

COUNCIL AGENDA RESPONSE (DC-4)

TO: Mayor and Council

FROM: Stephen K. Postema, City Attorney

CC: Fredrick J. Dindoffer

SUBJECT: November 5, 2020 Council Agenda Response (Item DC-4 Only)

DATE: November 5, 2020

**DC-4 – Reconsideration of Vote to Defeat 19-1887, the “Resolution Supporting the Environmental Protection Agency’s Active Involvement with the Gelman Site and Encouraging its Listing of the same as a “Superfund” Site”**

**Question:** Please provide verifiable (non-opinion) information describing the applicable steps that will be taken, time frames, and the decision-making processes: (i) in any possible evaluation and listing of the Gelman site on the National Priorities List under CERCLA; (ii) in any subsequent evaluation and final selection of response activities for the site; and (iii) in any enforcement of such response activities. Please include a description of the opportunities the City will have to have a role at various stages in the processes, including input into, possible opportunities for challenges to, or having a role in enforcement of, EPA’s determinations.

**Response:** To respond to this question, our answers are based on: (1) specific statutory and regulatory requirements, and court decisions, as appropriate; and (2) clear statements made by EPA itself. Although we understand EPA statements made at the January 16, 2020 public meeting<sup>1</sup> have since been discounted or even questioned by some, we nevertheless make direct reference to those EPA statements because EPA’s representative at the meeting was Joan Tanaka, who is the EPA Region 5 Acting Superfund Deputy Director, and thus speaks from a position of authority. Her statements were and are consistent with the statute, regulations, and court decisions under CERCLA, and with the experience of the City’s outside counsel (Bodman) in the program.

This response assumes the governor of Michigan would have submitted a letter to EPA requesting that EPA evaluate the Gelman site, list it on the NPL if it meets EPA criteria and undertake and implement all studies and response actions necessary to achieve standards EPA finds appropriate under CERCLA.

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<sup>1</sup> Available at

<https://www.youtube.com/watch?v=QCUwRmwGR7k&feature=youtu.be&t=7344>  
(1.16.20 Public Meeting).

The steps in EPA's Superfund process would be as follows.

1. Listing site on National Priorities List (NPL)
  - a. Submission of petition to EPA: EPA's Joan Tanaka stated that this must be accompanied by a letter from the governor of Michigan inviting EPA to evaluate the site, stating that "[the state's] environmental program is not working" or lacks sufficient resources to address the site.<sup>2</sup>
  - b. Preliminary assessment and scoring under CERCLA: Under the statute and regulations, EPA performs a preliminary assessment and, if the site scores highly enough, EPA proceeds to further evaluate whether the site might qualify for listing based on a set of regulations called the Hazard Ranking System (40 CFR Part 300, App. A). The City along with anyone else in the public may submit information, data and comments during this process.
  - c. **Timing:** EPA acknowledged that it had performed a quick preliminary assessment of the Gelman site, and that this site "would be eligible to go to the next step" for scoring, which Tanaka said could take "3 more years" for it to determine whether to propose to list the site, and another year to place it on the list.<sup>3</sup> Tanaka stated that EPA had not evaluated the appropriateness of the data developed already at this site, but that such existing data "possibly" might reduce that time frame somewhat.
  - d. **EPA evaluation and listing decision:** Even if the site scores highly enough, EPA may decide not to list it on the NPL. Generally, if environmental response work is already being done at the site "EPA likely would not proceed further."<sup>4</sup>
  - e. **If EPA decides NOT to list the site, the City, and others, have no ability to seek judicial review of the decision.**
    - i. 42 USC 9659(a)(2) authorizes a citizen suit against the EPA where there is an alleged failure to perform a **non-discretionary duty**). However, 42 USC 9605(d), which requires EPA to perform a preliminary assessment in response to a petition and, if warranted, an evaluation under the Hazard Ranking System, does not require any particular decision on the petition, and 42 USC 9605(a)(8)(A) and (B) states that a determination of what is placed on NPL is based on EPA's judgment, **i.e., subject to EPA's discretion**. In other words, a decision not to list the site is not a non-discretionary decision, so may not be challenged in court.

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<sup>2</sup> See, e.g., 1.16.20 Public Meeting at 0:34:20 – 0:36:20.

<sup>3</sup> See 1.16.20 Public Meeting at 00:22:20-00:22:55 and at 1:25:34-1:26:11,

<sup>4</sup> See, Tanaka, 1.16.20 Meeting at 00:18:55-00:19:22.

- ii. In *Frey v. EPA*, 751 F.3d 461, 470 (7<sup>th</sup> Cir. 2014), the federal Court of Appeals stated, “We thus read CERCLA’s citizen suit provision to allow [court] review of claims regarding whether the EPA complied with required procedures under CERCLA, but not claims regarding the substance of the EPA’s decisions, which is a matter of discretion for the agency.”
- f. **If EPA decides to propose to list site**, it does so by publishing a notice of the proposed action in the Federal Register and providing an opportunity for public comment (known as “notice and comment rulemaking”).
  - i. The City can submit comments, along with anyone else in the general public. **Although EPA must consider comments, it need not change its proposed decision based on comments received.**
  - ii. EPA stated that Gelman, like any member of the public, also can submit comments, to challenge and try to delay an EPA determination to list the site.<sup>5</sup>
- g. After reviewing all the comments, if EPA issues a final rule listing the Gelman site, Gelman would have 90 days after publication of the final rule to sue to challenge the listing decision. That lawsuit would be in the federal Court of Appeals for the D.C. Circuit. 42 USC 9613(a). **Based on the normal progress of such cases, this could delay further EPA action on the site for a year or more.**
  - i. Note that judicial review of EPA’s listing decision is limited. EPA’s decision would be set aside only if it was “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Meritor, Inc. v. Env’tl Prot. Agency*, 966 F.3d 864, 869 (D.C. Cir. 2020).

## 2. Remedial Investigation/Feasibility Study (RI/FS)

- a. This is the next step **if the site is listed**, assuming the listing is not challenged, or is upheld in court if challenged.
- b. RI/FS is the process of collecting data to characterize site conditions, determine the nature of the release, assess risk to human health and the environment, evaluate both the performance and the cost of treatment technologies, and evaluate alternative remedial actions.
  - i. EPA must provide opportunity for public input. See, e.g., 40 CFR 300.430(c)(2)(ii) (requiring EPA to prepare a community relations plan, the purpose of which includes “[e]nsur[ing] the public

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<sup>5</sup> See 1.16.20 Public Meeting at 1:08:30 – 1:09:16.

appropriate opportunities for involvement in a wide variety of site-related decisions, including site analysis and characterization, alternatives analysis, and selection of remedy.”). This process **does not include a requirement that EPA accept or implement suggestions made by the public.**

- ii. EPA’s Tanaka stated that as part of the foregoing process, EPA will have meetings, seek community suggestions and will listen.<sup>6</sup>
- iii. The entire community, including the City, would or could have involvement in submitting comments in the process, but would not have a role in enforcement. EPA would be responsible for negotiating, monitoring and enforcing compliance with an Enforcement Agreement that would be developed between Gelman and the EPA. The Enforcement Agreement would be to develop data and to perform the RI/FS. Tanaka stated clearly that the local “community [will] not be part of the Enforcement Agreement between EPA and Gelman.”<sup>7</sup> Moreover, Tanaka stated that the community “[does not have] any place at the table” to enforce what is to be done.<sup>8</sup> Thus, the City would not have access to the courts to demand enforcement of an Enforcement Agreement under CERCLA.
- iv. Although EPA can be compelled in court to perform an RI/FS (because it is a non-discretionary duty), **the City could not sue EPA if the City disagrees with the substance of the RI/FS that is done.** See, *Frey*, 751 F.3d at 470.
- c. EPA would likely negotiate with Gelman to have Gelman perform the RI/FS. EPA has said that those negotiations could take a year.<sup>9</sup>
- d. **Timing to complete the RI/FS:** EPA has said that completion of the RI/FS process at a small, easy site can take 2 years; and that at large, complex site the process could take decades.<sup>10</sup>

### 3. Record of Decision (ROD)

- a. At the conclusion of the RI/FS, EPA publishes a ROD containing the remedy that EPA has selected for the site.

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<sup>6</sup> See 1.16.20 Public Meeting at 1:14:30-1:16:10.

<sup>7</sup> See 1.16.20 Public Meeting at 1:15:10-1:15:22.

<sup>8</sup> See 1.16.20 Public Meeting at 1:16:05-1:16:20.

<sup>9</sup> See 1.16.20 Public Meeting at 1:27:56-1:28:05.

<sup>10</sup> See 1.16.20 Public Meeting at 1:26:28-1:26:42.

- i. EPA need not obtain state or local concurrence before publishing a ROD. See, e.g., 40 CFR 300.515(e)(2)(ii) (“State concurrence on a ROD is not a prerequisite to EPA’s selecting a remedy…”).
  - b. If the City wanted to challenge the ROD, **it could not do so until the remedial action is complete.** See, 42 USC 9613(h)(4); *Frey*, 751 F.3d at 467. For the Gelman site, this could be many, many years in the future.
  - c. Even after the remedial action is complete, **the City could only challenge a failure by EPA to follow required procedures, not the substance of EPA’s decision.** *Frey*, 751 F.3d at 470. In other words, although EPA has a non-discretionary duty to select remedial actions that are protective of human health and the environment, a court can review only whether the EPA has determined, in its discretion, whether the remedy is protective. *Id.* **The City could not go to court and say that EPA should be requiring Gelman to do more, or to do something different.**
  - d. **Timing:** EPA has said that it could take a year to complete preparation of a ROD.<sup>11</sup>
4. Post-ROD implementation of remedy
- a. EPA would enter into negotiations with Gelman to design the work.
  - b. **Timing:** EPA has said that the negotiation and design process could take 1-3 years.<sup>12</sup>
  - c. Enforcement of the performance of the remedy under the ROD: EPA is responsible to monitor and enforce compliance with performance of the remedy for the site under the remedial plan under the ROD. As Tanaka stated, the community does not have any place at the table to enforce what is to be done.<sup>13</sup> Thus, under CERCLA, the City would not have a right to go to court to demand enforcement of the remedial actions or the ROD.
5. Completion of remedy
- a. **Timing:** EPA has said that groundwater cleanup in general is very difficult and could take decades.<sup>14</sup>
  - b. At the conclusion of the cleanup required by the ROD would be when the City could challenge the ROD on procedural grounds. See Paragraphs 3.b and c above.

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<sup>11</sup> See 1.16.20 Public Meeting at 1:27:00-1:27:13.

<sup>12</sup> See 1.16.20 Public Meeting at 1:27:47-1:27:57; 1:28:08-1:28:14.

<sup>13</sup> See 1.16.20 Public Meeting at 1:16:05-1:16:20.

<sup>14</sup> See 1.16.20 Public Meeting at 1:28:17-1:28:37.