

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

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**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 Intervenor’s 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 Intervenor 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 Intervenor 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 Intervenor 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 Judgement 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

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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.

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EXHIBIT 1

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

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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

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THE HURON RIVER WATERSHED
COUNCIL,

Intervenor,
and

SCIO TOWNSHIP,

Intervenor,

v

GELMAN SCIENCES, INC., a Michigan
Corporation,

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ADDRESSING RESPONSE ACTIVITIES FOR THE GELMAN SITE**

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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).

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ARGUMENT

I. Background and Gelman Site History.

A. EGLE and Gelman Begin Negotiations to Modify Consent Judgment.

In late 2015, EGLE and Gelman began negotiations to revise the Third Amended Consent Judgment (3rd CJ)¹, that governs response activities at the Gelman Site in expectation of EGLE's promulgation of a substantially lowered revised drinking water cleanup criterion for 1,4-dioxane, the contaminant of concern for the Gelman Site. The revision of the 1,4-dioxane drinking water cleanup criterion (then 85 parts per billion (ppb)) to 7.2 ppb was established on October 27, 2016.² EGLE first utilized the emergency rulemaking authorities of the Administrative Procedures Act³ to establish the new 7.2 ppb criterion, and acted to extend the emergency rule's effectiveness for six months.⁴ On October 27, 2017, EGLE promulgated the 7.2 ppb drinking water cleanup criterion as a stand-alone final rule through the notice and participation/comment process under the Michigan Administrative Procedures Act, MCL 24.201 *et seq.*⁵

In late 2016, nearly a year before the revised drinking water cleanup criterion for 1,4-dioxane was promulgated as a final rule, EGLE and Gelman reached agreement on

¹ Entered by this Court on March 8, 2011.

² 2016 MR 20, p 55 (Nov. 15, 2016).

³ MCL 24.248(1).

⁴ 2017 MR 8 (May 15, 2017).

⁵ 2017 MR 20 (Nov. 15, 2017).

revisions to the Third Amended Consent Judgment providing for response activities to address the revised 7.2 ppb criterion.

B. Intervenor Join Negotiations for Revised Consent Judgment.

The City of Ann Arbor, Washtenaw County, and the Huron River Watershed Council separately moved to intervene in this case in late 2016. The Court granted their motions on January 18, 2017. Subsequently, Scio Township moved to intervene in the Gelman case, and the Court granted the motion in its Order dated February 6, 2017.⁶ Collectively, the four entities are referred to as the “Intervenors.” The proposed revisions to the Consent Judgment that EGLE and Gelman had been working on in late 2016 served as the starting point for negotiations with the Intervenors.

After nearly four years of negotiations, during an August 12, 2020 status conference, the parties (including the Intervenors) informed this Court that they had reached agreement on a proposed Fourth Amended and Restated Consent Judgment (4th CJ) (Exhibit 2), pending approval by the Intervenor local governments’ elected officials. The proposed 4th CJ provided for substantial and important remedial activities and investigations and would have put into place additional safeguards to ensure continued protection of human health and the environment.⁷ EGLE and the Intervenor

⁶ In the interest of allowing all involved to focus resources on the negotiations and not litigation, the January 18 and February 6, 2017 Orders granting the motions to intervene both provided that the Intervenors “shall refrain from filing their proposed complaints at this time” in order “to participate in negotiations concerning the proposed Fourth Amended Consent Judgment to be presented to the Court in this matter.” (Exhibit 3.)

local governments followed through on their commitments during the status conference to hold separate public comment sessions for the proposed 4th CJ. EGLE's public comment period closed on September 21, 2020 and EGLE posted its Public Comment Responsiveness Summary on EGLE's Gelman Sciences, Inc. contamination information website on November 12, 2020.⁸

Disappointingly, the elected officials of the Intervenor local governments rejected the proposed 4th CJ that had been negotiated by and agreed upon by counsel for all parties.

At this time, the Intervenor local governments are asking the U.S. Environmental Protection Agency (USEPA) to identify the Gelman Site as a federal "Superfund" site by listing it on the National Priorities List (NPL).⁹ Simultaneously, the Intervenor local governments continue to pursue litigation before this Court and have represented to their communities that they wish to obtain the best possible outcome for their communities

⁷ Although it recites the outdated 1,4-dioxane drinking water cleanup criterion (85 ppb), the remedy under the still-in-effect 3rd CJ remains protective of human health because no one is drinking well water that exceeds the 7.2 ppb drinking water cleanup criterion for 1,4-dioxane. Promptly after promulgation of the 7.2 ppb criterion on October 27, 2016, Gelman connected to the municipal water supply the sole residence and associated commercial buildings utilizing a well for drinking water that exceeded the new criterion.

⁸ https://www.michigan.gov/egle/0,9429,7-135-3311_4109_9846-71595--,00.html (last visited on April 29, 2021.)

⁹ On April 12, 2021, EGLE transmitted the letters and resolutions from Intervenor local governments seeking NPL listing of the Gelman Site to USEPA, asking USEPA to "[a]s requested by the communities, please reinitiate assessment of the site for the NPL listing process."

by pursuing a litigated outcome at the same time that they seek EPA involvement at the Gelman Site.

C. EGLE's Conceptual Site Model for the Gelman Site Supports Remedial Proposals.

EGLE's Expert Report introduces a virtual conceptual site model (VCSM) of the Gelman Site and plume produced by utilizing RockWorks software. The RockWorks VCSM of the Gelman Site will be in the future shared on EGLE's new geographic information system platform. EGLE's Expert Report is largely based on EGLE's RockWorks modeling of the Gelman Site's geology and plume and provides scientific support for the additional investigation and 1,4-dioxane removal response activities that would be required under the terms of the proposed 4th CJ. EGLE maintains its support for those additional investigation and contaminant removal activities as key elements of a remedy for the Gelman Site.

The RockWorks modeling provides a better understanding of the movement and location of the Gelman Site's contaminated groundwater. For example, there continue to be questions and differing hypotheses offered by different parties about how the 1,4-dioxane plume migrates through the eastern portion of the Gelman Site—i.e., whether there may be channels that provide preferential pathways for migration or whether the 2-dimensional plume drawings, such as the map published by Washtenaw County (Exhibit 4), sufficiently represent the plume. EGLE utilized the RockWorks model of the

Gelman Site to test whether the groundwater bearing sand and gravel units identified in Gelman Site borings/wells are connected, which it confirmed, concluding that: "In a hydrogeologic sense, a geobody represents zones of hydraulic communication. . . . the largest geobody of sand and gravel (groundwater flow) constitutes 99.5% of the geologic static model. It is therefore accurate to say that almost all of the sand and gravel within the model are connected." EGLE Expert Report ¶ 39. That is, for practical purposes EGLE has concluded that it is appropriate to consider the aquifer as a single unit, consistent with the generalized Washtenaw County map. *Id.*, ¶¶ 40, 42, 43, 44.

II. Elements of a Remedy that EGLE Urges the Court to Include in any Order for the Gelman Site.

The Intervenor's do not object to many of the revisions contained in the proposed 4th CJ, but are seeking additional investigations, monitoring and reporting, among other things. EGLE continues to support the revisions contained in the proposed 4th CJ. Among its many provisions, the proposed 4th CJ includes the following key requirements that EGLE urges the Court to include in any remedy required at the Gelman Site:

- Implementation of updated cleanup criteria.
- Additional investigations.
- Expanded monitoring.
- Increased pumping/remediation.

- Expansion of the existing “Prohibition Zone” (PZ) institutional control requiring municipal water use.

A. Proposed 4th CJ—Updated 1,4-Dioxane Cleanup Criteria Implementation.

The proposed 4th CJ implements the current Part 201 drinking water cleanup criterion of 7.2 ppb for 1,4-dioxane. As noted above, EGLE and Gelman have in practice implemented the 7.2 ppb criterion since October 2016. Updating the requirements that apply to Gelman (and all 1,4-dioxane cleanups) is needed to bring the Gelman Site documents up to date and to document the applicability of the more protective cleanup criteria to this site.

The proposed 4th CJ also implements the current 1,4-dioxane cleanup criterion of 280 ppb for groundwater venting into surface water (known as the “groundwater-surface water interface” (GSI) cleanup criterion), which was 2,800 ppb under the 3rd CJ. With the lowered GSI criterion, GSI investigations to determine whether the contamination is entering surface water above the criterion have become necessary and EGLE supports inclusion of the proposed 4th CJ requirements that Gelman submit GSI investigation workplans to EGLE for approval prior to implementation.

B. Proposed 4th CJ—Additional Investigations Through Expanded Monitoring Well Network.

The existing extensive monitoring well network (228 monitoring wells)¹⁰ was proposed to significantly expand by installing up to 36 new monitoring wells in 14 key

¹⁰ 2018 Gelman Grid Site Map. 374 wells and borings have been installed by Gelman since 1986. The deepest monitoring well is 301 feet deep. The average distance

locations to delineate the location of the newly defined plume boundaries based upon the 7.2 ppb criterion and to monitor the plume and the potential for migration outside of the PZ. The additional monitoring supported by EGLE and the Intervenor would ensure compliance with the goals of an updated remedy and would ensure that the remedy remains protective of human health and the environment under Part 201.

Additional monitoring wells proposed to be installed along the northern and southern PZ boundaries will further ensure that contamination will be detected before it can migrate out of the PZ toward private drinking water wells. EGLE Expert Report, ¶¶ 55, 56, 57 (wells A, B, C).

New monitoring wells proposed to be installed near West Park and the Allen Creek Drain area will help address issues concerning the venting of 1,4-dioxane into the Drain and are consistent with the existing downgradient investigation workplan. *Id.*, ¶¶ 59, 60, 61 (wells E, F, G, H).

In the Western Area, new monitoring wells as proposed in the 4th CJ would further define the horizontal extent of groundwater contamination based upon the much lower 7.2 ppb criterion and to determine the location of future compliance wells. These additional monitoring points will assist in detecting any prohibited expansion of the plume. *Id.*, ¶ 62 (wells I, J, K, L, M, N).

between the wells is 473 feet. EGLE Expert Report at ¶ 27. In addition, EGLE, with assistance from the Washtenaw County Health Department, annually samples over 100 (130 proposed this year) private drinking water wells outside of the Prohibition Zone.

C. Proposed 4th CJ—Increased Remediation.

The proposed 4th CJ significantly increases the amount of pump-and-treat groundwater remediation to further reduce contamination, approximately doubling the pumping rate in the PZ (Prohibition Zone—the area covered by an institutional control precluding use of groundwater, see Section II.D, *infra*, for more details). At the “Parklake” site within the PZ, EGLE supports retaining the requirements included in the 4th CJ that would require Gelman to extract contaminated groundwater at a rate of approximately 200 gallons per minute and treat it with the same ozone/hydrogen peroxide chemical oxidation process utilized at its Wagner Road treatment plant. The Intervenor also support increased treatment in this vicinity.

Responding to community concerns, however, the Intervenor’s elected officials rejected the Parklake proposal, bringing forth objections based on the proposed permitted discharge containing residual 1,4-dioxane¹¹ (below applicable criteria) and based on the increased water flow into First Sister Lake, which the community asserted could have adverse impacts on the lake’s ecology and the function of a rain garden, among other things.

EGLE supports increased treatment in the area, but the treated water must have a discharge point. In evaluating a permit application for any discharge, EGLE must

¹¹ The discharge would be below the 7.2 ppb drinking water criterion, like the NPDES-permitted discharge from Gelman’s Wagner Road treatment plant downstream of First Sister Lake.

consider the potential adverse impacts of a requested discharge point, including levels of remaining contaminants and volume of the discharge. To the extent that the Intervenor oppose any discharge of treated water into First Sister Lake and seek to require Gelman to discharge the treated water elsewhere in a Court Order, EGLE notes that predetermination of a discharge point is contrary to EGLE's process for evaluating applications for effluent discharge from pump and treat systems. EGLE is prepared to evaluate any proposed discharge point in its normal permit evaluation process. EGLE believes it would be inappropriate to prohibit Gelman or any party from applying for an otherwise lawfully authorized permit, including on the basis of the proposed discharge location. If Gelman applies for and is ultimately denied a permit to discharge into First Sister Lake, then Gelman should still be required to install the Parklake extraction well and utilize another means of lawfully discharging the treated water.

Existing extraction wells in the "Evergreen" area in the PZ were proposed to be replaced or supplemented with new extraction in a nearby more highly contaminated portion of the plume. Additional source control was proposed to occur on the Gelman property with phytoremediation and additional pump and treat systems. EGLE supports a requirement for Gelman to propose performance monitoring criteria for the new onsite source control and would require the performance monitoring criteria to be submitted to EGLE for approval in Gelman's workplans for the additional onsite source control.

EGLE supports replacing the 500 ppb “termination” standard for the new Parklake and Gelman property extraction wells with the same narrative standard employed for other extraction wells under the 3rd CJ (and the proposed 4th CJ). Specifically, EGLE supports language requiring Gelman to operate the required extraction wells for a minimum of two years and to continue to operate them “until Defendant determines that the Eastern[/Western Area] Objectives will be met at a reduced extraction rate or without the need to operate the extraction well,” and further requiring that EGLE approve Gelman’s determination.

D. Proposed 4th CJ—Expansion of PZ Institutional Control.

The PZ is a judicial institutional control originally established by this Court’s Order Prohibiting Groundwater Use, dated May 17, 2005. The PZ is located solely within the City of Ann Arbor and prohibits the use of drinking water wells and requires the use of the municipal drinking water system. The PZ has been geographically expanded in the past.¹²

The 4th CJ proposed to expand the PZ along its northern and southern boundaries because the extent of the 1,4-dioxane plume is now defined by the more restrictive 7.2 ppb drinking water cleanup criterion. The plume itself has not physically expanded to the north or south.¹³ While EGLE understands that any proposed

¹² For example, similar to the proposed 4th CJ, the March 8, 2011 Third Amendment To Consent Judgment added “Expanded Prohibition Zone” areas.

expansion of the PZ is a sensitive issue, the expansion was intentionally limited to only areas that are already connected to municipal water to ensure that affected residents' water use will not be affected by the changes. The proposed 4th CJ contains a new process for five-year reviews of the PZ to determine if a contraction may be warranted. EGLE continues to believe the five-year review process is the most effective way to consider and address issues and concerns related to the boundaries of the PZ.

E. Proposed 4th CJ—Continued Consultation With Intervenor.

The Intervenor originally agreed that they would not be parties to the proposed 4th CJ. The parties had worked out an enhanced involvement for the local government Intervenor in a separate proposed Order of Dismissal. Under those terms, EGLE agreed to affirmatively seek input from the local government Intervenor¹⁴ prior to deciding on Gelman's requests regarding certain proposed 4th CJ obligations, including the right to engage in dispute resolution procedures under the Order if they disagreed with EGLE's decision on the following:

- Terminating or significantly reducing groundwater pump and treat response activities.
- Modification of termination criteria or cleanup criteria.

¹³ The plume has migrated further eastward/downgradient as envisioned and authorized by the remedy implemented under the Consent Judgment.

¹⁴ The Huron River Watershed Council's intervention was limited to solely surface water issues and, therefore, was not included in the consultation/dispute resolution provisions.

- Termination of post-termination monitoring—Gelman is generally required to monitor for at least 10 years after all pump and treat response activities end.
- Groundwater-surface water interface workplans.
- Modification of provisions addressing: (i) Evergreen/Maple Road/Parklake pump and treat; (ii) Gelman property response activities; (iii) Prohibition Zone boundary changes; (iv) cleanup criteria; (v) termination of post-termination monitoring; and (vi) termination of the proposed 4th CJ.

Although unusual, EGLE does not oppose maintaining the consultation and dispute resolution rights previously agreed upon with the local government Intervenor set forth in the proposed Order of Dismissal and summarized above. These rights and processes provide Intervenor with a robust ability to remain involved in major decisions for the Gelman Site. If the Intervenor ask the Court to grant additional authorities that would delegate or cede EGLE's authority to implement Part 201 as granted to EGLE by the Legislature, EGLE will have to oppose their request. EGLE has previously agreed to create an active and unprecedented oversight role for the local government Intervenor going forward in this matter, which EGLE continues to support.

III. Allen Creek Drain Investigation.

The issue of groundwater contamination entering the Allen Creek Drain storm sewer is a matter that EGLE is addressing, but EGLE believes that specific language in a Court Order is not necessary to deal with this highly technical matter. EGLE prefers to employ an iterative workplan process which requires Gelman to submit workplans for

EGLE's review and approval for all investigations. Entering fixed, prescriptive mandates for borings or wells in a Court Order may result in requirements to place wells or conduct sampling in areas that may not align with the location(s) of infiltration.¹⁵

The Allen Creek Drain investigation is currently being addressed through the work plan submitted to EGLE on April 15, 2021, and EGLE prefers to continue to address this issue through that process. The proposed investigation employs an iterative approach utilizing sampling from within the Drain to determine approximate locations where 1,4-dioxane may be infiltrating before proposing locations for investigational borings and monitoring wells adjacent to the Drain.

EGLE also believes that this issue should continue to be addressed without specific Consent Judgment or Order provisions or mandates for specific investigational techniques because the Gelman Site remedy requires that where the plume ultimately "vents" to surface water, Gelman must achieve compliance with applicable criteria, whether the plume reaches surface water via the Drain or the Huron River or both.¹⁶

¹⁵ As part of their proposed approach to Allen Creek Drain, Intervenor's have previously proposed 28 "high resolution" roto-sonic borings to bedrock at predetermined locations every 200 feet along Maple Road and Westwood/Grandview/Glendale; EGLE recommends consideration of boring placement as part of a work plan, to avoid "locking in" the locations of borings roughly one mile and one-half mile away from the 1,4 dioxane detection in the Drain, which may not provide useful data. Similarly, Intervenor's have proposed over 50 shallow temporary wells at fixed locations every 100 feet or less on both sides of the branch of the Drain with the 49 ppb detection, whereas EGLE would propose in-drain sampling to determine where the plume may be entering the Drain.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request the Court to consider EGLE's views regarding key elements of a remedy in any decision entered in this proceeding.

Respectfully submitted,

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¹⁶ EGLE supports assigning responsibility for conducting surface water and Drain sampling to Gelman.