Mark J. Zausmer
Gary K. August
Michael L. Caldwell
Heidi D. Hudson
Mischa M. Boardman[1]
Nicole M. Wright
Matthew G. McNaughton
Cameron R. Getto
Cinnamon A. Rice
Amy Sitner Applin
Jason W. Baas
Andrea M. Johnson
James C. Wright[2]
Michael D. Crow
Marc D. McDonald[1]
Jeremy M. Mullett

FARMINGTON HILLS
31700 Middlebelt Road, Suite 150
Farmington Hills, MI 48334-2374
(248) 851-4111 phone
(248) 851-0100 fax

[1]Also Admitted in IL
[2]Also Admitted in OH
[3]Also Admitted in MA and District of Columbia
[4]Also Admitted in NY
[5]Also Admitted in CA

Z A C
Zausmer, August & Caldwell, P.C.
FARMINGTON HILLS & LANSING

Nicholas J. Assenmacher
Scott M. Assenmacher
Thomas T. Bearse
Theresa A. Bodwin
Christopher A. Chesney
David M. Cords
Kaitlyn A. Cramer
Randi M. Davis
Danielle R. DePriest
Cristy M. DeVos[1]
Melissa A. Durity
Joseph D. Engerer
Paige E. Gross
Steven J. Hurvitz[3]
Daniel I. Jedell[4]
Timothy M. Kubik
Michael L. Kuper
Frederick V. Livingston
Colin B. Macbeth
Alexis A. Martin[5]
Daniel J. McCarthy
Katharine G. McCarthy
April E. Moore
Shaun M.J. Neal
Elizabeth J. Oligaard
Peter R. O'Toole
Bryan R. Padgett
A. Adam Post, II
Elizabeta Rumery[1]
Vincent C. Sallan
Jason M. Schneider
Michael A. Schwartz
Devin R. Sullivan[1]
Kyle A. Warwick
Lauren M. Wawrzyniak
Daniel P. Webber
Thal F. Wendrow
Kyle T. Zwiren

December 12, 2016

Clerk of the Court
Washtenaw County Circuit Court
101 E. Huron Street
Ann Arbor, Michigan 48107-8645

RE: Attorney General v Gelman Sciences, Inc.
Case No. 88-34734-CE
Our File No. 4710-00002

Dear Clerk:

Enclosed for filing please find Gelman Sciences, Inc.'s Response in Opposition to The City of Ann Arbor's Motion to Intervene w/Exhibits and Proof of Service in reference to the above matter. Please do not hesitate to contact me if you have any questions regarding the enclosed. Thank you.

Very truly yours,
ZAUSMER, KAUFMAN, AUGUST & CALDWELL, P.C.
Michael L. Caldwell
Michael L. Caldwell

MLC:hlr
Enclosure
cc: The Honorable Judge Timothy P. Connors (w/enclosure)
Brian J. Negele, Esq. (w/enclosure)
Fredrick J. Dindoffer, Esq. (w/enclosure)
Stephen K. Postema, Esq. (w/enclosure)
Robert Charles Davis, Esq. (w/enclosure)

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Zausmer, August & Caldwell, P.C.
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 | 230 N. Washington Square, Suite 200, Lansing, MI 48933-1340

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 Timothy P. Connors

Brian J. Negele (P41846)
Michigan Department of Attorney General
525 West Ottawa Street
P.O. Box 30212
Lansing, MI 48909-7712
Telephone: (517) 373-7540
Attorney for Plaintiffs

Michael L. Caldwell (P40554)
Zausmer, August, & Caldwell, P.C.
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334
Telephone: (248) 851-4111
Attorney for Defendant

GELMAN SCIENCES, INC.'S RESPONSE IN OPPOSITION TO THE CITY OF ANN ARBOR'S MOTION TO INTERVENE

In 1988, the Michigan Department of Environmental Quality ("MDEQ") initiated this action to facilitate the cleanup of 1,4-dioxane contamination caused by the former Gelman Sciences, Inc. facility located in Scio Township, Michigan. For almost 3 decades, Gelman Sciences and, since its acquisition by Pall Corporation in 1997, Gelman Sciences d/b/a Pall Life Sciences (collectively, "Gelman"), have been working with MDEQ to remediate the contamination and protect the public health in and around the City of Ann Arbor, pursuant to a series of consent judgments and court orders with which Gelman has fully and consistently complied. These combined efforts have resulted in a cleanup program that has been nationally recognized for its excellence and one that is fully protective of the public. One measure of the

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31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 | 230 N. Washington Square, Suite 200, Lansing, MI 48933-1340

protectiveness of the existing cleanup program is that, despite the State's recent issuance of dramatically more restrictive cleanup standards, not a single person in the community is currently exposed to 1,4-dioxane above these new regulatory levels. Not one. Furthermore, for over a year, Gelman and MDEQ have been working together to identify what modifications to the cleanup program would be needed to ensure that the cleanup remains protective under the anticipated revisions to the drinking water standards.

Now, despite the absence of any threat to the public, and nearly 30 years after the State filed its complaint, the City of Ann Arbor ("the City") seeks to intervene in this matter as a plaintiff as of right pursuant to MCR 2.209 and MCL 324.2137(8). The City's motion is replete with false and misleading accusations regarding Gelman, MDEQ, and the cleanup effort, including inaccurate statements as to the legality of Gelman's waste disposal methods and the progress of the remediation. But when the rhetoric and hyperbole are stripped out, it becomes abundantly clear that: i) factually, there is no new public health threat that could possibly justify the City's belated intervention; and ii) the City has not satisfied the legal requirements for intervention because its motion is extremely untimely and its interests in this case are more than adequately represented by the State. Additionally, permitting the City to intervene would inject significant uncertainty into the ongoing negotiations regarding the fourth amended consent judgment and delay the prompt conclusion of this important process. For those reasons, Gelman respectfully requests that the City's motion be denied.

BACKGROUND

A brief summary of the long and complex history of this action is necessary to correct the record in view of the many misleading allegations contained in the City's motion.

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Gelman Sciences moved to Scio Township in 1963, and it began using 1,4-dioxane to produce medical-grade filters in 1966. Pursuant to a series of wastewater discharge permits issued by MDEQ's predecessor agency, Gelman disposed of its wastewater in treatment ponds which—by design and with the permission of the relevant state authorities—discharged treated wastewater to the ground. In accordance with similar permits, Gelman also utilized a spray irrigation system to dispose of its treated wastewater to the ground.

These wastewater discharges were legal and authorized. However, while the treatment systems successfully addressed the other chemicals found in the process wastewater, they could not successfully treat 1,4-dioxane due to its unique resistance to biodegradation. Gelman did not know and was not advised by its consultants, experts, or the suppliers or manufacturers of 1,4-dioxane that the treatment processes would not successfully biodegrade that substance. Unfortunately, Gelman's permitted waste disposal practices caused the unintended release of 1,4-dioxane into the groundwater.

In 1988, the State filed its complaint in this matter. After hearing the State's case during a nearly year-long bench trial in 1990, but before Gelman presented its defense, Judge Patrick J. Conlin granted Gelman's Motion for Involuntary Dismissal and dismissed all of the State's claims against Gelman, except as to the overflows from one of the treatment ponds in the late 1960s, on the basis that the discharges were permitted releases for which Gelman could not be held liable. *See* Opinion & Order (July 25, 1991) at 21; *see also id.* at 24.[1]

In October 1992, the State entered into a consent judgment with Gelman, under which Gelman agreed to take specified response actions to address the 1,4-dioxane contamination. The consent judgment incorporated the statewide health-based generic cleanup standards for 1,4-

[1] For these reasons, the City's claim that Gelman "unlawfully discharged" 1,4-dioxane from its wastewater treatment processes is misleading.

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dioxane that were in effect at the time. The cleanup objectives of the consent judgment were fairly modest: Gelman agreed to install groundwater extraction systems to prevent the further spread of the known contaminant plumes and to address the on-site contamination at the Gelman facility. There was, however, no requirement to reduce contaminant concentrations near the source area.

In 2000, Gelman and MDEQ were at loggerheads over how to properly implement the consent judgment. Contrary to the intervenors' suggestion that the State has repeatedly agreed to lessen its remedial efforts, the State took aggressive action and filed a motion to enforce the consent judgment, seeking to require Gelman to undertake additional cleanup. From Gelman's perspective, the Company was trying to accelerate the cleanup as demanded by MDEQ, but could not secure necessary approvals from MDEQ for various response actions. Consequently, in response to the State's motion, Gelman asked the Court to hold an evidentiary hearing during which Gelman could present its cleanup plan. That plan included a wide range of aggressive response activities designed to greatly increase the pace of cleanup.

Following the evidentiary hearing, Judge Donald E. Shelton essentially ordered Gelman to implement its cleanup plan. *See* Opinion & Order (July 17, 2000). Over the next five years, as part of a plan approved by MDEQ and the Court, Gelman increased its extraction/treatment rate from approximately 250 gallons per minute ("gpm") to approximately 1200 gpm, installed 11 new purge wells to eliminate the areas of highest groundwater contamination near the Gelman property, and decreased the 1,4-dioxane concentrations in the groundwater. At Gelman's Wagner Road facility, for example, dioxane groundwater detections were reduced from over

25,000 parts per billion ("ppb") to approximately 1000 ppb or less, substantially diminishing the mass of 1,4-dioxane migrating off-site and the risk to the public and to the environment.[2]

Gelman continued to comply with its obligations under the consent judgment and completed every remediation milestone within the time frame set by the Court-approved 5-Year Plan. By 2005, as a result of Gelman's "pumping and treating over a billion gallons of contaminated water . . . over 37,000 pounds of 1,4 dioxane ha[d] been removed from the aquifer covered by th[e] Court's five year order." *See* Order (May 19, 2005) at 3.[3]

In 2005, the Court in this matter established a "Prohibition Zone" within the City of Ann Arbor to address a plume located under heavily congested commercial and residential neighborhoods in the City. *See id.* The Court prohibited the use of groundwater within the Prohibition Zone for drinking water and other purposes, consistent with ordinances already in place at the time that precluded the installation and use of wells in areas served by the City's water supply system. The purpose of the Prohibition Zone is and always has been to prevent unacceptable exposure (e.g., drinking water) to the groundwater contamination while allowing the groundwater contamination to migrate safely to the Huron River, where it could vent at safe levels well downstream from the City's municipal water supply intake at Barton Pond.[4]

The City brought its own state and federal court claims against Gelman in 2004 and 2005 in connection with this same groundwater plume. These cases settled in 2006, and the City

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[2] *See* Time-Series Maps showing concentration decreases, attached as Ex. 1.

[3] To date, Gelman has extracted and treated almost 8 billion gallons of contaminated groundwater and removed over 110,000 pounds of 1,4-dioxane.

[4] Part 201 provides for the establishment of such an "institutional control" remedy to prevent unacceptable exposures to contamination. MCL 324.20121(8). The institutional control-based remedy in the City is also consistent with the methods used by the U.S. EPA to address 1,4-dioxane plumes at other sites in Michigan.

executed liability releases in Gelman's favor that bar this intervention, as discussed in Section V, below. *See* Settlement Agreement, Ex. E to City Mot. Importantly, as part of that settlement, the City accepted and agreed to cooperate with Gelman's implementation of the Prohibition Zone-based remediation of this plume. *Id.*, Section IX.G.

In 2011, MDEQ and Gelman agreed to amend the consent judgment again, to reflect a greater understanding of the groundwater conditions in the Evergreen Subdivision area and to better coordinate the cleanup objectives. The Prohibition Zone was expanded to include the existing northernmost portion of the plume near the Evergreen Subdivision area.[5] The expansion required Gelman to provide municipal water to the six homes in the area that were still utilizing a private water well, an obligation with which it promptly complied. The requirement from the original 1992 consent judgment that Gelman capture the leading edge of the Evergreen Plume was eliminated, as it interfered with other cleanup objectives, but Gelman continued to operate the Evergreen extraction system to reduce the contaminant concentrations that could migrate eastward through the Prohibition Zone.

The 2011 consent judgment amendment also reflected the reality and limitations of pump-and-treat remediation: despite the dramatic decreases in 1,4-dioxane groundwater concentrations attained as a result of Gelman's initial cleanup efforts, it became clear that the pump-and-treat approach could not reduce the groundwater concentrations below the 85 ppb cleanup standard in effect at that time.[6] Accordingly, the 2011 revisions instead provided for a performance-based groundwater extraction requirement: Gelman was to pump as much

[5] In other words, the Prohibition Zone was not expanded because the plume expanded; rather, the Prohibition Zone was expanded to include the Evergreen plume that had previously been addressed in a different manner under the 1992 consent judgment.

[6] *See* Analytical Data Graphs from Gelman's extraction wells, attached as Ex. 2, showing concentrations leveling off over time well above 85 ppb cleanup standard.

Zausmer, August & Caldwell, P.C.
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 | 230 N. Washington Square, Suite 200, Lansing, MI 48933-1340

Zausmer, August & Caldwell, P.C.
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 | 230 N. Washington Square, Suite 200, Lansing, MI 48933-1340

groundwater as was necessary to keep the footprint of the plume in the Western Area (west of Wagner Road) from expanding, while simultaneously pumping enough from the Eastern Area extraction wells to keep the plume within the Prohibition Zone. Since 2011, Gelman has continued to satisfy the "non-expansion" objective of the revised consent judgment and has prevented any new water supply wells from being affected by the groundwater contamination.[7]

In March 2016, MDEQ announced a revised drinking water criterion for 1,4-dioxane of 7.2 ppb, and in October, it enacted an emergency rule implementing that change and imposing a residential vapor intrusion screening level of 29 ppb.[8] The emergency rule will remain in effect for 6 months, after which point it will expire.

For more than a year, in addition to continuing its remediation efforts, Gelman has been working proactively with MDEQ to prepare for the anticipated change in the drinking water standard. In 2014 and 2015, for example, Gelman implemented an extensive hydrogeological investigation in the Honey Creek area, confirming that no drinking water wells were threatened, that the plume in that vicinity was not expanding (even when measured at 1 ppb), and that it was in fact declining in concentration. Brode Aff. ¶ 12. Even before the 7.2 ppb standard was

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[7] The City asserts that the migration of the contamination "poses a threat to the City's primary source of drinking water at Barton Pond." City Br. at 10; *see also* Proposed Compl., Ex. G to City Br., ¶ 70. In reality, however, there is no evidence that the groundwater contamination is migrating toward Barton Pond or that the City's water intake is in any danger. *See* Ex. 3, Aff. of James W. Brode, Jr., CPG ("Brode Aff.") ¶¶ 11–12. In fact, the City's own consultant has rejected that notion. Ex. 4, Letter from Douglas J. Sutton to Matthew Naud (Apr. 4, 2014), at 6 ("In general, I find it highly unlikely that contamination from the Evergreen Area is migrating to Barton Pond.").

[8] It is important to emphasize that 1,4-dioxane has never been considered to be sufficiently volatile to pose a vapor intrusion risk. 1,4-dioxane's "Henry's Law Constant" (HLC), which is a measure of a chemical's ability to volatize out of a solution with water, is an order of magnitude below the threshold for considering a chemical to be a "volatile." The draft administrative rules, however, identify 1,4-dioxane as one of 20 or so chemicals that "may become volatile," apparently based on the chemicals' vapor pressure (a measure of a chemical's ability to volatize from its pure form).

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announced, Gelman agreed to provide municipal water to the one property at the site that used a well with concentrations above single digits. This summer, in conjunction with MDEQ, Gelman undertook a shallow groundwater investigation to determine whether groundwater that could potentially come into contact with residential basements posed a threat under the new vapor intrusion screening level. The investigation did not reveal any risk to the public: 1,4-dioxane was detected in only 2 of the 27 borings, and only at 1.9 and 3.3 ppb—well below the vapor intrusion standard imposed by the emergency rule.[9]

Gelman and MDEQ have also been negotiating revisions to the consent judgment for more than a year, well in advance of the promulgation of the revised standards. The parties have been exchanging draft consent judgment language to memorialize the necessary adjustments to the cleanup program to ensure that it remains protective of the public health and is compliant with the new rules. Those discussions have proven fruitful, and the parties are nearly ready to present a fourth amended consent judgment to the Court for its review and approval. However, this process has largely been put on hold as a result of the City's motion.

DISCUSSION

The City seeks to intervene in this matter as of right. City Br. at 10.[10] Rule 2.209, which governs intervention as of right, provides in relevant part:

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[9] Furthermore, although this groundwater cannot legally be used for drinking water because it is within the Prohibition Zone, it would be safe to drink under the new drinking water criterion. It is thus ironic that the shallow groundwater investigation findings were used to justify the emergency rule and now in turn, the motions to intervene filed in this action.

[10] The City's brief makes clear that it is not seeking permissive intervention pursuant to Rule 2.209(B). *See, e.g.*, City Mot. at 1 ("The City of Ann Arbor ('City') moves to intervene in this case as a plaintiff as of right under MCR 2.209 and MCL 324.20137(8)."); *see also* City Br. at 10 (only discussing standard for intervention as of right). Even if it had, however, denial of its motion would still be warranted. For the reasons discussed herein, permitting the City to intervene in this action would significantly impede the resolution of the consent judgment

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> On timely application a person has a right to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

MCR 2.209(A)(3).

As set forth above, there are no new circumstances, no "new contamination," and no threat to the public health that would justify the City's intervention at this point:

- There are no drinking water wells threatened with contamination above the new drinking water standard. Gelman voluntarily connected to the municipal water supply the only property with a well with levels between the old 85 ppb standard and the new criterion before the new criterion was even announced. Although the delineation of the plume when measured at 7.2 ppb will be refined in certain areas, the extent of groundwater contamination at this level is well understood. Brode Aff. ¶¶ 7, 8, 12, 14.

- The shallow groundwater investigation demonstrated that there is no public health risk associated with the new vapor intrusion screening level in the small area of the site where that screening level is relevant.

- The recent issuance of emergency rules was not the result of an existing or new public health crisis, but rather was a vehicle to allow the State to keep its commitment to the City to finalize the new drinking water standard by the end of the year.[11] Moreover, it makes no sense to allow the City to intervene based on the issuance of *more restrictive standards*—where MDEQ is presumably acting consistent with the City's wishes. Indeed, issuance of the new standards is further evidence, as discussed below, that MDEQ is adequately representing the City's interests.

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amendment process, and "unduly delay or prejudice the adjudication of the rights of the original parties." *See* MCR 2.209(B).

[11] The new drinking water standard and vapor intrusion screening level were part of a much larger rules package that the State published in April. Given the size of the rules package and the significant public comments received, it was simply impossible to promulgate the rules, including the new standards for 1,4-dioxane, by the end of the year. Issuance of the emergency rules specific to 1,4-dioxane was the vehicle chosen by the State to keep its commitment to the community to have new standards in place for 1,4-dioxane by the end of the year.

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Furthermore, the City has failed to satisfy the mandatory requirements for intervention as of right: its motion is exceptionally untimely and its interests are more than adequately represented by the State. Accordingly, the City's motion should be denied.

I. The City's motion is untimely.

First, and perhaps most importantly, the City's request to intervene is untimely. The City conveniently ignores the "timely application" requirement of Rule 2.209, *see* City Br. at 10, but timeliness is an essential element of intervention, such that "any unreasonable delay after knowledge of an action will justify denial of intervention where no satisfactory excuse is shown for the delay." *Prudential Ins Co of Am v Oak Park Sch Dist*, 142 Mich App 430, 434; 370 NW2d 20 (1985). In assessing whether a motion to intervene is timely, courts consider several factors:

> 1) the point to which the suit has progressed; 2) the purpose for which intervention is sought; 3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; 4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and 5) the existence of unusual circumstances militating against or in favor of intervention.

Blount-Hill v Zelman, 636 F3d 278, 284 (6th Cir 2011); *see also Smith v Iosco Cty Bd of Commr's*, No 209634, 1999 WL 33441255, at *2 (Mich Ct App June 18, 1999) (applying factors under MCR 2.209) (attached as Ex. 5).[12]

[12] Because the standards for intervention under MCR 2.209 and Federal Rule of Civil Procedure 24 are so similar, it is proper to look to the federal courts for guidance. *D'Agostini v City of Roseville*, 396 Mich 185, 188; 240 NW2d 252 (1976). Moreover, MCL 324.20137(8)—regarding intervention under Part 201—is nearly identical to intervention under CERCLA. *Compare* MCL 324.20137(8) *with* 42 USC § 9613(i) (2006). Therefore, case law discussing intervention under CERCLA is helpful to resolving questions under Part 201. And case law under CERCLA makes clear that the standards of Rule 24 apply to intervention under CERCLA. *See Cal Dep't of Toxic Substances Control v Comm Realty Props*, 309 F3d 1113, 1118–19 (9th Cir 2002).

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In this case, the first three factors bar the City's motion. This action was commenced nearly 30 years ago, and the City cannot possibly claim that it was unaware of its purported interest in this case at any point during the last 3 decades. The appropriate time to intervene, if ever, was during the active stage of this litigation in its early years. Yet at no point—during the year-long bench trial in 1990, the entry of the consent judgment in 1992, the entry of the Unit E order establishing the Prohibition Zone in 2005, the entry of the third amended consent judgment expanding the Prohibition Zone in 2011, and the announcement of the revised drinking water standards in March 2016—did the City file a motion to intervene in this action. The City's insistence that it "need[s] to be at the table to participate" in the latest round of consent judgment amendment negotiations is belied by its failure to seek to do so previously, and its inability to offer any explanation for its exceptionally long delay provides a sufficient basis on its own for the Court to deny the motion. *See Prudential Ins Co*, 142 Mich App at 434.

The remaining factors also weigh heavily against permitting the City to intervene. The parties have been negotiating revisions to the consent judgment for months, and they are now close to presenting to the Court a fourth amended consent judgment to reflect the revised cleanup standard. "To the extent intervention poses a threat of disruption to the consent decree process . . . the untimeliness of the Cit[y's] motion threatens significant prejudice to the existing parties." *United States v Bliss*, 132 FRD 58, 60 (ED Mo 1990). This is especially true here, where—as demonstrated by the City's prior refusals to cooperate in good faith with Gelman's remediation efforts[13] and the combative tone adopted in its motion—allowing the moving party

[13] The City has repeatedly taken affirmative actions to frustrate and slow the remediation efforts required by this Court. In 1996 and 1997, when Gelman sought to install 1000 feet of piping in the Evergreen Subdivision area to connect a capture well to the existing remedial infrastructure, the City denied Gelman access to its right-of-ways. It took 18 months and the intervention of the Court and a Special Master before the City finally assented. Then, in 1998, after the City again

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to intervene at this late stage in the proceedings threatens to "derail[] a lawsuit within sight of the terminal." *See United States v. BASF-Inmont Corp*, No. 93-1807, 1995 WL 234648, at *2 (6th Cir 1995) (attached as Ex. 6); *see also Sch Dist of City of Ferndale v Royal Oak Twp Sch Dist No 8*, 293 Mich 1, 10; 291 NW 199 (1940) ("It is the general rule that an intervention is not a proper proceeding where it will have the effect of retarding the principal suit . . . ."); *Smith*, 1999 WL 33441255, at *3 (delay of even five months too long). For those reasons, when presented with similar circumstances, courts have routinely denied intervention requests in CERCLA actions in which the existing parties have negotiated, or are finishing negotiations of, a consent decree. *See Bliss*, 132 FRD at 59–60 (collecting cases); *see also, e.g.*, *Cal Dep't of Toxic Substances Control v Comm Realty Props*, 309 F3d 1113, 1118–20 (9th Cir 2002); *United States v Pintey Bowers, Inc*, 25 F3d 66, 72 (2d Cir 1993); *United States v WR Grace & Co*, 185 FRD 184, 192 (DNJ 1999).

The recent developments identified by the City do not excuse its delay in bringing the intervention request. For example, the City speculates that the new consent judgment may require it to supply more citizens with municipal water, thus imposing on the City the "burden and obligation to construct the infrastructure necessary to supply the water." City Br. at 10–11.

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denied Gelman access to install a pipeline from the Evergreen extraction system to Gelman's treatment facility, the City went to court to block Gelman's proposed alternative: a horizontal well to be drilled well below the depth that the City's utilities and right-of-ways could plausibly extend. The Court quickly dismissed the City's claims and let the horizontal well proceed. Finally, in 2002, the City temporarily blocked Gelman's effort to amend its discharge permit for the Honey Creek tributary to increase its extraction/treatment volume limit from 800 gpm to 1300 gpm. The City's delaying tactic prevented Gelman from accelerating its cleanup for well over a year.

The City's consistent obstructionist approach to the remediation of the dioxane contamination provides a strong reason to deny its motion. Indeed, in 2004, the Court cited the City's long history of obstruction as a factor in rejecting the cleanup plan favored by the City as impractical. *See* Order (Dec. 17, 2004) at 13.

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But this is not a new development that would render its motion timely—the risk that residents would have to be connected to the municipal water supply was present when the Prohibition Zone was established in 2005 and when it was expanded in 2011.

The City also seems to suggest that its motion is timely because "[m]onitoring wells have now detected 'New Contamination,' and 'unforeseen changes in the migration pathway of a known plume.'" City Br. at 2. In addition to being factually inaccurate and misleading, as discussed in greater detail below, the assertion is contradicted by the City's own pleading. For example, the City argues that "test results in 2014 from monitoring MW54d, which is sited outside of the Prohibition Zone, showed levels of 1,4 dioxane exceeding both the former generic criterion for groundwater based on ingestion (85 ppb) and the newly adopted generic criterion for groundwater based on ingestion (7.2 ppb)." *Id.* at 9 n.4. But the City did not seek to intervene (or take any action) in 2014; instead, it waited over 2 years to file this motion. The same is true for the City's allegations regarding well MW121d (2013 test) and 465 DuPont (2015 tests). *See id.* at 9.

The recent shallow groundwater investigation similarly fails to justify the City's motion to intervene, because that investigation does not support any viable claim relating to the dioxane contamination. Of the 27 borings made at locations selected by MDEQ, 25 revealed no detectable concentrations of 1,4-dioxane in groundwater. The only two detections were at 1.9 and 3.3 ppb—significantly below the vapor intrusion screening level (and below the new drinking water criterion). Finally, any claims the City might seek to assert based on those detections are barred by its 2006 settlement agreement with Gelman, as discussed in Section V below. Accordingly, the groundwater testing results provide no basis for the City to bring new claims against Gelman, as it seeks to do in its intervenor complaint, and they certainly do not

make its motion timely. For all those reasons, the City's request to intervene in this matter should be denied.

II. The City's interests are adequately represented by MDEQ, the governmental agency tasked with protecting the health and safety of the public.

In addition to being untimely, the City's motion is unnecessary: its interests in this matter are more than adequately represented by the State of Michigan. "[T]he burden of establishing inadequate representation . . . remains on the proposed intervenor." *Pennsylvania v Rizzo*, 530 F2d 501, 505 (3d Cir 1976). The City has failed to meet its burden here.

First, the City insists that it "need[s] to be at the table to participate" in the ongoing negotiations regarding the revisions to the consent judgment to ensure that the public health and safety of its residents are protected. *See* City Br. at 2–3. But such a generalized interest in public welfare is not enough to demonstrate an entitlement to intervene as of right. *See, e.g.*, *WR Grace*, 185 FRD at 189–90 (affirming denial of motion to intervene based on the "Township's repeated assertion of a general interest in protecting the health and property values of its residents," because the Township had failed to show "that its asserted interests may form the basis for a municipality to intervene as of right in a CERCLA case"). That is because the State of Michigan—and more specifically, MDEQ and the Michigan Attorney General—has the same interest in protecting the health and welfare of Michigan citizens as does the City itself.[14] For that reason, numerous courts have determined in similar circumstances that the "State . . . and the United States, as governmental entities acting in the public interest, are both presumed to adequately represent the interests which . . . Cities assert." *Bliss*, 132 FRD at 60; *see also Rizzo*,

[14] MDEQ states that its mission is to "promote[] wise management of Michigan's air, land, and water resources to support a sustainable environment [and] healthy communities," and it lists the protection of public health and the improvement of air, land, and water quality as two of its foremost strategic goals. *See DEQ Mission*, MDEQ, http://www.michigan.gov/deq/0,4561,7-135-3306-276848--,00.html.

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31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 | 230 N. Washington Square, Suite 200, Lansing, MI 48933-1340

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530 F2d at 505 ("[A] presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee.").[15] That is especially true for municipal corporations, like the City, which "are creatures of the state." *Smith v Scio Twp*, 173 Mich App 381, 388; 433 NW2d 855 (1988).

The City also insists that "[t]he State of Michigan does not adequately represent the City's interests in this matter" because "MDEQ has allowed 1,4 dioxane plumes to continue to spread through Ann Arbor and surrounding communities, and has allowed Defendant to first breach its promise to fully cleanup [sic] the pollution, and later to contain it." City Br. at 11. Aside from being inaccurate, this purported statement of interest amounts to nothing more than the City's disagreement with the selected remedy and how MDEQ, the Attorney General, and this Court have resolved the litigation. Dissatisfaction with the management of this case is not enough to meet the City's burden to show an inadequate representation of its interests by the instrumentalities of the State of Michigan. *See, e.g., United States v Hooker Chems & Plastics Corp*, 749 F2d 968, 987 (2d Cir 1984) ("The mere existence of disagreement over some aspects of the remediation necessary to abate the hazard does not demonstrate a lack of capacity on the part of the government as *parens patriae* to represent its constituents fairly and faithfully.").

Indeed, as has been noted in a similar context under CERCLA:

> [T]he issue is not whether the Township agrees with the determination of the United States, but whether the United States served as an adequate representative of the Township's interest. . . . The fact that the Township disagrees with the amount of the proposed settlement is not sufficient to overturn the presumption that the United States, acting under the authority and responsibility imposed by

[15] To that end, some courts have even suggested that "[b]ad faith or malfeasance on the part of the Government in negotiating and accepting a consent decree must be shown before intervention will be allowed." *Bliss*, 132 FRD at 61. While the City is apparently dissatisfied with the remediation in this case, MDEQ and the Attorney General's representation, and this Court's prior orders, it does not go so far as to allege bad faith or malfeasance by the State.

> CERCLA, is required to represent the same interests that the Township champions—the public interest, the interests of its residents.

WR Grace, 185 FRD at 191. In other words, the question is not whether the City is fully satisfied with MDEQ's remedial approach or the Court's earlier rulings;[16] it is whether MDEQ has adequately represented the interests at stake. Here, the City has not overcome the presumption that the State of Michigan has adequately represented those interests.

Furthermore, the history of this case demonstrates that MDEQ and Gelman are more than capable of continuing to handle the remediation efforts in a way that is protective of the public health and safety. The parties have spent the past three decades investigating, monitoring, and implementing measures to guard against the contamination, and Gelman has spent years and very significant expense working to contain, track, and remediate the plumes. The City's allegation that "[p]rior litigation by both the State of Michigan and the City of Ann Arbor has not resulted in the remediation of the pollution," *see* City Br. at 2, is simply untrue: this action has produced significant remediation and containment efforts that are ongoing today.[17] And although the

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[16] In April 2016, the Washtenaw County Board of Commissioners tasked its staff to compare the monitored natural attenuation remedy approved by MDEQ and this Court at the Gelman site to the remedial approach at other Michigan 1,4 dioxane sites. The staff concluded:

> The current cleanup remedies implemented at these [other] Superfund sites is monitored natural attenuation (MNA). . . . The presence of 1,4 dioxane has been known at two of the sites for over 10 years, and still no aggressive cleanup remedies have been implemented . . . none of the four Michigan Superfund sites with 1,4 dioxane are pumping or treating groundwater presently. . . . There are currently no Superfund sites in Michigan where complete cleanup of 1,4 dioxane is taking place or has been identified as the goal.

Comparing the City's demands with the uniform approach to dioxane remediation across all of Michigan alone establishes how disruptive the City would be to the smooth implementation of the consent judgment.

[17] For example, Gelman has installed more than 200 investigative, monitoring, or extraction wells to address the plume. Gelman has taken, tested, and submitted to MDEQ tens of thousands

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changes implemented by the emergency rule will require a prompt amendment to the consent judgment, this does not mean that the City's interests have not been or will not be represented in connection with the new cleanup standard. To the contrary, MDEQ, the Attorney General, and Gelman are in the process of finalizing revisions to the consent judgment to ensure that the cleanup program continues to remain protective of the public's health and safety in full compliance with the revised standards.[18]

In summary, the fact that the City's interests are more than adequately represented by the existing parties to this action provides an independent basis to deny the City's motion.

III. The City still has the ability to protect its interest, even if it is not granted party status in this litigation.

The City asserts that it needs to be a party to this matter so that its concerns will be reflected in the negotiations over the consent judgment modifications. As a threshold matter, every single citizen of the City and the County could plausibly assert an interest in joining this litigation on that basis, a factor which strongly counsels against granting the City's request. *See, e.g.*, *Ferndale*, 293 Mich at 10 (holding that a court may deny intervention when "it will have the effect of . . . complicating the case and producing a multifariousness of parties and causes of action"). And in any event, the City's claim is baseless. The City has multiple avenues to make sure its concerns are heard, and it has taken advantage of every one of them:

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of groundwater sampling results over its 30 years of remedial efforts. Brode Aff. ¶ 5. Notably, the City's intervention papers do not contain any allegation that Gelman has ever failed in its obligations or violated the consent judgment.

[18] Accordingly, to the extent the City seeks to excuse its terribly untimely intervention request by relying on the recent emergency rules, it cannot do so. The emergency rule made the cleanup criteria *more* stringent, and MDEQ will adequately represent the City's interest in enforcing the new standards. It would make little sense to allow the City to intervene now—when MDEQ is acting consistent with the City's wishes by imposing more onerous cleanup standards—when the City failed to seek to intervene with respect to previous consent judgments which reflected more lenient standards.

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- Both the City and Washtenaw County are members of the "Coalition for Action on Remediation of Dioxane" (CARD), which is a partnership of local governments and citizens that look at strategies to address the groundwater contamination. The CARD group meets on a quarterly basis with MDEQ District staff to discuss its concerns with the cleanup. Upper MDEQ management and the Assistant AG assigned to this case also often attend these meetings.

- Under the City Settlement Agreement, Gelman and the City "shall meet on a regular basis to discuss issues of interest to the City and/or to [Gelman] related to the [Gelman] Remediation." *See* Settlement Agreement, Section IX.D.4.

- The City and its lobbyist have met on numerous occasions with the Governor, the MDEQ Director, and representatives of the Attorney General's office to press its concerns regarding the cleanup, the new cleanup standard, and the pending consent judgment modifications. This level of "political pull" has resulted in the City's Environmental Coordinator being included as a representative in the "Criteria Stakeholder Advisory Group" (CSA) the State formed in 2014 to guide development of the administrative rules that included the new standards for 1,4-dioxane. More recently, after the draft rules were published in April, the City's Environmental Coordinator was included as a member of the six-member stakeholder group advising MDEQ with regard to issues related to changes to the draft rules.

Suffice it to say, the City has had and will continue to have ample opportunity to make its concerns heard, and those concerns have been reflected in the parties' negotiations over modifications to the consent judgment.

IV. The City's motion also should be denied because MDEQ is diligently pursuing its enforcement action.

Even if the City had shown that its motion is timely and that its interests are inadequately represented—which it has not—denial of the City's motion still would be appropriate because MDEQ is diligently pursuing its enforcement action, which acts as a bar to the City's claims.

The City's interest in this case is based on its claim that the dioxane contamination is "polluting groundwater that Ann Arbor could otherwise utilize to provide municipal water and threatening the health and safety of its citizens," City Br. at 10, and it seeks to hold Gelman liable for the contamination as an owner or operator of the site that caused the release. *See*

Zausmer, August & Caldwell, P.C.
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 | 230 N. Washington Square, Suite 200, Lansing, MI 48933-1340

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Proposed Compl., Ex. G to City Mot., ¶ 80. Thus, its claims are akin to an independent citizen suit under Part 201, which provides, in relevant part:

> [A] person, *including a local unit of government on behalf of its citizens*, whose health or enjoyment of the environment is or may be adversely affected by a release from a facility, . . . may commence a civil action against . . . [a]n owner or operator who is liable under Section 20126 for a violation of this part or rule promulgated under this part or an order issued under this part in relation to that facility.

MCL 324.20135(1)(a) (emphasis added).

An action under this provision may only be filed, however, where "[t]he state has not commenced and is not diligently prosecuting an action under this part or under other appropriate legal authority to obtain injunctive relief concerning the facility or to require compliance with this part or a rule or an order under this part." *Id.* at 324.20135(3)(b).[19] The purpose of this bar is to "prevent a multitude of litigation which would otherwise stall government action." *River Vill W LLC v Peoples Gas Light & Coke Co*, 618 FSupp2d 847, 853–54 (ND Ill 2008). For this reason, the "case law favors a broad reading of the diligent prosecution bar so as to bar a citizens suit when the pollution which is the subject of the suit is also the subject of current . . . enforcement." *Cooper Indus, Inc v Abbott Labs*, No 93-CV-193, 1995 WL 17079612, at *2 (WD Mich May 5, 1995) (attached as Ex. 7).

Here, if the City had sought to bring the same proposed claims in an independent citizen suit, those claims would be precluded because MDEQ *has* commenced and *is* diligently prosecuting an action to obtain injunctive relief regarding the same contamination—as shown by the recent negotiations and forthcoming motion to amend the consent judgment, as well as the numerous prior consent judgments and adversarial court proceedings. The City should not be

[19] Such citizen suits are similarly barred under federal environmental laws if the state or federal agency is pursuing its own enforcement action. *See* 42 USC 6972(b)(1)(B).

permitted to circumvent this statutory bar by intervening in this action instead, because both an independent action and intervention would frustrate the goal of Part 201—allowing MDEQ to quickly, efficiently, and effectively enforce remediation. This provides the Court with yet another basis to deny the City's request to intervene in this matter.

V. Because the City has released its claims against Gelman, permitting it to intervene in this matter would be futile.

There is an additional reason why the City's untimely intervention motion should be denied: the City has released its claims against Gelman, and its complaint would not survive a motion for summary disposition under MCR 2.116(C)(7). Accordingly, the City's intervention at this late stage would not only be prejudicial to the interests of the existing parties and risk delaying the timely amendment of the existing resolution of this matter, it would also be futile.

As the City acknowledges, it has already litigated its claims against Gelman relating to the 1,4-dioxane contamination; those cases ended in a settlement in 2006. *See* Settlement Agreement. Under that agreement, Gelman committed to undertaking a variety of monitoring and remediation activities, and to pay the City $285,000. *Id.*, Section III.A. In exchange, the City agreed to dismiss its pending lawsuits against Gelman and to "forever relinquish, remise, discharge, waive, and release any and all Claims" that it might in the future seek to assert against Gelman, including "[a]ll Claims arising directly or indirectly from Hazardous Substances in soil, groundwater, and surface water at or emanating, released, or discharged from the [Gelman] Property." *Id.*, Sections III.B., IV.A.

This broad release is subject to limited exceptions for seven discrete categories of claims, and the City appears to rely on two of those exceptions in its pleadings in an effort to circumvent the release contained in the Settlement Agreement and deprive Gelman of the benefit of its bargain. *See* Proposed Compl. ¶ 12. In relevant part, those exceptions provide:

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> Notwithstanding [the release clause] above, the City reserves, and this Agreement is without prejudice to, its right to petition, challenge, sue, proceed against or otherwise seek reimbursement, contribution, indemnification and/or other remedy from PLS, with respect to:
>
> * * *
>
> 2. Any future necessary Response Activity Costs or Response Costs to address a new plume of Contamination or Contamination in a previously uncontaminated aquifer that is discovered after the date of this Agreement that could not have been brought in the State Lawsuit or Federal Lawsuit ("New Contamination").
>
> * * *
>
> 3. Claims that arise from the unforeseen change in the migration pathway of a Known Plume that: (a) Results in the presence of 1,4-Dioxane at levels above the then applicable GCGI or State or Federal Maximum Contaminant Level at locations where such concentrations are not present as of the date of this Agreement; and (b) causes a City Property to be considered a "facility" as defined under Part 201.

Settlement Agreement, Sections IV.B.2, IV.B.3.

The claims asserted in the City's intervenor complaint do not fall within either of these exceptions, meaning that its action against Gelman is precluded by the prior settlement release. As a threshold matter, the Settlement Agreement provides that these exceptions to the release "shall not apply to: [t]he future migration of Contamination within the Prohibition Zone." *Id.*, Section IV.B.2.a; *see also id.*, Section IV.B.3.a. In other words, the City has waived its right to assert claims against Gelman based on new contamination or the unforeseen change in the migration pathway of a known plume where that contamination is within the Prohibition Zone. This would squarely bar the City's purported claims based on the recent detections "near Huron and Seventh Streets in the City of Ann Arbor," and the shallow groundwater investigation results. *See* Proposed Compl. ¶ 18.

The remainder of the City's allegations regarding the 1,4-dioxane contamination and migration relate to the Evergreen Subdivision area, located in the northwest corner of the current

Zausmer, August & Caldwell, P.C.
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 | 230 N. Washington Square, Suite 200, Lansing, MI 48933-1340

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Prohibition Zone.[20] Specifically, the City points to dioxane detections at MW121d, 465 DuPont, and MW54d in support of its assertion that "the plumes continue to expand." *See id.* ¶¶ 51–52. But, the City has still failed to show that either exception permits it to bring the claims it now seeks to assert against Gelman based on 1,4-dioxane contamination in the Evergreen area.

First, the City cannot plausibly argue that the migration of the dioxane contamination in the Evergreen area falls within the Section IV.B.2 exception permitting the City to bring claims related to response costs "to address a new plume of Contamination or Contamination in a previously uncontaminated aquifer that is discovered after the date of this Agreement." The 1,4-dioxane contamination in groundwater beneath the Evergreen area has been a target of remediation efforts since the original consent judgment was entered in 1992, long before the 2006 Settlement Agreement was signed. Thus, the detections of which the City complains are not part of a "new plume of contamination"—they are connected to the well-known, existing Evergreen plume. *See, e.g.*, Brode Aff. ¶¶ 6–7, 9.

Second, the City cannot show that the migration of the Evergreen plume was "unforeseen," as it must in order for the exception in Section IV.B.3 to apply to its claims. As evidence that "[t]here have been unforeseen changes in the migration pathway of 1,4 dioxane contamination," the City cites results from MW54d, which it insists "is sited outside the Prohibition Zone and the foreseeable 1,4 dioxane pathway as of the date of the Settlement Agreement." Proposed Compl. ¶ 62. But the data from this well does not support the City's intervention—in November 2006, the concentration in this well was 32 ppb, whereas the most recent concentration detected in this well was 22 ppb. Thus, the contamination in this area has

[20] The Evergreen area was not incorporated in the original Prohibition Zone boundary as that term is defined in the Settlement Agreement, *see* Settlement Agreement, Section II.R, and so the Prohibition Zone carve-out to the two relevant exceptions is inapplicable.

been known since 2006, and the existing plume in this area has recently retreated, not expanded. *See* Brode Aff. ¶ 6. The well sampling data thus undercuts, rather than supports, the City's alleged need to intervene on this basis.

More importantly, MW54d and the other monitoring wells upon which the City relies are located within the boundaries of the current Prohibition Zone, as it was expanded in 2011. Under the 2011 amendment to the consent judgment, the plume capture objective for the Evergreen area was eliminated and the plume was allowed to migrate east to the Huron River. *Id.* ¶¶ 7, 9. At a minimum then, the potential migration of the plume toward MW54d and toward MW110 in the Evergreen area was foreseeable as of 2011, yet the City waited five years to seek to intervene on that basis.[21] It should not be permitted to do so now. *See, e.g., Karrip v Cannon Twp*, 115 Mich App 726, 731; 321 NW2d 690 (1982) ("[A] right to intervene should be asserted within a reasonable time and . . . an unreasonable delay is a proper reason to deny intervention.").

There is an additional reason why this exception does not apply. Section IV.B.3 permits the City to bring claims against Gelman that arise from "the unforeseen change in the migration pathway of a Known Plume" only where the migration "causes a City Property to be considered a 'facility' as defined under Part 201." Settlement Agreement, Section IV.B.3. The Settlement Agreement defines "City Property" as "property, buildings, and facilities owned by the City." *Id.*, Section II.C. Here, the City alleges only that "[c]ertain *areas* within the City limits . . . are 'facilities,' . . . due to Releases of Defendant's Hazardous Substances that originated at and from the Source Property." Proposed Compl. ¶ 74 (emphasis added). The City does not specify what

[21] MW110 is located directly downgradient from where the former leading edge capture well in the Evergreen area was located. The increasing concentrations in MW110 are an obvious and easily anticipated result of ceasing operation of the leading edge capture well and indicate that the plume is migrating to the east as expected.

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areas it is referring to, nor does it assert that it owns any property, buildings, or facilities there. It has therefore failed to allege sufficient facts to show that this exception applies.

Accordingly, the City has not demonstrated that any of its claims are subject to an exception to the waiver of its rights contained in the 2006 Settlement Agreement, and its claims against Gelman have therefore been released in a bargained-for prior settlement. Michigan Court Rule 2.116 permits a party to "move for dismissal of or judgment on all or part of a claim" where that party can show that "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of release." MCR 2.116(B)(1), (C)(7); *see also Rinke v Auto Moulding Co*, 226 Mich App 432, 435; 573 NW2d 344 (1997) ("Pursuant to MCR 2.116(C)(7), a claim may be barred because of a release."). For the reasons set forth above, permitting the City to intervene in this matter would be futile, because the City's complaint against Gelman would not survive a Rule 2.116(C)(7) motion. On this ground alone, the Court could deny the City's request to intervene. *See, e.g., Laroe Estates, Inc v Town of Chester*, 828 F3d 60, 64 (2d Cir 2016) ("Although . . . legal futility is not mentioned in [Federal] Rule 24, we have affirmed denials of a motion to intervene on that basis.") (citing *United States v Glens Falls Newspapers, Inc*, 160 F3d 853, 856 (2d Cir 1998)); *EEOC v Century I, LC*, 142 FRD 494, 496 (D Kan 1992) (denying motion to intervene as futile to the extent that the plaintiff's "claims could not withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6)").

Finally, even if the City were permitted to intervene—despite the untimeliness of its motion, the adequate representation of its interests by MDEQ and the Attorney General, and the sweeping effect of the release clause—its claims against Gelman would still be strictly circumscribed by the 2006 Settlement Agreement. Under Section IV.B.2, the City could only seek future response costs necessary to address a new plume of contamination. Similarly, the

Zausmer, August & Caldwell, P.C.
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Section IV.B.3 exception allows the City to bring only those claims that relate to the unforeseen change in the migration pathway of the contamination, where that migration causes a City Property to be considered a "facility." Neither exception provides the City with a path to obtaining the result it seeks: a seat at the table to discuss the course, scope, nature, or timing of the ongoing remediation effort. *See* City Br. at 2–3. That is a right the City has unquestionably released in the 2006 Settlement Agreement.

CONCLUSION

For the foregoing reasons, defendant Gelman Sciences, Inc. respectfully requests that the Court deny the City of Ann Arbor's Motion to Intervene.

Respectfully submitted,

ZAUSMER, AUGUST & CALDWELL, P.C.

Michael L. Caldwell (P40554)
31700 Middlebelt Road
Suite 150
Farmington Hills, MI 48334
(248) 851-4111; (248) 851-0100

PROOF OF SERVICE

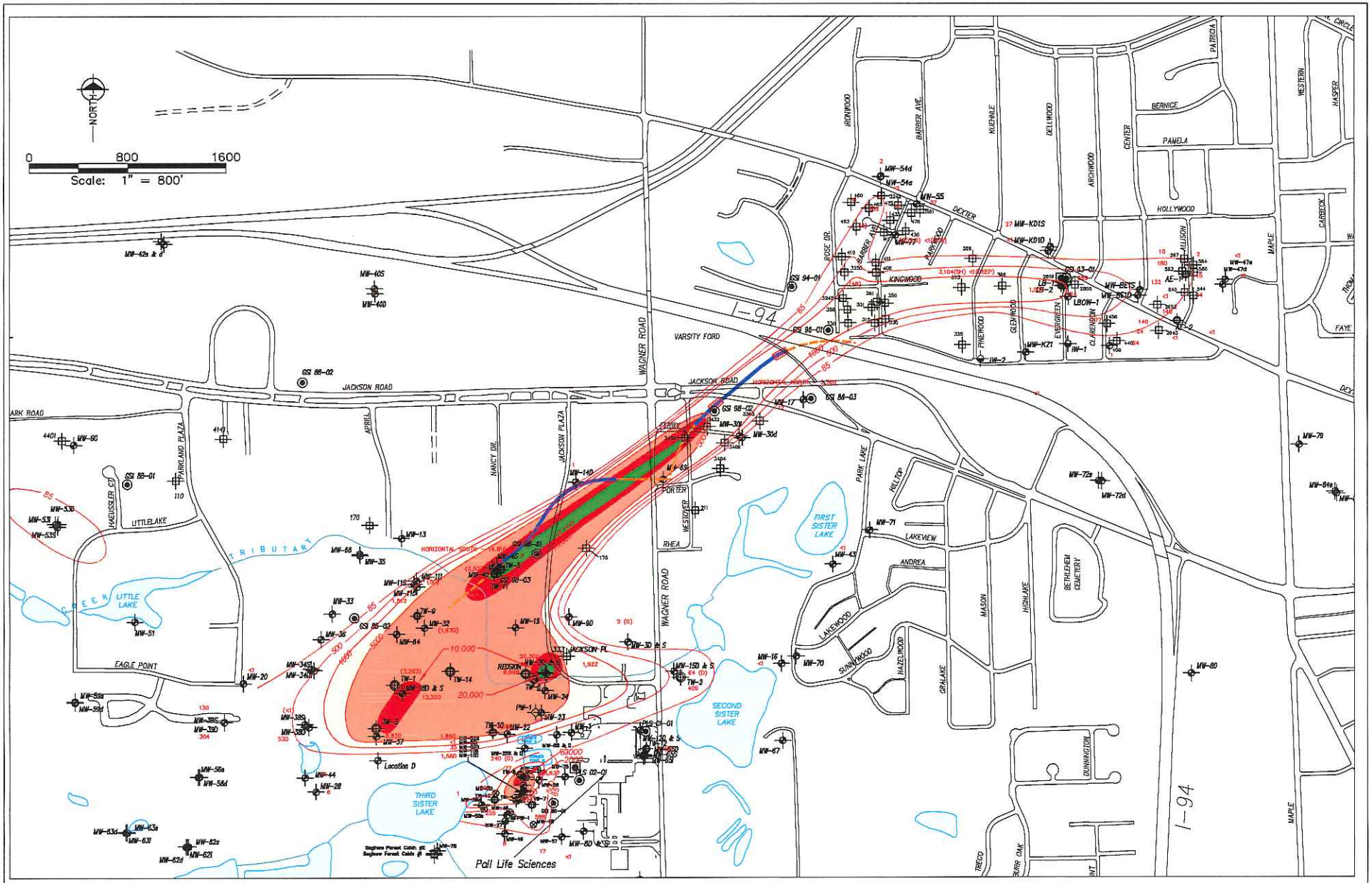
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on these pleadings on **DECEMBER 12, 2016**.

By:
- ☐ U.S. Mail
- ☐ Hand-Delivered
- ☒ Federal Express + EMAIL
- ☐ Facsimile
- ☐ Overnight Courier
- ☐ E-Filing Service

Signature: Halina Linda Romanski
HALINA LINDA ROMANSKI

Zausmer, August & Caldwell, P.C.
31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 | 230 N. Washington Square, Suite 200, Lansing, MI 48933-1340

Exhibit 1



LEGEND

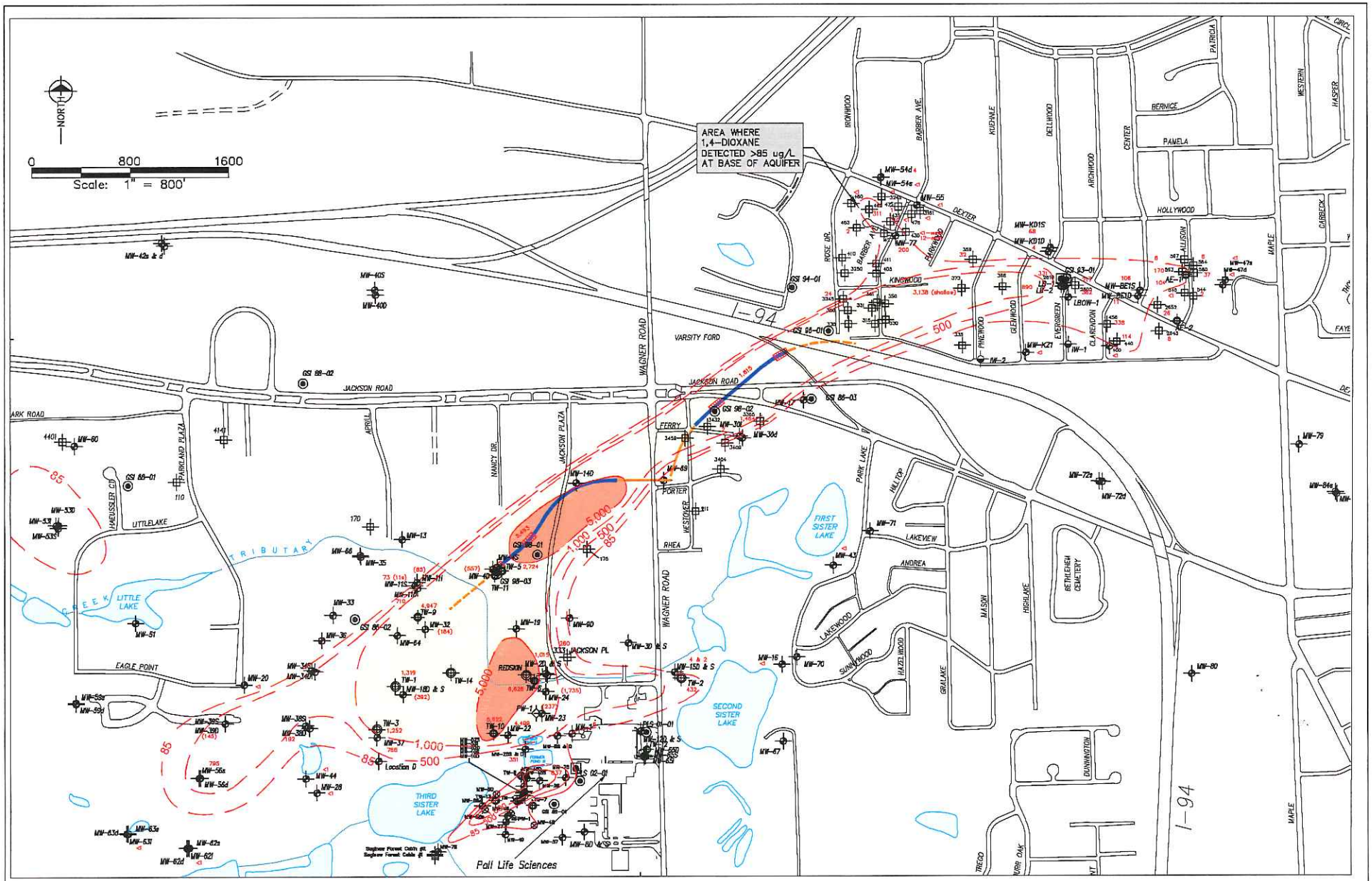
- MONITOR WELL
- RESIDENTIAL WELL
- PURGE WELL
- HYDROGEOLOGIC TEST BORING
- UV/OX. TREATMENT SYSTEM
- TEMPORARY PURGE WELL
- 1,4-DIOXANE ISOCONCENTRATION CONTOUR (ug/L)
- 1,437 – 1,4-DIOXANE CONCENTRATION (ug/L)
- (NM) – DATA NOT USED

- 1,000 - 5,000 µg/L 1,4-Dioxane
- 5,000 - 10,000 µg/L 1,4-Dioxane
- 10,000 - 20,000 µg/L 1,4-Dioxane
- >20,000 µg/L 1,4-Dioxane

BASE MAP ADAPTED FROM MAPS PROIDED BY THE CITY OF ANN ARBOR AND SCIO TOWNSHIP GIS

1,4-DIOXANE ISOCONCENTRATION CONTOUR TIME SERIES MAPS FOR FIVE YEAR PLAN

FEBRUARY - DECEMBER 2000



LEGEND

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- TEMPORARY PURGE WELL
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- DATA NOT USED

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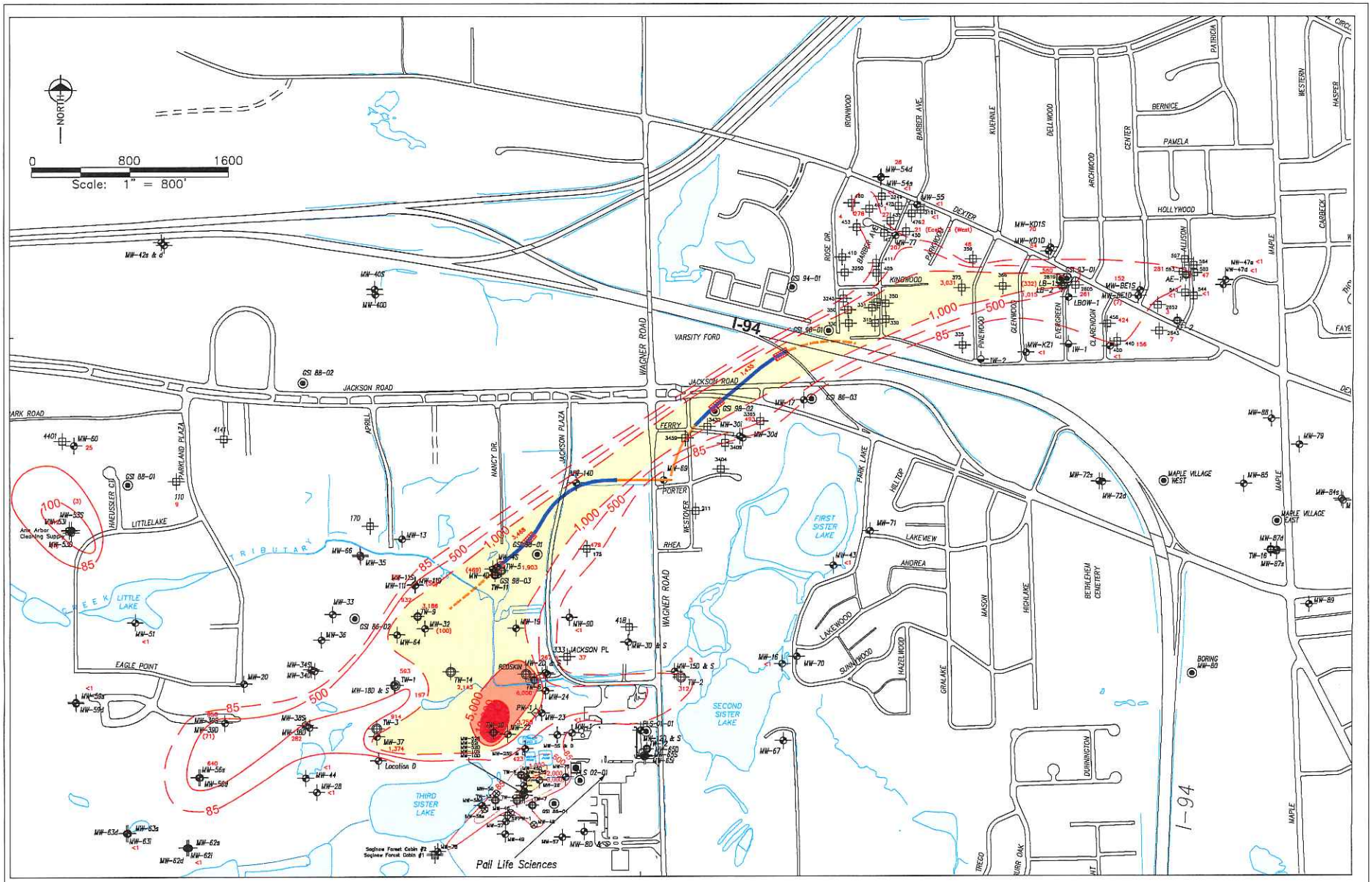
BASE MAP ADAPTED FROM MAPS PROIDED BY THE CITY OF ANN ARBOR AND SCIO TOWNSHIP GIS

1,4-DIOXANE ISOCONCENTRATION CONTOUR TIME SERIES MAPS FOR FIVE YEAR PLAN

APRIL - MAY 2002



LEGEND

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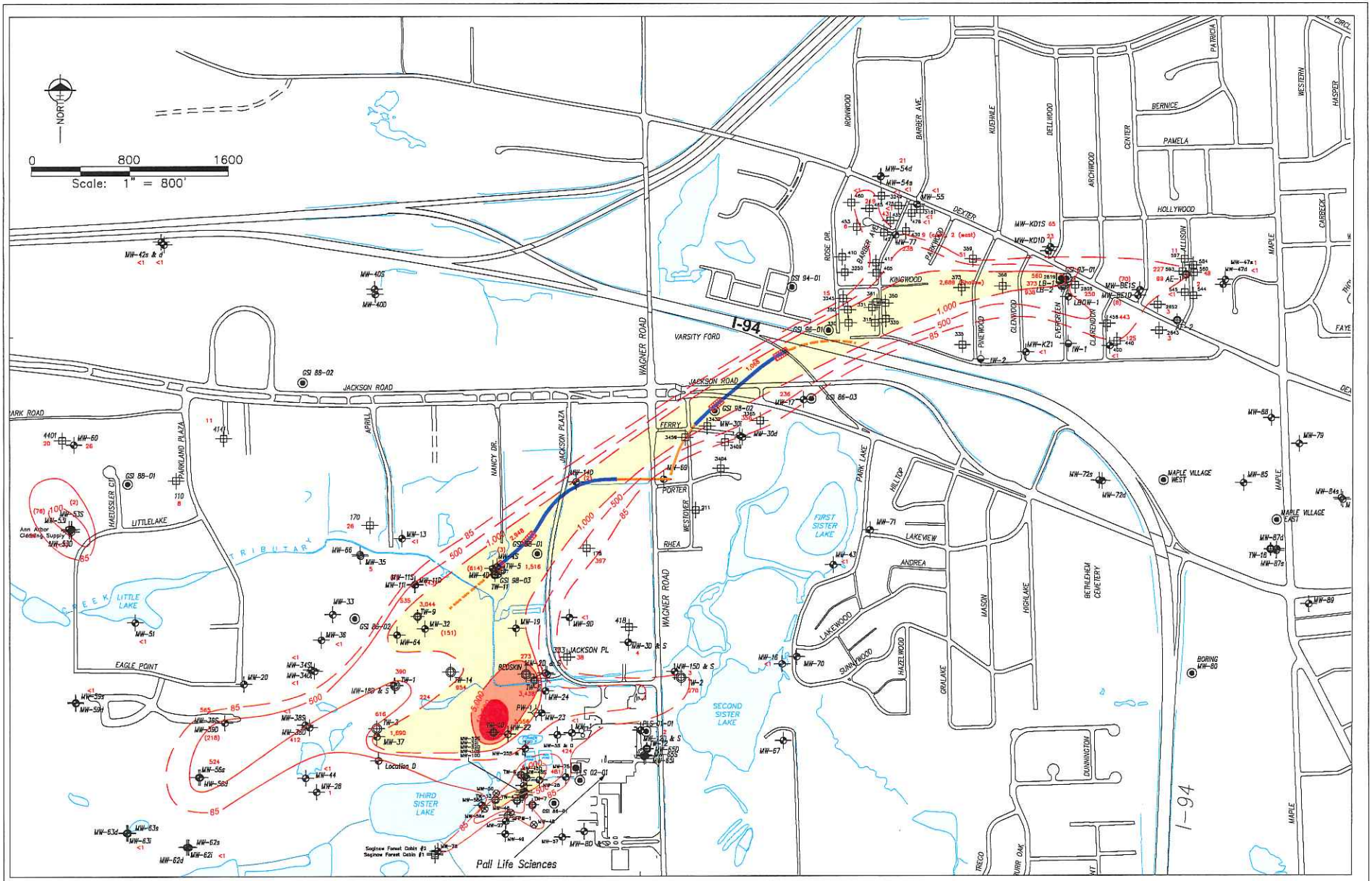
- 1,437 – 1,4-DIOXANE CONCENTRATION (ug/L)
- (184) – DATA NOT USED

- 1,000 - 5,000 µg/L 1,4-Dioxane
- 5,000 - 10,000 µg/L 1,4-Dioxane
- 10,000 - 20,000 µg/L 1,4-Dioxane
- >20,000 µg/L 1,4-Dioxane

1,4-DIOXANE ISOCONCENTRATION CONTOUR TIME SERIES MAPS FOR FIVE YEAR PLAN

JANUARY-MARCH 2003

BASE MAP ADAPTED FROM MAPS PROIDED BY THE CITY OF ANN ARBOR AND SCIO TOWNSHIP GIS



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1,4-DIOXANE ISOCONCENTRATION CONTOUR TIME SERIES MAPS FOR FIVE YEAR PLAN

JULY-SEPTEMBER 2003

BASE MAP ADAPTED FROM MAPS PROIDED BY THE CITY OF ANN ARBOR AND SCIO TOWNSHIP GIS

Exhibit 2

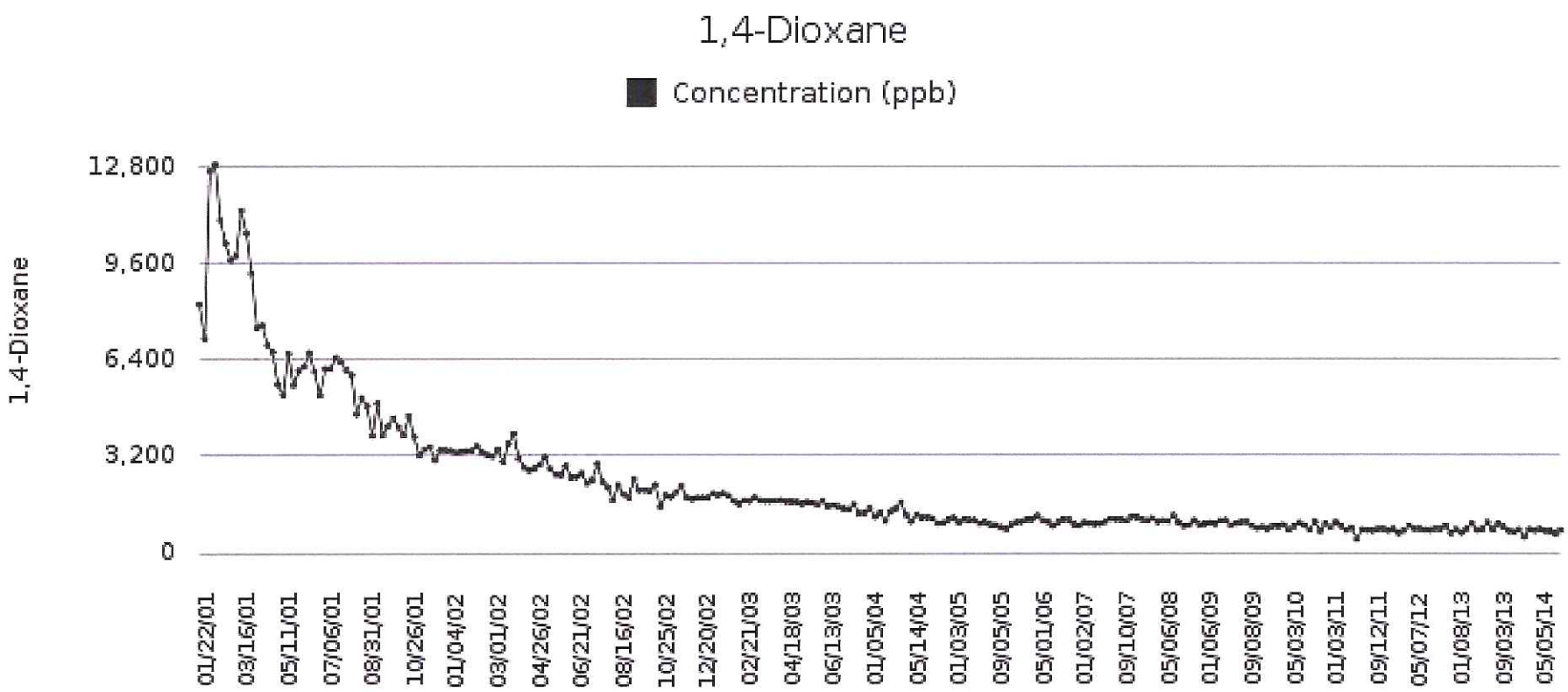
Gelman Sciences, Inc. d/b/a
Pall Life Sciences
642 South Wagner Road
Ann Arbor, MI 48103-9019 US
www.pall.com

Analytical Data Graph

Printed: 11/14/2016

Well Name: TW-5

Aquifer:	D2	Date Installed:	01/11/2001	Boring Depth:	115.00 Feet bgl	Screen 1:	115.00 to 95.00 Feet
Map Location:	L-15	Well Driller:	Ohio Drilling	Ground Elevation:	907.00 Feet	Screen Length:	20.00
X Coordinate:	13275652.08	Well Type:	Extraction Wells	TOC Elevation:	Unknown Feet	Screen 2:	NA to NA Feet
Y Coordinate:	285200.44	Sampling Interval:	Not Set	TOC to screen bottom:	Unknown Feet		
Comments:							



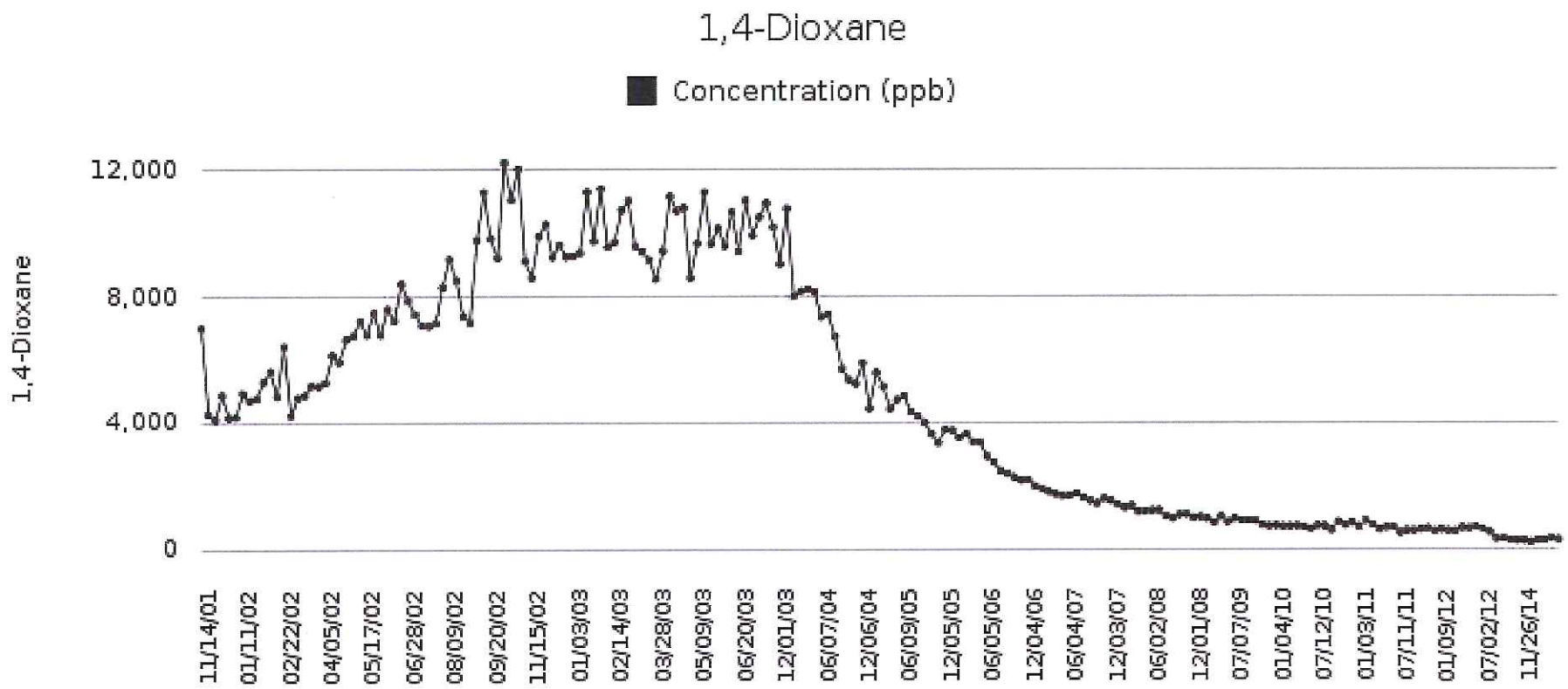
Gelman Sciences, Inc. d/b/a
Pall Life Sciences
642 South Wagner Road
Ann Arbor, MI 48103-9019 US
www.pall.com

Analytical Data Graph

Printed: 11/14/2016

Well Name: TW-10

Aquifer:	C3	Date Installed:	09/14/2001	Boring Depth:	65.00 Feet bgl	Screen 1:	60.00 to 50.00 Feet
Map Location:	O-15	Well Driller:	Stearns	Ground Elevation:	925.00 Feet	Screen Length:	10.00
X Coordinate:	13275493.33	Well Type:	Extraction Wells	TOC Elevation:	Unknown Feet	Screen 2:	NA to NA Feet
Y Coordinate:	283860.26	Sampling Interval:	Semi-Annual	TOC to screen bottom:	Unknown Feet		
Comments:							



Gelman Sciences, Inc. d/b/a
Pall Life Sciences
642 South Wagner Road
Ann Arbor, MI 48103-9019 US
www.pall.com

Analytical Data Graph

Printed: 11/14/2016

Well Name: TW-11

Aquifer:	E	Date Installed:	12/17/2001	Boring Depth:	179.00 Feet bgl	Screen 1:	179.00 to 159.00 Feet
Map Location:	M-15	Well Driller:	Stearns	Ground Elevation:	910.00 Feet	Screen Length:	20.00
X Coordinate:	13275537.13	Well Type:	Extraction Wells	TOC Elevation:	911.02 Feet	Screen 2:	NA to NA Feet
Y Coordinate:	285153.36	Sampling Interval:	Not Set	TOC to screen bottom:	Unknown Feet		
Comments:							

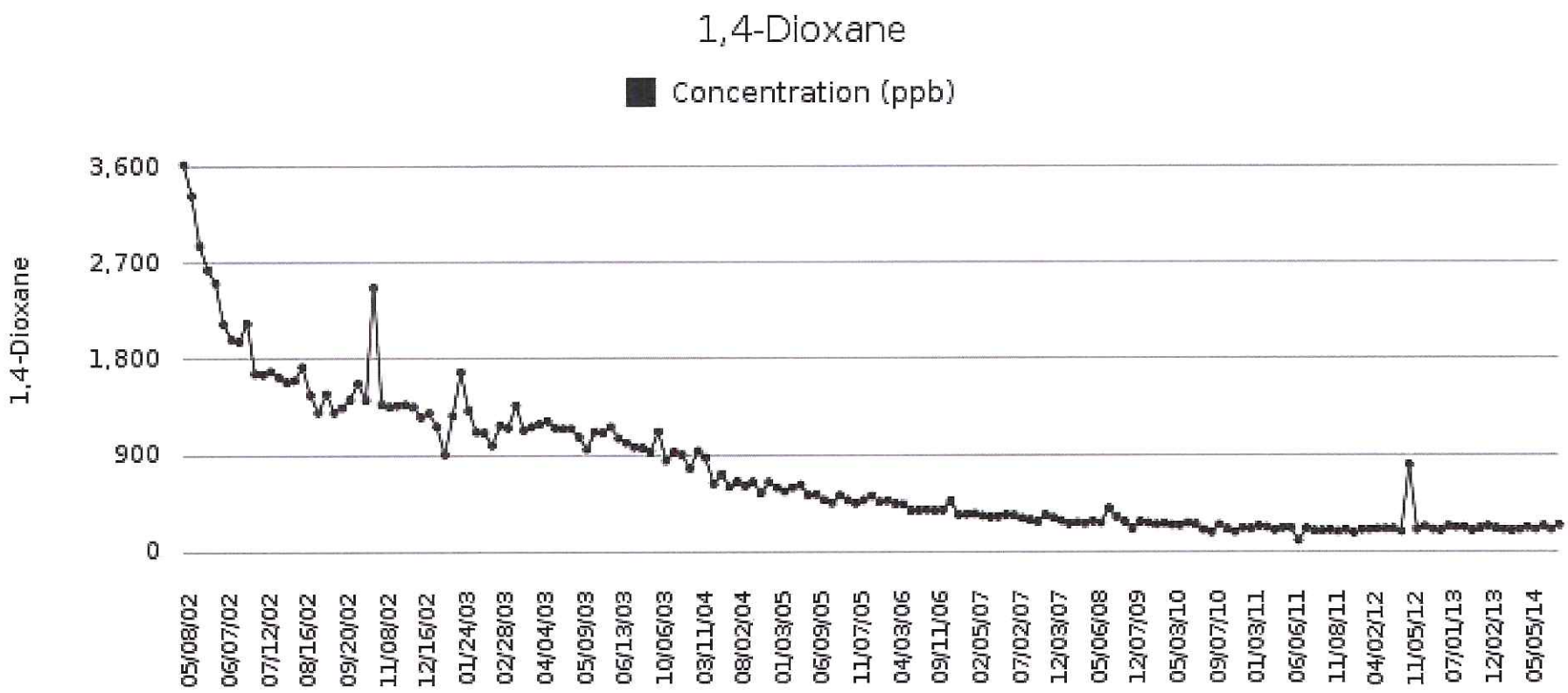


Exhibit 3

Affidavit of James W. Brode, Jr., CPG

JAMES W. BRODE, JR., CPG, being first duly sworn, deposes and says:

1. I am a practicing professional hydrogeologist with over 33 years of experience. I am employed as a Senior Project Manager by Fleis and VandenBrink Engineering, Inc. I am a Certified Professional Geologist by the American Institute of Professional Geologists. A copy of my professional qualifications is attached as Attachment 1.

2. I have been involved in investigations of the soils, groundwater, and surface water at and in the vicinity of the Gelman Sciences, Inc. ("Gelman") facility in Scio Township, Ann Arbor, Michigan, since 1986. This work was done by me in my professional capacity on behalf of Gelman. I am also familiar with data and interpretations generated by Gelman and the Michigan Department of Environmental Quality ("MDEQ") related to investigations of soils and groundwater.

3. Gelman has been working under the supervision of MDEQ and the Washtenaw County Circuit Court to investigate and remediate the site and to implement the environmental response actions that are described in a continuing consent judgment entered in the State's enforcement lawsuit. Gelman routinely communicates with MDEQ and regularly reports to the Court regarding matters related to the investigation and remediation of soil and groundwater at or near the Gelman site. Gelman's local Project Coordinator, Farsad Fotouhi, and I also regularly meet with MDEQ's technical staff to review the data gathered by these investigations and the progress of the cleanup mandated by the Consent Judgment.

4. Numerous investigations of the soils, groundwater, and surface waters at and in the vicinity of the facility have been conducted since 1986. I performed many of these investigations personally. Other investigations were performed under my direct supervision.

5. Based on my 33 years of experience as a professional hydrogeologist working primarily in Michigan, it is my opinion that the Gelman site is one of the most thoroughly investigated sites in the State of Michigan. Since the discovery of 1,4-dioxane at the Gelman site, some of the investigations of soil and groundwater performed by Gelman have included:

- The drilling/installation of well over 200 borings/wells, including one of the world's longest horizontal environmental wells and transmission line;
- The collection and analysis of tens of thousands of groundwater samples;
- The collection of hundreds of soil samples;
- The collection of tens of thousands of water level measurements to establish groundwater flow directions; and
- Aquifer testing at numerous portions of the Gelman site in order to determine the relevant aquifer characteristics, like transmissivity and storativity.

These investigations have covered an area of over approximately 5 square miles and have extended as deep as 300 feet below the ground surface.

6. Since the mid-1980s, I have been involved in numerous investigations of the Evergreen Subdivision. These investigations have included, but are not limited to: the installation and sampling of numerous monitoring wells, the collection of water levels, aquifer performance testing, and natural gamma logging of residential wells in the Evergreen Subdivision. I have directly participated in the preparation of numerous reports regarding 1,4-dioxane in the Evergreen Subdivision area. I also directly participated in the preparation of routine maps of the extent of 1,4-dioxane and groundwater flow conditions in the Evergreen Subdivision. The presence of 1,4-dioxane in the Evergreen area has long been known and is not a new development.

7. I have concluded that available water quality data from the Evergreen Subdivision indicate that 1,4-dioxane levels above 7.2 ppb are fully contained within the existing, Court-approved Prohibition Zone ("PZ"). The purpose of the PZ is and always has been to allow the groundwater contamination to migrate safely to the Huron River.

8. The low level detections (1 to 2 ppb) in the groundwater sampled from MW-121d and MW-129d are consistent with the original intent to locate these wells along the northern edge of detectable contamination. The low level detections of 1,4-dioixane in the groundwater sampled from these wells does not support the conclusion that the plume, when measured at 7.2 ppb, will expand beyond the PZ boundary.

9. Since the Consent Judgment objective was changed from a capture objective to a migration within the PZ objective, the migration of the Evergreen portion of the plume has behaved as expected, with the contamination migrating eastward. This is demonstrated by the increase of 1,4-dioxane concentrations in groundwater sampled from MW-110.

10. I have reviewed the State of Michigan WellLogic database to determine where residential wells are located in the area north of the PZ. I am aware that the MDEQ and Washtenaw County routinely collect water samples from wells north of the PZ and analyze the samples for 1,4-dioxane. In April of 2016, Washtenaw County completed a comprehensive water sampling event that included approximately 35 residential well locations north of the PZ. 1,4-dioxane has not been detected in any of the residential samples north of the existing PZ. Furthermore, based on my extensive review of data and Gelman's ongoing remedial efforts, it is my opinion that residential wells north of the PZ will not become contaminated with 1,4-dioxane from the Gelman Site in the future.

11. I am familiar with the location of the City of Ann Arbor water intake in Barton Pond. There are no water quality or water level data that indicate the plume of 1,4-dioxane associated the Gelman site will ever migrate to the Barton Pond impoundment. The available water quality and water level data indicate the plume will follow a more eastern flow path as it migrates toward the Huron River and that the plume will vent to the river at a location well downstream of Barton Pond impoundment.

12. Since the mid-1980s, I have been involved in numerous investigations of the Honey Creek area in the western portion of the of the Gelman site in Scio Township. These investigations have included, but are not limited to: the installation and sampling numerous monitoring wells, the collection of water levels, aquifer performance testing, and natural gamma logging of wells, stream flow measurements and groundwater modeling. I have directly participated in the preparation of numerous reports regarding 1,4-dioxane in the Honey Creek Area. I also directly participate in the preparation of routine maps of the extent of 1,4-dioxane and groundwater flow conditions in the Honey Creek Area. Water quality and water level data I have reviewed confirms that the 1,4-dioxane plume in the Honey Creek area is generally stable or shrinking, and not expanding even when measured at 1 ppb. For this reason, there are no drinking water wells threatened by 1,4-dioxane in the Honey Creek area.

13. I have been involved in numerous investigations of the areas within the city limits of Ann Arbor concerning the Gelman plume. These investigations have included, but are not limited to: the installation and sampling numerous monitoring wells, the collection of water levels, aquifer performance testing, and groundwater modeling. I have directly participated in the preparation of numerous reports regarding 1,4-dioxane in the City of Ann Arbor. I also directly participate in the preparation of routine maps of the extent of 1,4-dioxane and groundwater flow

conditions in the areas where the plume occurs within the City of Ann Arbor. I have also participated in discussions with the MDEQ regarding additional monitoring wells to define further the extent of 1,4-dioxane in the City of Ann Arbor and other areas at the revised 7.2 ppb standard.

14. The physical extent of the contamination plume measured at 85 ppb has been defined by Gelman to the satisfaction of the MDEQ. As a result of the extensive mapping associated with defining the plume to 85 ppb, the extent of contamination as defined by the recent 7.2 ppb standard is also well understood. There are a limited number of areas where additional boring/well data will provide some refinement of the plume boundary at the 7.2 ppb level, but it is clear from the results of previous investigations that no drinking water wells are threatened under the new 7.2 ppb standard.

FURTHER, AFFIANT SAYETH NOT.

JAMES W. BRODE, JR., CPG

Subscribed and sworn to before
me this 12th day of December, 2016

Halina Linda Romanski

Notary Public, Oakland County, MI
My commission expires: 9/13/17

HALINA LINDA ROMANSKI
Notary Public, State of Michigan
County of Oakland
My Commission Expires Sep. 13, 2017
Acting in the County of

Attachment 1
(Statement of Qualifications)

James W. Brode, Jr., CPG

6688 Hart Drive
Kalamazoo, Michigan

Registrations/Certifications

Certified Professional Geologist - American Institute of Professional Geologists

Certified Underground Storage Tank Professional - Michigan

HAZWOPER Site Worker

Education

M.S. Degree in Geology with Hydrogeology Emphasis, Western Michigan University

B.S. Degree in Geology, Western Michigan University

Years of Professional Experience

32

Selected Awards

2007 Groundwater Management Professional of the Year, Michigan Water Environment Association

2006 Michigan's Outstanding Professional Geologist of the Year

Project I have worked on for over 26 years received the Prestigious NGWA 2010 Outstanding Groundwater Remediation Project of the Year Award

Career Summary and Skills

Jim has over 32 years' experience in a diverse range of environmental and hydrogeological consulting services including environmental risk analysis, environmental investigations and site assessments, remedial investigations and feasibility studies, cleanup implementation and closure under Part 201 of Michigan's Environmental Code, underground storage tank management and cleanups under Part 211 and Part 213. Jim also manages environmental remediation projects in Florida and New York.

Jim is an expert in identifying, developing and protecting groundwater supplies. Jim has managed community water supply projects across the State of Michigan. These projects have included evaluating water supply needs for communities, identifying sustainable well sites, and designing water supply wells and well fields. Jim has applied state-of-the-art analytical methods/models in his work.

Jim has worked with communities in protecting their groundwater supplies (wellhead protection). He has helped his clients in the development of innovative and award-winning projects.

Jim has also provided consulting to the industrial and mining sectors on a variety of water resources related issues.

Mr. Brode has served as an expert witness in several key lawsuits in the State of Michigan and has over 150 hours of litigation experience in environmental lawsuits. He has also given presentations to many professional organizations on a variety of topics.

Employment History

2010 to Present – Senior Project Manager, Fleis and Vandenbrink Engineering, Inc.

Provide consulting services to a variety of clients. Involved in strategic planning for the company along with client development. Manage multiple remediation, due diligence, water supply and groundwater protection projects.

1997 to 2010 - Associate/Senior Hydrogeologist, Fishbeck, Thompson, Carr and Huber, Inc.

Provide consulting services to a variety of clients. Manage projects with total revenues of over 7 million dollars. Involved in strategic planning for the company. Serve as a personnel group leader several staff. Serve as the services area manager for groundwater supply, wellhead protection, ecological services, and hydrogeological studies.

1989 to 1997 - President, Alpha Geosciences, Inc

Formed and served as president of this respected environmental/hydrogeological consulting firm. Ran a profitable company with several employees. Eventually this company was sold to Fishbeck, Thompson, Carr and Huber.

1984-1989 - Geologist/Hydrogeologist, Keck Consulting Service

Served as a geologist/hydrogeologist. Worked on numerous projects, starting off as a field geologist and working up to a project manager.

Affiliations

American Institute of Professional Geologists, former Michigan Section President
Association of Groundwater Scientists and Engineers
National Groundwater Association, Aquifer Protection Interest Group, Chairperson 2004-2005

Community Activities

City of Kalamazoo Environmental Concerns Committee, 1995-2001
City of Kalamazoo Wellhead Protection Team, 1996 to Present
City of Kalamazoo Brownfield Redevelopment Initiative, former Task Force Member
City of Kalamazoo Wastewater Policy, Former Task Force Member
City of Kalamazoo Task Force on Storm Water Management at Western Michigan University Research and Engineering Campus, Former Member
City of Battle Creek Water Festival, Active Volunteer 2001-Present

Publications

Fotouhi, F., Brode, J., and Kolon, S., United States Environmental Protection Agency, Technology News and Trends, January 2005.

Fotouhi, F., Bardsley, D., and Brode, J., "Combined Horizontal Well and Transmission System Provides Solution to Several Logistical Challenges," Horizontal News, Vol. 6, No. 1, pp. 3-5, 2000.

Contributing editor – Environmental Investigation and Remediation: 1,4-Dioxane and Other Solvent Stabilizers by Thomas Mohr, CRC Press, 2010

Selected Presentations

"Putting Risk into Perspective," presented at Michigan Landman's Association 19th Annual Meeting, Lansing Michigan.

"Naturally Occurring/Anthropogenic Metals in Soils," presented at Michigan Chemical Council Environmental Conference, Lansing, Michigan, 1997.

"Water Well Maintenance," presented at American Water Works Association Annual Meeting, Bellaire, Michigan, 1997.

"Horizontal Well and Transmission Pipeline," presented at National Ground Water Association Annual Meeting, Nashville, Tennessee and Ann Arbor, Michigan, 1999.

"The Pall/Gelman Sciences 1,4-Dioxane Plumes - History and Innovations in 1,4-Dioxane Remediation," presented at California Groundwater Association - 1,4-Dioxane and Other Solvent Stabilizers in the Environment, San Jose California, December 2003.

"Sustainable Groundwater Withdrawal," presented at American Water Works Association/Water and Environment Association Annual Conference, 2004.

"Managing Multiple 1,4-Dioxane Plumes in a Complex Glacial Environment," presented at National Ground Water Association, Phoenix, Arizona.

"A Multi-Variable Scoring Tool for Ranking Potential Sources of Contamination in the Greater Lansing Area," presented at National Ground Water Association Annual Meeting, Las Vegas, Nevada, 2004.

" Environmental Issues at Pall's Ann Arbor Facility," presented at Certified Hazardous Material Managers of Michigan, American Society of Safety Engineers Annual Conference, 2004.

'Wellhead Protection in Action – A Communities Response to a Proposed Walmart – MWEA Annual Conference, 2008

Michigan's Water Withdrawal Assessment Tool – Varnium Water Law Conference, April, 2009

Siting Sustainable Well Sites – Tri-County Regional Planning Commission and Groundwater Management Board, April 2009

A 30 Year Perspective of a Large-Scale Groundwater Remediation Project: A case History of the Pall Gelman Site in Ann Arbor, Michigan – Michigan Section of the American Institute of Professional Geologists, Annual Meeting, December 2014.

A 30 Year Perspective of a Large-Scale Groundwater Remediation Project: A case History of the Pall Gelman Site in Ann Arbor, Michigan – No Spills Conference, Mt. Pleasant Michigan, January 2015.

SELECTED EXAMPLES OF PROJECT WORK

Remediation

Lansing Board of Water & Light, Lansing, Michigan - Project manager for a RI/FS of a former ash disposal landfill site.

Pall/Gelman Sciences Inc., Ann Arbor, Michigan – Serve as the principal hydrogeologist on an extensive hydrogeological investigation that resulted in the

definition and understanding of the distribution of several regionally extensive groundwater contamination plumes. Other projects included designing groundwater extraction systems and evaluating the fate of groundwater contamination. Assisted in the design of one of the largest groundwater remediation systems in the world for the treatment of 1,4-dioxane.

PPG Industries, Inc., Hersey, Michigan - Principal investigator of an unprecedented investigation of approximately 30 mineral well sites. The work involved investigating the potential for brine contamination associated with drilling activities, and eventually led to the development and implementation of remedial strategies and the closure of approximately 15 sites.

Pall Corporation, Pinellas Park Florida – Serve as project coordinator for a chlorinated solvent release site. Remediation technologies have included bioremediation and insitu-chemical oxidation. Manage multiple consultants on this project.

Kalium Chemicals, Ltd., Hersey, Michigan — Provided hydrogeological consulting on remedial investigation/remediation projects. Projects included delineation of multiple chloride plume, groundwater flow modeling, and the design of hydraulic containment systems.

Shell Oil Company, Kalkaska and Pigeon River, Michigan — Conducted remedial investigation at oil and gas release sites.

Motor Wheel, Lansing, Michigan, Shelegal Gravel Site — Conducted remedial investigations, EPA Superfund site.

Joe's Sales and Service Site, Evart, Michigan — Conducted remedial investigations, EPA Superfund site.

American Anodco, Ionia, Michigan — Remedial investigations, EPA Superfund site.

Federated Insurance Company, Edwardsburg, Michigan — Design of SVE system at gas station site.

ARCO Industries Inc., Schoolcraft, Michigan — SVE operation and maintenance.

DKI Inc., Kalamazoo, Michigan — Excavation/hauling at an industrial site.

Frederick Transport Services, Michigan — Excavation/hauling at I-94 interstate spill.

City of Kalamazoo, Michigan —Project manager responsible for investigation and remedial design for former laundry facility.

Kalamazoo, Michigan

- Oil Company — Groundwater, product, and recovery system.
- Residential Site — Excavation/hauling.

Leaking Underground Storage Tanks

Kalamazoo Oil, Ackerman Oil Company Site, Vicksburg, Michigan — Project manager for the remedial investigation, remediation, and closure of this soil and groundwater contamination site.

ANR Freight, Detroit and Grand Rapids, Michigan — Project manager in the closure of two sites.

Kal-Drake, Inc., Kalamazoo, Michigan — Actively involved in the remedial investigation and remediation of this free product site which is under consideration for closure.

City of Mt. Pleasant, Michigan — Project manager for remedial investigation and obtaining an unrestricted closure for a airport LUST site.

Klaves Marina, Pinckney, Michigan — Involved in obtaining a restricted closure for this LUST site.

DKI Inc., Kalamazoo, Michigan — Assisted the client in receiving an unrestricted closure of for this LUST site.

Eaton Corporation, Battle Creek, Michigan — Served as project manager on the closure of a LUST site at the Battle Creek Airport. Verification of soil remediation samples were collected from a statistically valid sampling grid developed over an *in situ* SVE/bioremediation system. The site was closed to the satisfaction of the MDEQ.

Environmental/Surface Water Studies

Aggregate Industries, Allegan, Michigan — Project manager working on numerous inland lakes and streams permits.

Moose Lake Aggregates, LLC, Niles, Michigan — Project manager for an inland lakes and streams permit. Represented company at public hearings.

Gelman Sciences Inc., Ann Arbor, Michigan

- Honey Creek Drainage System — Involved in the evaluation of the hydrogeologic conditions of Honey Creek, a stream receiving treated groundwater under a NPDES permit. Related work included field measurements, groundwater monitoring system design, and predictive modeling of contaminant fate.
- Allen Drain — Assisted in the design and field evaluation of a tracer test of several miles of storm sewer.

City of Portage, Michigan

- Principal investigator of the quality of the upstream portions of Portage Creek. Related work included both biological and chemical assessment of water quality.

- Principal investigator of storm water outfall into the Portage Creek. This work involved the year long monitoring of over 14 outfalls to the Portage Creek.

City of Kalamazoo, Michigan — Investigated sediments in Woods Lake, specifically age dating of the sediments using radionuclides.

Bass Lake, Kalamazoo, Michigan — Assisted the Boy Scouts of America in a feasibility study of using an augmentation well to increase lake levels.

Emergency Response

PPG Industries, Inc., Hersey, Michigan — Emergency response for a tanker truck spill.

Federated Insurance Company, Edwardsburg, Michigan — Emergency response for a residential oil spill.

Kalamazoo, Michigan

- Emergency response for a tanker truck rupture onsite.
- Emergency response for fuel release onsite.

Groundwater Supply

City of St. Louis, Michigan — Assisted community in the replacement of contaminated municipal supply wells.

Aggregate Industries, Allegan, Michigan — Evaluated water supply options for supplying a sand and gravel wash plant.

Michigan State University, East Lansing, Michigan — Assisted in the installation of a Type I municipal well.

Kellogg Biological Station, Hickory Corners, Michigan — Assisted in the evaluation of water supply options to manage elevated arsenic levels in the water supply.

PPG Industries, Inc./Kalium Chemicals, Hersey/Evart, Michigan — Participated in the development of a large capacity well used as a source for solution mining of potash. Work activities included well design, installation, and testing. The well has been successfully used for over 14 years.

Goguac Lake Association, Battle Creek, Michigan — Assisted the Goguac Lake Association and the Calhoun County Drain Commissioner in finding a suitable location for the installation of a lake level augmentation well system. Two high capacity wells (greater than 1,000 gpm) were designed, installed, and successfully tested.

Kaiser-Francis Oil Company, Harrison, Clare County, Michigan — Assisted in the development of a water supply system to be used for the secondary recovery in an oil field.

Sun Oil Company, Essexville, Michigan — Assisted in the development of a water supply system to be used for the secondary recovery in an oil field.

City of Battle Creek, Michigan — Assisted the City in assessing capacity related issues at a well field.

City of Kalamazoo, Ross Township, Michigan — Participated in a cooperative effort with the City and Western Michigan University in evaluating well field operation and the possible effects it may have on the surface water hydrology of a portion of Ross Township. Work activities included a 30-day watershed stress test.

Kalium Chemicals, Ltd., Hersey, Michigan — Water supply development.

Village of Pullman, Michigan — Principal hydrogeologist in the evaluation of potential water supply alternatives for the Village, who was confronted with numerous private well systems contaminated with an industrial solvent. Involved the drilling of hydrogeologic test borings and the installation of a test/production well. This work led to the replacement of existing contaminated wells with wells completed in a different aquifer system.

City of McBain, Michigan — Assisted in the development of a new well field including aquifer testing.

City of Albion, Michigan — Assisted in the development of a new water supply system for the City. Work activities included the selection of a suitable well field site, the drilling of observation wells, and the drilling and testing of a test production well.

City of Sturgis, Michigan — Assisted in the evaluation of potential well field locations.

City of Cedar Springs, Michigan — Assisted in the evaluation and development of a new well field site.

City of Cadillac, Michigan — Assisted the City in finding two well field sites.

City of Alma, Michigan — Investigated potential water supply well sites in an area of limited groundwater potential. Installed a Type I municipal water supply well.

Great Spring Waters of America, Big Rapids, Michigan — Participated in the locating and permitting of a Type II water supply well for a water bottling plant.

Village of Baldwin, Michigan — Assisted the Village in developing a new water supply well.

Confidential Client — Assist the land owner with the review of hydrogeological data from a water supply (spring source) providing spring water for bottling.

Confidential Client — Assisted the client with evaluation of a spring water source.

Bass Lake, Kalamzoo, Michigan — Assisted the Boy Scouts of America in a feasibility study of using an augmentation well to increase lake levels.

Village of Bellaire Michigan – Project manager for new well installation

Village of Mesick – Hydrogeologist/manager for the installation of two production wells.

Village of Benzonia – Hydrogeologist/manager for the installation of a production well.

Village of Bear Lake – Hydrogeologist/manager for the installation of a production well.

Village of Northport – Hydrogeologist/manager for the installation of a production well.

Groundwater (Wellhead) Protection

Tri-County Regional Planning Commission/Lansing Board of Water & Light/City of East Lansing, Michigan — Served as project manager for an extensive contaminant source inventory for the tri-county region.

City of Kalamazoo, Michigan

- Assisted the City with the development of a groundwater ordinance and associated performance standards.
- Assisted the City with an extensive contaminant source inventory.

Lawrence Township, Michigan — Provided guidance on wellhead protection questions.

Michigan State University, East Lansing, Michigan — Assisted with the development of MSU's WHPP. Participated in over 20 team meetings and developed a plan to protect a large university water supply system.

City of Niles, Michigan — Assisted the City with developing their WHPP.

Niles Township, Michigan — Assisted the Township with developing their WHPP.

City of Battle Creek, Michigan

- Verona Well Field — Assisted the City with completing a WHPA delineation of a very high capacity/fractured rock well field. Worked with the wellhead protection team to complete their WHPP.
- Columbia Well Field — Assisted the City with completing their WHPA delineation and developing their WHPP.

City of Cedar Springs, Michigan — Assisted in completing a WHPA delineation.

Village of Baldwin, Michigan — Assisted the Village in completing a WHPA delineation.

City of Richmond, Michigan — Assisted the City in completing their WHPP.

City of Marshall, Michigan — Assisted the City in completing their WHPP.

City of Greenville, Michigan — Assisted the City with developing their WHPP.

City of Fremont, Michigan — Assisted the City with completing their WHPA delineation and developing their WHPP.

City of Grand Ledge, Michigan — Assisted the City with the completion of their WHPA delineation and WHPP.

Village of Augusta – Assisting with wellhead protection activities.

City of Cadillac, Michigan — Assisted the City in completing a WHPA delineation and their WHP Plan.

City of Ithaca, Michigan — Assisted the City in completing their WHPP.

Kal Lake Sewer and Water Authority – Assisted in new well field identification, delineation of a WHPA and updating their WHP Plan.

Village of Bellaire – Assisted with the delineation of a WHPA and updating their WHP Plan.

Due Dillegence/Brownfields

Served in a supporting role and provided project management for numerous investigations of commercial, industrial, and recreational properties throughout the State of Michigan

Groundwater Modeling

PPG Industries, Inc., Hersey, Michigan

- Mecosta County — (Numerical) Model of groundwater flux rates aquitard.
- Osceola County — (Numerical) Contaminant transport model.

Gelman Sciences Inc., Ann Arbor, Michigan

- (Numerical) Regional groundwater flow model.
- (Numerical) Groundwater flow model for the core area.
- (Analytical) Honey Creek drainage system.
- (Analytical Transport) Western system area.

Kalamazoo, Michigan — (Analytical) Laundry facility capture zone evaluation.

City of Kalamazoo, Ross Township, Michigan — (Analytical/Numerical) Well field.

Confidential Client — Developed a groundwater flow model of a wastewater disposal site.

Confidential Client — Used numerical groundwater flow model to evaluate capture area for spring water source.

Pall Life Sciences, Ann Arbor, Michigan — Assisted in the development of a groundwater flow model of a large geographic area west of Ann Arbor.

City of Battle Creek, Michigan — Assisted in the update of a groundwater flow model of the Verona Well Field area.

Michigan State University, East Lansing, Michigan — Assisted in using a numerical groundwater flow model of the Tri-County area to revise WHPA delineations of MSU production wells.

Village of Baldwin, Michigan — Assisted in the development of a groundwater flow model for a WHPA delineation.

City of Fremont, Michigan — Assisted in the development of a groundwater flow model for a WHPA delineation.

City of Grand Ledge, Michigan — Assisted in the development of a groundwater flow model for a WHPA delineation.

Numerous Aggregate Clients in Michigan — Modeled the hydrologic impacts lake development for support of several inland lakes and streams permits.

Landfills

City of Evart, Michigan — Landfill.

City of Pinconning, Michigan — Whitefeather Landfill.

Geophysics

Pall/Gelman Sciences Inc., Ann Arbor, Michigan — Borehole geophysics at several sites.

PPG Industries, Inc., Hersey, Michigan

- Borehole geophysics and electrical resistivity studies at several sites in Osceola and Mecosta Counties.
- Electromagnetic survey in Mecosta County.

City of Clare, Michigan — Landfill electrical resistivity study.

Lowell City Services Oil and Gas Company, Lowell, Michigan

- Electromagnetic survey.
- Gas transfer station hydrogeologic investigation.

ARCO Industries, Inc., Schoolcraft, Michigan — Electromagnetic survey.

Other Environmental

France Stone Company, Monroe County, Michigan — Mr. Brode was involved in the hydrogeologic investigation of a proposed limestone quarry. Work activities included

the investigation of local water use, the drilling of observation wells, aquifer testing, predictive modeling, and monitoring system design.

PPG Industries, Inc., Hersey, Michigan — Project geologist in an extensive investigation of the hydrogeology of portions Osceola and Mecosta Counties. This work involved the drilling of numerous deep hydrogeologic test borings to the bedrock surface. The information derived from the investigations was used to develop a regional hydrogeologic model for use in the development of a solution mining facility.

Legal/Expert Witness

Mr. Brode has served as an expert witness in several key lawsuits in the State of Michigan and has over 150 hours of litigation experience in environmental lawsuits. Selected trials and depositions include:

Pall Corporation v. State of Michigan (Deposition, 2000)

Pall Corporation v. State of Michigan, et al. (Deposition, 1999)

Kalamazoo Oil Company v. John Boerman (Trial, 1998)

Eureka Township v. City of Greenville (Trial, 1993)

Gelman Sciences Inc. v. Dow Chemical, et al. (Deposition, 1993)

Dawson v. Gelman Sciences Inc. (Deposition, 1993)

Gelman Sciences Inc. v. Fidelity and Casualty Company of New York (Deposition, 1992)

Redskin Industries v. Gelman Sciences Inc. (Deposition, 1991)

ADP v. Gelman Sciences Inc. (Trial and Deposition, 1991)

Buccha v. Federated Insurance Co. (Trial, 1991)

Scarbrough, et al. v. Gelman Sciences Inc. (Deposition, 1990)

Gelman Sciences Inc. v. Fireman Fund Insurance Co. (Deposition, 1989)

State of Michigan v. Gelman Sciences Inc. (Trial and Deposition, 1989)

John and Ethel Kedo v. Bidwell & Boley, Inc. (Deposition, 2002)

Exhibit 4

HGL
HydroGeoLogic, Inc
Exceeding Expectations

April 4, 2014

Matthew Naud
Environmental Coordinator
City of Ann Arbor
Public Services Area
301 E. Huron Street
P.O. Box 8647
Ann Arbor, MI 48107-8647

RE: Summary of January 31, 2014 Meeting with Pall Life Sciences (PLS) and Professional Opinion Regarding Plume Migration to the North from the Evergreen Area

Dear Mr. Naud:

At the request of the City of Ann Arbor and Tetra Tech, I attended a meeting on January 31, 2014 with the following participants:

- Matthew Naud – Environmental Coordinator, City of Ann Arbor
- Michael Gebhard – Application Specialist, Washtenaw County
- Jennifer Lawson – Water Quality Manager, City of Ann Arbor
- Cresson Slotten – Systems Planning Unit Manager, City of Ann Arbor
- Craig Hupy – Public Services Area Administrator, City of Ann Arbor
- Farsad Fotouhi – PLS
- Jim Brode, CPG – Fleis & Vandenbrink Engineering, Inc., Contractor to PLS
- Patti McCall – Tetra Tech, Contractor to City of Ann Arbor
- Doug Sutton, Ph.D., PE – HydroGeoLogic, Inc. (HGL), Contractor to Tetra Tech

The purpose of the meeting was to exchange information and perspective on the 1,4-dioxane plume in the Evergreen Area so that I could evaluate the potential for that plume to migrate further north from the Evergreen Area and impact additional receptors, including Barton Pond. Discussions at the meeting were primarily focused on identifying the appropriate information for me to review and arranging the transfer of that information from PLS to me.

Subsequent to the meeting I reviewed the following information provided by PLS or obtained from the Michigan Department of Environmental Quality (MDEQ) website:

- Soil boring and well construction logs for the Evergreen Area
- Water quality data from the Evergreen Area
- Cross-sections depicting the geology and water quality of the Evergreen Area
- Historic quarterly reports

Below is a summary of my review and my professional opinion regarding the potential for the 1,4-dioxane plume to migrate from the Evergreen Area to the north.

331 Newman Springs Road, Building 1, 4th Floor, Suite 143, Red Bank, NJ 07701
Phone: (732) 784-2812 Fax: (732) 784-2850
www.hgl.com

Introduction

My general approach to this evaluation is to examine multiple lines of evidence to evaluate what the collection of evidence suggests about the potential for plume migration to the north outside of the Prohibition Zone. The lines of evidence I consider are as follows:

- Geology/stratigraphy underlying the Evergreen Area
- Measured water levels and the interpreted groundwater flow directions
- 1,4-dioxane concentration trends over time
- Horizontal and vertical 1,4-dioxane distribution

Each of these items is discussed separately and then considered in my concluding statement. My analysis considers the current Michigan Department of Environmental Quality (MDEQ) 1,4-dioxane cleanup criterion of 85 µg/L, but I also describe implications if the cleanup criterion were changed to a more typical cumulative excess cancer risk of $1x10^{-5}$.

Geology/Stratigraphy

In a November 2009 letter to Mr. Naud, I summarize the outcome of a previous meeting with PLS, in which I comment on the conceptual site model for groundwater flow and contaminant transport in the Evergreen Area. In this November 2009 letter, I make the following statements:

> Rather, the easterly and southerly flow components in the Evergreen Area D2 aquifer are best explained by low hydraulic conductivity to the north of the Evergreen Area that prevents flow to the north, therefore causing all flow in the Evergreen Area (and some distance north of the Evergreen Area) to leave through a preferential pathway to the east. The Evergreen Area was described as a bowl that had one outlet, which is to the east where the D2 aquifer likely merges with the E aquifer.
>
> Boring logs, as presented by MACTEC, indicate that the confining layer that underlies the D2 aquifer in the Evergreen Area slopes upward to the north. It is possible that the confining layer rises to an elevation that is higher than the water table, thereby preventing flow to the north. That is, the boring logs, as presented, appear to support the conceptual model offered by Dr. Sutton.

Since the 2009 meeting and letter, PLS and its consultants have installed monitoring well clusters MW-129 and MW-130. The soil logs from these two wells installations alone do not provide conclusive proof that contaminant migration cannot occur to the north.

The soil log from MW-129 supports the finding that the top of the confining unit increases to the north, potentially rising above the water table. Recharge in this area to the north would be constrained from migrating north and would result in a southerly groundwater flow component in the interval screened by MW-129s. More specifically, the elevation of the top of the confining unit (using NAVD88 datum) at MW-55 and MW-54d is approximately 805 feet and 815 feet above mean sea level, respectively. By comparison, the elevation of the top of the confining unit at the MW-129 cluster is approximately 825 feet or possibly 842 feet if a thin intervening permeable layer pinches out.

However, there is also a permeable interval screened by MW-129i and MW-129d (from an elevation of 740 feet to approximately 805 feet) that could extend to the north and could allow groundwater flow and contaminant transport to the north if this interval is hydraulically connected to a unit with a lower hydraulic head to the north.

The soil log from MW-130 shows a vertically extensive permeable zone from an elevation of 760 feet to over 870 feet along with other smaller permeable intervals at lower elevations. The soil log from MW-130 therefore shows that permeable aquifer material is present that could allow groundwater flow and contaminant transport to the north if this interval is hydraulically connected to a unit with a lower hydraulic head to the north.

At the meeting, there was mention by PLS that soil logs from residential wells to the north of the Evergreen Area were not of sufficient quality to help identify where these permeable intervals identified in MW-129 and MW-130 pinch out or connect to other permeable units.

Water Levels

Water levels are measured at various depth intervals, and groundwater flows in different directions depending on the depth interval. Using cross-sections A-A', B-B', C-C', and D-D' provided by PLS (see Attachment A), I assign the following depth intervals for interpreting horizontal groundwater flow direction.

- Shallow – 373s, MW-47s, MW-54s, MW-72s, MW-87s, MW-107, MW-120s, MW-121s, MW-123s, MW-129s, MW-130s, MW-KD1s

- Intermediate – MW-54d, MW-55, MW-72d, MW-77, MW-79(s), MW-85, MW-87d, MW-88, MW-92, MW-101, MW-113, MW-121d, MW-122s, MW-129i, MW-129d, MW-130i

- Deep – 373d, MW-79d, MW-100, MW-120d, MW-122d, MW-123d, MW-130d

These intervals for interpreting horizontal groundwater flow are different than those used by PLS, but I suggest that using these three intervals (instead of the two intervals used by PLS) allows for more thorough consideration of vertical variation in water levels. In addition, the water levels from one interval can be compared with an underlying or overlying interval to determine if the intervals are likely to be hydraulically connected. Similar water levels in the same location but at different depth intervals suggests a likely hydraulic connection between these intervals whereas significantly different water levels at the same location suggests the two intervals are likely hydraulically separated.

Maps posting these water levels are included as Attachment B and illustrate the following:

- The shallow interval shows no potential for northerly contaminant migration from the MW-133 cluster to the MW-120 cluster. Further to the east, there is not enough information to evaluate the potential for northerly groundwater flow.

- The intermediate interval shows generally converging flow from above (i.e., higher elevations) and from the south, west, and north toward MW-54d, MW-55, and MW-122s. Groundwater flow then continues from these wells to the east toward LB-1. There is no permeable zone in the intermediate interval in the vicinity of the MW-120 cluster; however, both the shallow and deep intervals at MW-120 have water levels that, if posted to the intermediate interval in this location, would suggest groundwater flow is not to the north in this area. There is insufficient information to evaluate groundwater flow to the north in the area east of MW-120.

- The deep interval also generally suggests flow to the north is unlikely. There is an absence of data to the west in the vicinity of the MW-54 cluster because bedrock (instead of a permeable zone) is present at the corresponding depth. One potential area for northerly flow is in the vicinity of the MW-123 cluster, which is a low point between the MW-120 cluster and the MW-130 cluster. Absent additional information to the north or northeast of MW-123, groundwater flow could be interpreted as potentially converging to this location and continuing to flow to the north.

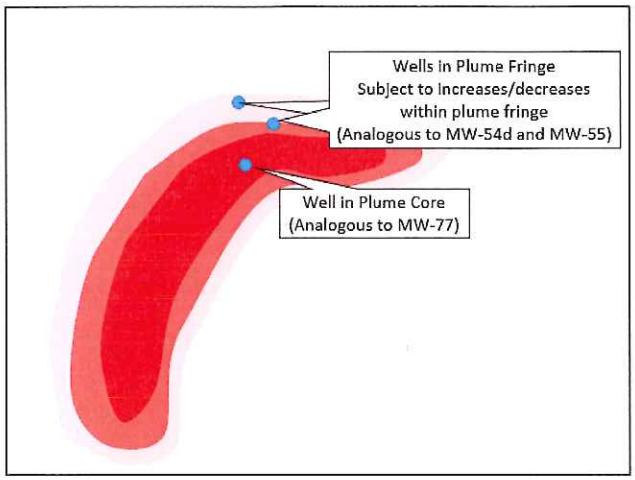
Although horizontal anisotropy of hydraulic conductivity is observed at the regional scale that causes groundwater and contamination to flow in a more easterly direction than predicted by regional hydraulic gradients, I believe that on the local scale of the Evergreen Area hydraulic conductivity is more isotropic in nature. Therefore, I believe that the hydraulic gradients interpreted at the scale of the Evergreen Area are generally representative of groundwater flow direction.

1,4-Dioxane Concentration Trends

A review of concentration trends in 38 wells in the Evergreen Area or east of the Evergreen Area shows 14 of those wells within increasing 1,4-dioxane concentrations over time. The concentration increases at MW-54d, MW-55, MW-77, and MW-122s are likely the drivers for concern about the potential for northerly contaminant transport from the Evergreen Area because the next set of wells to the north are at the boundary of the Prohibition Zone. The other nine wells with concentration increases (MWKD1s, MW-113, LB-1, MW-100, MW-81, MW-91, MW-104, MW-BE1s, MW-BE1d, and MW-107) are located east of the above-noted wells, and concentration increases in these wells supports a conceptual model in which contamination is migrating to the east.

The concentration increases at MW-54d, MW-55, MW-77, and MW-122s are consistent with groundwater flow converging to this zone from various directions, including from the south and southwest where the main plume is located. The low level increases at MW-54d, MW-55, and MW-122s relative to MW-77 suggest that MW-77 is within the plume core that is migrating to the east toward LB-1 and that dispersed contamination associated with that plume core is causing the concentration increases at MW-54d, MW-55, and MW-122s. As the plume core migrates through MW-77 and 1,4-dioxane concentrations increase, lower level concentration increases will also be observed at MW-54d, MW-55, and MW-122s. This potential conceptual model is illustrated schematically in the figure on the following page. More rigorous analysis and data would be needed to confirm this potential concept as the cause of the concentration increases at MW-54d, MW-55, and MW-122s. Some changes due to regional water levels and remedy pumping may also play a role in concentration trends, such as the decreasing concentration at MW-122s between 2008 and 2010 followed by an increasing trend at the same well between 2010 and 2013.

Schematic of Potential Conceptual Model for Low-Level Concentration Increases at MW-54d and MW-55.



Three wells along the northern boundary of the Prohibition Zone (MW-120s, MW-123s, MW-121d) had a single 1,4-dioxane detection above the reporting limit during February 2012. The detections ranged from 2 µg/L to 7 µg/L. The cause of these detections is unclear. Sampling results are reported at a reporting limit of 1 µg/L. It is also unclear if 1,4-dioxane is present more routinely in these locations below 1 µg/L.

Horizontal and Vertical 1,4-Dioxane Distribution

The distribution of the 1,4-dioxane plume is highly controlled by the variation in permeability shown on the cross-sections. This variation in permeability results in a tortuous path of 1,4-dioxane transport. Although the entire 1,4-dioxane plume within the Prohibition Zone is over 500 acres, certain areas of the plume are highly concentrated and relatively narrow. Vertically, 1,4-dioxane concentrations can change significantly over a distance of less than 20 feet. Horizontally, the Evergreen Area plume that is over 500 µg/L is depicted by PLS in the vicinity of Pinewood Avenue as less than 300 feet wide. In the vicinity of MW-77, the east to west width of the 1,4-dioxane contamination that is over 500 µg/L is depicted as less than 1,000 feet. The demonstrated tortuous path of the 1,4-dioxane, the narrow vertical intervals of high contamination, and the narrow horizontal widths of contamination make it difficult to definitely delineate the plume, particularly if monitoring wells have short screen intervals and are spaced more than 1,000 feet apart in areas of concern (such as between the MW-129 cluster and the MW-120 cluster).

Conclusion

The above converging lines of evidence generally show that advective transport of 1,4-dioxane outside of the Prohibition Zone to the north above 85 µg/L is unlikely in the vicinity of MW-129 and MW-120. Although permeable intervals are present in these locations on the boring logs, the water levels in these and other wells do not suggest flow to the north. However, groundwater flow and contaminant transport to the north might be occurring east of MW-120.

The 1,4-dioxane concentration increases at MW-54d, MW-55, MW-77, and MW-122s might suggest the potential for northerly migration, but could also be explained by a conceptual model in which contamination primarily migrates to the east. The heterogeneity of the subsurface and the tortuous path followed by the 1,4-dioxane makes definitive delineation difficult. More extensive modeling of plume behavior in this area and additional sampling would be needed to predict the future northern extent and magnitude of 1,4-dioxane.

In general, I find it highly unlikely that contamination from the Evergreen Area is migrating to Barton Pond. However, I cannot definitively demonstrate that contamination above the standard of 85 µg/L will not migrate out of the Prohibition Zone to the north, particularly in the area east of the MW-120 cluster. My understanding is that there are residential wells in this area. Further information about groundwater flow and contaminant transport in this area is merited. One or two monitoring well clusters to the east of MW-120 would be helpful in evaluating the direction of groundwater flow and contaminant transport east of MW-120. In addition, improvements could likely be made in interpreting water levels and groundwater flow directions that may lead to a better understanding of contaminant transport in this area.

Implications of a Change in the 1,4-Dioxane Cleanup Standard

EPA recently updated the Regional Screening Levels (RSLs) in November 2013. These updates can be found at the following web address:

http://www.epa.gov/reg3hwmd/risk/human/rb-concentration_table/Generic_Tables/docs/master_sl_table_01run_NOV2013.pdf

These RSLs indicate that a 1,4-dioxane concentration of 0.67 µg/L in tap water translates to a $1x10^{-6}$ cumulative excess cancer risk. Using this information and a target excess cancer risk of $1x10^{-5}$ consistent with other MDEQ cleanup criteria, the 1,4-dioxane cleanup criterion would be approximately 6.7 µg/L. The current cleanup criterion of 85 µg/L would be higher than a $1x10^{-4}$ excess risk.

Given the use of groundwater in the area for drinking water, the implications of a cleanup criteria of approximately 6.7 µg/L should be considered further for plume characterization and management. A cleanup criterion of 6.7 µg/L is more than 12 times lower than the current cleanup criterion. Exceedances of the 6.7 µg/L criterion outside of the Prohibition Zone to the north is therefore much more likely than exceedances of the 85 µg/L criterion in the same area. In addition, low-level detections at the Prohibition Zone boundary monitoring wells (e.g., 2 µg/L at MW-120) would provide ample time to develop and implement a plan before concentrations

exceed 85 µg/L. By contrast, these same detections at Prohibition Zone boundary monitoring wells (which have already occurred on a sporadic basis) could suggest that an exceedance of 6.7 µg/L is imminent.

If the cleanup criterion is lowered to a value close to 6.7 µg/L or if stakeholders are interested in maintaining the standard level of protectiveness from groundwater contamination adopted elsewhere in Michigan, one or both of the following would be advisable.

1. Revise or update the analytical method to allow for lower levels of detection and to provide for earlier notice of potential target risk exceedances. Modified Method 8270 with selective ion monitoring can achieve a detection limit of 0.075 µg/L and a reporting limit of 0.15 µg/L. This reporting limit is more than 40 times lower than 6.7 µg/L and would provide additional time to detect 1,4-dioxane and evaluate concentration trends before the 6.7 µg/L is reached at the Prohibition Zone boundary. For comparison, the current reporting limit of 1 µg/L is 85 times lower than the current cleanup criterion of 85 µg/L.

2. Install monitoring wells approximately midway between the area of MW-54, MW55, MW-122s and the Prohibition Zone boundary. Monitoring concentration trends at these locations would help determine if contamination is approaching the Prohibition Zone boundary and the amount of time that might elapse before a specific concentration is exceeded at that Prohibition Zone boundary absent additional remedial action.

3. Space monitoring wells at and near the Prohibition Zone boundary no more than 500 ft apart perpendicular to the direction of expected contaminant migration. This spacing would help detect relatively narrow contaminant flow paths that might be controlled by groundwater flow through localized variations in hydraulic conductivity as observed elsewhere at the site.

Thank you for the opportunity to review the data from this complex site. Please feel free to contact me (732-784-2812 or dsutton@hgl.com) to discuss this interpretation further.

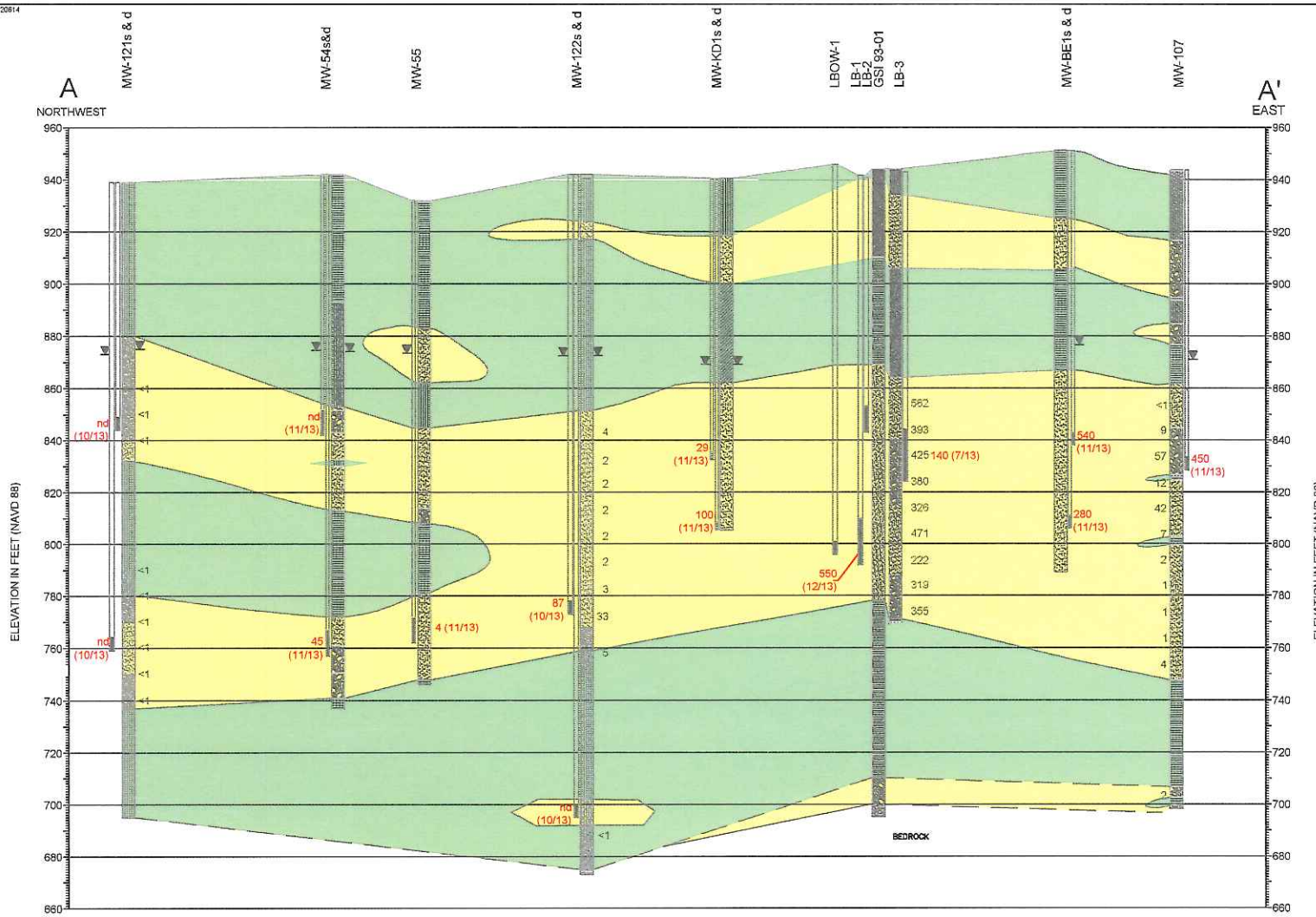
Sincerely,

Douglas J. Sutton, Ph.D., PE, LEED AP

ATTACHMENT A

CROSS-SECTIONS

2014 Evergreen Cross Sections / amberp 020614



0 400 800
SCALE IN FEET
VERTICAL EXAGGERATION = 10X

LEGEND

67 - VERTICAL SAMPLE AND 1,4-DIOXANE CONCENTRATION µ/L (Samples Collected During Installation Unless Noted)

130 - 1,4-DIOXANE CONCENTRATION (µ/L) AND COLLECTION DATE (Samples Collected From Well)

SAND GRAVEL SHALE CLAY SILT DIAMICTON

WELL
WATER LEVEL ELEVATION
SCREENED INTERVAL

NOTES:
-MOST RECENT WATER QUALITY DATA WAS USED.
-THE CORRELATIONS SHOWN ARE BASED ON PROFESSIONAL JUDGEMENT. OTHER INTERPRETATIONS ARE POSSIBLE AND SHOULD BE CONSIDERED.

FLEIS & VANDENBRINK ENGINEERING, INC.

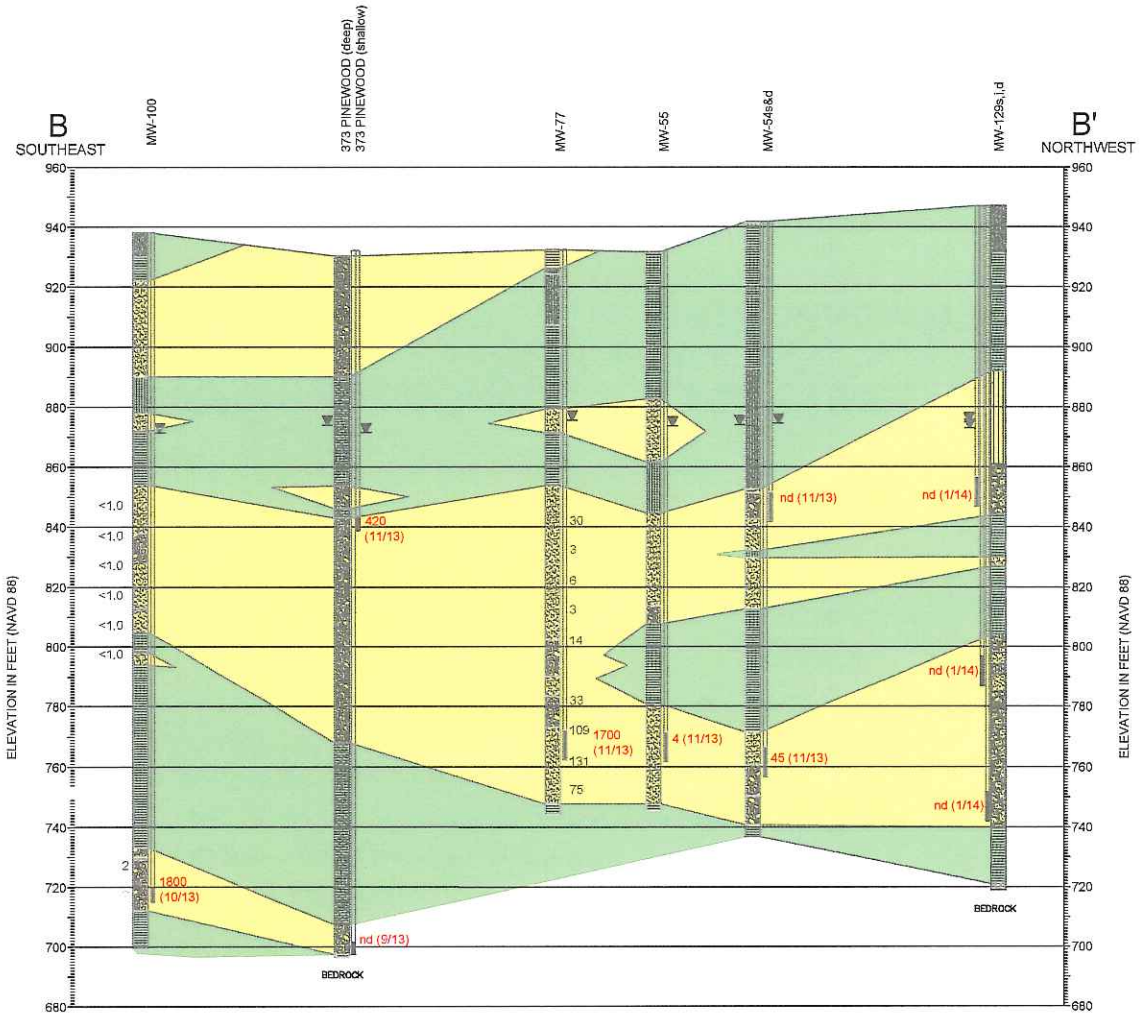
PALL LIFE SCIENCES
WASHTENAW COUNTY, MI

Hard copy is intended to be 11"x17" when plotted.

EVERGREEN AREA
CROSS SECTION A-A'

2014 808500

2014 Evergreen Cross Sections / amberp 020714



LEGEND

67 - VERTICAL SAMPLE AND 1,4-DIOXANE CONCENTRATION µ/L (Samples Collected During Installation Unless Noted)

130 - 1,4-DIOXANE CONCENTRATION (µ/L) AND COLLECTION DATE (Samples Collected From Well)

WELL

WATER LEVEL ELEVATION

SCREENED INTERVAL

SAND GRAVEL SHALE CLAY SILT DIAMICTON

0 400 800

SCALE IN FEET

VERTICAL EXAGGERATION = 10X

NOTES:
-MOST RECENT WATER QUALITY DATA WAS USED.
-THE CORRELATIONS SHOWN ARE BASED ON PROFESSIONAL JUDGEMENT. OTHER INTERPRETATIONS ARE POSSIBLE AND SHOULD BE CONSIDERED.

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PALL LIFE SCIENCES
WASHTENAW COUNTY, MI

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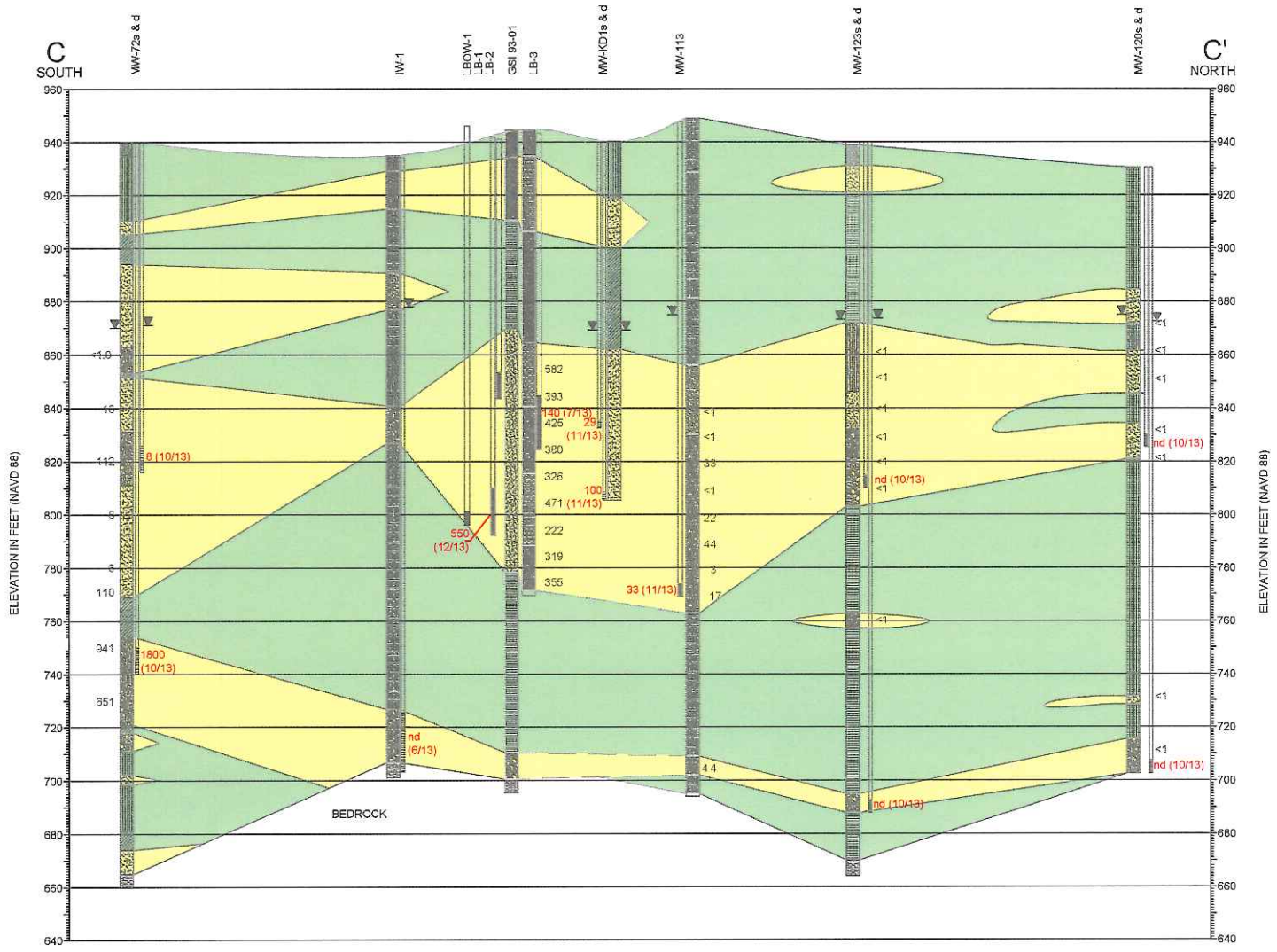
EVERGREEN AREA
CROSS SECTION B-B'

2014 806500

2014 Evergreen Cross Sections / amberp 020714



LEGEND

67 - VERTICAL SAMPLE AND 1,4-DIOXANE CONCENTRATION µ/L (Samples Collected During Installation Unless Noted)

130 - 1,4-DIOXANE CONCENTRATION (µ/L) AND COLLECTION DATE (Samples Collected From Well)

WELL

WATER LEVEL ELEVATION

SCREENED INTERVAL

SAND GRAVEL SHALE CLAY SILT DIAMICTON

0 400 800

SCALE IN FEET

VERTICAL EXAGGERATION = 10X

NOTES:
-MOST RECENT WATER QUALITY DATA WAS USED.
-THE CORRELATIONS SHOWN ARE BASED ON PROFESSIONAL JUDGEMENT. OTHER INTERPRETATIONS ARE POSSIBLE AND SHOULD BE CONSIDERED.

PALL LIFE SCIENCES
WASHTENAW COUNTY, MI

Hard copy is intended to be 11"x17" when plotted.

EVERGREEN AREA
CROSS SECTION C-C'

2014 806500

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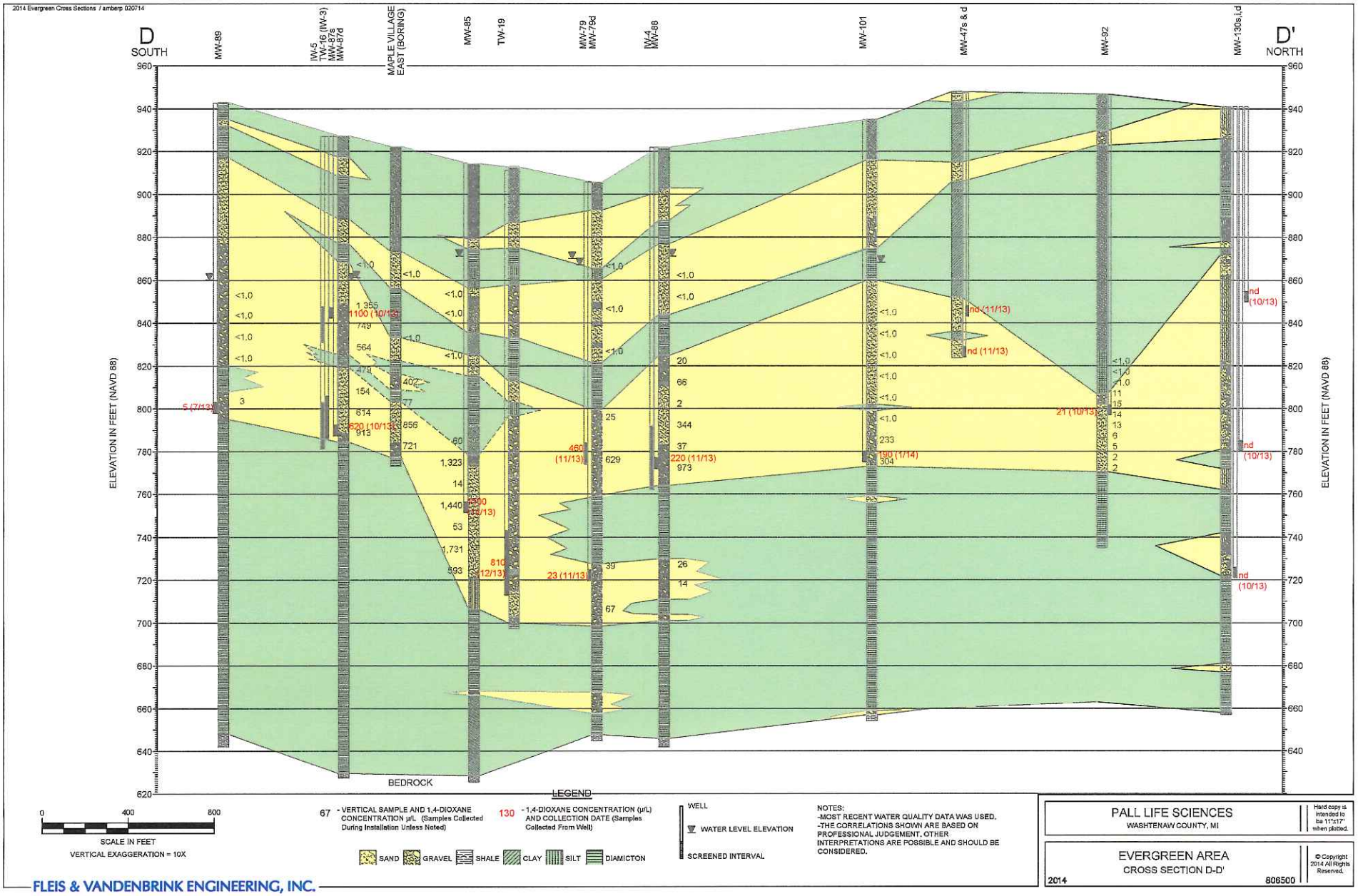
2014 Evergreen Cross Sections / amberp 020714
D
SOUTH
D'
NORTH
MW-89
IW-5
TW-16 (IW-3)
MW-87s
MW-87d
MAPLE VILLAGE EAST (BORING)
MW-85
TW-19
MW-79
MW-79d
IW-4
MW-88
MW-101
MW-47s & d
MW-92
MW-130s,i,d
ELEVATION IN FEET (NAVD 88)
960
940
920
900
880
860
840
820
800
780
760
740
720
700
680
660
640
620
BEDROCK
LEGEND
0
400
800
SCALE IN FEET
VERTICAL EXAGGERATION = 10X
67 - VERTICAL SAMPLE AND 1,4-DIOXANE CONCENTRATION µ/L (Samples Collected During Installation Unless Noted)
130 - 1,4-DIOXANE CONCENTRATION (µ/L) AND COLLECTION DATE (Samples Collected From Well)
WELL
WATER LEVEL ELEVATION
SCREENED INTERVAL
SAND
GRAVEL
SHALE
CLAY
SILT
DIAMICTON
NOTES:
-MOST RECENT WATER QUALITY DATA WAS USED.
-THE CORRELATIONS SHOWN ARE BASED ON PROFESSIONAL JUDGEMENT. OTHER INTERPRETATIONS ARE POSSIBLE AND SHOULD BE CONSIDERED.
PALL LIFE SCIENCES
WASHTENAW COUNTY, MI
Hard copy is intended to be 11"x17" when plotted.
EVERGREEN AREA
CROSS SECTION D-D'
2014
806500
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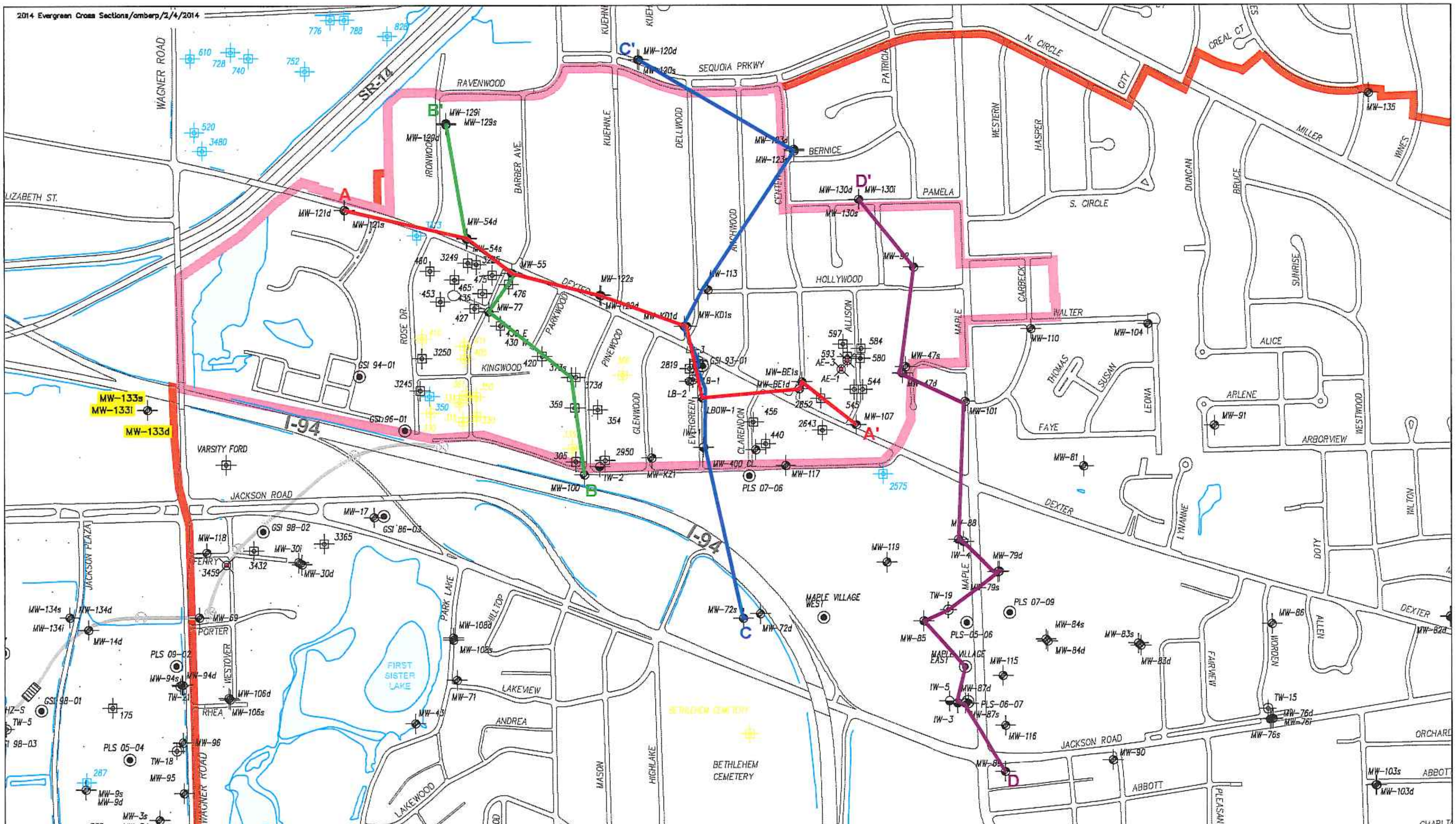
FLEIS & VANDENBRINK ENGINEERING, INC.



LEGEND

- MONITOR WELL
- RESIDENTIAL WELL (Active/Non-Active)
- PURGE WELL
- TEMPORARY PURGE WELL
- SOIL BORING
- PROHIBITION ZONE BOUNDARY
- EVERGREEN AREA
- MW-133 -COMPLIANCE MONITOR WELL

NORTH

0 600 1,200
SCALE IN FEET

FLEIS & VANDENBRINK ENGINEERING, INC.

PALL LIFE SCIENCES
WASHTENAW COUNTY, MI

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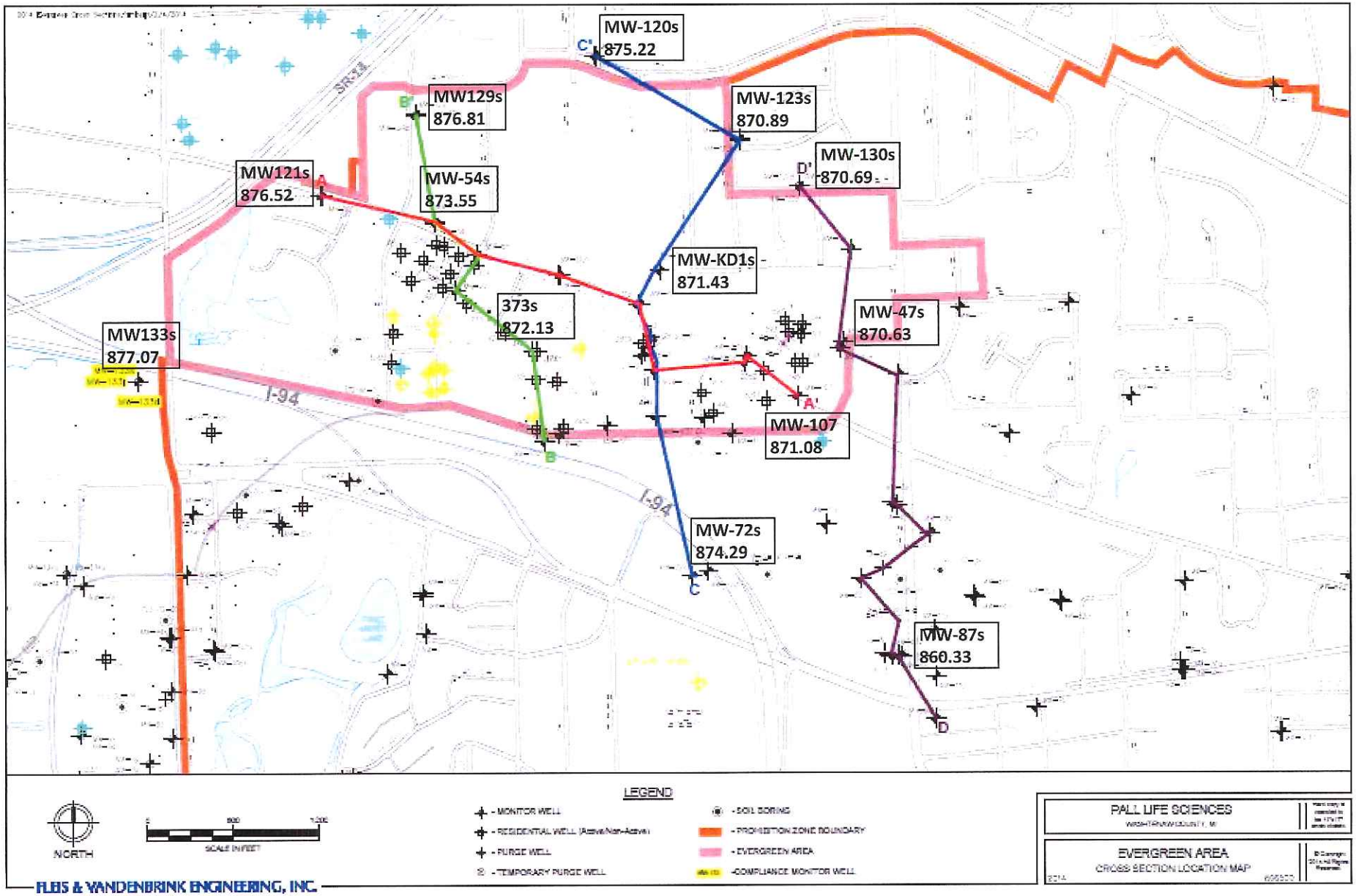
EVERGREEN AREA
CROSS SECTION LOCATION MAP

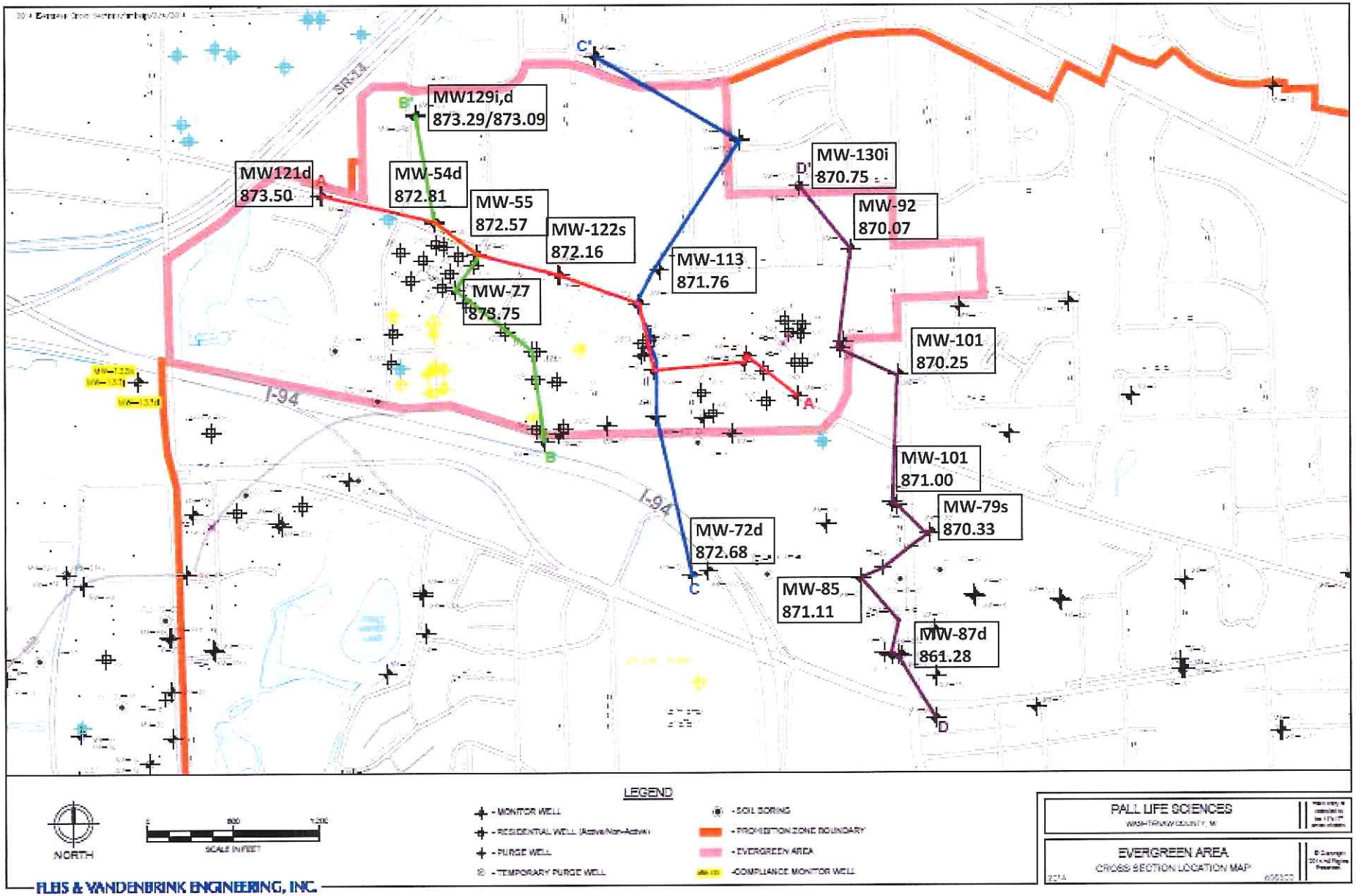
2014 806500

ATTACHMENT B

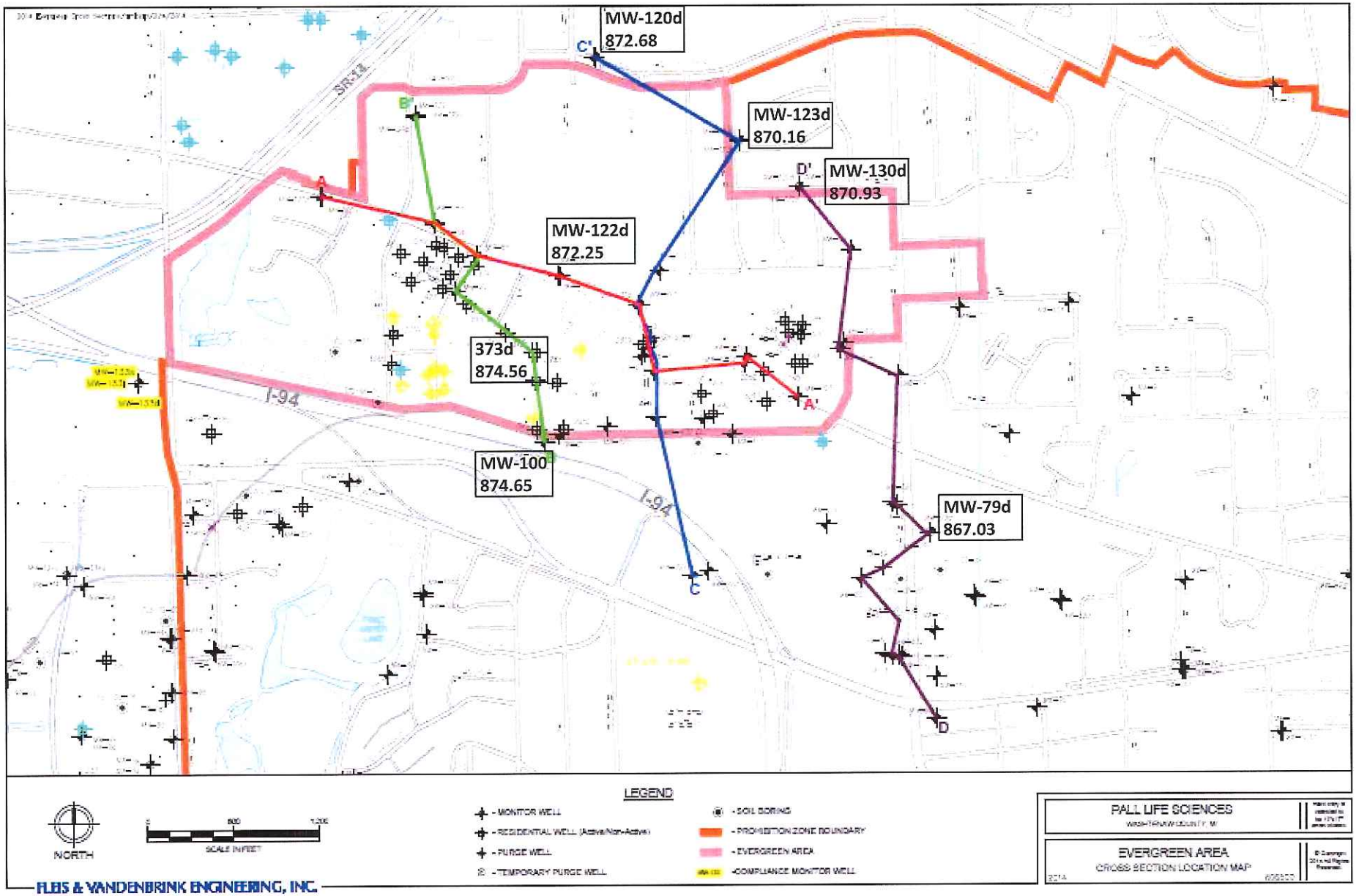
POSTED WATER LEVELS



Posted Water Levels for Interpreted Shallow Zone
(September 2013 Data and Base Map Provided by PLS)



Posted Water Levels for Interpreted Intermediate Zone (September 2013 Data and Base Map Provided by PLS)



Posted Water Levels for Interpreted Deep Zone
(September 2013 Data and Base Map Provided by PLS)

Exhibit 5

1999 WL 33441255
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Clarence SMITH, Betty Smith, Clayton E. Hobson, Daphna Hobson, Clayton S. Hobson, Niana V. Hobson, Marcel Feyers and Tawas Lake Improvement Association, Plaintiffs-Appellees,
and
TAWAS LAKE PRESERVATION SOCIETY, Wally Stopczynski, Jacki Reinke, Doug Reinke, Delores Czerneawski and Peter Czerniawski, Intervenors-Appellants,
v.
IOSCO COUNTY BOARD OF COMMISSIONERS, Defendant-Appellee.

No. 209634.
|
June 18, 1999.

Before: NEFF, P.J., and HOOD and MURPHY, JJ.

Opinion

PER CURIAM.

***1** Plaintiffs filed a complaint seeking to have defendant take necessary steps to provide for and maintain the water level of Lake Tawas at a level established by a 1959 court order. After a feasibility study determined that the construction of a dam was a viable option, a proposed judgment was filed with the court. Before the judgment was entered, appellants filed a motion to intervene in an effort to oppose the construction of the dam and, the corresponding special tax assessment. Appellants' motion was denied, and judgment in the underlying action was subsequently entered. Appellants appeal the denial of their motion as of right, and we affirm.

The trial court had discretion to decide whether to grant appellants' motion to intervene. *Precision Pipe & Supply, Inc v. Meram Construction, Inc,* 195 Mich.App 153, 156; 489 NW2d 166 (1992). We review for an abuse of that discretion. *Id.* at 156-157.

Although appellants' motion fails to set forth the subrules under which they moved, it appears that they moved for intervention as of right pursuant to MCR 2.209(A)(3), and, in the alternative, for permissive intervention pursuant to MCR 2.209(B)(2). MCR 2.209(A) governs intervention by right, and the relevant subsection provides:

On timely application a person has a right to intervene in an action:

(3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The court rule "should be liberally construed to allow intervention when the applicant's interest may otherwise be inadequately represented." *Id.* However, the court rule also requires that the application to intervene be timely and that the applicant's rights or interests be effected by the disposition of the underlying action. All of the elements must be met before an applicant qualifies to intervene as of right. See *Karrip v. Twp of Cannon,* 115 Mich.App 726, 731; 321 NW2d 690 (1982) (interpreting GCR 1963, 209.1, the predecessor to MCR 2.209(A)).

MCR 2.209(B) governs permissive intervention and the relevant subsection provides:

On timely application a person may intervene in an action

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

Timeliness is a requirement of both of the intervention subrules. A right to intervene should be asserted within a reasonable time, and laches or an unreasonable delay are proper reasons to deny intervention. *Karrip, supra* at 731. In other words, one asserting a right to intervene "must be diligent, and any unreasonable delay after knowledge of an action will justify denial of intervention where no

satisfactory excuse is shown for the delay." *Prudential Ins Co of America v. Oak Park School Dist,* 142 Mich.App 430, 434; 370 NW2d 20 (1985).

***2** There are several factors to consider when determining if an application to intervene is timely. See *Bradley v. Milliken,* 828 F.2d 1186, 1191 (CA 6, 1987)[1], where the court stated:

Timeliness should be evaluated in the context of all relevant circumstances, such as the purpose of the motion to intervene, the length of time the applicant for intervention should have known of his interest in the case, whether the original parties would be prejudiced by further delays, whether there are any unusual circumstances which would bear on granting or denying the motion and to what stage the lawsuit has progressed.

In this case, appellants claim that they satisfied the diligence requirement and did not unreasonably delay where they filed the motion to intervene shortly after they learned the outcome of the feasibility study, which was conducted pursuant to a 1995 stipulation between the parties. We disagree.

The underlying action was filed in November of 1994. Subsequently, the case proceeded with motions being made and a scheduling order being entered. Apparently, the parties conducted some discovery and began settlement negotiations. In December 1995, a stipulation was signed by the parties and entered. It provided that mediation was adjourned and that all other proceedings were to be adjourned "to allow the parties to continue their ongoing settlement negotiations in good faith in an attempt to resolve this suit." The stipulation also provided that the parties were to have an engineering study conducted for the purpose of determining the feasibility of maintaining the lake at the amount previously ordered by the court in 1959, and more significantly, it stated:

Upon completion and submittal of the engineering study, the parties will determine if the engineering study provides a feasible means in which to establish the normal lake level as ordered by the 1959 Circuit Court for the County of Iosco.

If a feasible means by which to establish the lake level exists, Defendant will proceed with the necessary steps to maintain the Tawas Lake level at 582.0 feet above sea level. All necessary expense to maintain the Tawas Lake level at 582.0 feet above sea level, shall be special assessed through the Special Assessment District currently in existence.

There was no question at the hearing on the motion to intervene that appellants were aware of the lawsuit and were aware that a feasibility study was being conducted. Presumably they were also aware of the stipulation pursuant to which the study was conducted. They did not, however, move to intervene during this time.

In May 1997, the feasibility study was completed. It concluded that construction of a lake level control structure would be feasible to keep the lake level at the amount ordered in 1959. On June 11, 1997, a public hearing on the matter was held before the county board of commissioners, a fact that is not contested by appellants.[2] On October 29, 1997, plaintiffs filed a notice of hearing for entry of judgment. On November 18, 1997 a proposed judgment was filed by plaintiffs, which was objected to by defendants on November 21, 1997. On November 21, 1997, appellants' counsel finally filed an appearance and finally moved to intervene.

***3** The trial court did not abuse its discretion in determining that appellants' motion to intervene was untimely. The length of time was unreasonable and the reason for delay is disingenuous. Appellants claim that they had to wait for the completion of the feasibility study and could not know whether intervention was necessary until that time. When the parties entered their stipulation in 1995, they clearly indicated that, during the adjournment, they intended to continue settlement negotiations in an attempt to resolve the suit. Thus, the suit could have settled prior to the completion of the study and therefore, appellants' excuse does not weigh in favor of allowing intervention. Moreover, even if we assume that it was reasonable for appellants to wait until the feasibility study was complete, it was complete and subject to a public hearing by June of 1997, yet appellants took no action until more than five months later, on November 21, 1997, after a hearing for entry of judgment was noticed. At best, the delay was still more than five months, but we believe that appellants had an obligation to intervene several years earlier, i.e. as soon as they knew of the pending suit, or at the very least, when they learned of the

stipulation and feasibility study, which was a product of the stipulation. Both the pending suit and the stipulation had a direct effect on appellants' rights.

We also note that at the time the motion to intervene was filed, there was virtually nothing more to be done, except to have the judgment entered pursuant to the terms of the stipulation. Although it undoubtedly took time to organize the Tawas Lake Preservation Society, any of the organizers could have tried to intervene immediately and put the court and the parties on notice that they were attempting to organize a more formal entity for the purpose of opposing the relief sought by plaintiffs. They did not. The suit had clearly progressed to a point where it was untimely for appellants to be granted the right to intervene.

Moreover, intervention at this late stage does prejudice to the parties. Further litigation would cause additional expenses for plaintiffs and for the county and its taxpayers, especially because appellants have requested discovery. Further, various public meetings and hearings were already held to gather input from the citizens, including appellants; experts already examined the issues and reached conclusions; and the parties to the underlying litigation already settled the matter per the December 1995 stipulation. Intervention will result in reopening settled issues and duplicating efforts already made, which in turn will result in more cost and a delay in the relief sought by plaintiffs in November 1994.

Although we agree that refusing to allow intervention does prejudice appellants to some degree, we find that it was not an abuse of discretion to fail to tip the scales in appellants' favor based on this factor alone. Appellants had ample opportunity to challenge this suit prior to November 1997. Any prejudice now suffered by appellants is a result of their tardy actions. We also note that the claimed environmental interests of appellants will be adequately protected because the construction of a dam may only be accomplished if a valid permit is issued in accordance with M.C.L. § 324.31507 *et seq.;* MSA 13A.31507 *et seq.,* regardless of the judgment in the underlying suit. Further, the law provides specific procedures that must be followed before defendant may assess additional taxes for the purpose of maintaining the lake level. MCL 324.30701 *et seq.;* MSA 13A.30701 *et seq.* These procedures adequately protect appellants with regard to additional taxation.

***4** Although appellants are correct in noting that their interests were probably not adequately represented by the parties, this factors alone, without the making of a timely application, does not warrant a finding that the trial court abused its discretion. *Karrip, supra* at 731. The motion to intervene, either permissibly or as of right, was properly denied.

In making our ruling, we also address appellants' argument that the trial court erred by failing to allow them to submit affidavits at the motion hearing. Whether to admit evidence is within the discretion of the trial court. *Chmielewski v. Xermac, Inc,* 457 Mich. 593, 614; 580 NW2d 817 (1998). At the hearing, plaintiffs opposed the admission of the affidavits, claiming that they had not been given proper notice. Even though the trial court previously had indicated that appellants could submit affidavits at the hearing, MCR 2.116(G)(1) requires that affidavits such as those offered must be submitted at least twenty-one days prior to the motion hearing. The affidavits were not properly submitted. Moreover, even though the court did not admit the affidavits, it was clear from the record that the court recognized and considered the information contained in the affidavits.

Affirmed.

All Citations

Not Reported in N.W.2d, 1999 WL 33441255

Footnotes

1 Because MCR 2.209 is similar to FRCP 24, it is proper to look to the federal courts for guidance. *D'Agostini v. City of Roseville,* 396 Mich. 185, 188; 240 NW2d 252 (1976).

2 Apparently there were approximately five different hearings on the matter throughout the time that the suit was pending.

End of Document

Exhibit 6

52 F.3d 326
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee;
Citizens United, Proposed Intervenor-Appellant,
v.
BASF-INMONT CORPORATION; Chrysler Corporation; Ford Motor Company; General Motors Corporation; Sea Ray Boats, Incorporated; Reichhold Chemicals, Incorporated; the Sherwin-Williams Company; Grow Group, Incorporated; Mayco Plastics, Incorporated; Met-L-Aid, Incorporated; Allied-Signal, Incorporated; Hoover Universal, Incorporated; Mercury Paint Company; Lapeer Metal Products Company; Foamseal, Incorporated; BFI of North Metro, Incorporated; Richfield Disposal, Incorporated; and Olsonite Corporation, Defendants-Appellees;
Bundy Corporation, et al., Defendants.

No. 93-1807.
|
April 18, 1995.

On Appeal from the United States District Court for the Eastern District of Michigan, No. 91-40320; Stewart A. Newblatt, District Judge.

E.D.Mich., 819 F.Supp. 601

AFFIRMED.

Before: KEITH, NORRIS, and BATCHELDER, Circuit Judges.

Opinion

PER CURIAM.

***1** Citizens Union appeals the district court's denial of its motion to intervene and seeks review of the district court's entry of a consent decree in this CERCLA action. *See United States v. BASF-Inmont Corp.*, 819 F.Supp. 601 (E.D.Mich.1993). For the reasons stated below, we affirm the denial of the motion to intervene and therefore do not address the entry of the consent decree.

I.

On July 12, 1991, the United States filed this action for injunctive relief pursuant to § 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(a), as amended by the Superfund Amendments and Reauthorization Act of 1986 (CERCLA). Days later, the United States lodged with the district court a proposed consent decree under § 122 of CERCLA, 42 U.S.C. § 9622, to which the United States and the settling defendants had agreed.

In compliance with §§ 117 and 122(i) of CERCLA, 42 U.S.C. §§ 9617 and 9622(i), and 28 C.F.R. § 50.7, the United States published in the Federal Register a notice of the proposed consent decree and a period of public comment to last thirty days. *See* 56 Fed.Reg. 36845 (Aug. 1, 1991). Due to requests by commenters, the United States extended the comment period by thirty days. *See* 56 Fed.Reg. 42756 (Aug. 29, 1991). Citizens United (CU) is a non-profit Michigan corporation consisting primarily of residents in the vicinity of the Metamora Landfill, the site which is the subject of the proposed decree. On September 26, 1991, CU filed extensive comments expressing opposition to the proposed consent decree.

On March 13, 1992, the EPA responded to the comments submitted by CU and other concerned persons. After reviewing the comments and responses, the United States moved the district court for entry of the decree on March 17, 1992. On the same day, the settling defendants also moved for entry of the decree.

On April 9, 1992, the district court held a status conference. The district court decided not to hold a public hearing on the issue of whether to enter the proposed decree. The district court's reasons for this decision included the sixty-day opportunity for public comment and the absence of motions to intervene.

On August 12, 1992, CU filed its motion to intervene. In an order entered March 24, 1993, the district court

denied CU's motion to intervene as untimely and granted the parties' motion for approval of the consent decree. In doing so, the district court considered and rejected CU's principal substantive objections to the decree. On June 30, 1993, the district court denied as untimely CU's motion to intervene for the appeal. This appeal followed.

II.

Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that, in a civil case, the notice of appeal must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from, "but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed *by any party* within 60 days after such entry." Fed.R.App.P. 4(a)(1) (emphasis added).

***2** In a motion to this court, the settling defendants claimed that CU's notice of appeal, filed approximately fifty days [1] after entry of judgment, was untimely. The settling defendants argued that CU, as a proposed intervenor, is not a "party" within the meaning of Rule 4(a)(1). Therefore, the settling defendants argued, the applicable limitation for time to appeal is the 30-day period.

A panel of this court properly denied the motion. Courts apply the 60-day limitation to any case in which the United States or its agency or officer is a party, without regard to the appealing entity's status as a proposed intervenor. *See, e.g., Valley Ranch Dev. Co. v. FDIC,* 960 F.2d 550, 556 (5th Cir.1992); *Mt. Graham Red Squirrel v. Madigan,* 954 F.2d 1441, 1462-63 (9th Cir.1992); *Diaz v. Trust Territory of the Pacific Islands,* 876 F.2d 1401, 1404-05 (9th Cir.1989); *Hodgson v. United Mine Workers,* 473 F.2d 118, 123 (D.C.Cir.1972). Courts that have confronted the particular argument advanced by the settling defendants have rejected it. *See, e.g., Thurman v. FDIC,* 889 F.2d 1441, 1447-48 (5th Cir.1989); *Boggs v. Dravo Corp.,* 532 F.2d 897, 899-900 (3d Cir.1976) (former version of Rule 4(a)(1)); *see also United Steelworkers v. Jones & Lamson Mach. Co.,* 854 F.2d 629, 630 (2d Cir.1988). CU's appeal was therefore timely.

III.

For intervention as of right [2] to be proper, the application for intervention must be timely. *See* Fed.R.Civ.P. 24(a); *NAACP v. New York,* 413 U.S. 345, 365 (1973); *Grubbs v. Norris,* 870 F.2d 343, 345 (6th Cir.1989); *Triax Co. v. TRW, Inc.,* 724 F.2d 1224, 1227 (6th Cir.1984). [3] In determining whether a motion to intervene is timely, a court must consider

(1) the point to which the suit has progressed;

(2) the purpose for which intervention is sought;

(3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case;

(4) the prejudice to the original parties due to the proposed intervenor's failure, after he knew or reasonably should have known of his interest in the case, to apply promptly for intervention; and

(5) the existence of unusual circumstances.

Bradley v. Milliken, 828 F.2d 1186, 1191 (6th Cir.1987); *Stotts v. Memphis Fire Dept.,* 679 F.2d 579, 582 (6th Cir.), *cert. denied sub nom. Orders v. Stotts,* 459 U.S. 969 (1982); *Michigan Ass'n for Retarded Citizens v. Smith,* 657 F.2d 102, 105 (6th Cir.1981). On appeal, the district court's finding that the motion was untimely is reviewable only for an abuse of discretion. *Grubbs,* 870 F.2d at 345. As set forth below, we conclude that the district court did not abuse its discretion in denying the motion to intervene as untimely.

A. Stage of the Proceeding

As the district court held, the purpose of the timeliness inquiry is to prevent "a tardy intervenor from derailing a lawsuit within sight of the terminal." *United States v. South Bend Community Sch. Corp.,* 710 F.2d 394, 396 (7th Cir.1983), *cert. denied sub nom. Brookins v. South Bend Community Sch. Corp.,* 466 U.S. 926 (1984). For this reason, a motion to intervene filed during the final stages of a proceeding is not favorably viewed.

***3** CU argues that the motion to intervene did not come during the final phase of the litigation, because the district court did not approve the decree until seven months after

CU filed its motion to intervene. At the time CU filed its motion to intervene, only one step in the litigation remained: the district court's approval of the proposed consent decree. This is *the* final stage of the proceeding. Therefore, the district court properly found the first factor to weigh against intervention.

B. Purpose

Where intervention would result only in the reconsideration of claims or objections previously presented to and rejected by the district court, the purpose of the intervention is not compelling. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir.1994) (finding intervention in CERCLA action unnecessary where intervenor previously presented views to district court); *City of Bloomington v. Westinghouse Elec. Corp.*, 824 F.2d 531, 537 (7th Cir.1987) (same); *United States v. Mid-State Disposal, Inc.*, 131 F.R.D. 573, 577 (W.D.Wis.1990) (same). CU's stated purpose in seeking intervention is to oppose entry of the consent decree.

As CU concedes in its brief, it has "participated in this litigation as a de facto party from the earliest stages of the administrative process through consideration of the motion to enter the Consent Decree." The district court considered and rejected CU's objections to the consent decree. As the district court held, these circumstances counsel against intervention.

C. Length of Delay

The first step in the inquiry under this factor is determining the point at which the proposed intervenor knew or reasonably should have known of his interest in the case. Actual or constructive knowledge that one's interests *might* be affected generally suffices. *See, e.g., Cuyahoga Valley Ry. Co. v. Tracy*, 6 F.3d 389, 396 (6th Cir.1993); *Michigan Ass'n for Retarded Citizens*, 657 F.2d at 105. Such knowledge will not suffice where the proposed intervenor had reason to believe that his interests were adequately protected by an original party. *See Stotts*, 679 F.2d at 583.

As the district court noted, the objectives of CU and of the United States may differ in terms of the degree of clean-up desired. CU became aware of the differences by, at the latest, July 1991, when the government lodged the consent degree with the district court. *See NAACP v. New York*, 413 U.S. at 367; *Pitney Bowes, Inc.*, 25 F.3d at 71; *Mid-State Disposal*, 131 F.R.D. at 576. These differences only became clearer once the government moved for entry of the decree. Even if CU's awareness did not mature until the government moved for entry of the decree, we agree with the district court that the five-month gap between the motion for entry and CU's motion to intervene was inexcusably long.

Because of CU's awareness, reliance on the opportunities for comment was inappropriate. *See Pitney Bowes*, 25 F.3d at 71; *Westinghouse Elec.*, 824 F.2d at 535, 537. This factor counsels against intervention.

D. Prejudice

***4** Where intervention would require renewal of negotiations and a delay in implementing CERCLA remediation, the intervention would prejudice the parties' interests. *Pitney Bowes*, 25 F.3d at 72; *Westinghouse Elec.*, 824 F.2d at 535-36; *Mid-State Disposal*, 131 F.R.D. at 576; *see also Stotts*, 679 F.2d at 584; *Michigan Ass'n for Retarded Citizens*, 657 F.2d at 105. We agree with the district court that granting CU's tardy motion to intervene would require renegotiation and delay implementation of the remedy. Therefore, this factor weighs against intervention.

E. Unusual Circumstances

CU argues that its extensive commenting is an unusual circumstance that militates in favor of intervention because granting intervention would impose no "significant new or costly burdens on the existing parties or the Court." As discussed, the district court's refusal to allow CU a second bite at the apple did not prejudice CU. To that, CU responds that the district court's denial of CU's motion to intervene for the appeal is a new apple, of which CU deserves a bite. As the government points out, however, there is nothing at all unusual about the denial of a right to appeal under these circumstances. The inevitable effect of a denial of intervention is that the proposed intervenor has no right to appeal. Moreover, where the parties enter into a consent decree, the occurrence of an appeal, not the absence of

one, would be unusual. We therefore agree with the district court that the unusual circumstance of CU's extensive commenting counsels against intervention.

We also agree with the district court that CERCLA's clear policy favoring speedy settlement and execution of the remedy is an unusual circumstance urging denial of intervention. *See Pitney Bowes,* 25 F.3d at 73.

IV.

All factors of the timeliness inquiry counsel against granting Citizens United's motion to intervene. The judgment of the district court is AFFIRMED.

All Citations

52 F.3d 326 (Table), 1995 WL 234648

Footnotes

1 The exact date of the filing of the notice of appeal is unclear from the record. The docket lists two dates: May 13, 1993, and May 17, 1993. The notice itself is stamped with the date May 13, 1993. However, a handwritten note on the notice suggests that the filing fee was not paid until May 18, 1993. In any event, the notice was filed more than thirty but fewer than sixty days after the March 24, 1993, entry of judgment.

2 Before the district court, CU sought permissive intervention as well. CU's appellate brief contains no mention of permissive intervention; therefore, CU has waived the issue.

3 Timeliness is the first of four conditions for intervention as of right. The applicant must also show a substantial legal interest in the subject matter of the pending litigation, an impaired ability to protect that interest, and inadequate representation of that interest by the present parties. Fed.R.Civ.P. 24(a)(2); *Grubbs,* 870 F.2d at 345; *Triax Co.,* 724 F.2d at 1227; *see also* 42 U.S.C. § 9613(i) (setting forth nearly identical conditions for intervention in CERCLA proceedings). Because we affirm the district court on the timeliness factor, we do not address the remaining factors of the test for intervention as of right.

End of Document

Exhibit 7

1995 WL 17079612
Only the Westlaw citation is currently available.
United States District Court,
W.D. Michigan, Southern Division.

COOPER INDUSTRIES, INC., Plaintiff,

v.

ABBOTT LABORATORIES, INC., et al., Defendants.

No. 93–CV–193.

May 5, 1995.

Attorneys and Law Firms

Dustin P. Ordway, Dickinson Wright, PLLC, Grand Rapids, MI, Maclay R. Hyde, Alan Held, Gray, Plant, Mooty, Mooty, et al., Minneapolis, MN, for plaintiff.

Scott Graham, Gemrich, Moser, Bowser & Lohrmann, Kalamazoo, MI, Erica Lynn Dolgin, Gabriel M. Rodriguez, Schiff, Hardin & Waite, Robert L. Graham, Stephen A.K. Palmer, Jenner & Block, Chicago, IL, John H. Fildew, William P. Thorpe, Fildew, Hinks, Miller, Todd, et, al., Detroit, MI, Thomas R. Wurst, Smith, Haughey, Rice & Roegge, PC, Mark E. Brouwer, Warner, Norcross & Judd, LLP, Grand Rapids, MI, for defendants.

OPINION

GIBSON, J.

1 This matter is before the Court on the motion of defendant Michigan Department of Military Affairs [1] to dismiss plaintiff's claims against it pursuant to Federal Rule of Civil Procedure 12. For the reasons that follow, this motion is granted in part and denied in part.

I.

This action involves allegations under the Comprehensive, Environmental Response, Compensation and Liability Act ("CERCLA," 42 U.S.C. §§ 9601–9675) and the Federal Water Pollution Control Act ("FWPCA," 33 U.S.C. §§ 1251–1387). Generally speaking, plaintiff's allegations are that the defendants, including the Department of Military Affairs, operated and continued to operate facilities from which there were releases of hazardous substances, including T.C.E., P.C.E., and Polynuclear Aromatic Hydrocarbons. According to plaintiff, these releases caused the pollution of defendants' facilities as well as the ground water at the Sturgis water well site ("the Site"), and have necessitated the plaintiff's treatment of the Site pursuant to an administrative order of the U.S. Environmental Protection Agency of October 23, 1992, under Section 106 of CERCLA.

This Court has already determined by its Opinion of March 23, 1995, that the allegations against other defendants sufficiently state CERCLA causes of action such that dismissal or more definite statement is not required by Rules 8 and 12. The same reasoning applies to plaintiff's claims against defendant Department of Military Affairs, and dictates that this aspect of the motion should be denied. However, since it is apparent from the parties' briefing that plaintiff wishes to amend its third-amended complaint under Rule 15 to allege releases at two additional facilities and since such leave should be liberally granted, the Court will also permit such amendment within 14 days of this Opinion.

II.

This brings the Court to the central issues raised by this motion—including whether the third amended complaint establishes a basis for standing under the CERCLA citizens suit statute or the FWPCA citizens suit statute. The issue of standing is a jurisdictional issue. *See Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville,* 508 U.S. 656, 113 S.Ct. 2297, 2301, 124 L.Ed.2d 586 (U.S.1993). In connection with the standing requirement, the Supreme Court has required that the pleadings "demonstrate three things" so as to show an actual case or controversy:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," ... (2) a causal relationship between the injury and the challenged conduct, by

which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court," ...; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative[.]"

***2** *Northeastern, supra,* at 2302.

In light of these requirements, the defendant contends that the Court lacks jurisdiction. However, defendant's arguments that these elements have been insufficiently pled largely mirror its arguments that plaintiff's CERCLA claims were insufficiently pled—and accordingly fail for the same reasons. Plaintiff has clearly pled economic and noneconomic harms caused by the defendant's alleged pollution of the Site, including the concrete harm of the cost of treating the polluted Site. This injury is directly traceable to the alleged pollution of defendant's facility (according to plaintiff's allegations). Furthermore, a verdict for plaintiff on its claim against defendant would redress the injury by stopping the pollution of the Site which is allegedly continuing.

In connection with these elements, the Court also notes that economic injuries are a sufficient basis of injury under the FWPCA and CERCLA to establish standing. *See Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1, 16–17, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). This is because an FWPCA or CERCLA case is distinguished from an Administrative Procedures Act suit such as was involved in *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), in terms of the standing requirement. *See Conservation Law Foundation v. Reilly,* 950 F.2d 38, 42–43 (1st Cir.1991); *Save Our Community v. U.S.E.P.A.,* 971 F.2d 1155, 1161 n. 11 (5th Cir.1992). Furthermore, even if this were not the case, the Court believes that the third amended complaint implies sufficient noneconomic harms to plaintiff's employees who use water from the Sturgis Site to give plaintiff standing. Accordingly, the Court concludes that Cooper has standing to assert its citizens suit claims under the FWPCA and CERCLA.

III.

However, standing is not the only jurisdictional issue raised by the defendant. Specifically, defendant has argued that the "diligent prosecution" bar contained in the CERCLA citizens suit statute (42 U.S.C. § 9659) voids the Court's jurisdiction over this matter. This statute provides in pertinent part:

> No action may be commenced under paragraph (1) of subsection (a) of this section if the President has commenced and is diligently prosecuting an action under this chapter, or under the Solid Waste Disposal Act [42 U.S.C. §§ 6901 *et seq.*] to require compliance with the standard, regulation, condition, requirement, or order concerned [including any provision of an agreement under section 9620 of this Title].

42 U.S.C. § 9659(d)(2).

In *Gwaltney of Smithfield v. Chesapeake Bay Foundation,* 484 U.S. 49, 60–61, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987), the Supreme Court explained that such limitations expressed Congress's judgment that citizen suits play an "interstitial" rather than a "potentially intrusive" role. In light of such a policy, both the Eighth and First Circuit Courts of Appeals have held that citizens suits are proper only if the "federal, state, or local agencies fail to exercise their enforcement responsibility...." *Arkansas Wildlife Federation v.. I.C.I. Americas, Inc.,* 29 F.3d 376, 380 (8th Cir.1994); *North & South Rivers Watershed Ass'n v. Scituate,* 949 F.2d 552, 557 (1st Cir.1991). This case law favors a broad reading of the diligent prosecution bar so as to bar a citizens suit when the pollution which is the subject of the suit is also the subject of current E.P.A. CERCLA enforcement.

***3** To the contrary, the plaintiff maintains that the citizens suits here alleged are not barred because the subject of those suits are the separate facilities of the defendants—which are not involved in the E.P.A.'s enforcement. Hence, the plaintiff relies on other case law reading the diligent prosecution bar more narrowly. *See ACME Printing Ink Co. v. Menard, Inc.,* 812 F.Supp.

1498, 1505–10 (E.D.Wis.1992); *Hudson River Fishermen's Ass'n v. County of Westchester,* 686 F.Supp. 1044, 1052 (S.D.N.Y.1988).

While the plaintiff has confused this issue by referring to pollution of the separate facilities, it is apparent that the damages plaintiff is claiming relate to the same site (*viz.*, the Sturgis water well site). Under these circumstances, the plain meaning of the diligent prosecution bar requires this Court to dismiss the CERCLA citizens suit claims (Count II) pursuant to Rule 12 due to lack of jurisdiction.

IV.

Assuming that the Court otherwise has jurisdiction over the plaintiff's FWPCA citizens suit claims[2] (Count IV), this Court must determine whether under Rule 12 the complaint adequately states a cause of action under the FWPCA. As is noted by the defendant, this statute principally is intended to address pollution of navigable waters and, thus, requires the allegation that navigable waters were polluted from a point source by a discharge of the defendant. *See* 33 U.S.C. § 1362(12); 33 U.S.C. § 1365(a)(1).

While plaintiff's complaint does quote the statutory elements, it fails to identify any point source or navigable water involved with the pollution of the Site. Rather, it pleads only that the disposal and migration of ground waters constitute a violation of the Act. In its brief, plaintiff states that its allegations were intended to refer to the fact that this defendant's facilities have floor drains which drain into the sewer, which in turn discharges into the Nye Drain, which in turn discharges into the Fawn River.[3]

Taking this explanation as a request to amend the complaint, the Court must deny such request because such amendment would be futile. Even assuming that the migration of ground water led to the pollution of the Fawn River, which further led to the pollution of the Site, such allegations are insufficient to state a cause of action under the FWPCA. In *Village of Oconomowoc Lake v. Dayton Hudson Corp.,* 24 F.3d 962 (7th Cir.1994), the Seventh Circuit Court of Appeals considered similar allegations concerning runoff polluting navigable waters:

> What of the possibility that water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the "waters of the United States"? Justice Story's bucket [of water] was part of the navigable waters in this sense.... But the Clean Water Act does not attempt to assert national power to the fullest. "Waters of the United States" must be a subset of "water"; otherwise why insert the qualifying clause in the statute? ... Neither the Clear Water Act nor the E.P.A.'s definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.

***4** *Id.* at 965. *See also Kelley on behalf of Michigan v. United States,* 618 F.Supp. 1103 (W.D.Mich.1985).

Such a holding dooms the assertion of a Clean Water Act citizens suit in this case. The allegations as understood from plaintiff's brief are that the pollution of ground water which in part circulated from a point source on defendant's property was hydrologically connected to the pollution of the Fawn River. Such allegations are insufficient to state a cause of action under the Clean Water Act since they concern ground waters and not "waters of the United States." As stated in *Oconomowoc Lake,* the fact that these ground waters are hydrologically connected to some surface waters is insufficient to transform this case to a FWPCA cause of action. Accordingly, the Court determines that Count IV of the complaint should be dismissed due to plaintiff's failure to state a cause of action for which relief may be granted.

V.

Therefore, it is the conclusion of the Court that defendant's motion should be granted in part and denied in part. More specifically, the Court grants the motion to dismiss Count II due to lack of jurisdiction and Count IV due to failure to state a claim for which relief may

be granted. In all other respects the motion is denied. Additionally, plaintiff shall be permitted to amend its complaint within 14 days of this Opinion to identify two additional facilities which were owned or operated by defendant Michigan Department of Military Affairs and which may have contributed to the pollution of the Site.

ORDER

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 5th day of May, 1995.

In accordance with the Court's Opinion of this date;

IT IS HEREBY ORDERED that defendant Michigan Department of Military Affairs' motion to dismiss (pleading no. 101) is GRANTED IN PART and DENIED IN PART.

IT IS FURTHER ORDERED that plaintiff Cooper Industries is GRANTED leave to file an amended complaint within 14 days of the date of this Order in order to specify the location of two additional MDMA facilities at which releases have occurred.

IT IS FURTHER ORDERED that Count II of plaintiff's third amended complaint (for liability under 42 U.S.C. § 9659) is DISMISSED pursuant to Federal Rule of Civil Procedure 12 due to lack of jurisdiction.

IT IS FURTHER ORDERED that Count IV of plaintiff's third amended complaint (for liability under the FWPCA, 33 U.S.C. §§ 1365) is DISMISSED pursuant to Federal Rule of Civil Procedure 12 due to plaintiff's failure to state a claim for which relief may be granted.

IT IS FURTHER ORDERED that in all other respects defendant's motion is DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp., 1995 WL 17079612

Footnotes

1 The Court notes that other defendants have also filed pleadings stating their intent to join in this motion. Such motions to join this motion are granted and the Court's Opinion should be read as affecting all parties to this action.

2 Such assumption is valid because it does not appear that the statute requires a completely non-adversarial notice period (*see Zands v. Nelson*, 779 F.Supp. 1254 (S.D.Cal.1991)), and it further appears that the FWPCA notice was substantially in conformance with the legal requirements for such. In addition, the Court notes that the allegations of the complaint imply that such pollution is ongoing.

3 The Court notes that the plaintiff has not even specified in its brief facts from which the Court could conclude that the Fawn River is a navigable river nor that the pollution of the Fawn River has affected the interests of the plaintiff.