

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

Plaintiffs-Appellees,

and

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

Intervenors-Appellees,

vs.

GELMAN SCIENCES, INC., a Michigan
corporation,

Defendant-Appellant.

Court of Appeals Docket No. 357599

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

Brian J. Negele (P41846)
MICHIGAN DEPT OF ATTORNEY
GENERAL
Attorney for Plaintiff-Appellee EGLE
525 W. Ottawa Street
P.O. Box 30212
Lansing, MI 48909-7712 (517) 373-7540
negeleb@michigan.gov

Bruce A. Courtade (P41946)
Gregory G. Timmer (P39396)
RHOADES MCKEE PC
Attorneys for Defendant-Appellant Gelman
Sciences, Inc.
55 Campau Avenue NW, Suite 300
Grand Rapids, MI 49503
(616) 235-3500
bcourtade@rhoadesmckee.com
gtimmer@rhoadesmckee.com

RECEIVED by MCOA 7/2/2021 1:42:15 PM

Fredrick J. Dindoffer (P31398)
Nathan D. Dupes (P75454)
BODMAN PLC
Attorneys for Intervenor/Appellee City of
Ann Arbor
1901 St. Antoine, 6th
Floor Detroit, MI 48226
(313) 259-7777
fdindoffer@bodmanlaw.com
ndupes@bodmanlaw.com

Stephen K. Postema (P38871)
ANN ARBOR CITY ATTORNEY'S
OFFICE
Attorneys for Intervenor/Appellee City of
Ann Arbor
301 E. Huron, Third Floor
Ann Arbor, MI 48107
(734) 794-6170
spostema@a2gov.org

Bruce T. Wallace (P24148)
William J. Stapleton (P38339)
HOOPER HATHAWAY, P.C.
Attorneys for Intervenor/Appellee Scio Twp.
126 S. Main Street
Ann Arbor, MI 48104
(734) 662-4426
bwallace@hooperhathaway.com
wstapleton@hooperhathaway.com

Michael L. Caldwell (P40554)
ZAUSMER, P.C.
Attorney for Defendant-Appellant Gelman
Sciences, Inc.
32255 Northwestern Hwy., Suite 225
Farmington Hills, MI 48334
(248) 851-4111
mcaldwell@zausmer.com

Robert Charles Davis (P40155)
DAVIS BURKET SAVAGE LISTMAN
TAYLOR
Attorney for Intervenor/Appellees
Washtenaw County, Washtenaw County
Health Department, and Washtenaw County
Health Officer Jimena Loveluck
10 S. Main Street, Suite 401
Mt. Clemens, MI 48043
(586) 469-4300
rdavis@dbsattorneys.com

Erin E. Mette (P83199)
GREAT LAKES ENVIRONMENTAL
LAW
CENTER
Attorneys for Intervenor/Appellee HRWC
444 2nd Avenue
Detroit, MI 48201
(313) 782-3372
erin.mette@glelc.org

**INTERVENORS-APPELLEES' RESPONSE TO DEFENDANT-APPELLANT
GELMAN'S MOTION FOR PARTIAL STAY OF PROCEEDINGS PENDING APPEAL**

NOW COME Intervenor-Appellees, ("Intervenors") by and through counsel, and for their response to Defendant-Appellant Gelman Science's ("Gelman") Motion for a Partial Stay of Proceedings Pending Appeal ("Motion"), state as follows:

1. Gelman cites the wrong court rule in its Motion, but Intervenor do not dispute that MCR 7.209(D) authorizes the Court of Appeals to grant a stay of proceedings in the trial court.

2. Pursuant to an Order dated June 29, 2021, this Court of Appeals has dismissed Gelman's claim of appeal for lack of jurisdiction.

3. Gelman's claim of appeal has been dismissed, leaving only its application for leave to appeal pending before this Court.

4. No party disputes that the existing judgments and orders must be modified in order to address the significant change in cleanup criteria for 1,4-dioxane. The trial court clearly had authority to enter the June 1, 2021 Order ("Response Activity Order") to address the change in cleanup criteria and, in fact, the trial court had previously entered multiple orders related to the cleanup without the consent of the parties. There is no basis for Gelman's objection to entry of the Response Activity Order due to allegations about lack of consent, in particular where EGLE and Gelman disputed the appropriate way to address the change in cleanup criteria.

5. A finding that some of the releases of 1,4-dioxane from the Gelman facility were permitted has absolutely no bearing on the remedial activities at the site or this Motion. The 1992 Consent Judgment makes no such distinction as to the releases and requires Gelman to contain the entire plume of groundwater contamination emanating from the Gelman facility and extract the contaminated groundwater from the aquifers. The orders entered by the trial court have always required Gelman to conduct response activities related to all of the 1,4-dioxane contamination without any consideration of whether the releases were permitted or not.

6. Intervenors do not dispute that, prior to their intervention in the case, EGLE and Gelman engaged in negotiations to modify the Consent Judgment in anticipation of the changed cleanup criteria for 1,4-dioxane.

7. The substance of the negotiations between Gelman and EGLE before Intervenors became involved in the case has no relevance to this Motion. EGLE and Gelman never submitted

an alleged “Bilateral Amendment” to the trial court and no such document is part of the record. To the contrary, EGLE and Gelman each submitted to the trial court two very different proposals for modification of the existing cleanup judgments and orders. Moreover, the fact is that Intervenors’ involvement in the negotiations resulted in an order that requires significantly more site actions to fully implement the new cleanup criteria and more removal of 1,4-dioxane from the environment than what had been negotiated between Gelman and EGLE. EGLE supports those site actions.

8. The trial court’s decision to allow Intervenors in the case has resulted in a vastly improved cleanup regime and site actions to more fully support implementation of the new cleanup criteria for 1,4-dioxane, as embodied in the Response Activity Order.

9. The trial court decided that it was not necessary for Intervenors to file their complaints because the proceedings had been in the remedial phase for years and the issue before the court was implementation of the most appropriate remedy in response to the change in cleanup criteria. This Court’s June 29, 2021 Order finding that the 1992 Consent Order is the final order in the case is consistent with the trial court’s decision regarding the Intervenor complaints. The trial court exercised its inherent and equitable powers in the post-judgment phase of the proceedings and ordered Gelman to implement response activities to address the changed cleanup criteria for 1,4-dioxane.

10. As stated above, the trial court correctly decided that it was not necessary for Intervenors to file their complaints in the remedial phase of the proceedings.

11. The negotiations culminated in significant improvements to the cleanup regime in the form of more removal of 1,4-dioxane from the environment and more monitoring of the contaminant plume. The negotiations also resulted in additional site actions and more complete implementation of the newly issued cleanup criteria for 1,4-dioxane as determined to be necessary

by the State of Michigan to fully protect human health and the environment. These improvements were the direct result of Intervenor's involvement in the negotiations.

12. The proposed settlement was not approved by the governmental bodies of the Intervenor.

13. The intervention orders speak for themselves.

14. As stated above, the trial court correctly decided that it was not necessary for Intervenor to file their complaints in the remedial phase of the proceedings. The trial court exercised its inherent and equitable powers in response to the changed cleanup criteria and scheduled a hearing to consider the components of a cleanup plan which would most effectively respond to the changed criteria.

15. This Court's order denying Gelman's Emergency Application for Leave to Appeal speaks for itself.

16. Prior to the hearing, the Intervenor, Gelman and EGLE each submitted detailed briefs and technical reports to the trial court in support of their positions on the appropriate components of a cleanup plan to respond to the changed criteria. Contrary to Gelman's representations to this Court that it has always been in agreement with EGLE on a cleanup plan, Gelman and EGLE had very different positions on the proposed terms of an order to address the change in criteria. EGLE supported entry of the Proposed Fourth Amended Consent Judgment negotiated among the parties after the Intervenor's involvement, while Gelman argued for an order which was similar—though not identical¹—to what it had negotiated with EGLE before the

¹ This is yet another reason why Gelman's reliance on an alleged "Bilateral Amendment" is misplaced. Even when it had the opportunity to file briefs with the trial court, Gelman urged the court to enter an order with several significant differences compared to what it negotiated with EGLE.

Intervenors became involved. EGLE's hearing brief is attached as **Exhibit 1**. The trial court adopted EGLE's position and entered the Response Activity Order which embodied the terms of the Proposed Fourth Amended Consent Judgment. This Court should disregard Gelman's protestations of alleged procedural irregularities because the hearing held by the trial court and its procedural decisions to resolve the differences regarding the scope of response activities were in the context of post-judgment proceedings and were consistent with the dispute resolution procedure in the Consent Judgment which Gelman agreed to long ago.

17. The Proposed Fourth Amended Consent Judgment incorporated in the trial court's Response Activity Order was the product of four years of negotiations among the Intervenors, Gelman and EGLE and their experts. Gelman publicly agreed to its terms and EGLE advocated for it at the hearing. The trial court made the reasonable and informed decision to adopt the terms of the Proposed Fourth Amended Consent Judgment in its Order and require quarterly hearings to monitor developments and consider implementation of additional response activities at the site.

18. The important remedial actions which Gelman wants to stay, and describes as "extra work", will remove thousands of pounds of additional 1,4-dioxane from the source area and another "hot spot" on the site. These remedial actions are a critical component for implementation of the new cleanup criteria and were fully supported by EGLE at the hearing.

19. Intervenors agree that their Brief in Opposition to Gelman's Motion for Partial Stay is attached as Exhibit 2 to Gelman's Motion.

20. Intervenors agree that Gelman's Motion for Leave and proposed Supplemental Brief are attached as Exhibit 3 to Gelman's Motion.

21. With entry of its Response Activity Order, the trial court established a reasonable and sensible process where Gelman would begin implementation of response activities to address

the changed cleanup criteria and the court also scheduled quarterly hearings for the parties to address the status of the response activities and consider implementation of additional activities. There is no reason to stay any of these response activities and in fact Gelman's request for only a partial stay is a clear acknowledgement of the trial court's inherent authority to enter an order which addresses the change in cleanup criteria.

22. Intervenor agree that a transcript of the hearing on Gelman's Motion for Partial Stay is attached as Exhibit 4 to its Motion.

23. Notwithstanding counsel's statement at the end of the hearing for partial stay, in EGLE's hearing brief it advocated for the Proposed Fourth Amended Consent Judgement as being fully protective of the environment. To reiterate, neither EGLE nor Gelman ever submitted for entry a "Bilateral Amendment."

24. Intervenor agree that a copy of the Order Denying Motion for Partial Stay of Order to Conduct Response Activities to Implement and Comply with Revised Cleanup Criteria is attached as Exhibit 5 to Gelman's Motion.

25. There is no basis for this Court to partially stay proceedings for, *inter alia*, the following reasons:

- a. The trial court has inherent and equitable powers to order response activities at the site and Gelman's consent is not necessary;
- b. The trial court ordered Gelman to conduct the response activities which it deemed necessary to respond to the change in cleanup criteria and to protect the public health and the environment;
- c. Gelman's complaints about alleged procedural irregularities can be disregarded because these were post-judgment proceedings and there was no need for the trial court to make findings of fact or liability determinations;
- d. Recognizing the need for continued supervision, the trial court scheduled quarterly hearings to address the status of the response

activities and Gelman will have the opportunity to raise any issues or concerns at this time.

26. For the reasons stated above, there is no basis to partially stay the proceedings in the trial court and Gelman should be required to fully implement all response activities set forth in the court's Response Activity Order while this appeal is pending.

27. The trial court found that the Fourth Amended Consent Judgement was fully protective of public health and the environment and EGLE supported its entry at the hearing.

WHEREFORE, Intervenors-Appellees respectfully request that this Honorable Court of Appeals enter an order denying Defendant-Appellant Gelman Science's Motion for Partial Stay of Proceedings Pending Appeal and grant such other relief as the Court deems just under the circumstances.

HOOPER HATHAWAY, P.C.

Dated: July 2, 2021

BY: /s/William J. Stapleton
William J. Stapleton (P38339)
Attorney for Intervenor-Appellee
Scio Township
126 South Main Street
Ann Arbor, MI 48104
(734) 662-4426
wstapleton@hooperhathaway.com

ANN ARBOR CITY ATTORNEY'S
OFFICE

Dated: July 2, 2021

BY: /s/Stephen K. Postema w/permission
Stephen K. Postema (P38871)
Attorney for Intervenor-Appellee City of
Ann Arbor
301 E. Huron, Third Floor
Ann Arbor, MI 48107
(734) 794-6170
spostema@a2gov.org

BODMAN, PLC

Dated: July 2, 2021

BY: /s/Nathan D. Dupes w/permission
Nathan D. Dupes (P75454)
Attorney for Intervenor-Appellee City of
Ann Arbor
1901 St. Antoine, 6th Floor
Detroit, MI 48226
(313) 259-7777
ndupes@bodmanlaw.com

DAVIS BURKET SAVAGE LISTMAN

Dated: July 2, 2021

BY: /s/Robert Charles Davis w/permission
Robert Charles Davis (P41055)
Attorney for Intervenors-Appellees
Washtenaw County, Washtenaw County
Health Department, and Washtenaw
County Health Officer Jimena Loveluck
10 S. Main Street, Suite 401
Mt. Clemens, MI 48043
(586) 469-4300
rdavis@dbsattorneys.com

GREAT LAKES ENVIRONMENTAL
LAW CENTER

Dated: July 2, 2021

BY: /s/Erin E. Mette w/permission
Erin E. Mette (P83199)
Attorneys for Intervenor Huron River
Watershed Council
444 2nd Avenue
Detroit, MI 48201
(313) 782-3372
erin.mette@glelc.org

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2021 I electronically filed the foregoing paper with the Clerk of the Court using the MiFile system which will send notification of such filing to all attorneys of record at their respective email addresses as registered with the same.

HOOPER HATHAWAY, P.C.

/s/William J. Stapleton
William J. Stapleton (P38339)
Attorney for Intervening Plaintiff Scio
Township

EXHIBIT 1

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 22ND JUDICIAL CIRCUIT
WASHTENAW COUNTY

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

No. 88-34734-CE

HON. TIMOTHY P. CONNORS

Plaintiff,

and

THE CITY OF ANN ARBOR,

**DEPARTMENT OF ENVIRONMENT,
GREAT LAKES, AND ENERGY'S BRIEF
ADDRESSING RESPONSE ACTIVITIES
FOR THE GELMAN SITE**

Intervenor,

and

WASHTENAW COUNTY,

Intervenor,

and

THE WASHTENAW COUNTY HEALTH
DEPARTMENT,

Intervenor,

and

WASHTENAW COUNTY HEALTH OFFICER,
JIMENA LOVELUCK,

Intervenor,

and

RECEIVED by MCOA 7/2/2021 1:42:15 PM

FILED IN Washtenaw County Trial Court; 4/30/2021 5:38 PM

THE HURON RIVER WATERSHED
COUNCIL,

Intervenor,
and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan
Corporation,

Defendant.

Brian J. Negele (P41846)
Assistant Attorney General
Attorney for Plaintiff EGLE
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664

Michael L. Caldwell (P40554)
Karen E. Beach (P75172)
Attorneys for Defendant Gelman Sciences,
Inc.
Zausmer, P.C.
31700 Middlebelt Rd., Suite 150
Farmington Hills, MI 48334
(248) 851-4111

Frederick J. Dindoffer (P31398)
Nathan D. Dupes (P75454)
Attorneys for City of Ann Arbor
Bodman, PLC
1901 St. Antoine, 6th Floor
Detroit, MI 48226
(313) 259-7777

Robert Charles Davis (P40155)
Attorney for Washtenaw County,
Washtenaw County Health Department,
and Washtenaw County Health Officer,
Jimena Loveluck
10 S. Main St., Suite 401
Mt. Clemens, MI 48043
(586) 469-4300

Stephen K. Postema (P38871)
Abigail Elias (P34941)

Erin E. Mette (P83199)
Attorney for HRWC

RECEIVED by MCOA 7/2/2021 1:42:15 PM

Attorneys for City of Ann Arbor
Ann Arbor City Attorney's Office
301 E. Huron, Third Floor
Ann Arbor, MI 48107
(734) 794-6170

Great Lakes Environmental Law Center
444 2nd Ave.
Detroit, MI 48201
(313) 782-3372

RECEIVED by MCOA 7/2/2021 1:42:15 PM

Bruce T. Wallace (P24148)
William J. Stapleton (P38339)
Hooper Hathaway, P.C.
Attorneys for Scio Twp.
126 S. Main St.
Ann Arbor, MI 48104
(734) 662-4426

**DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY'S BRIEF
ADDRESSING RESPONSE ACTIVITIES FOR THE GELMAN SITE**

Dana Nessel
Attorney General

Brian J. Negele (P41846)
Assistant Attorney General
Attorney for Plaintiff EGLE
Environment, Natural Resources, and
Agriculture Division
P.O. Box 30755
Lansing, MI 48909
(517) 335-7664

Dated: April 30, 2021

RECEIVED by MCOA 7/2/2021 1:42:15 PM

TABLE OF CONTENTS

	<u>Page</u>
Introduction.....	1
Argument.....	2
I. Background and Gelman Site History.....	2
A. EGLE and Gelman Begin Negotiations to Modify Consent Judgment.	2
B. Intervenors Join Negotiations for Revised Consent Judgment.....	3
C. EGLE’s Conceptual Site Model for the Gelman Site Supports Remedial Proposals.....	5
II. Elements of a Remedy that EGLE Urges the Court to Include in any Order for the Gelman Site.....	6
A. Proposed 4th CJ—Updated 1,4-Dioxane Cleanup Criteria Implementation.....	7
B. Proposed 4th CJ—Additional Investigations Through Expanded Monitoring Well Network.....	7
C. Proposed 4th CJ—Increased Remediation.....	9
D. Proposed 4th CJ—Expansion of PZ Institutional Control.....	11
E. Proposed 4th CJ—Continued Consultation With Intervenors.....	12
III. Allen Creek Drain Investigation.....	13
Conclusion.....	15

INTRODUCTION

Plaintiffs, the Attorney General for the State of Michigan and the Michigan Department of Environment, Great Lakes, and Energy (EGLE), submit this Brief and attached EGLE Expert Report (Exhibit 1) as directed by the Court's April 6, 2021 Order Denying Motion for Reconsideration and Scheduling Hearing Dates. As explained below, EGLE supports implementation of a remedy at the Gelman Site of 1,4-dioxane contamination in Scio Township and the City of Ann Arbor (Gelman Site) that requires additional investigation and response activities. The additional response activities are needed to establish compliance with the updated, lowered cleanup criteria for 1,4-dioxane under Part 201, Environmental Response, of the Michigan Natural Resources and Environmental Protection Act, MCL 324.20101 *et seq.* (Part 201).

RECEIVED by MCOA 7/2/2021 1:42:15 PM

