount, if any, shall be awarded to plaintiff per **[*39]** the terms of the Settlement Agreement. Similarly, the court is to determine to what degree the work

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[9] On this point the trial court stated,

> Mr. Kuncaitis--he may have been over in the corner with Mary Ann Eyde. But on the other hand he probably did perform some functions that benefited you [defendant] the last ten months. You'd take issue with that. And of course your position is that he should have been broomed last February [1998] or before and that I shoved you down his throat. To some degree I did. I felt there was some merit to having him continue. Given the expertise and the background and the knowledge he had, particularly while this whole thing was pending here and we were trying to reach a resolution on the greater issues it made sense to me to keep as much of the status quo as possible while all this was being sorted out.

[10] Apparently defendant borrowed the money he loaned to the company because he paid interest to the bank on the loan amount.

performed by Kuncaitis was on behalf of Westbay, bearing in mind that simply because his work may have benefited or been more favorable to plaintiff does not automatically mean Kuncaitis' salary should be considered plaintiff's expense, as opposed to Westbay's. To the extent the court concludes, if at all, that Kuncaitis was acting in 1998 as plaintiff's individual employee, the corresponding salary shall be plaintiff's responsibility alone. The resultant Westbay expenses shall be borne equally by the parties. The court is also to take evidence regarding the amount of interest defendant paid on the $ 100,000 loan and make its decision regarding the interest accordingly.

IX. Conclusion

We hold that this appeal is properly before us as it was timely filed. In regards to defendant's motions to recuse Judge Osterhaven, we affirm Chief Judge Eveland's rulings denying these motions. We also affirm the court's decisions pertaining to the closing date of the company books and defendant's liability on the interest accrued on the Michigan National Bank debt. As to the other issues challenging **[*40]** certain trial court decisions, we affirm the lower court's rulings with respect to the disposition of the hydro-ax and forklift, and the proceeds from the litigation settlement involving a Komatsu excavator, as well as the proceeds from the sale of a tractor and a chainsaw.

But we reverse the court's decisions pertaining to the PMS debt, the capital accounts, the cable contract proceeds, defendant's 1998 salary, Mr. Kuncaitis' 1998 salary, and the award of interest to defendant on a $ 100,000 loan made by him to the company, and remand these issues for further proceedings in accordance with this opinion. Finally, we decline to address the merits of the following issues: the parties' security deposit liability and the division of the fire-loss insurance proceeds.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski

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