

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

Superior Court Department
Civil Action No. 2013-04131-J

TOWN OF ACTON, and)
 JANET K. ADACHI, MIKE GOWING,)
 KATIE GREEN, DAVID CLOUGH AND)
 JOHN SONNER AS THEY ARE THE)
 MEMBERS OF THE)
 BOARD OF SELECTMEN OF THE)
 TOWN OF ACTON,)
 Plaintiff,)
 v.)
 W.R. GRACE & CO. — CONN.)
 Defendant.)

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

The Plaintiffs, the Town of Acton (the “Town”) and its Board of Selectmen (“Board”) submit this Memorandum in Support of their Motion for a Preliminary Injunction seeking to enjoin the Defendant W.R. Grace & Co.-Conn. (“Grace”), and those acting in concert with it, from prematurely shutting down a groundwater pumping and treatment remediation system (the active component of the so-called “Northeast Area Remedial Action”) (hereafter the “Treatment System”) installed and operated by Grace to remediate a plume of groundwater contamination from property currently owned and formerly operated by Grace in the Town (the “Site”). Shutting down the Treatment System violates the Town’s Groundwater Cleanup Standards Bylaw (the “Bylaw”)¹; will cause irreparable harm to the Town, the public, and the environment; and prolongs the endangerment to a public drinking water supply aquifer within the Town which has been contaminated by Grace but not fully remediated by Grace as required by the Bylaw.

¹ A certified copy of the Bylaw is attached as Exhibit A to the Town’s Verified Complaint.

The Town meets the requirements for an injunction. There is a strong likelihood the Town will prevail on the merits. Grace has contaminated the public drinking water supply aquifer at and downgradient from the Site with several volatile organic compound (“VOC”), including, without limitation, 1,1-dichloroethene (also known as “1,1-dichloroethylene,” “vinylidene chloride” (“VDC”)), vinyl chloride, benzene, and 1,4 dioxane (“dioxane”), in excess of limits permitted by the Bylaw and other federal and state drinking water criteria. Grace implemented the Treatment System to pump and treat groundwater thereby removing Grace’s contaminants as part of an effort to restore this aquifer to a fully useable condition. Now, without reducing contaminant concentrations to the limits specified by the Bylaw (or federal and state drinking water criteria), Grace intends to shut down the Treatment System in disregard of the Bylaw’s mandate.

The requested injunction preserves the *status quo* with respect to the Treatment System, benefits the strong public interest in accelerating the removal of chemical pollution from a drinking water supply aquifer, and avoids irreparable harm that would result were Grace permitted to proceed with its proposed shut down of the Treatment System. Groundwater is the *sole* source of public drinking water within the Town. Every day that Grace fails to treat and remove its chemical contaminants, including several known or likely carcinogens, from the groundwater aquifer the public will continue to be deprived of their “right to be free of contamination to the municipal water supply.” *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1233 (D. Mass. 1986).

Background

A. The Bylaw

The Town adopted the Bylaw by a unanimous vote of Town Meeting on April 10, 1997 pursuant to Article 89 (the Home Rule Amendment) of the Massachusetts Constitution; the Town's police powers to protect the public health, safety, and welfare; its authority under G.L. c. 40, § 21; and its authority to plan for the prevention, control and abatement of water pollution pursuant to G.L. c. 21, § 27(1). Verified Complaint ("VC") ¶¶ 16-17; and Bylaw (VC Ex. A), § 1. On July 23, 1997, over Grace's objection, the Massachusetts Attorney General approved the Bylaw pursuant to G.L. c. 40, § 32, and the Bylaw has been in effect since that time. VC ¶¶ 31, 33.

The Bylaw's purpose is to protect, preserve, improve and maintain the Town's existing and potential public drinking water sources and to assure public health and safety through the application of environmental groundwater quality cleanup standards requiring restoration of contaminated water resource areas to a fully useable condition. Bylaw § 2. The Bylaw (§ 5) mandates:

Any Cleanup performed in the Town of Acton by a person potentially liable under Section 5(a) of General Laws Chapter 21E on, in, at, of or affecting any Resource Area(s) shall on a permanent basis meet or surpass in cleanness the Groundwater Cleanup Standards established by this Bylaw throughout the Resource Area for each and every contaminant for which the Cleanup is or has been undertaken.

It further provides (in § 6):

All sampled locations throughout the Resource Area shall meet the Ground Water [Cleanup] Standards established by this Bylaw. No averaging of samples may be used to determine compliance with the Ground Water Cleanup Standards for any particular sampling point, Resource Area or any combination of Resource Areas. All Resource Areas which undergo a Cleanup must be restored to a fully useable condition.

The Bylaw (in § 4.10) defines Groundwater Cleanup Standards as:

(1) Maximum Contaminant Level Goals (“MCLGs”) established under the Safe Drinking Water Act for each Contaminant for which an MCLG has been established, see 40 CFR § § 141.50 - 141.52; and (2) where an MCLG for a specific Contaminant is zero, or where an MCLG for a specific Contaminant has not been promulgated, 1 part per billion (“ppb”) for any such volatile organic compound (“VOC”) and 5ppb total for all such VOC's.”

Pursuant to Section 7 of the Bylaw “it shall constitute a breach of this bylaw to discontinue for more than thirty (30) days or to abandon a Cleanup of a Resource Area without meeting the Groundwater Cleanup Standards of this Bylaw.” See Bylaw § 7.

B. Grace’s Contamination of Resource Areas in the Town

Grace (including its predecessors-in-interest) has owned the Site, a 260 acre parcel of land in the Town and the neighboring Town of Concord, for approximately 60 years. VC ¶¶ 46, 47. In its operations at the Site, Grace used and disposed of numerous VOCs, including, without limitation, VDC, vinyl chloride, benzene, and dioxane. VC ¶ 48. Grace’s operations released Contaminants² (including without limitation VOCs, VDC, vinyl chloride, benzene, and dioxane) into unlined lagoons, an on-Site industrial landfill and/or other disposal areas at the Site. VC ¶ 50. Although Grace’s manufacturing operations at the Site have ceased, Grace’s Contaminants continue to pollute groundwater beneath and migrating downgradient from the Site. VC ¶ 53.

Because of a groundwater divide underlying the Site, groundwater beneath the Site flows toward public drinking water wells both to the south and the north of the Site. VC ¶¶ 55-57. This groundwater commingles with and comprises a portion of the aquifers providing groundwater to the public drinking water supply wells Assabet 1 and Assabet 2 (to the south) and the Lawsbrook, Scribner and School Street Wells (to the north). VC ¶ 58. Pursuant to Department of Environmental Protection (“DEP”) regulations, the aquifers underlying the Site

² Bylaw § 4.1 defines “Contaminant” as “any physical, chemical, biological or radiological substance or matter in water. See 42 U.S.C. § 300f(6). The term ‘Contaminant’ includes, without limitation, any material or substance defined as ‘oil’ or ‘hazardous material’ under Massachusetts General Laws Chapter 21E or the Massachusetts Contingency Plan, 310 CMR 40.0000 et seq. (the ‘MCP’).”

are classified as GW-1; portions of these aquifers are used as a Current Drinking Water Supply Area; and portions are considered a Potential Drinking Water Supply Area. VC ¶ 60. Pursuant to the Bylaw, the groundwater aquifer contaminated by VOCs released at and from Grace's Site constitute Resource Areas.³ VC ¶ 59.

C. History of the Treatment System

Beginning in 1980, there has been a long history of federal and state enforcement activity concerning the Grace Site, which is described in detail in the Verified Complaint. VC ¶¶ 91-138.⁴ However, it was not until 2010 – thirty years after these enforcement activities began – that Grace started to operate the Treatment System to address its plume of VOC Contaminants migrating northerly toward the Lawsbrook, Scribner and School Street Wells. VC ¶ 139. Now, after operating the Treatment System for only about three years, Grace is about to shut it down even though (a) during its three years of operations, the Treatment System removed over fourteen pounds of Grace's chemical pollutants from the drinking water aquifer (VC ¶ 143), (b) continuing to operate the Treatment System would accelerate the cleanup of the aquifer and reduce the time to reach to drinking water standards and a fully usable condition by about 16 years (Okun Aff. ¶ 45-46), and (c) shutting down the Treatment System would violate the Bylaw's requirement that the system cannot be discontinued until it meets "the Ground Water [Cleanup] Standards established by [the] Bylaw throughout the Resource Area for each and every Contaminant for which the Cleanup is or has been undertaken." VC ¶ 145; Bylaw § 5.

³ Resource Areas under § 4.11 of the Bylaw include, without limitation, Zone 1 of public water supply wells, DEP Approved Wellhead Protection Areas, Zone 2 of public water supply wells, Interim Wellhead Protection Areas for a Public Water Supply, and Potentially Productive Aquifers.

⁴ Without limitation, in April 1980, the United State filed a civil action against Grace pursuant to Section 7003 of the Resource Conservation and Recovery Act ("RCRA"). *United States v. W.R. Grace & Co.*, D. Mass. Civ. A. No. 80-748-C. VC ¶ 92. The Commonwealth filed a parallel administrative action to the RCRA action. VC ¶ 93. In October 1980, EPA and Grace entered into a Consent Decree regarding Site cleanup, and DEP later amended its prior Administrative Consent Order to conform to that decree. VC ¶¶ 94-96. As part of the environmental cleanup, EPA issued a Record of Decision in 1989 which divided activities at the Site into three "Operable Units" ("OUs") and eventually resulted in the implementation of the Treatment System. VC ¶¶ 102-129. See also text below.

In 1998 (a year after the Town promulgated the Bylaw), Grace commenced work under a phase of the Site remediation known as Operable Unit Three (“OU3”) to determine the extent of groundwater contamination on- and off-Site and to identify the remedial measures necessary to restore affected groundwater to a “fully useable condition in the shortest practical time.” VC ¶ 108. On September 30, 2005, EPA issued a Record of Decision (the “ROD”) selecting the remedy for OU3. VC ¶ 109. Baseline human health and ecological risk assessments conducted in connection with the ROD,

revealed that potential exposure to compounds of concern in groundwater and sediment via ingestion, dermal contact, and/or inhalation by human health may present an unacceptable human health risk (cancer risk greater than 10^{-4} and noncancer Hazard Index greater than 1), or an unacceptable ecological risk.

VC ¶ 113 (quoting ROD at 46). The ROD concluded that, because of these risks, “actual or threatened releases of hazardous substances from this Site, if not addressed by implementing the response action selected in this ROD, may present an imminent and substantial endangerment to public health, welfare, or the environment.” VC ¶ 114 (quoting ROD at 46). The ROD describes the “primary expected outcome of the selected remedy” as restoring “the groundwater/aquifer at the Site ... such that it will be useful for domestic purposes (e.g., ingestion, bathing, cooking, etc.) without pre-treatment for Site-related contaminants.” VC ¶ 117 (quoting ROD at 76).

The OU3 ROD’s selected remedy “includes active treatment of contaminated groundwater ... monitored natural attenuation of groundwater beyond the active treatment zones and institutional controls to restrict groundwater use until the cleanup objectives have been met to address unacceptable risks.” VC ¶ 115 (quoting ROD at 66). In response to comments from the Town, the ROD selected a remedy involving active pumping and treatment of contaminated groundwater rather than one “relying on monitored natural attenuation for groundwater in the Northeast Area of the Site.” VC ¶ 128 (quoting ROD at 85, 87).

In September 2006, EPA issued a Remedial Design/Remedial Action Statement of Work for work under OU3 (the “RD/RA”), which, *inter alia*, described the Treatment System’s required procedures and submittals. VC ¶¶ 130,131. The RD/RA allowed for treated effluent from the Northeast Area to be discharged back to the Northeast Area aquifer or, under appropriate conditions, discharged to an on-Site pond (Sinking Pond). VC ¶ 132.⁵

Beginning in April 2010, Grace has operated the Treatment System, which has involved pumping contaminated groundwater from a bedrock extraction well, treating the pumped water at a treatment facility located on a property adjoining the Site, and injecting the treated water into shallow unconsolidated deposits within the aquifer. VC ¶ 140. The ROD allowed, at the end of three years of operation, for “an evaluation to determine if pumping can be discontinued.” VC ¶ 152 (quoting ROD at 69).

On February 25, 2013, Grace’s consultant, Tetra Tech, Inc. (“Tetra Tech”) sent a letter to EPA and DEP acknowledging that there “has been a significant reduction in VOC concentrations in the Northeast Area as well as some shrinkage of the areal extent of contamination” and that water level data collected by the Acton Water District (“AWD”) did not “show any obvious impacts to yield or drawdown from operation” of the Treatment System. VC ¶ 150, Ex. C, pp. 3 and 5. Nonetheless, Grace proposed to “shut down the Northeast Area Remedial Action on April 1, 2013 and begin decommissioning the system.” VC ¶ 150, Ex. C, p. 6. The Town objected to this proposal in a letter to EPA and DEP dated April 30, 2013, and at a meeting with the agencies on August 12, 2013. VC ¶ 153, Ex. D; Okun Aff. ¶ 51. However, on September 20, 2013, EPA issued a letter providing “conditional approval for shutdown of the Northeast treatment system.” VC ¶ 156. The EPA’s letter authorizes Grace to imminently shut

⁵ The purpose of discharging treated effluent back to the aquifer was to mitigate “a decrease in yield of groundwater to the School Street public well field and/or....stream flow to Fort Pond Brook ... in the Northeast Area.” VC ¶ 132 (quoting RD/RA at 2-3).

down the Treatment System and does not address the Bylaw's Groundwater Cleanup Standard in any way. VC ¶¶ 160-161.

D. Current Contamination

Grace has not met either the cleanup standards established by the ROD or the identical Ground Water Cleanup Standard established by the Bylaw for VDC, a possible human carcinogen which may "cause health problems if present in public or private water supplies in amounts greater than the drinking water standard set by EPA" VC ¶¶ 64-65, 67.⁶ The ROD (at Table L-4) established the Maximum Contaminant Level Goal ("MCLG") for VDC of seven (7) parts per billion (ppb) as the ROD's "Interim Groundwater Cleanup Level" for VDC; and the Bylaw (at § 4.10) established the same 7 ppb MCLG as the Ground Water Cleanup Standard for VDC. VC ¶¶ 66, 122.⁷ By Grace's own admission, however, concentrations of VDC exceed 7 ppb in a continuous contaminant plume (about a mile long and about 1200 feet wide) extending from Grace's Site to the Lawsbrook and Scribner public drinking water supply wells. VC ¶ 147. Within the plume are areas of VDC concentrations ranging from 30-60 ppb and from 60-86 ppb, an order of magnitude greater than the applicable cleanup levels for VDC under the ROD and the Bylaw. VC ¶ 148.

With the imminent shut down of the Treatment System, Grace (and EPA and DEP) would be relying exclusively on "natural attenuation" to further reduce VDC concentrations in an effort to meet the MCLG.⁸ VC ¶¶ 159; Ex. C at pp. 3, 4, 6; ROD at p. 12. However, the

⁶ Vinyl chloride has also been encountered in concentrations exceeding the limits permitted by the ROD in Resource Areas in the vicinity of the Site. VC ¶ 78. Other VOCs, including benzene and dioxane are present in concentrations that exceed the Bylaw's Groundwater Cleanup Standards. VC ¶¶ 83, 89.

⁷ Under the federal Safe Drinking Water Act ("SDWA"), Maximum Contaminant Level Goals or MCLGs are the maximum level of a contaminant in drinking water at which no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety. See 40 CFR § 141.2.

⁸ Grace (and EPA) also advocate for so-called "institutional controls" to restrict private groundwater use until the cleanup objectives of the OU3 ROD have been met to address unacceptable risks. See VC ¶ 115; ROD at 66. It is

Bylaw requires more: before the Treatment System can be shut down, the Cleanup “shall on a permanent basis meet or surpass in cleanness the Ground Water Cleanup Standards established by this Bylaw throughout the Resource Area for each and every Contaminant for which the Cleanup is or has been undertaken;” and further all contaminated Resource Areas “must be restored to a fully useable condition. *See* Bylaw §§ 5 and 6. This standard has not been met. Moreover, as explained by the Town’s expert James Okun, there is a material difference between the active Treatment System and passive “natural attenuation.” In practical terms, the Treatment System reduces VDC in groundwater to levels meeting the 7 ppb standard under the Bylaw and the ROD approximately twice as fast as natural attenuation alone. Okun Aff., ¶ 46. For Grace to wait for nature to take its course prolongs the pollution of the public drinking water aquifer, preventing the Town and the public from making otherwise lawful uses of groundwater resources without risking exposure to Grace’s potentially carcinogenic contaminants.

Argument

I. THE APPLICABLE STANDARD FOR A PRELIMINARY INJUNCTION

Ordinarily, a party seeking a preliminary injunction must establish that “success is likely on the merits; irreparable harm will result from denial of the injunction; and the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party.” *Doe v. Superintendent of schools of Weston*, 461 Mass. 159, 164 (2011). However, a government entity seeking to enforce a law that protects the public health, safety, or welfare need not demonstrate irreparable harm. *See Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89-90 (1984); *Town of Winchendon v. Wachusett Valley Riders Club, Inc.*, 13 Mass. L. Rptr. 217, 2001 WL 881343 at *3 (Mass. Super. Ct. 2001) (irreparable harm not required where “Town seeks to

of course tautological that *preventing* the use of the aquifer is not the same as *restoring* the aquifer to a fully usable condition. *See* VC ¶¶ 108; Bylaw § 4.7 and 6; ROD at p. 12.

enforce certain state and town regulations designed to protect the health and safety of the public”).⁹ In such a case, the Court must determine, in addition to likelihood of success on the merits, only whether “the requested order promotes the public interest, or alternatively, that the equitable relief will not adversely affect the public.” *Mass. CRINC*, 392 Mass. at 89. As such, the Town is relieved “of the showing of irreparability ... because the expected injury to the legislatively prescribed public interest amounts to irreparable harm.” *Davis v. Cape Cod Hosp.*, 71 Mass. App. Ct. 1121, 2008 WL 1820642 at *2 (2008) (Rule 1:28 Decision). Indeed, the Bylaw (§ 7) specifically provides that:

[a]ny breach of this Bylaw shall be deemed to cause irreparable harm to the Town of Acton and its citizens, residents, and persons employed in the Town, entitling the Town of Acton to all appropriate injunctive relief in addition to all other available remedies provided by law.

In the present case, the Town satisfies these requirements for a preliminary injunction.

II. THE TOWN LIKELY WILL SUCCEED ON THE MERITS.

A. Grace’s Proposal to Shut Down the Treatment System Violates the Bylaw.

Under Bylaw § 7, it is a breach of the Bylaw “to discontinue for more than thirty (30) days or to abandon a Cleanup of a Resource Area without meeting the Groundwater Cleanup Standards of the Bylaw.” Grace’s Cleanup (the Treatment System) of Contaminants (including VDC) released at and from the Grace-owned Site has not met the Bylaw’s Groundwater Cleanup Standard (for VDC, the MCLG of 7 ppb) throughout the affected Resource Area (the public drinking water aquifer extending from the Site to the Lawsbrook, Scribner and School Street Wells). VC ¶ 68. As a result, Grace’s proposal to imminently shut down the Treatment System violates the Bylaw.

⁹ Although this standard typically applies to enforcement efforts by the Attorney General, “[b]y logical extension, it may benefit municipal authorities able to satisfy the requirements of demonstrated unlawfulness and harm to the public health, safety, or welfare.” *Town of Wellesley ex rel Bd. of Selectmen v. Javamine, Inc.*, 21 Mass. L. Rptr. 12, 2006 WL 1345836 at *2 (Mass. Super. Ct. 2006).

B. The Bylaw is a Valid Exercise of the Town's Governmental Authority

The Home Rule Amendment authorizes the Town to enact local Bylaws which are not inconsistent with the state constitution or state legislation, even in fields already regulated by the Commonwealth or the Federal Government. *See Amherst v. Attorney General*, 398 Mass. 793, 795 (1986) (reversing Attorney General's disapproval of local ordinance which would prohibit, with some limitations, the discharge of certain firearms within town limits); *Lovequist v. Conservation Commission of Dennis*, 379 Mass. 7 (1979) (upholding local wetlands bylaw more stringent than state Wetlands Protection Act and regulations). The Bylaw meets this standard.¹⁰

It has long been settled that protection of public health is "a subject of 'particular, immediate, and perpetual concern' to any municipality" and is at the core of its police powers. *Arthur D. Little, Inc. v. Commissioner of Health & Hospitals*, 395 Mass. 535, 546 (1985) (citations omitted). Local regulation in this area, "carr[ies] a heavy presumption of validity." *Id.* The SJC has specifically recognized a municipality's important "interest in the purity of [its] water supply" as part of its "responsibility for the health and safety of its inhabitants," and in light of "the unfortunate consequences that might result if that supply should become polluted." *Lawrence v. Commissioner of Public Works*, 318 Mass. 520, 522-23 (1945).

The Bylaw's stated purpose fits these well-recognized bases for municipal regulation. *See* Bylaw, § 2 (quoted above). The Bylaw recognizes that the Town "relies exclusively on groundwater sources within the Town as its sole source of public drinking water for residents, businesses and industries in the Town;" that "[t]here have been a number of documented releases and threats of release within the Town of 'oil and 'hazardous material;'" that groundwater serving the Town's public water supply has been contaminated or threatened by various releases of

¹⁰ In objecting to the Attorney General approval of the Bylaw, Grace raised certain legal objections to the Bylaw's validity. The following sections of this Memorandum anticipate that Grace may make similar (unavailing) arguments here.

those contaminants; and that “[m]ultiple contaminants in groundwater and/or multiple pathways of exposure to such contaminants has presented and continues to present extraordinary risks to Acton’s present and future public drinking water supply sources.” Bylaw, §§ 3.1-3.4. As there is no doubt that the Town had Home Rule and police power authority to adopt the Bylaw to address concerns at the core of its municipal interests, the Bylaw is enforceable unless preempted by state or federal law. As explained below, neither federal nor state preemption applies.

C. Federal Law Does Not Preempt the Bylaw

There are three ways in which federal or state law can preempt the Bylaw, none of which applies here: (1) express preemption, (2) field preemption, and (3) conflict preemption. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000); *Connors v. City of Boston*, 430 Mass. 31, 35 (1999).

The relevant federal laws contain savings clauses specifically disclaiming any express or field preemption. CERCLA provides that, “Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.” 42 U.S.C. § 9614(a). *See Village of DePue, Ill. v. Exxon Mobil Corp.*, 527 F.3d 775, 786 (7th Cir. 2008) (“CERCLA’s preemptive scope is not total” and does not preempt all “municipal ordinances that affect federal removal or remedial actions”). RCRA is even clearer: “Nothing in this title shall be construed to prohibit any State or political sub-division thereof from imposing any requirements...which are more stringent than those imposed by such [federal regulations].” 42 U.S.C. § 6929.

There is also no federal conflict preemption of the Bylaw. Conflict preemption will exist only if compliance with the Bylaw makes “compliance with...federal law...a physical impossibility” or if it stands “as an obstacle to the accomplishment and execution of the full

purposes and objectives of Congress.” *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 281 (1987). CERCLA’s “explicit statutory goal” is “expediting remedial measures for hazardous waste sites.” *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 89 (1st Cir. 1990). In the few cases where a Court has found local regulation preempted by federal hazardous waste law, the local regulation *prevented* a cleanup action. *See United States v. City and County of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996) (EPA remedial order requiring an on-site solidification of contaminated soils preempted local zoning ordinance prohibiting maintenance of hazardous waste in the zoning district); *Borough of Maywood v. United States*, 679 F. Supp. 413, 421 (D.N.J. 1988) (local planning board decision which had effect of preventing cleanup of site preempted). Just the opposite is the case under the Bylaw.

The Bylaw *promotes* a complete and permanent cleanup and, as applied here, will result in a more expeditious cleanup than Grace’s “natural attenuation” approach. Okun Aff. ¶¶ 45-46. The Bylaw is precisely the type of more stringent local ordinance permitted by both CERCLA’s and RCRA’s savings clauses. *United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409 (6th Cir. 1991) (State anti-degradation law may be more stringent than federal law and is not preempted by CERCLA); *Blue Circle Cement v. Bd. of Com’rs. Rogers County*, 917 F.Supp. 1514, 1518 (N.D. Okla. 1995) (under RCRA, “Congress explicitly intended not to foreclose state and local oversight of hazardous waste management more stringent than federal requirements”). The Bylaw therefore is not preempted by federal law.¹¹

¹¹ Moreover, the Bylaw does not conflict with EPA’s selected remedy under the ROD which included “active treatment of contaminated groundwater ... monitored natural attenuation of groundwater beyond the active treatment zones and institutional controls to restrict groundwater use until the cleanup objectives have been met to address unacceptable risks.” VC ¶ 115 (quoting ROD at 66). Grace admits that the combination of active treatment and natural attenuation has significantly reduced VDC concentrations in the northeast plume. VC ¶ 150; Ex. C at pp. 3, 4, 6. Continuing the active treatment will accelerate cleanup of the aquifer to the point where the ROD’s Interim Groundwater Cleanup Level and the Bylaw’s Ground Water Cleanup Standard for VDC are met. Okun Aff. ¶ 45-46. Even if EPA staff would allow Grace to shut down the active Treatment System now does not mean that federal law *requires* Grace to do so. As a result, the Bylaw’s requirement for continuing the active Treatment

D. State Law Does Not Preempt the Bylaw.

For similar reasons, the Bylaw will survive a challenge that it is preempted by state law. The state superfund statute, G.L. c. 21E, does not contain any express preemption provision. Its implementing regulations, the MCP, instead includes a broad savings clause (310 CMR 40.0007(7)) providing that, “No provision of 310 CMR 40.0000 shall be construed to relieve any person of complying with all other applicable federal, state or local laws.” In addition, the MCP contains a variety of express provisions contemplating local government regulation of hazardous material cleanups. *See Okun Aff.*, ¶ 29. There is no basis for finding that G.L. c. 21E or the MCP either expressly preempt the Bylaw or regulate hazardous waste cleanups to the exclusion of local regulation.

Given the heavy presumption of validity afforded to the Bylaw enacted to protect the public health (*Arthur D. Little*, 395 Mass. at 546), conflict preemption in Massachusetts requires a “sharp conflict between local and State provisions.” *Bloom v. City of Worcester*, 363 Mass. 136, 154 (1973). No sharp conflict exists where, as here, the Bylaw “furthers, rather than frustrates” the state statute’s intent. *Tri-Nel Management, Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 225 (2001). *See also Lovequist*, 379 Mass. 7, 15 (1979). Not only does the Bylaw advance the purpose of G.L. c. 21E “to compel the prompt and efficient cleanup of hazardous material” but the Bylaw is also consistent with the MCP’s purpose to “provide for the protection of health, safety, public welfare and the environment’ by encouraging ‘**persons responsible** for releases ... of ... hazardous material to undertake necessary and appropriate response actions in a timely way.’” *Bank v. Thermo Elemental Inc.*, 451 Mass. 638, 653 (2008)

System is not inconsistent with federal law. *See Akzo Coatings of America, Inc.*, 949 F.2d 1409 (cited above) *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (Because “CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment,” courts are “obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes.”),

(emphasis added), citing 310 Code Mass. Regs. § 40.0002. Indeed, for VDC (the principal contaminant at issue in this case), there is no conflict at all because the Bylaw's Ground Water Cleanup Standard for Resource Areas (7 ppb) is the same as the MCP's method one cleanup standard for groundwater classified as GW-1 (7 ppb). *Compare* Bylaw §§ 4.10 and 5 with 310 CMR 40.0974(2).¹²

Moreover, the Bylaw allows for a variance where “achievement of the Ground Water Cleanup Standards is technologically infeasible or not cost-effective based on the limits of best available technology, the marginal costs, the marginal benefits, and the risks to the public health, safety, welfare and the environment,” which is consistent with the MCP's overall risk-based and feasibility approach. *See* 310 CMR 40.0971-0973. Grace has not sought or been granted such a variance. VC ¶ 38. Therefore, the mere fact that the Bylaw may in certain circumstances require a stricter standard of “how clean is clean” than does than G.L. c. 21E or the MCP does not render the Bylaw in sharp conflict with the statutory scheme.¹³

This analysis is reinforced by the Commonwealth's Water Quality program. G.L. c. 21 authorizes the division of water pollution control to “[e]ncourage the adoption and execution by cities and towns.....of plans for the prevention, control and abatement of water pollution,” while also authorizing the division to adopt *minimum* water quality standards. G.L. c. 21, §§ 27(1), (5), and (12). Municipalities may use their “plans for the prevention, control and abatement of water

¹² Even where the Bylaw's cleanup standard may be stricter than the MCP's analogous numerical standard (such as a situation where “an MCLG for a specific Contaminant is zero, or where an MCLG for a specific Contaminant has not been promulgated” and the Bylaw imposes a cleanup standard of 1 ppb any/5ppb total for all such VOC's (Bylaw § 4.10(2)), it is not a “sharp conflict” with c. 21E or the MCP to require a polluter to help to protect the public health, safety, welfare and the environment by removing more of its Contaminants from a public drinking water aquifer. Stricter local bylaws are at the heart of Home Rule. *See Lovequist*, 379 Mass. at 15. The Bylaw thus furthers G.L. c. 21E's purpose of remediating polluted sites so that they pose “no significant risk to health, safety, the environment and public welfare.” G.L. c. 21E, § 3A(g).

¹³ The Bylaw (§ 10) contains a severability clause to ensure that its provisions are given maximum force and effect.

pollution” to enact more stringent water quality limits than the Commonwealth’s. The Bylaw does so, again furthering, rather than frustrating, the statutory purpose.

Because of the strong presumption of validity, the Bylaw’s focus on a core area of municipal responsibility, and the absence of any basis for state or federal preemption, the Bylaw will likely survive a challenge to its enforceability. Coupled with Grace’s violation of the Bylaw’s objective standard, the Town’s likelihood of success on the merits is high.

III. THE PUBLIC INTEREST MANDATES A PRELIMINARY INJUNCTION.

A. A Preliminary Injunction Serves the Public’s Interest in a Contaminant-Free Water Supply Aquifer.

The requested injunction furthers the important public interest “to be free of contamination to the municipal water supply.” *Anderson*, 628 F. Supp. at 1233. In enacting the Bylaw, Town Meeting unanimously affirmed this vital public interest by assuring “public health and safety through the application of stringent environmental ground water cleanup standards which assure restoration of any contaminated water resources area covered by [the Bylaw] to a fully useable condition.” Bylaw § 2. EPA recognized a similar public interest in establishing the goal for OU3 that requires Grace to restore the groundwater resources to a “fully useable condition in the shortest practical time” “so that the aquifer is suitable as a public water supply and for irrigation purposes without pre-treatment for Site-related contaminants.” VC ¶¶ 108, 116 (quoting ROD at 12, 47). The Bylaw implements this public interest by adopting cleanup standards linked to MCLGs, public health goals aimed at assuring “no known or anticipated adverse effect on the health of persons would occur, and which allows an adequate margin of safety.” *See* 40 CFR § 141.2.

Requiring Grace, the party responsible for the contamination, to continue to pump and treat the groundwater will promote this public interest. In fact, despite operating at about 40% of

its design capacity, the Treatment System, during its first three years of operations, removed over fourteen pounds of Grace's VOCs from the aquifer. VC ¶ 143; Ex. C at p. 4 and Fig. 4 and 5. Based on a comparison of the aerial extent and concentration of Grace's plume of Contaminants affecting Resource Areas in 2009 (before the Treatment System began to operate) and in 2012 (approximately three years into its operation), the Treatment System has removed significant concentrations of Grace's Contaminants from affected Resource Areas downgradient of the Site. *Compare* VC Ex. C Fig. 4 and 5. If it is not shut down, the Treatment System will continue to accelerate the removal of Grace's VOCs from the affected Resource Areas. Okun Aff., ¶ 46. If the Treatment System remains in operation at its current rate of pumping and treatment, groundwater Resources Areas would be expected to meet the Bylaw's Groundwater Cleanup Standards within about 15 years, compared to about 31 years for natural attenuation alone. *Id.* The Treatment System also enhances the effects of natural attenuation even in contaminated areas beyond the range of the Treatment System because it causes cleaner water with a greater degree of oxygenation to penetrate the core of the plume. Okun Affidavit, ¶¶ 47-49.

Remediating contaminated groundwater to a "fully useable condition in the shortest practical time" has other meaningful public benefits. The ROD calls for "institutional controls" to restrict groundwater use until the cleanup objectives of the OU3 ROD have been met to address unacceptable risks. VC ¶ 159 (citing ROD at 66). As a practical matter, no member of the public can install or use a private irrigation well that draws groundwater from the contaminated plume or the surrounding area. Okun Affidavit, ¶ 69. EPA advocates for such institutional controls because the contaminated "groundwater would not be safe for homeowners or others to ingest or otherwise come into contact with." VC ¶ 164. Accelerating the groundwater cleanup with the Treatment System would reopen groundwater for such public use.

B. The Treatment System Does Not Adversely Affect the Public Interest

Continuing the Treatment System's operation will not adversely affect the public. *Mass. CRINC*, 392 Mass. at 89. As the Tetra Tech Letter acknowledges, despite the Treatment System's operation for the past three years, "[w]ater levels and extraction rate data collected by the Acton Water District....do not show any obvious impacts to yield or drawdown from operation" of the Treatment System. VC ¶ 150. The only suggestion that the Treatment System may adversely affect the public is the claim that the Treatment System has caused the pumping of dioxane-contaminated groundwater from the bedrock aquifer and the re-injection of dioxane-contaminated water into the shallower aquifer, potentially contaminating the shallower aquifer with dioxane. Okun Aff. ¶ 73. The facts do not support a finding that this has occurred. Okun Aff. ¶¶ 74, 78. In any event, that purported harm was created by Grace itself and cannot justify a premature shut down of the Treatment System.

The potential harm caused by relocating dioxane from a deeper aquifer to a shallow aquifer is a harm which Grace caused and controls. The RD/RA required Grace, in designing the Treatment System, to present "alternate procedures to prevent releases or threatened releases of hazardous substances, pollutants, or contaminants, which may endanger health and the environment or cause an exceedance of any cleanup standard." VC ¶ 137 (quoting RD/RA at 41). There are several alternatives for dioxane that do not require the drastic result of shutting down the Treatment System. Grace can (if feasible) treat the pumped water to remove dioxane prior to discharge. Okun Aff. ¶ 79. If such treatment is infeasible, Grace can (with permission from EPA and DEP) discharge dioxane-contaminated water to Sinking Pond, which is not used as a public drinking water supply or, with permission from EPA and DEP to other surface water

such as the nearby Fort Pond Brook. *See* Okun Aff. ¶ 79; VC ¶ 132 (quoting RD/RA at 2-3).¹⁴ Grace could also obtain and comply with a groundwater discharge permit for dioxane-contaminated groundwater. These alternatives would allow Grace (along with EPA and DEP) to determine what levels of dioxane may safely be discharged to surface or ground waters. Simply put, Grace cannot use its dioxane pollution as an excuse to justify shutting down the Treatment System which is removing Grace's other VOC pollution where there are viable alternatives to solve a dioxane problem of Grace's own making.

IV. SHUTTING DOWN THE TREATMENT SYSTEM WOULD CAUSE IRREPARABLE HARM.

Even if the Town were required to demonstrate irreparable harm, the Town would be entitled to an injunction because the Treatment System's shut down would cause irreparable harm and threaten the public health and safety of Town's residents. Baseline human health and ecological risk assessments conducted in connection with the ROD "revealed that potential exposure to compounds of concern in groundwater and sediment via ingestion, dermal contact, and/or inhalation by human receptors may present an unacceptable human health risk...or an unacceptable ecological risk." VC ¶ 113 (quoting ROD at 46). The ROD concluded that, because of these risks, not implementing the response action selected in this ROD, "may present **an imminent and substantial endangerment to public health, welfare, or the environment.**" VC ¶ 114 (quoting ROD at 46).

The ROD's cleanup levels, let alone the Bylaw's more stringent standards have not been met. Rather, concentrations of VDC, and in some cases vinyl chloride, continue to exceed the ROD's cleanup levels. VC ¶¶ 68, 78. Groundwater at and downgradient of the Site fails to meet federal and state public drinking water standards and the MCP's GW-1 standard. Okun Aff.

¹⁴ Discharging directly to Fort Pond Brook would also alleviate concerns regarding the potential drawdown of water levels in the brook due to pumping. *See* Okun Aff. ¶ 79.

¶¶ 59. If the Treatment System is shut down, groundwater Resource Areas will not meet the Groundwater Cleanup Standards in the Bylaw for another 31 years (compared to 15 years if the Treatment System operates at its current rate). Okun Aff. ¶¶ 45-46. During that period, affected groundwater will either remain unavailable for public use or will have to be treated by the AWD (at public expense) prior to use.

Even a temporary shutdown (longer than 30 days allowed by Bylaw § 7) can cause irreparable harm because some of the gains made as a result of the Treatment System's operation would be lost and contaminant levels would rise in the short run. Okun Aff. ¶¶ 56. In addition, portions of the contaminant plume would migrate during the shutdown, getting closer to the public water supply wells and potentially beyond the reach of the Treatment System even if the Treatment System were later reactivated. Okun Aff. ¶ 57. Shutting down the Treatment System would also slow the rate of natural attenuation of VOCs in the groundwater by limiting the supply of clean, oxygenated water in the aquifer. Okun Aff. ¶ 58.

Conclusion

For these reasons, the Court should grant the Town's Motion and prohibit Grace, and those acting in concert with it, from shutting down the Treatment System at this time.

The Plaintiffs
By their attorneys,


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CERTIFICATE OF SERVICE

I certify that I caused this Memorandum to be served on the Defendant's Registered Agent by sending it by hand to the Civil Process Division of the Suffolk County Sheriff's Department for service of process with the Summons and Complaint in this matter on this 23rd day of September 2013.



Mina S. Makarios