STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL for the
STATE OF MICHIGAN, et al,
MICHIGAN NATURAL RESOURCES
COMMISSION, MICHIGAN WATER
RESOURCES COMMISSION, and
MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

Plaintiffs,

Case No. 88-34734-CE

vs

Hon. Donald E. Shelton

GELMAN SCIENCES INC.,
a Michigan corporation,

Defendant.
_____/

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**PALL LIFE SCIENCES' RESPONSE TO PLAINTIFF'S MOTION TO ENTER ORDER PROHIBITING GROUNDWATER USE**

## INTRODUCTION

In its December 17, 2004 Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer (the "Unit E Order"), this Court identified the specific response activities that Defendant Pall Life Sciences ("PLS") needed to implemented to address the Unit E contamination. (Exhibit 1.) One of the actions necessary

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to address the eastern portion of the plume was entry of an order restricting the use of groundwater in specified areas to supplement the existing Washtenaw County Rules and Regulations. (Unit E Order, pp. 11-12.) The parties were instructed to submit a proposed order that contained the additional controls specified in the Unit E Order. The institutional control order was to include a map showing the area within which restrictions on the use of the Unit E aquifer would apply (the "Protected Area").[1]

Unfortunately, the parties could not agree on the language of the required order or on the southern boundary of the Protected Area, due in large part to provisions inserted at the insistence of the City of Ann Arbor (the "City"). Although Pall Life Sciences ("PLS") agrees with much of Plaintiff's proposed order, the order contains several provisions that are inconsistent with this Court's Unit E Order and/or are unnecessary. Specifically, under Plaintiff's proposed order:

a. The City could not use the Northwest Supply Well and would be required to formally abandon the well. (Plaintiff's proposed order and map, ¶¶ 4 and 7, attached as Exhibit 2).

b. PLS would be required to compensate the City for abandoning the Northwest Supply Well and for obtaining an alternative, replacement water supply, including all associated infrastructure, studies, access fees, etc. (Plaintiff's proposed order, ¶ 7a-f.)

c. Owners of existing, uncontaminated private water supply wells that draw water from aquifers other than the Unit E would be required to abandon their wells, simply because the wells are located within the horizontal boundaries of the "Protected Area."

d. PLS would be required to submit and implement a DEQ-approved work plan for determining whether there are any drinking water wells in the Protected Area, even though PLS has already undertaken this investigation as part of its preparation of the Feasibility Study.

[1] Plaintiff's proposed order refers to the area where groundwater use is restricted as the "Prohibition Zone." PLS refers to this area as the "Protected Area."

PLS addresses each area of disagreement in this response and submits the attached proposed institutional control order and map depicting the Protected Area (Exhibit 3), which are consistent with both this Court's previous orders and the statutory requirements regarding institutional controls.[2]

**A. The Fate Of The City's Closed Northwest Supply Well Should Be Determined In The City's Lawsuit, Not Unilaterally By Entry Of An Institutional Control Order.**

1. This Court Has Already Ruled That Abandonment Of The Northwest Supply Well Is Not A Condition For Approval Of PLS' Cleanup Plan.

As this Court noted in its Unit E Order, the DEQ qualified its approval of PLS' proposed reinjection response plan to address the eastern portion of the plume on the satisfaction of six conditions. (Exhibit 1, Unit E Order, p. 10.) One of those conditions was the formal abandonment of the City's already out-of-service water supply well (the Northwest Supply Well, a/k/a the Montgomery Well). (Exhibit 1, Unit E Order, p. 10.) The City stopped using this well immediately after low levels of 1,4-dioxane (2 ppb) were detected in the well in March, 2001. As this Court acknowledged in the Unit E Order, the well is the subject of a separate lawsuit filed by the City, in which the City is pursuing claims for abandonment and replacement costs. (Exhibit 1, Unit E Order, p. 10-11.) Accordingly, this Court unequivocally rejected abandonment of the well as a condition to the otherwise acceptable cleanup plan:

> The outcome of those allegations, and any compensation claims, will be decided in that separate action. As far as this case is concerned, the closed well has no bearing on the remediation plan for Unit E. There is no basis to include [abandonment of the well] as a condition to the clean up plan.

[2] Exhibit 3 contains both a clean version of PLS' proposed order and a redline that identifies changes made to Plaintiff's proposed order.



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(Exhibit 1, Unit E Order, p. 11 (emphasis added).) Plaintiff neither appealed the Unit E Order nor sought reconsideration of this Court's rejection of the well abandonment condition.

Contrary to this clear finding, Plaintiff is now attempting to revive its well abandonment condition through the backdoor, under the auspices of its proposed institutional control order. Plaintiff's proposed order, and its insistence on gerrymandering the southern boundary of the Protected Area to include the Northwest Supply Well, would not only prohibit use of the well, but would require PLS to pay the City to abandon the well and to provide an alternative water supply well along with all of the supporting infrastructure, without affording PLS the opportunity to present a defense to these claims in the City Lawsuit. (See Exhibit 2, Plaintiff's proposed order, ¶ 4 (prohibition on use of groundwater within the Protected Area); and ¶ 7a-f (requiring abandonment and replacement, at PLS' expense, of the Northwest Supply Well)). This is precisely the compensation being sought by the City in its lawsuit against PLS. As even Plaintiff acknowledges, these requirements are blatantly inconsistent with this Court's clear ruling on this issue. (Plaintiff's Motion, ¶ 12.)

This Court should reject, out of hand, Plaintiff's belated (and unsupported) suggestion that this Court was "legally and factually erroneous" and that its rejection of the well abandonment requirement "should be reconsidered." The time for seeking reconsideration of this Court's ruling has long since passed. MCR 2.119(F) (motion for reconsideration must be filed within 14 days of entry of order). Substantively, Plaintiff has not presented any new facts or other acceptable justification for its untimely reconsideration request. Rather, Plaintiff simply repeats the position it took in its September 2004 Decision



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Document with regard to the abandonment of the Northwest Supply Well. That is not an appropriate basis for reconsideration:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration, which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

MCR 2.219(F)(3) (Emphasis added). This Court "expressly" ruled that the fate of the Northwest Supply Well and any related compensation claims should be decided in the City lawsuit, based on the factual record developed in that case. Certainly, "by reasonable implication," this Court also ruled that the required institutional control order should not include provisions that would unilaterally accomplish just the opposite result. Given Plaintiff's failure to identify any "palatable error" by this Court or to present any new factual support for its well abandonment condition, Plaintiff's request for reconsideration and its proposed order should be summarily rejected.[3]

2. This Court Correctly Rejected Plaintiff's Well Abandonment Requirement.

Plaintiff's failure to present any factual support for its position on the Northwest Supply Well is not surprising since it position is based on an unwritten "policy," not on any facts specific to this unique situation. (Plaintiff's September 1, 2004 Decision Document, p. 9). Furthermore, the record developed in connection with the City lawsuit supports this Court's rejection of Plaintiff's unsupported municipal well abandonment requirement:

- **Low Levels Of 1,4-dioxane.** Levels of 1,4-dioxane in the Northwest Supply Well, which have varied between 2 ppb and 4 ppb since the first detection in early 2001, have remained well below the 85 ppb cleanup criterion determined safe for drinking water. There is no

[3] Neither Plaintiff nor PLS can tell this Court what the financial impact of the Plaintiff's draconian proposed order would be. Even today, a year after suing PLS, the City has refused to identify the cost of replacing the well or the other damages it seeks. (See City's discovery responses, attached as Exhibit 4.)



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increasing trend as would be expected if the plume was migrating toward the well.

- **Well Not In Flow Path Of Plume**. Based on the currently available hydrogeological data, much of which was developed by the City in connection with its wellhead delineation study, the Northwest Supply Well is not in the flow path of the plume. (Exhibit 5.) Moreover, based on the current hydrogeologic understanding of the area, there appears to be a significant clay layer (approximately 30-40 feet thick) that shields the Northwest Supply Well, which is screened in the deepest portion of the aquifer (referred to as the "E-2"), from the more heavily contaminated shallower zone (referred to as the "E-1"). Therefore, even if the Northwest Supply Well was in the path of the plume, it appears to be vertically separated from the plume itself.[4]

- **The Well Is Closed And Will Not Be Restarted Absent An Unprecedented Emergency**. This Court correctly observed that the Northwest Supply Well is "closed." The City has not used the well since March 2001, and has no intention of doing so. Sue McCormick, the City Public Utilities Director, confirmed during her recent deposition that the City would not use the Northwest Supply Well as long as it contained detectable levels of 1,4-dioxane, except in an emergency situation (e.g., a catastrophic loss of raw water supply from the City's other raw water sources, the Huron River and the Steere Farm well field). (McCormick Dep. Tr., pp. 95-96, attached as Exhibit 6.) Ms. McCormick also confirmed that the City does not need water from the well to meet current capacity needs, that water demand has been stagnant for some time, and that no significant increase in demand in the foreseeable future is anticipated. (Exhibit 6, McCormick Dep. Tr., pp. 40-41, 130-31).

- **The City Has Told This Court That Use Of The Well Would Be Illegal**. The City has taken the position in this litigation that it is *legally prohibited* from using this well because to do so would violate its alleged Due Care obligation not to exacerbate the contamination under Section 7a of Part 201, MCL 324.2017a.[5] For example, in its November 3, 2004 response to PLS' motion for partial summary disposition, the City stated as follows:

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[4] A good example of the effectiveness of this barrier is the data from the MW-76 location, the closest existing monitoring location to the Northwest Supply Well. There are three monitoring wells at that location screened in the shallow, intermediate and deep portions of the aquifer (MW-76s, MW-76i, and MW-76d). Like the Northwest Supply Well, MW-76d is screened in the E-2, below the clay layer. MW-76s and 76i are screened in the E-1 portion of the aquifer. Although 1,4-dioxane levels in the shallowest well have hovered around the 85 ppb criterion (ranging from 61 to 108 ppb), levels in MW-76d have been barely detectable (ranging from non-detect to 2 ppb).

[5] It should be noted that PLS does not agree with the City's position in this regard.

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> Ann Arbor completed a Wellhead Protection Study relating to the Northwest Supply Well on September 30, 2002, which concluded that contamination found under Veteran's Memorial Park was in the same aquifer (Unit E) from which the Northwest Supply Well draws its water. . . In addition to complying with its clear statutory duty not to exacerbate the contamination caused by PLS, Ann Arbor's action in not restarting the Northwest Supply Well after September 30, 2002 is consistent with its duty to mitigate its damages. . . . Accordingly, it was only on or after September 30, 2002 that Ann Arbor first knew of the injury to the Northwest Supply Well because resumed use of the well would cause an illegal exacerbation of the contamination in Veterans Memorial Park.

(City's Brief, pp. 14-15, attached as Exhibit 7 (emphasis added);see also City of Ann Arbor's proposed Amicus Brief, p. 2.)

Thus, the City has, *in pleadings submitted to this Court*, stated that it is legally precluded from operating the Northwest Supply Well. Having told this Court, in support of its damage claim, that it cannot legally operate the well, it is inconceivable that the City would ever operate the well. The City's legal position is also consistent with the City's repeated public statements that it would not operate the well as long as it contained detectable amounts of 1,4-dioxane, except in case of an emergency.

- **The Well Is Adjacent To An Abandoned Landfill.** PLS recently discovered that there is a closed landfill located immediately adjacent to the Northwest Supply Well. According to the City's Phase II Environmental Site Assessment, which PLS has been allowed to review, but which has not yet been produced, the "Bemdji Street Landfill" contains heavy metals and PNAs in excess of acceptable levels. Despite its proximity to the Northwest Supply Well, the City apparently did not test for 1,4-dioxane in either the soil or the groundwater impacted by the landfill. PLS only recently learned of the landfill's existence because the City had previously redacted the reference to it before producing to PLS a document referring to the landfill. In that document, the City redacted the following sentence: "At this time, the exact source of the 1,4-Dioxane is not known. Most likely it is either from the groundwater contamination plume (Pall-Gelman) or from the construction fill site adjacent to Montgomery well." Because PLS only recently learned of the landfill's existence, PLS has not yet determined whether the landfill could be the, or "a," source of the small amounts of 1,4-dioxane present in the well, or, more generally, the effect of the landfill on the usefulness of the well.

- **The Northwest Supply Well Is Already Contaminated.** As noted in the Unit E Order, the City has detected arsenic in the well water at

> 18 ppb, well above the federal MCL of 10 ppb, which Michigan recently adopted (effective April 30, 2005). Under state law, the MCL becomes the residential cleanup criterion for arsenic. MCL 324.20120a(5). The presence of arsenic above the cleanup criterion renders the well property a "facility" under state law for reasons that have nothing to do with PLS or 1,4-dioxane. The effect of this issue on the City's claims for damages and water supply replacement costs must be evaluated in the City lawsuit and should not be unilaterally resolved by the institutional control order to be entered in this case.

Each of these factual issues, and many more, along with yet-to-be-developed expert testimony and associated legal issues regarding the City's claims need to be weighed and evaluated before the fate of the Northwest Supply Well (and whether any compensation is due) can appropriately be determined. PLS asks this Court to recognize its rights to fairly litigate the City's allegations in the City Lawsuit and to prevent PLS' due process rights from being undermined by entry of Plaintiff's proposed order.

3. The City Has Attempted To "Win" Its Lawsuit Against PLS Through Entry Of An Institutional Control Order That Is Inconsistent With The Unit E Order.

The sequence of events leading up to Plaintiff's submission of its proposed order makes it clear that the proposed requirement that PLS pay the City to abandon and replace the Northwest Supply Well was added at the insistence of the City. Simply put, the City is attempting to obtain the relief it is seeking in its lawsuit against PLS without having to prove its case.

Neither the original order drafted by Plaintiff's counsel on January 18, 2005, nor the draft order it provided to PLS on February 25, 2005, in response to PLS' comments required PLS to pay the City to abandon and replace the Northwest Supply Well. (Exhibit 8.) On February 28, 2005, in response to the City's attorney's request, Mr. Reichel provided this draft version of the institutional control order to the City's litigation counsel. (Exhibit 9.) In response, the City sent Mr. Reichel correspondence dated March 4, 2005 (not copied to



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counsel for PLS), complete with a redlined version of a revised order the City wanted the State to file with this Court. (Exhibit 10.) The revisions included the disputed language in paragraph 7 of Plaintiff's proposed order regarding replacement of the Northwest Supply Well. The City also quickly arranged a meeting with Plaintiff's Lansing officials on March 7, 2005, to lobby the State to adopt the redrafted order.[6] State Senator Brater, former Mayor of Ann Arbor, also contacted Plaintiff in connection with the order. (Exhibit 11.)

As a result of this lobbying effort, Plaintiff served a substantially revised order, without first discussing the changes with PLS, on March 11, 2005.[7] The most significant change made was that Plaintiff adopted, virtually without modification, the City's demand that PLS be required to pay the City for abandonment and replacement of the Northwest Supply Well. (Compare paragraph 7 of Plaintiff's current proposed order to paragraph 11 of the City's version of the order). Again, neither Plaintiff nor the City in its recently filed amicus brief offers a scintilla of factual support justifying this requirement or reconsideration of this Court's previous Unit E Order. Rather, the only justification for this requirement is the unproven claims made by the City in its lawsuit against PLS. PLS asks this Court to reject the City's attempt to circumvent the Court's Unit E Order as well as its burden of proving its claims in its lawsuit against PLS and to enter PLS' proposed order.

**B. Existing Non-Unit E Well Owners Should Not Be Forced To Connect To City Water.**

The institutional control order is intended to prevent unacceptable exposures to groundwater in the Unit E aquifer. Plaintiffs' proposed order, however, would require any

[6] After receiving Plaintiff's motion, PLS requested copies of communications between the City and Plaintiff regarding the order. Only upon receiving these documents did PLS learn of this meeting.

[7] Plaintiff, though counsel, notified PLS that it intended to file a revised order that included the City's demand for replacement of the Northwest Supply Well. PLS was informed that the decision had already been made and PLS was not given an opportunity to object to the inclusion of the City's provisions.

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private well owner within the Protected Area to abandon his/her well, regardless of whether the well draws water from the Unit E aquifer or some other, unaffected aquifer. (Exhibit 2, Plaintiff's proposed order, ¶ 6.) Such a requirement is unnecessary where it is clear that the existing well is uncontaminated and screened in a separate aquifer. PLS' proposed order would permit the handful of existing private well owners that may be in this situation to continue to use their unimpacted wells. (Exhibit 3, PLS' proposed order, ¶ 5e.)

**C. Submission Of A Work Plan To Identify Wells In The Protected Area Is Unnecessary.**

Plaintiff's proposed order would require PLS to submit a work plan to the DEQ for "identifying, or verifying the absence of, any private wells within the Prohibition Zone . . . ." (Exhibit 3, Plaintiff's proposed order, ¶ 6.) PLS does not dispute the importance of determining whether such wells exist. Rather, PLS' position is that it already took all reasonable steps to accomplish this goal when it prepared its June 1, 2004 Feasibility Study for the Unit E and does not believe there is any additional work to be done in this regard. It should be noted that, despite the involvement of the local governmental units in this matter, both in pleadings submitted to this Court and in numerous meetings with the DEQ, no "LUG" has identified a private water supply well within the Protected Area that PLS had not already identified. Moreover, the Order's instruction that the institutional control order be published along with the map depicting the Protected Area will provide an additional safeguard against unacceptable use of the aquifer.

PLS is concerned that the proposed requirement that PLS undertake further investigation is completely undefined and, therefore, potentially unlimited, subject only to the discretion of the DEQ. In response to Plaintiff's motion, PLS has provided Plaintiff with a written description of what investigatory steps it has already taken and has asked Plaintiff

to specify what additional investigation should be undertaken. Ideally, the parties could discuss any proposed investigation before the hearing, and, if necessary, the issue could be resolved by the Court as part of this hearing. To the extent any additional steps need to be taken, they should be listed in the order itself.

## CONCLUSION

For the reasons stated above, PLS asks this Court to reject Plaintiff's proposed Order Prohibiting Groundwater Use as inconsistent with this Court's Unit E Order and to enter the modified version of Plaintiff's proposed order attached hereto, along with the attached map, which depicts the "Protected Area" to be covered by the Order.

Respectfully submitted,

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