

Joint Meeting of the Washtenaw County
Board of Commissioners; Scio
Township Trustees; and City Council of Ann
Arbor, Regarding Gelman Sciences Dioxane
September 24, 2020

Legal Issues
in Public Comments/Questions

Three Proposed Documents :

- (1) the Proposed 4th Amended CJ;
- (2) the Proposed Stipulated Order, that would dismiss the current intervention while **Preserving Continuing Future Rights** for the Government Intervenors; and
- (3) the Proposed Settlement Agreements between Gelman and each of the Government Intervenors.

These documents should not be viewed in isolation

The Negotiations

- Conducted under the Court's Confidentiality Order
- We may not discuss what happened in the Negotiations, such as what was considered proposed, offered, rejected, argued or bargained.
- The court has lifted the order to permit us to discuss the final results and
 - how those Proposals compare to the current CJ and
 - what has been accomplished

What is in the Proposed Documents?

Review the Document Repository

- Suggest that everyone review the Three Proposed Documents in the Repository. Each Local Government has links to the Repository: See, e.g., <https://www.a2gov.org/Pages/Gelman-Proposed-Settlement-Documents.aspx>
- To aid in understanding, suggest review of
 - Summary of Key Differences document
 - View the seven videos prepared by Professor Lemke

Key Changes -- 4th CJ compared to 3rd CJ:

- III.Q: PZ Boundary expanded to reflect 85 to 7.2 reduction;
 - All within City where wells prohibited, so no risk of dioxane drinking water exposure
- V.A.1.a: Gelman must prevent migration of 7.2 past PZ boundary
- V.A.5.a.ii.B: Gelman must plan/take active remedial actions if Sentinel Well ever greater than 7.2
- V.A.2.f: Gelman avoids active measures only if it proves by “clear and convincing evidence that there are compelling reasons” that PZ expansion is “needed to prevent an unacceptable risk to human health”
- Government Intervenors may contest PZ expansion in court.

Key Changes, cont'd:

- Removes 2800 ppb Maple Road containment – In fact, all areas of plumes east of Wagner Road are below 2800
- GSI to be met: Statute allows use of Mixing Zone to meet 280 ppb
- Added Clusters of MWs for delineation and compliance
- Adds Rose and Parklake Wells – 1.5X volume and 3X dioxane removal
- New Gelman Site actions:
 - 3 new extraction wells, and possibly more
 - Phytoremediation in (1) former pond areas; and (2) Marshy area
 - Heated Soil Vapor Extraction at former Burn Pit and cap after done

The Stipulated Order

- Dismisses Current Intervention
- But, Provides Continuing Rights to Government Intervenors to contest any significant event under the CJ, including, e.g.
 - Changes to CJ
 - Modification, reduction or termination of Gelman actions
 - Proposals to change PZ
 - Termination of CJ
- These Continuing Rights terminate for a particular Intervenor if it later petitions EPA to take over or if it does not support this CJ if some other Government asks EPA to take over.
- HRWC does not have Continuing Rights under the Order

Responses to Comments/Questions

Why does the CJ provide that Gelman does not admit fault or liability?

- standard provision in just about every settlement ever entered, [and the court has not determined Gelman's liability]
- In the event of a dispute, Gelman's fault and liability would have to be proven with evidence, and decided by a court, and Gelman could assert available defenses

If Proposals are accepted, do the Government Intervenorors give up all future claims and rights?

- **No**
- The Order preserves Continuing Rights, by which the Government Intervenorors may dispute up through the court any proposed significant changes
- The 2006 Ann Arbor Settlement allows future claims by Ann Arbor for
 - Newly discovered plumes (e.g., going to Barton Pond or other areas)
 - Unforeseen change in direction of known plume that breaches PZ
 - Certain Impacts and costs in downgradient part of PZ

Can Gelman **unilaterally** increase the size of the PZ in the future?

- **No**
- Gelman cannot unilaterally change anything in the CJ
- Gelman may ask the court to expand the PZ
- Government Intervenors can contest such a request in court
- To expand PZ, Gelman must convince the court “**by clear and convincing evidence that there are compelling reasons** that the proposed expansion is needed to prevent an unacceptable risk to human health”. These are very high burdens of proof and persuasion.

If an area has dioxane greater than 7.2 ppb, is that considered a compelling reason to expand the Prohibition Zone Boundary?

- **No**
- V.A.1.a requires Gelman to prevent migration of 7.2 past PZ boundary
- V.A.5.a.ii.B requires Gelman to determine active response actions to prevent breach of the PZ
- Gelman might ask court to expand PZ to avoid active measures.
- However, Gelman may avoid use of active measures only if it convinces the court, with clear and convincing evidence, that the PZ needs to be expanded to prevent an unacceptable risk to human life.

Can the PZ be contracted in size?

- Yes. In fact, Section V.A.6 creates a PZ boundary review process to occur every five years to determine whether the boundary of the PZ can be contracted.

What will happen if not all Government Intervenors approve the settlement/proposed CJ?

- No clear answer.
- Gelman may tell the court it does not agree with the CJ.
- The court might order Mediation or Facilitation.
- The court might hold hearings on the issues in dispute
- The court might start the litigation process leading to a trial.
- After consideration, the court may simply decide to enter this 4th CJ.
- Other possible results.

What rights will the state and Intervenors have against Danaher if it fails to comply with the CJ?

- If Gelman violates the CJ, following a negotiation, the state can petition the court for an order compelling compliance, and the Government Intervenors have the right to petition the court if Gelman's actions are inconsistent with their Continuing Rights
- Note, Danaher has not been designated as a liable party. Factual and legal research would be needed to determine if Danaher could be held liable here.

If CJ and Stipulated Order are entered, have the local governments given up rights to go to EPA?

- There may be ways to file such a petition, but there would be risks and penalties.
- Such a petitioner would give up its continuing rights under the Order to contest Gelman's actions.
- Financial penalty to Ann Arbor

If the proposed CJ is not approved, are the parties still bound under the current CJ?

- Yes.
- Until the current CJ is vacated or amended, it remains in force.

How does the Financial Assurance Mechanism work? what about 100 years from now?

- XX.C.1 requires Gelman to update and maintain the FAM continuously until no longer needed.

If EGLE does not issue an NPDES permit for the Parklake well discharge into First Sister Lake, then what?

- Gelman could argue that it is not required to address that hot spot.

Are the following comments true?

- “USEPA would halt the dioxane plume and restore the aquifer to drinking water quality”.
- “*** the main elements of a Superfund Site clean-up would be: 1) active remediation of the aquifer to a protective drinking water criterion, regardless of whether the plume was in a Prohibition Zone or not.***”
- **No.** Review USEPA’s own words at time segment 1:01:05 through 1:02:30 in the video of the January 16, 2020 joint meeting that can be found at: [01/16/2020 EPA Joint Meeting video](#)

What would EPA do, cont'd:

- Joan Tanaka of EPA stated that it is “impossible to say” what USEPA would do.
- Tanaka continued, by stating that USEPA “frequently uses Institutional Controls” (like this Prohibition Zone) to put “controls on the use of water so that no one gets hurt” -- sometimes as a “long term cleanup remedy”.
- In other words, USEPA might leave the Prohibition Zone in place, and not require clean up to drinking water standards. It is not appropriate to promise that USEPA will require a different remedy here.

Would USEPA use its Emergency Removal Cleanup Authority to take immediate action to clean up the Gelman Plumes?

- No!
- USEPA stated that it could use such emergency authority only if there was exposure to 1,4-dioxane in a person's drinking water—not groundwater—at a concentration greater than 46 ppb. See, time segment 1:04:10 through 1:05:20 of the above video. Currently there are no residential wells with 1,4-dioxane in excess of the drinking water standard of 7.2ppb.

Three Key Points

- 1. The CJ would require immediate action by Gelman to better delineate the contamination, and increase cleanup, reducing risks that PZ will be breached or exposures will occur.
- 2. The CJ and Order provide continuing rights to the Government Intervenors to contest any attempt by Gelman to reduce actions, expand the PZ or alter the CJ.
- 3. USEPA will take much longer to act and there is no basis to claim USEPA will take the site or require any different or additional actions by Gelman. And under USEPA control, the Government Intervenors would not have direct ongoing rights to challenge changes to the Gelman requirements and actions.