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 EXHIBIT INDEX FOR REPLY BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

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DEFENDANT GELMAN SCIENCES, INC.'S EXHIBIT INDEX FOR REPLY BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

EXHIBIT	DESCRIPTION
1	EPA Toxicology Review, August 2010
2	Third Amendment to Consent Judgment dated 3/3/11
3	Plaintiff State of Michigan's Motion to Enforce Judgment dated 2/11/00

4	Defendant Gelman's Opposition to Motion to Enforce dated 2/28/00
5	Opinion and Remediation Enforcement Order dated 7/17/00
6	Opinion and Order Regarding Remediation of the Contamination of The "Unit E" Aquifer dated 12/17/04
7	Defendant Gelman's Petition for Dispute Resolution dated 7/6/07
8	Defendant Gelman's Brief in Support of Motion to Amend Consent Judgment dated 7/6/07
9	Stipulated Order Amending Previous Remediation Orders dated 3/8/11
10	Gelman Science Frequently Asked Questions EPA Role in Cleanup
11	Transcript excerpts 11/19/20
12	Transcript of hearing on Motion for Stay dated 2/4/21

EXHIBIT 1

EPA/635/R-09/005-F
www.epa.gov/iris

TOXICOLOGICAL REVIEW

OF

1,4-Dioxane

(CAS No. 123-91-1)

In Support of Summary Information on the Integrated Risk Information System (IRIS)

August 2010

U.S. Environmental Protection Agency
Washington, DC

EXHIBIT 2

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

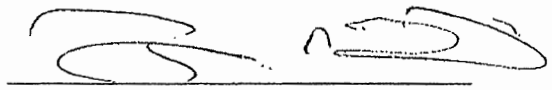
Approved as to form:

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:

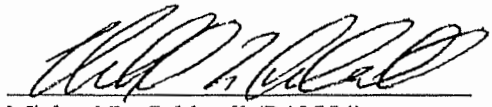
DEFENDANT



Dated: 3/3/11

Roberto Perez
President
Gelman Sciences, Inc.

Approved as to form:



Dated: 3/3/11

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535 Griswold St. Suite 1000
Detroit, MI 48226
(313) 963-3873
Attorneys for Defendant

IT IS SO ORDERED AND ADJUDGED this ____ day of _____.

HONORABLE DONALD E. SHELTON
Circuit Court Judge

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

EXHIBIT 3

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 NATURAL RESOURCES,

Plaintiffs,

v

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

File No. 88-34734-CE

Honorable Melinda Morris

Robert P. Reichel (P31878)
Assistant Attorney General
Natural Resources Division
Knapps Office Centre, Suite 530
300 South Washington Square
Lansing, MI 48913
Telephone: (517) 335-1488
Attorney for Plaintiffs

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Telephone: (248) 901-4050
Attorney for Defendant

PLAINTIFFS' MOTION TO ENFORCE CONSENT JUDGMENT

Plaintiffs, Jennifer M. Granholm, Attorney General of the State of Michigan, and the Michigan Department of Environmental Quality ("MDEQ"), as successor to Plaintiffs Michigan Natural Resources Commission, Michigan Water Resources Commission, and Michigan Department of Natural Resources under Executive Orders 1991-31 and 1995-18, by their undersigned counsel, hereby move this Court, pursuant to MCR 2.119 and 3.310, to enforce the Consent Judgment entered in this matter on October 26, 1992, and amended on September 23, 1996 and October 20, 1999 ("Consent Judgment"), by ordering Defendant Pall/Gelman Sciences, Inc. ("Pall/Gelman"), the successor to

Defendant Gelman Sciences, Inc., to: (a) perform certain environmental response activities necessary to meet the requirements of the Consent Judgment; and (b) pay Plaintiffs stipulated penalties for violations of the Consent Judgment.

NATURE OF THE CASE

1. The Consent Judgment requires Pall/Gelman to perform a comprehensive program of remedial action to clean up massive groundwater contamination emanating from its property in Scio Township. The remedial action is to be performed according to the specific terms of the Consent Judgment and plans approved by the MDEQ under the Consent Judgment.

2. As described below and in the accompanying Affidavits of Sybil A. Kolon and Leonard C. Lipinski, Pall/Gelman has repeatedly failed or refused to comply with several major requirements of the Consent Judgment and the MDEQ-approved plans. In some instances, Pall/Gelman is continuing to violate those requirements. These violations have caused, among other things, the continued spread of groundwater contamination specifically prohibited by the Consent Judgment.

3. In this motion, Plaintiffs ask this Court to order Pall/Gelman to perform specific environmental response activities needed to meet the requirements of the Consent Judgment. These include, among other things: (a) expanding the capacity of the treatment system(s) needed to treat contaminated groundwater that Pall/Gelman is or will be extracting at the site; (b) defining the extent of groundwater contamination emanating from the southwest portion of the site and remedying that contamination; and (c) submitting and implementing an MDEQ-approved plan that remedies groundwater contamination that extends to the west and northwest of the site.

4. In addition, this motion seeks an order requiring Pall/Gelman to pay the Plaintiffs all stipulated penalties that have accrued and are continuing to accrue under the Consent Judgment because of Pall/Gelman's violations of its terms. To date, more than $4 million in such stipulated penalties have accrued.

CONSENT JUDGMENT BACKGROUND

5. The original Consent Judgment was entered in this matter on October 26, 1992. (Copy attached as Tab 1).

6. On September 23, 1996, the first Amendment to Consent Judgment was entered pursuant to the stipulation of the parties. (Copy attached as Tab 2).

7. On October 20, 1999, the Second Amendment to Consent Judgment was entered pursuant to the stipulation of the parties. (Copy attached as Tab 3).

8. In Section I.B of the Consent Judgment, this Court expressly retained jurisdiction to enforce its terms:

> 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.

9. Section II of the Consent Judgment expressly provides that it "[i]s binding upon . . . Plaintiffs, Defendant, and their successors and assigns."

10. In February 1997, Defendant Gelman Sciences, Inc.'s assets and liabilities were acquired by Pall Acquisitions, Inc., and Defendant is now known as Pall/Gelman Sciences, Inc. ("Pall/Gelman"). The Consent Judgment is binding upon Pall/Gelman, the successor to Gelman Sciences, Inc.

11. The central provision of the Consent Judgment is Section IV, which requires Defendant implement the "Remedial Action":

> 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 [now MDEQ] pursuant to this Consent Judgment.

12. Section III.L of the Consent Judgment defines "Remedial Action" as follows:

> 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 [now MDEQ] under this Judgment.

13. In sum, the Consent Judgment requires Defendant to implement a comprehensive program to remedy groundwater and soil contamination in accordance with its terms and MDEQ-approved plans.

14. Section V of the Consent Judgment requires Defendant to perform groundwater remediation. The introductory paragraph states:

> 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.

15. The remainder of Section V contains specific requirements for three separate systems to address groundwater contamination at various locations.

16. The first is the Evergreen Subdivision Area System described in Section V.A. Its objectives included interception and containment of the leading edge of the plume of groundwater contamination migrating northeast from the Defendant's property and detected in the vicinity of the Evergreen Subdivision Area.

17. The second is the Core Area System described in Section V.B. The Core Area is located nearest the source of groundwater contamination emanating from Defendant's property and is specifically defined as "that portion of the Unit C_3 aquifer containing 1,4-dioxane in a concentration exceeding 500 µg/l." The objectives of the Core System included intercepting and containing migration of groundwater from the Core Area.

18. The third groundwater system is the Western System described in Section V.C. Its objectives included containing the downgradient migration of any plumes of groundwater contamination emanating from Defendant's property that are located outside the Core Area and to the northwest, west, or southwest of the Defendant's facility.

19. Subsections V.A, V.B, and V.C each contain specific requirements for the design, installation, and operation of groundwater extraction treatment and disposal systems and require Defendant to submit and, upon MDEQ approval, implement plans and schedules for those activities.

20. Section VII of the Consent Judgment specifically requires Defendant to perform these activities in compliance with applicable law and permits:

> 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.

21. The permits in question include, among others, an authorization from the MDEQ for reinjection of purged, treated groundwater from the Evergreen System back into the groundwater and a National Pollutant Discharge Elimination System ("NPDES") Permit No. MI008453 authorizing discharge of purged, treated groundwater from the Core Area and Evergreen Systems into a tributary of Honey Creek.

ENFORCEMENT PROVISIONS OF THE CONSENT JUDGMENT

22. Defendant is subject to stipulated penalties for specified violations of the Consent Judgment and requirements established under the Consent Judgment. Section XVII.A of the Consent Judgment provides:

> 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
lst through 15th Day	$ 1,000
15th through 30th Day	$ 1,500
Beyond 30 Days	$ 2,000

(Emphasis added).

23. Section XVII.D provides:

> 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.

24. Stipulated penalties are not Plaintiffs' exclusive mechanism for enforcement of Defendant's obligations under the Consent Judgment. Plaintiffs also reserved the right to seek enforcement of Defendant's obligations through other means, including direct enforcement by the Court pursuant to Section I of the Consent Judgment. Section XVII.F provides:

> 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.*

(Emphasis added).

EVERGREEN SYSTEM VIOLATIONS

25. Defendant has violated requirements of the Consent Judgment relating to the Evergreen System in at least three respects.

26. First, under Section V.A.1 of the Consent Judgment, the objectives of the Evergreen System include, among other things: "(a) to intercept and contain the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision Area."

27. As stated in the accompanying Affidavits of Sybil A. Kolon (¶¶ 9-13) and Leonard C. Lipinski (¶¶ 9-12), review of the available hydrogeologic and groundwater monitoring data show that since at least November 1, 1996 and continuing to the present the Evergreen System has failed to meet the objective specified in Section

V.A.1(a) of the Consent Judgment because groundwater contamination has migrated beyond the Evergreen System extraction wells, designated LB-1 and LB-2, and will not be captured by those wells.

28. In addition, as Defendant acknowledged in its November 1, 1999 submittal to the MDEQ entitled "Transmission Pipeline Interim Response - Revision II Evergreen System" (excerpt attached as Tab 4), "in order to capture and reduce further migration of 1,4-dioxane in the Unit D_2 aquifer, it is essential to increase the extraction rates [for the Evergreen System] up to 200 gpm [gallons per minute]" and that "Currently, the Evergreen System is operating at a flow rate of 120 to 140 gpm."

29. Based upon that violation of Section V.A.1, the MDEQ has calculated that stipulated penalties totaling $1,067,000 have accrued through January 31, 2000. Those penalties are continuing to accrue.

30. Second, as explained in the Affidavit of Sybil A. Kolon (¶¶ 14-15), under a Revised Evergreen System Monitoring Plan, as approved by the MDEQ on April 1, 1998 that was submitted pursuant to Section V.A.7 of the Consent Judgment, Defendant was required to install two additional monitoring wells downgradient of the "Allison" extraction well, designated AE-1. Those wells were to be in place by the date well AE-1 began operation. Defendant failed to install these wells until July 2, 1999.

31. As a result of that violation of the requirement established under the approved work plan, a total of $459,500 in stipulated penalties accrued. (Kolon Affidavit, ¶ 15).

32. Third, as explained in the Affidavit of Sybil A. Kolon (¶¶ 16-20), on at least 24 different days since July 15, 1998, Defendant has discharged effluent from its Evergreen Treatment System containing 1,4-dioxane in concentrations greater than 1 µg/l into the groundwater. Those discharges violated the effluent limits of the applicable groundwater discharge permit exemption. As a result, they also violated the requirements of Section V.A and VII of the Consent Judgment. Stipulated penalties of $24,000 have accrued because of those violations. (Kolon Affidavit, ¶ 20).

CORE AREA SYSTEM VIOLATIONS

33. Defendant has also violated requirements of the Consent Judgment in three respects.

34. First, as explained in the Affidavit of Sybil A. Kolon (¶¶ 21-27), from May, 1997 until June, 1998, Defendant failed to continuously operate the Core Area System groundwater extraction wells -- the central element of the Core System -- in accordance with Section V.B.5 of the Consent Judgment and the MDEQ-approved Revised Core System Work Plan.

35. Even allowing for an initial start-up period of more than three months to accommodate adjustments to the Core Area Treatment System, Defendant violated those requirements for at least 162 working days. As a result, stipulated penalties totaling at least $301,500 accrued for those violations. (Kolon Affidavit, ¶¶ 26-27).

36. Second, as explained in the Affidavit of Leonard C. Lipinski (¶¶ 12-21), Core System groundwater monitoring data submitted by Defendant, particularly monitoring data from monitor well MW-10d, clearly show that the Defendant's operation of the Core System since May, 1997 has continuously failed to contain groundwater contamination in the Core Area as defined in and required by Section V.B.1 of the Consent Judgment.

37. Again, even allowing for an initial start-up period of over three months, from late May through August, 1997, stipulated penalties totaling $1,173,500 have accrued for that failure to comply with Section V.B.1 of the Consent Judgment through January 31, 2000. (Kolon Affidavit, ¶¶ 28-29). Such penalties are continuing to accrue.

38. Third, Section V.B.4 and VII of the Consent Judgment require that Defendant's discharge of treated groundwater from the Core System to the Honey Creek Tributary comply with the applicable permit, NPDES Permit MI008453. As explained in the Affidavit of Sybil A. Kolon (¶¶ 30-32), Defendant's surface water discharges have violated that Permit and the Consent Judgment on eight occasions. Stipulated penalties totaling $8,000 have accrued as a result of those violations.

39. Because, as noted above, the Core Area System is not meeting the objectives of Section V.B.1 of the Consent Judgment, particularly in the vicinity of monitor well MW-10d, additional investigation and remedial activities are required in that area. The necessary activities are described in the Affidavit of Leonard C. Lipinski (¶¶ 21-23).

WESTERN SYSTEM VIOLATIONS

40. Section V.C.3 of the Amended Consent Judgment required Defendant to submit a revised work plan for the Western System Area by April 28, 1997.

41. As described in the Affidavit of Sybil A. Kolon (¶¶ 33-40), Defendant has, since that date, submitted a series of four incomplete and inadequate plans. Each of these plans failed to comply with applicable cleanup criteria and the requirements of Part 201 relating to remedial action plans.

42. Because of Defendant's persistent failure to submit a complete remedial action plan for the Western System Area, that complies with applicable law, stipulated penalties totaling of $1,197,500 have accrued from August 15, 1997 to January 31, 2000. (Kolon Affidavit, ¶ 40). Those penalties are continuing to accrue.

43. In order to satisfy the requirements of Part 201 of NREPA and the Consent Judgment, Defendant must either: (a) revise its most recent remedial action plan based upon "limited residential" cleanup criteria of MCL 324.20120a(1)(f) to include restrictive covenants as required in MCL 324.20120b(4) and address the other deficiencies identified in the MDEQ's November 24, 1999 letter (Kolon Affidavit, Exhibit E); or (b) submit an entirely different remedial action plan based upon other applicable cleanup criteria, such as active groundwater remediation to satisfy generic (unrestricted) residential land use requirements.

FAILURE TO INSTALL ADEQUATE GROUNDWATER TREATMENT CAPACITY

44. As described above and in the Affidavits of Sybil A. Kolon and Leonard C. Lipinski, Defendant's current operation of both the Evergreen and Core Area Systems are failing to meet the remedial objectives of Section V of the Consent Judgment. Consequently, additional groundwater extraction and treatment will be needed. Moreover, Defendant has yet to implement a remedial action to address groundwater contamination in the Western System Area. That may require additional groundwater extraction and treatment.

45. At a minimum, as Defendant itself has acknowledged (Tab 4), it needs to increase the groundwater extraction rate for the Evergreen System to 200 gallons per minute. Defendant has also acknowledged that it needs to extract and treat additional volumes of contaminated groundwater in the vicinity of MW-10d. Further, Defendant has installed an additional "horizontal well" between the Core and Evergreen Systems from which it proposes to extract additional groundwater at the rate of 200 gallons per minute.

46. Defendant's existing Core Area and Evergreen Systems lack both the hydraulic and treatment capacity to effectively treat the full volume of contaminated groundwater needed to meet the objectives of the Consent Judgment.

47. In order to avoid further delays in achieving compliance with those requirements, Defendant should be required to immediately take steps to expand its total groundwater treatment capacity to assure that it can effectively treat at least the total volume of groundwater -- 800 gallons per minute -- that it is authorized to discharge under the existing surface water discharge permit, and to assure a degree of treatment that complies with the existing effluent limits.

RELIEF REQUESTED

For the foregoing reasons, Plaintiffs request that this Court:

A. Order Pall/Gelman to implement the following response activities according to MDEQ-approved plans:

1. Increase the capacity of its groundwater treatment system(s) to reliably treat up to 800 gallons per minute of 1,4-dioxane contaminated groundwater extracted from the Evergreen, Core, and Western System Areas in compliance with the existing requirements of the applicable NPDES Permit.

2. Fully define the nature and extent of groundwater contamination emanating from the Gelman property and implement additional remedial measures necessary to contain the migration of contaminated groundwater as described in the Affidavit of Leonard C. Lipinski.

3. Prepare and implement an MDEQ-approved remedial action plan for the Western System as described in the Affidavit of Sybil A. Kolon.

B. Order Pall/Gelman to pay Plaintiffs stipulated penalties as follows:

1. $1,067,000 for violations of the Evergreen System objectives in Section V.A.1 of the Consent Judgment.

2. $459,000 for failure to install Evergreen monitoring wells in accordance with the MDEQ-approved plan.

3. $24,000 for groundwater discharges from the Evergreen System containing more than 1 µg/l 1,4-dioxane in violation of Section V.A and VII.A of the Consent Judgment.

4. $301,500 for failure to continuously operate the Core Area System in violation of Section V.B.5 of the Consent Judgment.

5. $1,173,500 for failure to operate the Core System in compliance with Section V.B.1 of the Consent Judgment.

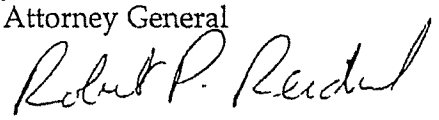
6. $8,000 for surface water discharges in violation of NPDES Permit MI008453 and Sections V.B.4 and VII of the Consent Judgment.

7. $1,197,500 for failure to submit and implement a remedial action plan for the Western System that complies with applicable law, in violation of Section V.C of the Consent Judgment.

C. Grant Plaintiffs such further relief as the court finds appropriate and just.

Respectfully Submitted,

JENNIFER M. GRANHOLM
Attorney General



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Dated: February 11, 2000

8901467/gelman/motion

EXHIBIT 4

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 NATURAL RESOURCES,

Plaintiffs,

File No. 88-34734-CE

v

Hon. Donald E. Shelton

GELMAN SCIENCES, INC., a Michigan corporation,

Defendant.

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PALL/GELMAN SCIENCES INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO ENFORCE CONSENT JUDGMENT

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INTRODUCTION

In 1992, Judge Conlin entered a Consent Judgment in one of the most hotly contested environmental cases in the state. Pursuant to the terms of the Consent Judgment, Gelman Sciences Inc. ("Gelman") agreed to remediate the 1,4-dioxane groundwater contamination in the vicinity of its Scio Township facility. Pall Corporation, a New York-based company, purchased Gelman in February, 1997, undertaking responsibility for implementing the required cleanup.[1] Despite opposition by some residents and local units of government, PGSI has implemented and continues to maintain a remedial program that complies with the Consent Judgment and state law. PGSI is controlling the groundwater contamination and is committed to implementing a comprehensive program to complete (and accelerate) the remedial process. To date, PGSI has remediated over 400,000,000 gallons of groundwater and removed almost 20,000 pounds of 1,4-dioxane. PGSI has won national awards for its remedial design and is operating the largest and most efficient treatment system of its kind in the nation. Ironically, most of the significant advances have been made by PGSI acting on its own initiative or with the assistance of the Court.

Consequently, Plaintiffs' motion for $4.2 million dollars in stipulated penalties under the Consent Judgment and an order requiring a technically infeasible expansion of the cleanup program is totally unjustified. Demands of this magnitude should be supported by a clear record of intransigence by a defendant and a failure of the defendant's systems to meet court-imposed requirements. Instead, Plaintiffs have provided this Court with a few conclusory paragraphs of argument based on two affidavits that conveniently ignore 95% of the factual record.

PGSI asks this Court to examine the entire record (and hopefully live witnesses) and make its own determination about whether PGSI has dragged its feet as Plaintiffs claim. An objective

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[1]This Brief will refer to the resulting corporation as Pall/Gelman Sciences Inc. or "PGSI." The word "Gelman" refers to the company prior to the merger with Pall Corporation.

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review of this record will demonstrate that not only has the cleanup progressed as contemplated by the Consent Judgment, but that PGSI has gone beyond the requirements of the Consent Judgment and improved the program to more effectively and efficiently clean up the aquifers to the levels required by law.

LEGAL ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO STIPULATED PENALTIES.

It is a common, if not universal, practice to provide for stipulated penalties in consent judgments or decrees governing environmental remedial programs. Under this section, such penalties are not intended to be punitive, but rather to provide an economic incentive for timely implementation of the remedial program.

Plaintiffs assert that stipulated penalties in this case are required pursuant to Section XVII of the Consent Judgment. Such penalties are only available if PGSI "refuses or fails" to comply with a term or condition of the Consent Judgment or a plan, requirement, or schedule established pursuant to the Consent Judgment. (Section XVII.A).[2] Moreover, the Court may "direct that stipulated penalties not be assessed and paid . . . upon a determination that there was a substantial basis for Defendant's position on the disputed matter." (Section XVI.E (Emphasis added)).[3] Thus, in order to be entitled to stipulated penalties, Plaintiffs must prove both that PGSI violated the Consent Judgment (or some other enforceable requirement) and that PGSI's position does not have a substantial basis. As set forth below, Plaintiffs have demonstrated neither element with regard to any of their claims.

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[2]The Consent Judgment and amendments are attached to Plaintiffs' motion.

[3]Section XVII.D states that "penalties may be waived in whole or in part by Plaintiffs or may be dissolved by the Court pursuant to Section XVII (sic)." The intended reference is to Section XVI.

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A. PGSI Has Implemented The Evergreen Remedial System As Required By The Consent Judgment.

The Consent Judgment is organized into various sections. The organic provisions on groundwater remediation are found in Section V. The groundwater plumes to be addressed by Gelman were divided into separate areas defined by geologic characteristics and general locations. These areas included: "Evergreen Subdivision Area" (Section V.A), "Core Area System" (Section V.B), and "Western Plume System" (Section V.C). For each area, the Consent Judgment provides objectives which were to be carried out through work plans approved by MDEQ. Work plans had to have certain required elements and had to be implemented by Defendant. In short, the objectives stated in the Consent Judgment were to be met by implementation of work plans submitted by Defendant.

Section V.A of the Consent Judgment provides for the installation of a system to "intercept and contain" the leading edge of the plume of groundwater contamination detected in the *vicinity* of the Evergreen Subdivision *area*.[4] For the purposes of the Consent Judgment, "groundwater contamination" is defined as "1,4-dioxane in groundwater at a concentration that is in excess of 77 micrograms per liter."[5] Defendant was required to submit work plans for continued investigation and design of the Evergreen System and was required to submit operation and maintenance plans and effectiveness monitoring plans to MDEQ for approval.

It should be stressed that at the time the Consent Judgment was entered, there was no dispute that further investigation was needed in order to design the various required work plans. Neither Plaintiffs nor Defendant wanted to or could "fix" at that time the boundaries of the plumes to be

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[4]Consent Judgment, Section V.A.1.(a).

[5] Amendment to Consent Judgment, Section III.G.H.

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addressed.[6] Plaintiffs wanted, and Defendant agreed to, a program that was prophylactic and that required Defendant to remediate the plumes wherever they exist at actionable levels. Within this framework, the standard for determining compliance is NOT whether the plume has expanded or contracted beyond some static demarcation line, but rather whether Defendant has responded to all information in the manner required by the approved work plans and the Consent Judgment.

1. Background and History of Evergreen System

The Evergreen Subdivision area is one of three areas of groundwater contamination that the Consent Judgment requires PGSI to investigate and remediate. In order to meet the stated objectives of "intercepting and containing" the leading edge of the plume in this area and removing the contaminated groundwater, Subsection V.A.(2) sets forth a number of specific steps that must be taken, including the installation of extraction wells, submission of a pump test report, treatment and disposal of extracted water in compliance with state law, and submission of work plans for approval to accomplish these tasks.

There is no dispute that Gelman (and later PGSI) accomplished these tasks. (Affidavit of Farsad Fotouhi, ¶ 8). Gelman/PGSI installed a purge well (denominated LB-1), performed the required investigations, submitted and -- following MDEQ approval -- implemented a work plan, all in 1993. The system as originally configured consisted of LB-1, a UV-Oxidation Treatment System, and an injection well for disposal of the treated groundwater.[7] (Id.). Pursuant to its approved monitoring plan, PGSI sampled various monitor wells to determine the location of the

[6]A review of the Consent Judgment substantiates that the parties avoided a static description of contamination. It is instead defined by wherever groundwater concentration of 1,4-dioxane exceed 77 ppb for Evergreen and Western Systems, or 500 ppb for the Core Area.

[7]The Consent Judgment contemplated other options for disposal of treated water, such as use of the sanitary sewer or use of the storm sewer to transmit water out of the area. Because of local opposition, both of these options proved infeasible.

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leading edge of the groundwater contamination and submitted these results to MDEQ. The Evergreen System was functioning as intended until the injection well into which the treated groundwater was reinjected into the aquifer became clogged and had to be abandoned. (Id., ¶¶ 9, 15-17). It took approximately a month before the City of Ann Arbor would agree to allow Gelman to discharge treated water to the City sanitary system. (Affidavit of Farsad Fotouhi, Attachment 2). PGSI promptly re-engaged purge well LB-1 after obtaining such approval. PGSI subsequently installed a second purge well in this area, LB-2, to enhance capture of the plume and speed the remediation along. (Id., ¶ 8.F).

Unfortunately, during the month-long hiatus from purging caused by the clogged injection well and the City's intransigence, a portion of the plume escaped beyond the capture zone of LB-1. PGSI promptly reported the detection of contamination in a downgradient well to MDEQ on or about November 1, 1996. (Affidavit of Farsad Fotouhi, ¶ 15). Plaintiffs immediately sent a letter demanding corrective action and stipulated penalties.[8] Gelman agreed to pay stipulated penalties of $24,000 in connection with the temporary shut-down of the Evergreen System and resulting escape of the plume.

Section H of the MDEQ-approved Evergreen System Monitoring Plan requires PGSI to undertake additional corrective action in the event monitoring results indicate that the approved system is not capturing the leading edge of the plume.[9] Pursuant to that requirement, Gelman began immediate investigation and corrective action to address the discovery of the escaped contamination. (Fotouhi Affidavit, ¶ 15-16). A chronology of significant activities related to the capture of the

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[8]A copy of correspondence from Robert Reichel to Farsad Fotouhi dated November 8, 1996, is attached as Exhibit 1. These matters were resolved by payment of a negotiated penalty in early 1997.

[9]A copy of the monitoring plan is attached as Exhibit 2.

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plume in the Evergreen Subdivision and related documentation are provided in Attachment 2 to Mr. Fotouhi's Affidavit.

As this Court is aware, PGSI was forced to bring a lawsuit to obtain the access needed for this additional work on July 18, 1997. MDEQ (through the Attorney General's office) continued to assert that stipulated penalties were accruing under the Consent Judgment for this area.[10] PGSI disagreed with this conclusion and invoked the Force Majeure clause under the Consent Judgment by correspondence dated August 4, 1997. (Copy attached as Exhibit 4).

For the next several months, while this Court attempted to resolve access issues, PGSI continued its work on the Evergreen Area. It submitted data as it was developed to MDEQ, investigated groundwater conditions, prepared the Operation & Maintenance Manual, submitted an effectiveness monitoring program, and hired contractors to install the Allison portion of the system, including the Allision Street extraction well, AE-1. (Fotouhi Affidavit, Attachment 2). PGSI also added a second extraction well downgradiant of LB-1, referred to as LB-2, on April 24, 1998. (Fotouhi Affidavit, Attachment 2).[11] With this Court's assistance, PGSI was able to obtain access to the rights of way from the City of Ann Arbor so that it could install the transmission lines from AE-1 to the Evergreen treatment system. AE-1 commenced operation on July 15, 1998. (Id.).

2. The Evergreen System is Capturing the Leading Edge of the Plume in the Evergreen Area.

The system used to meet the Evergreen System objectives consists of three purge wells, denominated LB-1, LB-2 and AE-1. The locations of these purge wells and the 77 ppb contour of 1,4-dioxane contamination in the aquifer that must be captured are shown on Attachment 2 to the

[10]Correspondence from Mr. Reichel to Mr. Connors, dated July 29, 1997, copy attached as Exhibit 3.

[11]This well was put in on PGSI's own initiative to optimize recovery of 1,4-dioxane in the Evergreen Area.

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Affidavit of James W. Brode. As can be seen from that map, and as stated in the Affidavits of Mr. Fotouhi (¶ 12) and Mr. Brode (¶ 7), these three wells are capturing the leading edge of the plume in the Evergreen Subdivision area.

Plaintiffs' contention that PGSI has not met this objective of the Consent Judgment is based entirely on the Affidavits of Leonard Lipinski and Sybil Kolon. As stated in these affidavits (¶¶ 11 and 10, respectively), this contention only takes into account the capture zones of just two of the three purge wells operating in the Evergreen System, LB-1 and LB-2. Apparently, Plaintiffs take the position that the failure of the original purge well to capture the part of the plume that is now being captured by AE-1 constitutes a continuing "violation" of the objectives stated in Section V.A.(1) of the Consent Judgment and ought to result in stipulated penalties (apparently into perpetuity). This position is not supportable.

The original Evergreen Workplan approved by the MDEQ did not guarantee that the proposed purge system would capture the plume. Rather it set forth: a) a proposed purge system that both the MDEQ and Gelman thought would capture the plume based on the available information; b) a monitoring plan designed to reveal if the system worked; and c) a contingency plan requiring additional corrective action if it did not. PGSI complied with this workplan and performed the additional corrective action required when PGSI's monitoring revealed that the plume had migrated beyond LB-1 during the shut down period. (Fotouhi Affidavit, ¶ 15-16 and Attachment 2). Plaintiffs' stipulated damages claim must fail as a result. Their artificial separation of the "Evergreen System" is factually unsupportable and serves no purpose other than to create a basis for assessing stipulated damages.

Plaintiffs have never contended that AE-1 is not part of the "Evergreen System." There has never been any dispute that the 1,4-dioxane to be captured by AE-1 was within the Evergreen System

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as defined in the Consent Judgment and approved workplans. The undisputed technical evidence is that AE-1 is capturing that portion of the groundwater contamination that is not or has not been captured by LB-1 or LB-2.[12] This Court can therefore dismiss out of hand Plaintiffs' assertions that performance of the "Evergreen System" should be measured only with respect to LB-1 and LB-2.

Moreover, stipulated penalties are not appropriate for the alleged failure to meet the objective to intercept and contain the leading edge of the plume where PGSI has acted diligently to incorporate the discovery of changed conditions into its remedial program. PGSI has not "refused or failed" to comply with any element of the Consent Judgment or the approved cleanup program. Just the opposite, PGSI has doggedly pursued the remedial objectives of the Consent Judgment, despite opposition of a vocal minority of area citizens and elected officials.

Under Plaintiffs' interpretation, PGSI would be strictly liable for stipulated penalties in the event that monitoring systems show that groundwater contamination has come to exist in places not known or not anticipated by the parties. Such penalties would accrue whether or not PGSI expeditiously addressed the new conditions. Rather than serve as an incentive to insure prompt compliance with Consent Judgment requirements, assessment of stipulated penalties would serve as punishment for imperfect knowledge and unforeseeable contingencies. If the enforcement practices Plaintiffs have utilized in this case were to become common practice, resolution of environmental problems through consent judgments would become a fond memory.

To sum up, PGSI asks this Court to reject Plaintiffs' request for stipulated penalties in connection with the alleged failure to capture the plume in the vicinity of the Evergreen Subdivision

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[12]MDEQ reviewed a capture zone analysis for AE-1 and concurred that the data provided showed that the proposed location of AE-1 was adequate to capture the escaped portion of the plume. See Fotouhi Affidavit, Attachment 2, Exhibit N.

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because: a) Gelman has already been penalized for the system shut down caused by the clogged injection well which allowed the plume to escape; b) the approved Evergreen System Work Plan provides a contingency for additional corrective action if such an event occurs; c) PGSI diligently pursued such additional corrective action; d) the current three purge well system is successfully capturing the plume; and e) assessing stipulated penalties under these conditions would serve no legitimate purpose.

3. Stipulated Penalties Should Not Be Assessed For The Delay In Installing Monitoring Wells Downgradiant Of The Allison Purge Wells.

Plaintiffs allege that PGSI was "required" to install two monitoring wells downgradiant of AE-1 "by the time AE-1 began operation." Plaintiffs allege that these wells were not installed until July 2, 1999, and that they are, therefore, entitled to stipulated penalties for each day of alleged noncompliance.

This allegation is baseless. As established in the Affidavit of Mr. Fotouhi and attachments, there has never been any agreement that the proposed downgradiant monitoring wells would be installed by a date certain. Indeed, PGSI explicitly stated that it was unable to commit to a date to have those wells installed because such installation was contingent upon obtaining access to private property.[13] Although MDEQ did not agree to this contingency, PGSI did not agree to anything

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[13] *See, e.g.,* Amendment of Revised Work Plan, Evergreen System and Allison Project, April 15, 1997, at 4 (Attachment 2, Exhibit D to Affidavit of Mr. Fotouhi); correspondence dated May 19, 1997, from Mr. Fotouhi to MDEQ regarding revised work plan, at 2 ("Because of the approval processes identified above, and the unknown times necessary to receive approvals, GSI cannot reasonably evaluate the time necessary to place the systems in operation after approval by the MDEQ") (Id., Exhibit F); Revised Evergreen System Monitoring Plan, March 19, 1998, at Table-2, note ** ("GSI proposes to install a nested well hydraulically down gradient of AE-1. The location of this well will be determined at a *later date*. The proposed wells *will not be installed until approval* of the well locations and screen depths by MDEQ")(emphasis added) (Id., Exhibit O); Correspondence from Mr. Fotouhi to MDEQ dated April 16, 1998, (Id., Exhibit Q), at 1.

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different. The so-called "approval letter" cited by Ms. Kolon from which MDEQ bootstraps stipulated penalties was in fact nothing more than a reiteration of "comments" and a request to provide a revised submittal. (See Attachment 2, Exhibit P to Affidavit of Mr. Fotouhi). In the response, PGSI refused to (indeed could not) accept the "conditions" announced by MDEQ.[14]

PGSI claimed "Force Majeure" with respect to the "Evergreen/Allison Area issue" in 1997.[15] PGSI filed one lawsuit to get the pipelines installed, but until the correct location of downgradiant monitoring wells could be established by performance tests of AE-1, further lawsuits to get access for installation of those wells would have been premature. The capture zone analysis for AE-1 was approved by MDEQ on March 17, 1998 (Attachment 2, Exhibit N to Affidavit of Mr. Fotouhi). Immediately after that, PGSI contacted the owners of the relevant properties. (Affidavit of Mr. Fotouhi, ¶¶ 18-25). As established in the Affidavit of Mr. Fotouhi, the property owner did NOT refuse access, but instead prolonged negotiations by repeatedly failing to respond to inquiries about the status. (Id., ¶¶ 21-24).

Finally, as more fully set forth in the Affidavits of Mr. Brode and Mr. Fotouhi, since the monitoring wells were installed, they have demonstrated that AE-1 is functioning as planned. Ironically, had MDEQ's position in its April 1 letter been honored, PGSI would have waited some undetermined amount of time with AE-1 idle in order to first get access to install monitor wells, possibly putting it in jeopardy of more stipulated penalties for failing to act sooner to capture the Allison portion of the plume.

In sum, Plaintiffs are not entitled to any stipulated penalties on this issue because: a) in

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[14]Attachment 2, Exhibit Q to Affidavit of Mr. Fotouhi.

[15]Correspondence dated August 4, 1997, from Mr. Connors to Mr. Klepper, attached hereto as Exhibit 4. Thus, PGSI's Force Majeure claim did not expire on July 15, 1998 -- the date AE-1 went into operation -- as Plaintiffs claim. See Kolon Affidavit, ¶ 12.

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anticipation of access issues, PGSI explicitly did not offer to install the downgradiant monitoring wells within any specified time period and therefore Plaintiffs have no specifically enforceable *right* to such penalties; b) PGSI was still covered for this area under its 1997 Force Majeure claim; c) PGSI undertook its best efforts to obtain access and ultimately did obtain access without resort to this Court; and d) the delay did not cause any exacerbation of conditions.

4. Plaintiffs Are Not Entitled To Stipulated Penalties In Connection With Isolated Past Alleged Violations Of The Non-Detect Limit In Its Groundwater Discharge Permit.

Plaintiffs demand $8,000 in stipulated penalties for the discharge into the aquifer of treated groundwater containing 1,4-dioxane in excess of 1 ppb. (Motion, ¶ 38). As explained in the attached correspondence from Mr. Fotouhi on this issue,[16] and in his Affidavit (¶ 10), the treatment system has to operate within very tight constraints. These include constraints on the ability of the technology to remove all of the 1,4-dioxane, and on the operational limits caused by the location of the system itself.

Unlike the NPDES permit, the groundwater discharge permit for the Evergreen System contains no upset provision. MDEQ takes the position that every reported discharge of 1 ppb or more into the aquifer is a basis for imposing a penalty under the Consent Judgment, subject to their informed "discretion." None of the alleged exceedences were above 5 ppb, which is far below the 77 ppb drinking water criterion. Therefore, the aquifer has not been harmed, even if the laboratory analysis accurately measured the amount of 1,4-dioxane at such low levels. Apparently the instances at issue did not warrant the imposition of penalties when they were timely reported. But now, in connection with this motion, MDEQ has elected to reverse its prior decision not to impose penalties

[16]December 28, 1998 correspondence from Mr. Fotouhi to Ms. Kolon, attached hereto as Exhibit 7. MDEQ's response is attached to that letter.

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in order to add a few thousand dollars to the millions it is seeking.

This Court need not follow MDEQ's lead. PGSI has consistently operated the Evergreen System at its peak efficiency. Moreover, future violations are not an issue. The injection well was taken off-line when the transmission line to the Core Area began operating on November 17, 1999, and is no longer used. (Affidavit of Farsad Fotouhi, ¶ 14). Thus, there is no compliance incentive whatsoever to be gained by penalizing PGSI for the alleged past violations.

B. Core Area System

1. PGSI Has Captured The Core Area Contamination

Plaintiffs allege that PGSI's operation of the Core System since May, 1997, has continuously failed to contain groundwater contamination in the "Core Area" as defined in and required by Section V.B.1 of the Consent Judgment. (Motion, ¶ 36). The "Core Area" is "that portion of the Unit C_3 aquifer containing 1,4-dioxane in a concentration exceeding 500" parts per billion ("ppb"). (Consent Judgment, Section V.B.1). The "Unit C_3 aquifer" is in turn defined as the "aquifer identified as the C3 Unit in reports prepared for Defendant by Keck Consulting." (Id., Section III.P).

Plaintiffs' claim arises from the fact that one monitoring well location originally thought to be within the capture zones of Core Area purge wells in the Unit C_3 aquifer (MW-10d) has been determined to be in a different geologic unit. As a result, the Core Area System purge wells are not capturing the groundwater in this area. PGSI has proposed an additional purge system and monitoring wells to address this area of concern. Although Plaintiffs do not directly dispute PGSI's interpretation of the geological conditions, Plaintiffs claim that this well is, by definition, in the Unit C_3 aquifer and therefore in the Core Area. (*See* Affidavit of Leonard Lipinski, ¶¶ 14-16). The only possible explanation for Plaintiffs' refusal to acknowledge the geologic reality is that it undermines

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their attempt to collect penalties against PGSI.

Pursuant to Section V.B. of the Consent Judgment, Defendant committed to capturing the plume of 1,4-dioxane at concentrations above 500 ppb in the area known as the C_3 Unit Aquifer. The program to accomplish this was set forth in the Revised Core System Work Plan, submitted to MDEQ on January 13, 1997. (Attachment 3, Exhibit A to Affidavit of Mr. Fotouhi). PGSI has installed four purge wells and purchased the largest available UV-Oxidation System for treating the purged groundwater to levels appropriate for the discharge. (Affidavit of Mr. Fotouhi, at ¶ 27). Operation of the Core System has accounted for the bulk of the almost 20,000 pounds of 1,4-dioxane that PGSI has removed from the aquifers. The well locations, projected capture zones, and systems for monitoring effectiveness of the Core System were submitted to MDEQ and approved.

During operation of the Core System, PGSI has submitted (and continues to submit) quarterly "Purge Area Effectiveness" reports for the Core Area. (Id. ¶ 28; Affidavit of James W. Brode, ¶ 11). In Report #3, dated September 30, 1998, PGSI reported that MW-10d appeared to be outside of the capture zone of the Core System. (Affidavit of Mr. Fotouhi, ¶ 34). PGSI promptly undertook actions to investigate the reasons for this finding. PGSI reported to MDEQ on June 30, 1999, that it had determined that MW-10d was not in the Unit C_3 as originally believed. (See Affidavit of Mr. Fotouhi, ¶¶ 34-35 and Attachment 3). This conclusion was based on the differences revealed by PGSI's investigation in transmisivity, thickness, hydraulic gradiants, soil boring profiles, water table elevations and groundwater flow directions. (Affidavit of James W. Brode, ¶ 15; "Report on Hydrogeologic Investigation in MW-10d Area Core System, Attachment 3, Exhibit H to Affidavit of Mr. Fotouhi). MDEQ acknowledged PGSI's position, indicated it was still "evaluating" PGSI's conclusion, and further reserved its right to take the position that MW-10d was in the Core Area.[17]

[17]See Fotouhi Affidavit, Attachment 3, Exhibit I.

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In the meantime, MDEQ concurred with PGSI's proposal to conduct further investigation. With the exception of MW-10d, PGSI's reports consistently showed that the purge wells were performing in accordance with the objectives of the Consent Judgment. (Affidavit of James W. Brode, ¶¶ 10-11; Affidavit of Farsad Fotouhi, ¶ 28). Plaintiffs do not present any data to the contrary.

PGSI conducted a second study of the area and on December 29, 1999, submitted a proposal for installing a new groundwater extraction and monitoring system (the Southwest System) to capture and treat groundwater in this area. (Attachment 3, Exhibit K to Affidavit of Mr. Fotouhi).

2. The Core System Has Met the Objectives of the Consent Judgment.

PGSI formally advised the MDEQ that MW-10d was not in the Core Area on June 30, 1999. Since that time, in various correspondence, MDEQ has had PGSI's interpretation "under evaluation." (Attachment 3, Exhibit I, Affidavit of Farsad Fotouhi). It wasn't until correspondence dated February 8, 2000, -- two days before Plaintiffs filed a motion seeking to penalize PGSI for the very condition it took them seven months to "evaluate" -- that MDEQ deigned to enlighten PGSI of its conclusion that MW-10d was in the Core Area, despite the unrebutted factual analysis submitted by PGSI. By this time, MDEQ could not, no matter how ridiculous its position, concur with PGSI's interpretation.

Plaintiffs do not offer any different hydrogeologic interpretation of the information than that presented by PGSI. They rely instead on a single sentence in the Keck Report (which, if read literally, suggests only that MW-10d is either in or *hydrogeologicly connected* to the Unit C_3 aquifer) and a map showing the 1988 interpretation of water levels in the Core Area.[18]

As established in the Affidavit of James W. Brode, the Unit C_3 aquifer is defined in the Keck Phase III report by *geologic and hydrogeologic characteristics*. (Affidavit of James C. Brode, ¶

[18]The use of these words was intentional. See Affidavit of James W. Brode, ¶ 13.

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13).[19] It is not, as Plaintiffs would lead this Court to believe, defined by the location of any particular monitoring well or by a "map" purporting to show the extent of the plume.[20] The geologic information and the hydraulic information gathered in the course of recent investigations establishes that MW-10d is in a formation geologically distinct from the Unit C_3 aquifer. (*See* Affidavit of James W. Brode, ¶ 15). The fact that MW-10d presents an additional concern to which PGSI is responding is not contested. As demonstrated by the Affidavit of Mr. Fotouhi, PGSI has investigated the area and has proposed more investigation and the installation of a purge well to address it. (Affidavit of Farsad Fotouhi, ¶ 35, and Attachment 3 to that affidavit). This course of action is completely consistent with the process set forth in the Consent Judgment.

The objectives of each system are to be met by proposing and implementing work plans, which provide contingencies in the event the performance monitoring shows that the system is not performing as anticipated.[21] There is no dispute that PGSI investigated and reported the MW-10d

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[19]This same description from the Keck Report was provided and approved by MDEQ in PGSI's Revised Core Area Workplan. *See* Attachment 3, Exhibit A, to Affidavit of Mr. Fotouhi, Section 2.3.1 (page 2). It is this description (and not Mr. Lipinski's post hoc rationalization) that controls the requirements in the Consent Judgment.

[20] PGSI does not dispute that from 1988 to 1998 it believed MW-10d was within the capture area of the Core System extraction wells. (Brode Affidavit, ¶ 14). The information since developed establishes unambiguously that this was an error. In this situation, where a stipulated penalty is being sought, it is convenient for Plaintiffs to ignore the body of the Keck Report and the actual geology and put forward some sort of strained literalist interpretation by reference to maps. No doubt if Defendant wanted to adopt the same posture in an effort to avoid an obligation to investigate some area that was not correctly defined in 1988, Plaintiffs would take the exact opposite position.

[21]Section 6.2.3 of the Revised Work Plan contained the contingency in the event monitoring information showed the system was not meeting the objectives. The tasks undertaken by PGSI in compliance with this contingency are fully set forth in the Affidavit of Mr. Fotouhi. MDEQ specifically told Defendant with respect to this contingency: "Any modifications to the Work Plan proposed as a result of a determination that the objectives of the Core Area System are not being met will be subject to approval [of] this office." Correspondence from Ms. Kolon to Defendant, dated December 16, 1996, at 2 (attached as Exhibit 8). Had PGSI tried to act without such approval, it would have been subject to penalties. It now appears MDEQ will also

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issue to MDEQ and undertook appropriate response. To impose any penalty for this circumstance, or to hold PGSI liable indefinitely going forward for the same "violation", does nothing to secure compliance, and instead penalizes the company for complying with its performance monitoring and contingency requirements.

Plaintiffs' position is that it is appropriate to fine PGSI over $1.1 million and to find PGSI in continuing violation of the Consent Judgment based on the imperfect state of knowledge in 1988. The plain language of the Consent Judgment simply does not support such a bizarre result, nor do the facts. Plaintiffs' position ignores the fact that MW-10d is not in the Unit C_3 aquifer as defined by good science, by the Consent Judgment, and by the Keck Report. It gives no credit whatsoever to the fact that PGSI has responded to the new information and is in fact proposing to address it as required by the approved Core Area Workplan and correspondence with MDEQ. Once again, the assessment of stipulated damages in such a situation serves no legitimate enforcement purpose. Plaintiffs' demand for penalties on this issue should, therefore, be dismissed.

3. The Core System Has Been Operated Continuously.

Plaintiffs allege that Defendant failed to operate the Core System continuously from May, 1997 until June, 1998, as required by the Consent Judgment (Section V.B.1) and the Revised Core System Work Plan. (Motion, ¶¶ 34-35; Affidavit of Sybil A. Kolon, ¶¶ 21-27). Plaintiffs seek $301,500 in stipulated penalties.

Plaintiffs are not entitled to any stipulated penalties under the Consent Judgment for this claim. As set forth in the Affidavit of Mr. Fotouhi (¶ 28), 17,450 pounds of 1,4-dioxane had been removed through December, 1999 by the Core System wells. As shown in Attachment 2 to the most recent "Purge Effectiveness Evaluation" (Attachment 3, Exhibit L to Affidavit of Farsad Fotouhi),

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assess penalties during the time it reviewed PGSI's proposals.

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one or more of the Core System wells have been in operation going back to May, 1997.

The system as originally configured and *approved* by MDEQ provided for recirculation of retained water through the treatment unit as needed to meet the NDPES permit requirements (Id. at ¶ 30). At the time this proposal was made, PGSI was working with a draft NPDES permit of 60 ppb for 1,4-dioxane after treatment by the Core System. (Id.). MDEQ approved the work plan for the Core System that had been designed to meet the objectives of this draft permit, and then issued a final NPDES permit that drastically reduced the levels of 1,4-dioxane allowed in the discharge. (Id. at ¶ 31).[22] This left PGSI in the difficult position of being forced to comply with lower discharge limits and at the same time having to immediately start up and run the treatment system as originally configured and approved by MDEQ. (Id.).

As established in the Affidavit of Mr. Fotouhi, PGSI did meet the objectives of the Consent Judgment and the NPDES permit despite these difficult circumstances. (Affidavit of Mr. Fotouhi,¶ 31-33). From September 1, 1997 to May 30, 1998 (which appears to be the period within which the Plaintiffs claim a penalty), PGSI operated the purge wells, the ponds, and the treatment system every day, except as required for ongoing maintenance. (Charts showing the 1,4-dioxane removed and the daily operation of the Core System are attached collectively as Exhibit 9). Variation from the *anticipated* purge rates in the Work Plan were an inevitable consequence of MDEQ's lowering of the discharge limitation under the NPDES permit from 60 ppb to 10 ppb for 1,4-dioxane after PGSI

[22]The Core Area work plan was conditionally approved on February 14, 1997. The final NPDES permit was issued on May 9, 1997. The final NDPES permit contained a daily maximum of 10 pbb of 1,4-dioxane, 1/6th of the proposed limit in the draft permit. PGSI has appealed this permit through a contested case hearing. A hearing has been held in front of an administrative law judge and a decision is anticipated in February or March. In the meantime, it is obligated to comply with both documents.

had submitted its work plan for MDEQ approval. (Id. ¶ 33).[23] These changes were disclosed fully to MDEQ. (Id. at ¶ 3 and Attachment 3, Exhibit D).

In light of these facts, Plaintiffs' contention that the Core System was not operated continuously is unsupported and no stipulated penalties should be imposed.

4. Plaintiffs Are Not Entitled To Stipulated Penalties For Duly Reported Upsets.

Plaintiffs claim that $8,000 in stipulated penalties have accrued for eight alleged "violations" of its NPDES Permit. (Motion, ¶ 38; Affidavit of Sybil A. Kolon, ¶ 31). This claim must be dismissed out of hand.

As noted in the Affidavit of Farsad Fotouhi (¶¶ 37-39, and Attachment 4 to Mr. Fotouhi's Affidavit), each of the eight instances involved "upset" conditions as defined in the federal regulations that were duly reported to MDEQ as required in Section C.8 of the NDPES permit. Further, PGSI provided MDEQ with a written report within five days, maintained contemporaneous operating records to identify the mechanical failures responsible for the upset conditions, and placed an appropriate notice of claim of "Upset" on the discharge monitoring reports for those discharges. (Affidavit of Farsad Fotouhi, ¶ 38). An upset condition handled in this manner is a complete defense to enforcement actions. 40 CFR 122.41(a).

Until a letter sent immediately before filing this motion, Plaintiffs had never indicated that they had rejected any of PGSI's claims for upset. Moreover, MDEQ did not report the alleged violations to the United States Environmental Protection Agency, as it is required to do pursuant to its authorization to administer the NPDES program. The claim for penalties for these upset

[23] As noted in the Affidavit of Farsad Fotouhi (¶ 29) and in the approved Work Plan, the purge rates were not "requirements" of the Work Plan as concluded by Ms. Kolon in her affidavit (¶ 22). PGSI stated in that Work Plan (and has demonstrated) that the Core System objectives could be met using different purge rates.

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conditions is specious and must be dismissed.

C. PGSI Has Complied With The Consent Judgment Requirements Regarding The Western Stystem.

Plaintiffs demand stipulated penalties of $1,197,500 "for Defendant's persistent failure to submit a complete remedial action plan for the Western System that complies with applicable law." (Affidavit of Sybil A. Kolon, ¶ 40; Motion at ¶¶ 41-42). This demand is not supportable.

PGSI has extensive data on the Western System. In each of its submittals it has maintained that the plume was static and that since the Core System began operating the plume has been attenuating. (Affidavit of Farsad Fotouhi, ¶ 40). Concentrations of 1,4-dioxane in the area are low. The most recent data indicates only one location where concentrations exceed the 77 ppb termination criteria and the plume is contracting. Id. Moreover, it is illegal for any property owner in the area affected by the plume to install a well and no one drinks the water.

The Consent Judgment does not require PGSI to submit a "remedial action plan" ("RAP") or to complete the remediation in the Western Area by a specific date. The Consent Judgment does **not** require Defendant to submit a "RAP" that complies with each requirement of Part 201 at all. Section V.C.3, on which Plaintiffs rely, requires Defendant to submit for MDEQ review and approval a "revised work plan for remedial investigation and design of the Western System." There is no dispute that PGSI submitted the revised work plan, and that it has repeatedly revised its work plan in response to MDEQ's comments. Thus, as a matter of law, Plaintiffs are not entitled to stipulated penalties.

The chronology of submittals and responses on the Western System is set forth in the Attachment 5 to Mr. Fotouhi's Affidavit. PGSI's compliance activities are described in Mr. Fotouhi's Affidavit at ¶¶ 41-49. Most recently, in correspondence to MDEQ dated January 6, 2000,[24]

[24]Attachment 5, Exhibit K to Affidavit of Farsad Fotouhi.

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PGSI either agreed, or offered, to amend its RAP to address every concern expressed by MDEQ save one – the adequacy of the proposed "institutional control" that would provide a legal prohibition against use of the affected aquifer. PGSI suggested a meeting with MDEQ to finalize an agreement to resolve this issue. Instead, they filed this motion seeking over a million dollars in stipulated penalties.

Until now, PGSI's approach to resolving the Western System requirements was to attempt to obtain approval of a "remedial action plan" under Part 201 of NREPA, as the MDEQ would prefer. PGSI has not dragged its feet and has diligently tried to meet the administrative requirements of a RAP. (Affidavit of Mr. Fotouhi, ¶¶ 41-49). To the extent MDEQ has had technical questions and has demanded for more information, PGSI has provided it (or offered to, before dialogue was terminated by this motion). Unfortunately, this effort has been beset with unanticipated complications, because in order for a RAP to be approved by MDEQ, it must meet specific statutory requirements.[25] Among these requirements is the requirement that any ordinance or similar local regulation relied upon as an institutional control must contain provisions requiring the local governmental unit to notify the MDEQ in the event the regulation is amended.[26] Also, a RAP has to follow a specified format and include elements that go beyond what is required under the Consent Judgment's objectives for the Western System.

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[25] See MCL 324.20120b.

[26] MCL 324.20120b(3). This provision applied only where a remedial action plan is proposed that will not meet applicable "generic" criteria listed in MCL 324.20120a(1)(a-e). The Consent Judgment actually requires PGSI to attain generic residential criteria. The use of a RAP provides a alternate possibility for closing out that portion of the site.

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The only outstanding issue is the technical compliance of the local regulations on which PGSI's proposed RAP's have relied. As it stands now, it is illegal under Scio Township's Water Ordinance and the Washtenaw County Rules and Regulations for persons occupying the land in the Western System to install private wells. Unfortunately, neither of these regulations satisfies the procedural notice requirements of Part 201, since these regulations were adopted before Part 201 was amended in 1995. PGSI has been unable to obtain cooperation from the either Scio Township or Washtenaw County in amending their regulations to conform with the technical requirements of Part 201. If these procedural issues cannot be resolved, PGSI will revise its work plan in order to address the specific requirements of the Consent Judgment rather than trying to satisfy each technical aspect of the provisions of Part 201 regarding approval of RAPs.

Significantly, the environmental situation has not worsened. To the contrary, the Western Plume has continued to shrink as result of natural attenuation and the source control provided by the Core System. (Affidavit of Mr. Fotouhi, ¶ 40, 44).

For all of these reasons, stipulated penalties are not appropriate.

II. PGSI HAS NOT FAILED TO INSTALL ADEQUATE GROUNDWATER TREATMENT CAPACITY.

Plaintiffs' final demand is for this Court to order PGSI to expand its total groundwater treatment capacity to assure that it can effectively treat at least 800 gallons per minute (gpm) of groundwater, and to assure a degree of treatment that complies with the existing effluent limits. (Motion, ¶ 47). This demand is not only bereft of factual support, it seeks relief that is unnecessary and inappropriate.

First, Plaintiffs did not offer one single document or piece of evidence about the ability of PGSI's current treatment system to handle the volumes of groundwater needed to meet the objectives of the Consent Judgment. There are no documents, testimony, or other evidence offered to support

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the assertion that "at least" 800 gpm will be needed to meet the objectives of the Consent Judgment. Indeed, the affidavits attached to Plaintiffs' Motion are silent on this issue. The affidavits submitted by PGSI show that the existing systems are doing their jobs. Moreover, PGSI has improved the design capability of both treatment systems. (Id., ¶¶ 8.b and 27.d). PGSI is also prepared to handle any additional treatment requirements that might in the future be necessary, and has repeatedly so informed MDEQ.

Second, on October 1, 1998, PGSI asked for an amendment to the NPDES permit to increase the volume allowed to be discharged to 800 gpm.[27] This was done, not because such volumes were required to meet the objectives of the Consent Judgment, but because PGSI anticipated that it would want to transmit the water currently purged from the Evergreen Area to the Core System. It also wanted flexibility to add additional capacity if PGSI decided to accelerate the cleanup program by installing additional groundwater extraction systems. (Affidavit of Mr. Fotouhi, ¶ 36).

Third, as Plaintiffs well know, the current NDPES permit has been appealed by PGSI and by local citizens opposing the groundwater cleanup.[28] In that proceeding, PGSI has contested its discharge limits under the permit. Various other petitioner/interveners, including the City of Ann Arbor and certain residents, have contested the 800 gpm discharge volume in that permit claiming that it was too large.[29] Hearings on the contested case were hotly litigated and consumed a month of testimony. A decision from the ALJ is imminent. For Plaintiffs to come to this Court and blithely demand relief that could subvert that proceeding, and additionally place PGSI in the position

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[27]A copy of the amended permit is attached hereto as Exhibit 5.

[28]*In re* Part 31, Point Source Pollution Control (NPDES) Permit No.l MI 004843, State of Michigan Department of Environmental Quality, Office of Administrative Hearings.

[29]*See, e.g.,* The City of Ann Arbor, et al's, Brief in Support of Proposed Findings of Fact and Proposed Conclusions of Law, pp 48-52, excerpts attached hereto as Exhibit 6.

of having to design and install a treatment system to discharge at 800 gpm at the current permit levels, when either or both of these limits may be changed by the ALJ, shows a complete contempt of the administrative hearing process. It should not be sanctioned by this Court.

CONCLUSION

For the above stated reasons, PGSI asks this Court to deny Plaintiffs' request for stipulated damages and for the additional injunctive relief sought in their motion.

Respectfully submitted,

FINK, ZAUSMER & KAUFMAN, P.C.

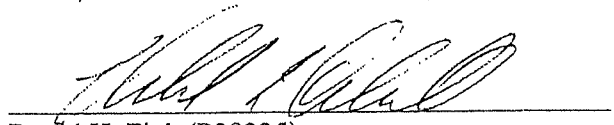

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EXHIBIT 5

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 6

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 7

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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PETITION FOR DISPUTE RESOLUTION

Defendant, Gelman Sciences Inc., d/b/a Pall Life Sciences ("PLS"), by and through its attorneys, Zausmer, Kaufman, August, Caldwell & Tayler, P.C., and Williams Acosta, PLLC, and for its Petition for Dispute Resolution, states as follows:

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INTRODUCTION

1. PLS submits this Petition and asks that the Court provide a resolution to a dispute currently existing between PLS and the Michigan Department of Environmental Quality ("DEQ") regarding whether certain circumstances, as described in detail below, constitute Force Majeure under the Consent Judgment between the parties. Specifically, this dispute arises from PLS' inability to maintain the minimum purge rate the DEQ has assigned to a purge well located on Allison Street in the Evergreen Subdivision. The well currently in operation, AE-3, is the third purge well PLS has installed at this location. Because of the poor aquifer conditions at this location and declining water levels in the area, each of these wells has, over increasingly short periods of time, failed to produce the required volume of water. Although PLS continues to purge as much water as AE-3 will produce, it is impossible to maintain the previously approved purge rate for reasons that are not in PLS' control. AE-3's reduced flow rate does not, however, prevent PLS from capturing the leading edge of the Evergreen plume.

2. Prior to AE-3's failure, PLS presented to the DEQ its analysis of the aquifer conditions in this area and its conclusion that operation of the Evergreen System purge wells (including AE-3) at the currently required rates is not necessary to capture the groundwater contamination the system was designed to contain. Indeed, as explained below and in the Motion to Amend Consent Judgment filed with this Petition, operating the Evergreen System at the currently required rates is actually counterproductive because groundwater contamination from the Unit E plume located to the south is being drawn into the Evergreen Subdivision by the overly aggressive pumping of the Evergreen System purge wells. Indeed, the Unit E plume is the primary, if not the sole, source of

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 • 721 N. Capitol, Suite 2, Lansing, MI 48906-5163

the 1,4-dioxane now being purged by AE-3. The DEQ has so far failed to respond to that report, indicating that it has not completed its review of PLS' analysis and is not prepared to engage in a constructive discussion of these issues. Instead, the DEQ has disputed PLS' claim of force majeure and sought to assess stipulated penalties for each day PLS is unable to maintain the required purge rate, even though it cannot offer a credible alternative course of action. Thus, PLS is compelled to bring this matter to this Court for resolution.

FACTUAL BACKGROUND

3. The parties to this action entered a Consent Judgment in this matter on October 26, 1992. (Exhibit 1). The Consent Judgment has been amended on two occasions since that time.

4. The Consent Judgment requires PLS to implement various remedial actions to address environmental contamination in the vicinity of PLS' property.

5. The Consent Judgment, among other things, requires PLS to submit work plans for meeting the identified objectives to the DEQ for approval.

6. Section V.A.1(a) of the Consent Judgment requires PLS "to intercept and contain the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area." (Exhibit 1, pp. 6-7). As understood at that time, groundwater contamination migrated to the Evergreen Subdivision area from the southwest through the aquifer designated the "D_2 aquifer." (Affidavit of James W. Brode ("Brode Aff."), Exhibit 2, ¶ 17).

7. Gelman originally accomplished this objective through the installation and operation of a single purge well denominated LB-1 pursuant to DEQ-approved work

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 • 721 N. Capitol, Suite 2, Lansing, MI 48906-5163

plans. The original Evergreen System successfully contained the leading edge until the injection well Gelman used to dispose of the treated groundwater became clogged and had to be abandoned in November 1996. Without anywhere to put the treated water, Gelman was forced to shut down LB-1 while it negotiated with the City of Ann Arbor for permission to temporarily discharge treated water into the City sanitary sewer system. PLS promptly re-engaged purge well LB-1 after obtaining such approval. PLS subsequently installed an additional purge well at this location, LB-2, which is screened to draw from a different depth, in order to maximize the system's efficiency. Eventually LB-2 was replaced with LB-3.

8. The parties' interpretation of the available data at the time indicated that a small portion of the plume escaped beyond the capture zone of LB-1during the hiatus from purging caused by the clogged injection well and the delay in obtaining City permission to use the sanitary sewer. Gelman began implementing the required corrective action by installing a downgradient purge well on Allison Street to capture the small portion of the plume that had migrated past the LB-1 location. After Pall Corporation purchased Gelman in 1997, PLS completed installation of the original Allison Street purge well, called AE-1, and the related pipeline infrastructure. PLS began operating AE-1 in July, 1998, and successfully captured and began removing 1,4-dioxane located east of the LB well location. At that time, the Unit D_2 levels as measured in nearby monitoring wells at that time were approximately at elevation 872 feet below ground surface ("bgs"). (See Brode Aff., Exhibit 2, ¶ 7). Because of the high water levels in the aquifer present at that time, AE-1 could support purge rates in the range of 50 gallons per minute ("gpm").

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
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9. Nevertheless, as part of its February 2000 Motion to Enforce Consent Judgment, the State sought additional stipulated penalties with regard to the portion of the plume that had migrated past the LB wells, taking the position that installation of AE-1 did not relieve PLS from its responsibility of preventing groundwater contamination from migrating past the LB purge wells. Under the DEQ's interpretation of the Consent Judgment, "the DEQ-approved function of AE-1 is simply to intercept and remove groundwater contamination that was discovered to have migrated beyond LB-1 in November 1996." (Exhibit 3, pp. 15-16). Under the DEQ's interpretation, AE-1 could be shut down as soon as it intercepted and removed the remnant portion of the plume.

10. The State subsequently amended the relief sought by its motion to include injunctive relief in form of an order requiring PLS to increase the combined purge rate of the LB-1 and LB-2 wells by 50 gpm (to 150 gpm total) in order to insure that these wells continued to capture the entire width of the plume at this location in the future. (June 21, 2000 Joint Pretrial Statement, Exhibit 3, pp. 5-6).

11. Although PLS did not agree that the Consent Judgment required PLS to capture the plume at both locations, it argued that, in any event, the existing LB purge rate was sufficient to capture the entire width of the plume. PLS, however, agreed that it made sense from an overall plume management perspective to increase the purge rate of the LB wells as the DEQ requested and informed the Court at the subsequent hearing that it intended to increase the combined purge rate of the Evergreen System wells, including AE-1, to 200 gpm. (Exhibit 3, p. 7).

12. Following the hearing on the DEQ's motion, this Court entered its July 17, 2000 Remediation Enforcement Order ("REO") in this matter. (Exhibit 4). Among other

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31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 • 721 N. Capitol, Suite 2, Lansing, MI 48906-5163

things, the REO requires PLS to purge a total of 200 gpm from the Evergreen System purge wells and to submit a plan to remediate the affected groundwater to acceptable levels within five years (the "Five-Year Plan").

13. The Five-Year Plan developed by PLS and subsequently adopted by the Court similarly requires that PLS maintain a combined pumping rate of 200 gpm for the Evergreen System. (Exhibit 5). The Five-Year Plan also contains other minimum purge rates for other purge wells that have been deemed to be "containment" wells, i.e., wells that prevent expansion of the various plumes of contamination. Maintaining these minimum purge rates has become problematic site-wide because of declining water levels in the aquifers.

EFFECT OF DECLINING WATER LEVELS SITE-WIDE

14. As a result of the drastic increase in PLS' groundwater extraction program after entry of the REO and perhaps longer term natural trends in precipitation, water levels in the aquifers, including the D_2 aquifer in the Evergreen Subdivision area, have declined significantly. (Brode Aff., Exhibit 2, ¶ 7). This decrease in water levels, six to seven feet in the Evergreen Subdivision area, has had a negative effect on PLS' ability to maintain the minimum purge rates set by the DEQ for certain extraction wells. (*Id.*)

15. On February 13, 2006, PLS asked the DEQ to eliminate these minimum purge rate requirements, including the 200 gpm combined purge rate requirement for the Evergreen System, in part so that the purge rates of other wells in more highly contaminated areas could be increased to maximize mass removal. (Exhibit 6). In that letter, Mr. Fotouhi notes that dropping water tables have made it difficult to maintain the minimum purge rates.

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
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16. In its initial March 27, 2006 e-mail response and later in a April 11, 2006 letter, the DEQ acknowledged the wisdom of eliminating the minimum purge rates from the Five-Year Plan, but conditioned deletion of this requirement on PLS' agreement to supply the DEQ with detailed information and analysis regarding the effects of any such changes on PLS groundwater purge program (collectively referred to as a "Well Optimization Plan"). (Exhibit 7). In subsequent technical meetings, Mr. Fotouhi and Mr. Brode explained that it was not possible to provide the requested studies and data.

17. PLS' attempt to eliminate the inefficient minimum purge rates on a site-wide basis floundered as the parties were unable to agree on the scope of information to be included in the Well Optimization Plan.

18. PLS eventually concluded that it was necessary to separately address the Evergreen System minimum purge rate requirement issue because of acute problems caused by the excessive purging from the Evergreen System purge wells and the imminent failure of AE-3.

EFFECT OF EXCESSIVE EVERGREEN PURGING AND UNFORSEEABLE CONTRIBUTION OF UNIT E

19. PLS increased the purge rate of the LB wells (LB-2 was subsequently replaced with LB-3) to a minimum of 150 gpm in September 2000. Since that time, PLS has maintained and usually significantly exceeded this purge rate. PLS is currently purging approximately 170 gpm from the LB wells.

20. PLS has demonstrated with various DEQ-approved capture zone analyses ("CZA") that it has been capturing the entire width of the D_2 plume at the LB location since the LB extraction well was restarted in 1996. Operation of the LB wells since that time has prevented any additional groundwater contamination above 85 ppb from

migrating past the LB capture zone toward the AE location. (Brode Aff., Exhibit 2, ¶18). Thus, the intended function of the Allison Street purge wells has been limited to intercepting and removing the small amount of groundwater contamination that may have migrated past the Evergreen Street location prior to that time, and there should be no continuing source of contamination reaching the Allison Street location.

21. As explained by Mr. Brode, however, PLS' purging from the Evergreen Subdivision in general, and from the LB purge wells in particular, has created a huge hydrogeologic depression that has extended well beyond the boundaries of the D_2 aquifer – the only known source of contamination in the area when the Consent Judgment and REO were entered. PLS' purging of these wells has drawn contaminated groundwater from the Unit E aquifer located to the south into the Evergreen Subdivision area. (Brode Aff., Exhibit 2, ¶ 19).

22. This phenomenon explains why PLS continues to observe relatively high concentrations of contamination in the water being drawn from the LB wells despite falling concentrations in the D_2 aquifer upgradient of these wells. It also explains why such a large mass of contamination has been removed from the AE wells. PLS estimates that approximately 60 pounds of 1,4-dioxane was present east of LB-1 when capture was regained (if it was ever lost) in 1996. Restarting LB-1, the subsequent installation of LB-2 and the increase in the combined purge rate of these wells cut off the upgradient source of contamination reaching the Allison Street extraction wells. Nevertheless, PLS has removed approximately 100 pounds from the AE wells to date. Moreover, concentrations in the immediate area of the AE wells have remained slightly above the cleanup criterion even though the upgradient source of contamination was cut off in 1996. (Brode Aff.,

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 • 721 N. Capitol, Suite 2, Lansing, MI 48906-5163

Exhibit 2, ¶ 19). The only plausible explanation for these data is the contribution from the Unit E aquifer.

23. This Court's December 17, 2004 Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer (the "Unit E Order") and related orders established a "Prohibition Zone" which prohibited certain uses of the groundwater within the zone in order to protect against unacceptable exposures to that area of groundwater contamination. (Exhibit 8). The excessive purging in the Evergreen Subdivision area has distorted the Unit E plume and drawn the northern edge of that plume beyond the original boundary of the Prohibition Zone. (Brode Aff., Exhibit 2, ¶ 19). PLS and the DEQ have already begun the process of revising the Prohibition Zone boundary, and further amendment may be necessary unless the excessive Evergreen purging is reduced.

24. Consistent with that realization and previous technical discussions of this issue with DEQ staff, PLS submitted its Evergreen System Review on May 10, 2007 (the "ESR"). The ESR sets forth PLS' conceptual plan for systematically determining the appropriate purge rate for the LB wells; that is, the purge rate that will still safely intercept the contamination migrating through the D_2 aquifer, but at the same time minimize or eliminate the distortion of the Unit E plume to the south and avoid pulling this water into the Evergreen Subdivision area. Under this proposal, purging at the AE location would cease, since that well is primarily (if not entirely) purging contamination from the Unit E at this point. (Exhibit 9).

25. Although the parties discussed this report at a subsequent technical meeting, the DEQ has not formally responded to it, nor has the DEQ been prepared to

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discuss this issue in the context of the current AE dispute. PLS recently submitted its work plan for implementing the ESR to the DEQ. (Exhibit 10.) The June 29, 2007 Work Plan sets for the specific steps that will be implemented to determine the appropriate purge rate for the LB wells. PLS will implement the Work Plan following DEQ approval or Court order granting PLS authorization to do so.

REQUIRED PURGE RATES FOR THE ALLISON STREET WELLS AND PRIOR DISPUTE RESOLUTION

26. At the insistence of the DEQ, PLS revised the Five-Year Plan originally submitted to the Court to include the initial minimum purge rates for AE-1. The rate designated for AE-1 was 35 gpm.

27. Even before the 5-Year Plan was formally adopted, PLS dramatically increased its groundwater purging operation. Under the authority of the REO, PLS began operating the Horizontal Well and increased the combined purge rates of the Evergreen wells to 200 gpm.

28. One unforeseen, and unforeseeable, consequence of this dramatic increase in purging is that the water table in the area of AE-1 was significantly lowered. As a result, PLS began having difficulty maintaining AE-1's 35 gpm purge rate shortly after this Court approved PLS' Five-Year Plan in January 2001. In April of 2001, for example, the water levels in the unit D_2 monitoring wells had fallen approximately 2-3 feet from the time AE-1 began operation.

29. Because of the reduced water level and difficult aquifer conditions, AE-1 would pull air into the pump instead of water if operated at 35 gpm.

30. Although PLS had brought the falling water table issue to the DEQ's attention during several conversations with the DEQ's project manager and had notified

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the DEQ in numerous reports beginning in January that AE-1's purge rate was fluctuating between 31 and 33 gpm, the DEQ first notified PLS that it considered PLS' inability to maintain the AE-1 purge rate to be a violation of the 5-Year Plan that would subject PLS to stipulated penalties by correspondence dated April 10, 2001.

31. PLS responded to this letter in correspondence dated April 17, 2001, and advised the DEQ that PLS was invoking the dispute resolution procedures of the Consent Judgment.

32. Consistent with its April 17, 2001 letter, PLS also submitted a Capture Zone Analysis to the DEQ on May 4, 2001. This Capture Zone Analysis demonstrated that even with conservative assumptions regarding the aquifer characteristics, a purge rate of 28 gpm at the AE-1 location would be sufficient to capture the leading edge of the plume. (Exhibit 11). The DEQ subsequently agreed that this purge rate was sufficient and approved PLS' CZA.

33. This Court held that PLS had a "substantial basis" for its position, and that it had the discretion to refrain from assessing penalties under the Consent Judgment. (See August 1, 2001 Stipulated Order Regarding Status Review and Dispute Resolution, Exhibit 12). This Court then demonstrated its focus on whether there had been any actual environmental harm by tabling the matter until the data from sampling the downgradient monitoring wells would indicate whether the reduced purge rate had allowed the plume to migrate beyond AE-1. The parties subsequently submitted these data to the Court and agreed that the data showed that the reduced purge rate was sufficient to capture the plume. (See August 2003 Stipulation Regarding AE-1 Dispute Resolution, Exhibit 13). The penalties sought by the DEQ have never been assessed by this Court.

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
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34. On August 21, 2002, PLS submitted to the DEQ a revised CZA seeking approval of a reduced extraction rate of 25 gpm for AE-1. (Exhibit 14). PLS subsequently submitted a further revision to the CZA on November 18, 2002. (Exhibit 15).

35. On May 19, 2004, in response to PLS' submission, the DEQ approved the operation of AE-1 at a minimum purge rate of 25 gpm. (Exhibit 16). At that time, the water elevations in the area monitoring wells for the D_2 unit were down approximately 5 feet from the original elevations in 1998. This is the currently approved rate for AE-3, which was placed into operation on or about June 8, 2004.

PAST PROBLEMS WITH ALLISON STREET WELLS

36. As detailed in the affidavits of Farsad Fotouhi and Mr. Brode, the aquifer conditions in the Allison Street area have made it extremely difficult to continue to operate a usable purge well in this area for any length of time. (Fotouhi Aff., Exh. 17, ¶¶ 13-30; Brode Aff., Exh. 2, ¶¶ 4 -7). These conditions when combined with the drastically reduced water levels observed in the area make it impossible to operate a purge well in this area at the DEQ-required purge rates.

37. As this history shows, as the water levels have declined, the useful life of the Allison Street purge wells has declined as well, and these wells have required increasingly frequent rehabilitation.

38. Rehabilitating an extraction well involves the use and storage of powerful acids and other reactive chemicals that are injected into the well to remove the biofouling and mineral deposits that accumulate on or around the well screen. As explained by Mr. Brode, this process presents risks to both the workers involved and residents of the

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 • 721 N. Capitol, Suite 2, Lansing, MI 48906-5163

Evergreen Subdivision and is not a procedure that should be undertaken unless substantial benefits are likely to result. (Brode Aff., Exhibit 2, ¶ 11). Moreover, rehabilitating a well does not recover 100% of the original capacity and repeated rehabilitation events have diminishing returns. (Brode Aff, Exhibit 2, ¶ 8).

RECENT FAILURE OF AE-3

39. As indicated chronology described in Mr. Fotouhi's Affidavit, PLS has experienced problems with AE-3 from almost the moment it was installed. These problems have culminated in the recent failure of the well.

40. On January 18, 2007, PLS shut down AE-3 and rehabilitated the well. (Affidavit of Farsad Fotouhi ("Fotouhi Aff."), Exhibit 17, ¶ 22). At the time of the shut-down, water elevations in the area monitoring wells for the D_2 unit had fallen approximately six to seven feet from their original elevations at the time AE-1 had first been commissioned.

41. On January 22, 2007, PLS resumed pumping the well and continued to pump the well at or above the minimum purge rate until March 4, 2007. (Fotouhi Aff., Exhibit 17, ¶ 22).

42. On March 4, 2007, PLS noted fluctuations in the purge rate of AE-3, and Mr. Fotouhi instructed staff to replace the pump. (Fotouhi Aff., Exhibit 17, ¶ 22). Pumping of the well resumed that day.

43. PLS continued to pump the well at or above the minimum purge rate until March 14, 2007. (Fotouhi Aff., Exhibit 17, ¶ 24).

44. As of March 14, 2007, AE-3 was being pumped at a rate of approximately 32 gpm. However, on that date, the pumping water level in AE-3 decreased to a depth

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 • 721 N. Capitol, Suite 2, Lansing, MI 48906-5163

equal to the pump intake. Accordingly, it was necessary for PLS to reduce the groundwater extraction flow rate from approximately 32 gpm to 25 gpm and then to 20 gpm. However, even at 20 gpm, the well continued to draw air into the pump and piping, so it was necessary for PLS to shut down AE-3. (Fotouhi Aff., Exhibit 17, ¶ 24).

45. On March 15, 2007, Mr. Fotouhi sent two emails to Ms. Kolon informing the DEQ (i) that PLS was turning the well off until March 19, 2007, and (ii) attaching water level data showing that water levels were low at the location of AE-3. (Exhibit 18).

46. On March 19, 2007, PLS turned the well back on, but the well continued to draw in air. (Fotouhi Aff., Exhibit 17, ¶ 26). Accordingly, PLS turned the well off to allow the water table time to rebound from pumping to normal conditions.

47. On April 3, 2007, Mr. Fotouhi informed Ms. Kolon that on March 19, 2007, PLS had turned the well back on but was forced to shut it back off because the well continued to draw in air. Mr. Fotouhi informed DEQ that the well would remain shut off while PLS considered its options. (Fotouhi Aff., Exhibit 17, ¶ 27).

48. On April 20, 2007, Mr. Fotouhi informed Ms. Kolon that PLS would rehabilitate the well but opined that most likely this would not fix the situation. (Exhibit 19).

49. AE-3 was rehabilitated between April 23, 2007, and April 26, 2007.

50. AE-3 was restarted on April 27, 2007, with a flow rate of 10 gpm, which was then raised to 15 gpm. The well drew in air at both the 10 gpm and 15 gpm flow rates.

51. PLS continued to operate AE-3 at a 15 gpm flow rate until April 30, 2007. The well continued to draw in air. Accordingly, at this point, PLS formed the belief that

it would be unable to maintain the minimum purge rate for any reasonable length of time without damaging the well and that circumstances existed constituting force majeure under the Consent Judgment. (Fotouhi Aff., Exhibit 17, ¶¶ 29, 30).

EXISTENCE OF FORCE MAJEURE AND INITIATION OF DISPUTE RESOLUTION

52. The Consent Judgment defines "Force Majeure" as "an occurrence or nonoccurrence arising from causes beyond the control of Defendants or of any entity controlled by the Defendant performing Remedial Action, such as Defendant's employees, contractors, and subcontractors." (Exhibit 1, § XIV.A).

53. The Consent Judgment further provides:

(a) When circumstances occur that Defendant believes constitute Force Majeure, Defendant shall notify the [DEQ] 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 [DEQ] 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. (Exhibit 1, § XIV.B (emphasis added)).

(b) A determination by the [DEQ] 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. (Exhibit 1, § XIV.C).

54. Under the Consent Judgment, "[a]ny delay attributable to a Force Majeure shall not be deemed a violation of Defendant's obligations under this Consent Judgment." (Exhibit 1, § XIV).

55. As discussed above, on April 30, 2007, PLS concluded that circumstances existed constituting force majeure. Accordingly, that day – well within 48 hours after PLS first believed circumstances constituting force majeure applied – PLS notified the

Zausmer, Kaufman, August, Caldwell & Tayler, P.C.,
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DEQ that circumstances existed related to AE-3 that constitute a force majeure event under the Consent Judgment. (Exhibit 20).

56. On May 17, 2007, within 14 business days of providing notice of the force majeure event to the DEQ, PLS submitted written documentation to the DEQ in support of its force majeure claim as required by the Consent Judgment. (Exhibit 21).

57. On May 29, 2007, the DEQ informed PLS that it had determined that the circumstances described by PLS did not constitute force majeure under the Consent Judgment. (Exhibit 22).

58. Accordingly, on June 1, 2007, PLS invoked the Dispute Resolution provisions of the Consent Judgment in accordance with the provisions of § XIV.C. (Exhibit 23).

59. Section XVI of the Consent Judgment, "Dispute Resolution," provides that the dispute resolution procedures set forth therein "shall be the exclusive mechanism to resolve disputes under this Consent Judgment." (Exhibit 1, § XVI.A).

60. Section XVI.A further provides: "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." (Exhibit 1, § XVI.A).

61. The parties did engage in such informal negotiations. The parties participated in a conference call on June 11, 2007, and Mr. Fotouhi provided information to the DEQ that Ms. Kolon requested with regard to the circumstances at issue. (Exhibit 24).

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62. Section XVI.B of the Consent Judgment provides that "immediately upon expiration of the informal negotiation period, the DEQ shall provide to Defendant a written statement setting forth the DEQ's proposed resolution of the dispute." (Exhibit 1, § XVI.B).

63. By correspondence dated June 15, 2007, the DEQ provided PLS with a written statement setting forth its proposed resolution. (Exhibit 25).

64. The DEQ's proposed resolution calls for PLS to pay $50,500.00 in stipulated penalties for the days between March 15, 2007, and May 31, 2007, in which AE-3 was not operating or was operating below the minimum approved purge rate. It is clear from the DEQ's correspondence that it will seek additional stipulated penalties for each day PLS is below the required rate on a going forward basis.

65. Pursuant to Section XVI.B of the Consent Judgment, as amended, PLS is required to petition this Court for resolution of the dispute no later than 15 working days after receipt of the DEQ's proposed resolution, and set 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." (Exhibit 1, § XVI.B).

MATTER IN DISPUTE

66. The issues in dispute are whether the circumstances causing PLS' inability to operate AE-3 at a minimum purge rate of 25 gpm constitute force majeure under the Consent Judgment and whether PLS timely gave notice of the event constituting force majeure.

67. PLS contends (i) that it was unable to operate AE-3 at the minimum purge rate because of circumstances that were, in retrospect, beyond its control from March 15, 2007, to May 3, 2007, and from May 31, 2007 to the present; and (ii) that it notified DEQ of the circumstances constituting force majeure within 48 hours after PLS first believed circumstances constituting force majeure applied.

68. Specifically, PLS has been unable to operate AE-3 at the minimum purge rate because of the poor quality of the aquifer at the location and because PLS' purging from upgradient locations (i.e., LB-1 and LB-3) has lowered the water table by approximately six to seven feet. As a result of these conditions, pumping AE-3 even at a rate lower than 25 gpm results in drawing in a significant amount of air, causing bio-fouling and further reductions in purging capacity.

69. Additionally, PLS first concluded that circumstances constituting force majeure existed on April 30, 2007, and that it informed DEQ of these circumstances on that same day, *i.e.* well within 48 hours of its conclusion that circumstances constituting force majeure existed.

70. The DEQ contends that the force majeure provisions of the Consent Judgment do not apply because (i) PLS failed to claim force majeure within 48 hours of the event constituting force majeure; and (ii) the circumstances at issue were not outside PLS' control. (Exhibits 22, 25).

71. Specifically, the DEQ claims that force majeure should have been declared in March 2007 and that PLS should have anticipated the reduction in the extraction rate at AE-3 and taken measures to capture the leading edge at that location such as the installation of a multi-well purge system. (Exhibits 22, 25).

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72. PLS disagrees that it should, or even could, have properly claimed a force majeure defense prior to April 30, 2007. PLS could only claim the defense after it concluded that there was nothing else it could do to meet the minimum required purge rate. The fact that PLS and Mr. Fotouhi explored other options before it asserted the defense is laudable, not a basis for claiming that PLS waived an otherwise valid defense. Indeed, it is hard to square the DEQ's assertion that PLS should have claimed the defense in March (i.e., PLS should have concluded that circumstances beyond its control prevented it from satisfying the purge rate requirement) with the DEQ's simultaneous assertion that meeting this requirement is still within PLS' control. It should also be pointed out that, in the face of the DEQ's threats of stipulated penalties, Mr. Fotouhi raised the purge rate of the well back up to 25 gpm on May 1, 2007 – the day after PLS claimed the force majeure defense – even though the well was pulling air into the well. He was able to maintain this level despite increasingly large air bubbles until May 30, 2007. (Fotouhi Aff., Exhibit 17, ¶ 31). Consequently, PLS arguably provided the DEQ with formal notification of its force majeure defense too early, not too late.

73. The DEQ's conclusion that maintaining the minimum purge rate is not beyond PLS' control is similarly flawed. As detailed in the affidavits of Mr. Fotouhi and Mr. Brode, the DEQ's proposed multi-well extraction system along Allison Street is unworkable and only multiplies the problems caused by the poor aquifer conditions and low water levels present at this location. (Fotouhi Aff., Exhibit 17, ¶¶ 32-33; Brode Aff., Exhibit 2, ¶¶ 9-11).

74. Moreover, it is clear that PLS should be purging less water from the Evergreen System purge wells, not more. The data demonstrate that the current capture

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zone of the Evergreen System extends to the "Unit E" plume and that continued operation of the Evergreen System at a combined purge rate of 200 gpm would continue to "pull" the Unit E plume toward the Evergreen System. Further distortion of the Unit E plume undermines the protectiveness of this Court's Unit E Order. Concurrent with this Petition, PLS has filed a Motion to Amend Consent Judgment seeking to redefine the Consent Judgment objective for the Evergreen System to address this concern.

75. Out of respect for this Court's authority, PLS is already attempting to obtain access and the necessary permits for installing a single extraction well along Allison Street so that a new well could be quickly installed should the Court rule against PLS. This area, including the underground right-of-way, is extremely congested and may not support another well and related pipelines, let alone a multi-well system. Moreover, although installation of such a well might temporarily allow PLS to obtain a 25 gpm purge rate, it would only be a stopgap remedy and would only put off resolution of this issue. (Fotouhi Aff., Exhibit 17, ¶ 35).

EFFECT, IF ANY, OF AE-3'S REDUCED PURGE RATE

76. Only one monitoring well in the area of AE-3 still reflects contaminant levels above 85 ppb. The contaminant levels in the groundwater purged from AE-3 have consistently been below 85 ppb since July 2005. (Brode Aff., Exhibit 2, ¶ 13). Therefore, there is only a small amount of contaminant mass above 85 ppb present in the Allison Street area that could potentially migrate to the east because of the currently reduced operation of AE-3.

77. Moreover, because of the increasingly broad capture zone created by the operation of the LB wells, the groundwater gradient in the area of Allison Street is nearly

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flat. Consequently, to the extent groundwater in this area is flowing east at all, it is at an extremely slow flow rate. Mr. Brode estimates that it would take over *eight years* for contamination to migrate from the one small area near AE-3 that is contaminated above 85 ppb to the downgradient monitoring wells. (Brode Aff., Exhibit 2, ¶ 14). Thus, there is no immediate danger that the reduced operation of AE-3 will result in any measurable environmental harm while this petition and the issues raised herein are being resolved.

EFFORTS MADE BY THE PARTIES TO RESOLVE THE DISPUTE

78. In an attempt to resolve this dispute, representatives of the parties participated in a conference call on Monday, June 11, 2007. Additionally, PLS has exchanged emails with the DEQ and has provided information requested by the DEQ with regard to the circumstances at issue. (Exhibit 24). Prior to this call, the DEQ informed PLS that it would not be prepared to address the effect of the Unit E on this issue because it had not completed its review of the ESR.

SCHEDULE

79. As discussed both above and in PLS' Motion to Amend the Consent Judgment, future operation of AE-3 or a replacement well or wells at a purge rate of 25 gpm is not feasible and would not effectuate the Consent Judgment's objective of containing the leading edge of the D_2 plume, which is already being intercepted by the LB wells. Moreover, continued operation of the Evergreen System at a combined purge rate of 200 gpm will continue to result in portions of the Unit E plume being pulled into the Evergreen System, frustrating the objectives of this Court's December 14, 2004 Unit E Order and the Consent Judgment. Accordingly, PLS asks this Court to authorize PLS to implement its June 29, 2007 Work Plan in accordance with the schedule set forth in

that plan. Implementation of this work and a timely determination of an appropriate purge rate for the LB wells are necessary "in order to ensure orderly implementation of the Consent Judgment."

RELIEF REQUESTED

80. PLS requests that this Court resolve the pending dispute between the parties pursuant to Section XVI of the Consent Judgment, as amended, and find that circumstances identified by PLS constitute a force majeure event under the Consent Judgment and that PLS will not be subject to stipulated penalties in connection with its inability to operate AE-3 at a minimum purge rate of 25 gpm. PLS also asks this Court to authorize PLS to: (a) cease operating an extraction well at the Allison Street area; (b) proceed with the work identified in PLS' June 29, 2007 Work Plan; and (c) allow PLS to reduce the combined purge rate for the Evergreen System to a lower rate, if it is determined that a lower rate will prevent groundwater contamination from migrating east of the LB location on Evergreen Street. PLS also asks this Court to grant the related Motion to Amend Consent Judgment filed contemporaneous with this Petition.

Respectfully submitted,

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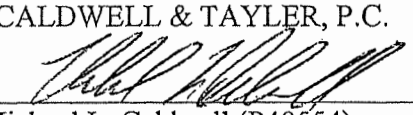

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Dated: July 6, 2007

EXHIBIT 8

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

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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

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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

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,

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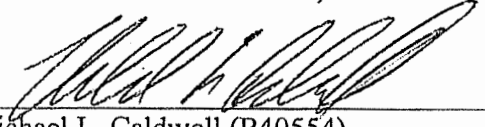

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Dated: July 6, 2007

EXHIBIT 9

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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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 MAR - 8 2011

PRESENT: Hon. DONALD E. SHELTON
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.

/S/DONALD E. SHELTON

CIRCUIT COURT JUDGE

LF/Gelman/88-34734-CE/Stip and Order Amending Previous Remediation Orders

EXHIBIT 10

EPA in Michigan

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.

Contact Us to ask a question, provide feedback, or report a problem.

EXHIBIT 11

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

Page 38

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

Page 39

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

Page 40

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

Page 41

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

Page 42

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

Page 43

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

Page 44

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.

Page 45

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,

Page 46

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

Page 47

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

Page 48

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

Page 49

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

EXHIBIT 12

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

Page 2

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ALSO APPEARING: Mr. Raymond B. Ludwiszewski

Page 4

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

Page 5

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

Page 6

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

Page 7

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.

Page 8

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

Page 9

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

Page 10

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

Page 11

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 --

Page 12

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

Page 13

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

Page 14

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

Page 15

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

Page 16

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)

Page 17

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.)

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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