

Gelman Sciences, Inc. – Michigan Contaminated Site  
Update on Gelman MS4 Permit Notice of Violation

Daniel J. Bicknell, MPH  
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## Update on Gelman MS4 Permit Notice of Violation

Gelman Sciences, Inc. (Gelman) has provided a final response to the January 2021 Municipal Separate Storm Sewer System Permit (MS4 Permit) Notice of Violation (NOV) sent by the Washtenaw County – Water Resources Commissioner (WRC) to Gelman for the illicit infiltration of dioxane contaminated groundwater into the MS4 permitted Allen Creek Drain in Ann Arbor, Michigan. Gelman sent to the WRC and Michigan Department of Environment, Great Lakes & Energy (EGLE) a February 1, 2022 State of Michigan Part 201 regulation related Down-gradient and Allen Drain GSI Investigations Work Plan (Part 201 GSI Work Plan), in part, to address the MS4 Permit NOV. The Gelman Cover Letter to the Part 201 GSI Work Plan detailed the agreement between Gelman, EGLE, and the Michigan Office of Attorney General (AG) on how to handle the MS4 Permit NOV (Agreement).

The Agreement concludes that the MS4 Permit NOV and requirements of the MS4 Permit terms and conditions will be satisfied by Gelman complying with the 2021 Court Order (Court Order) between Gelman and the State which covers the Michigan Part 201 regulation violations by Gelman. In particular, the Agreement finds that Gelman only needs to attain an EGLE Part 201 regulation Groundwater-Surface Water Interface (GSI) criterion of 280 ug/L dioxane prior to the dioxane plume seeping into the MS4 permitted Allen Creek Drain. However, the delegated federal Clean Water Act - MS4 Permit requires that no dioxane above background concentration be allowed to infiltrate into the Allen Creek Drain.

Federal enforcement actions are required against this polluter to obtain a MS4 Permit remedy which is consistent with federal environmental laws given the State of Michigan failure..

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The storm water data documents a continued Gelman violation of the Allen Creek Drain MS4 Permit since 2019 and that the dioxane plume infiltration into the drain storm water is not going away in the near future.

The MS4 Permit is a federal Clean Water Act permit that has been delegated to the State of Michigan to be administered on behalf of the federal United States Environmental Protection Agency (USEPA). The State of Michigan issued a MS4 Permit to the Washtenaw County - Water Resources Commissioner which covers, in part, the Allen Creek Drain. The MS4 Permit violation is a totally separate federal law violation from the State of Michigan Part 201 Contaminated Sites regulation violations which are covered by the new 2021 Court Order between the State and Gelman and incorporates the proposed 4<sup>th</sup> Amended Consent Judgment.

The State of Michigan issued a MS4 Permit to the Washtenaw County - Water Resources Commissioner which covers, in part, the Allen Creek Drain. The MS4 Permit defines an “illicit discharge” as “any discharge to, or seepage into, a municipal separate storm sewer system that is not composed entirely of storm water or uncontaminated groundwater”. The MS4 Permit guidance defines groundwater to be “contaminated” if “...a pollutant is present above background concentrations representative of the area if a discharge or release of the pollutant had not occurred.” In summary, as dioxane is not present naturally in the local groundwater, the MS4 Permit requires that there be no Gelman-related dioxane contaminated groundwater infiltrating into the Allen Creek Drain.

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In part, the 2022 Agreement uses the State of Michigan Part 201 regulations, which deal with contaminated sites, to cover compliance with the State of Michigan Part 31 law, which deals with the issuance of and compliance with water permits like the MS4 Permit. The Agreement cites a Michigan Part 31 law which states that “Notwithstanding any other provision of this part, remedial actions that satisfy the requirements of part 201 satisfy a person's remedial obligations under this part. MCL 324.3109b.”

The Assistant AG has interpreted the Part 31 law as allowing Gelman to apply a Michigan Part 201 regulation derived Groundwater-Surface Water Interface criterion of 280 ug/L dioxane to the dioxane contaminated groundwater infiltrating into the MS4 permitted Allen Creek Drain storm water. This view allows Gelman to violate the federal Clean Water Act - MS4 Permit requirement that the dioxane plume be below background levels prior to entering into the MS4 regulated storm water drain.

The Assistant AG view of the Michigan Part 31 law satisfaction exclusion precipitates a federal issue by having a state law allow a less stringent abatement level than that required under the federal Clean Water Act – MS4 Permit.

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The Agreement misrepresents the terms and conditions of the 2021 Court Order between the State and Gelman dealing with the Gelman violations of the State of Michigan Part 201 Contaminated Sites regulations. Gelman and the Assistant AG falsely claim that the Part 201 Court Order covers the MS4 Permit dioxane plume groundwater illicit seepage into the Allen Creek Drain and the Court Order provides Gelman an authorization similar to a NPDES permit to discharge the dioxane contaminated groundwater into the Allen Creek Drain.

The Court Order clearly does not provide either of these elements. The MS4 Permit violation is a federal law violation which is totally separate from the Gelman violations of the State of Michigan Part 201 Contaminated Sites regulations which are covered in the 2021 Court Order.

In fact, the Court Order requires Gelman to obtain all applicable environmental permits as part of its remedial action, including: storm water permits; wastewater permits; air permits; wetland permits; surface water permits, etc.

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Per the MS4 Permit and EGLE guidance, as Gelman obtaining a NPDES permit, lining the Allen Creek Drain to halt illicit groundwater seepage, or having an Enforceable Plan are not viable options to eliminate the Gelman illicit discharge, “immediate” action has been required since 2019 to abate the illegal dioxane infiltration into the Allen Creek Drain storm water.

However, it was not until January 2021, after the Ann Arbor City Council passed a 2020 Resolution asking the Water Resources Commissioner to send Gelman a Notice of Violation for the MS4 Permit violations, did the WRC send a NOV to Gelman covering the illicit dioxane infiltration into the Allen Creek Drain.

The end result of the NOV is the flawed 2022 Agreement.

The Assistant AG has now directed the Water Resources Commissioner to no longer follow-up on the NOV as the violation will be resolved within the Part 201 regulation related Court Order.

The only remaining viable regulatory option to attain compliance with the MS4 Permit is for the USEPA and the United States Department of Justice to take-over the NOV and bring a federal enforcement action against Gelman compelling compliance with the MS4 Permit. Such an action will rightfully have the federal government manage the correction of the federal MS4 Permit violations and not put the compliance oversight responsibility on the local governments.



Gelman Dioxane Plume & EGLE-WRC Allen Creek Drain Storm Water Sampling Locations with 2019 Average Dioxane Values and 2020 & 2021 Dioxane Values in ug/L (ppb)

