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,

vs

GELMAN SCIENCES INC., a Michigan corporation,

Defendant.
_____/

Case No. 88-34734-CE

Hon. Donald E. Shelton

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BRIEF IN SUPPORT OF MOTION TO AMEND CONSENT JUDGMENT

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INTRODUCTION

Pall Life Sciences ("PLS") seeks to amend the Consent Judgment to clarify its obligations with regard to the Evergreen System. Specifically, PLS asks that the Consent Judgment be amended to clarify that the objectives of the Evergreen groundwater extraction system do not apply to the plume of contamination in the Unit E aquifer. As the Court is aware, contamination in the Unit E was discovered in 2001, well after the parties drafted the October 1992 Consent Judgment. The proposed amendment to the Consent Judgment will make it consistent with the current state of knowledge and this Court's December 17, 2004 Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer (the "Unit E Order"). This amendment is necessary because operation of the Evergreen System, which is designed to meet the current objective of capturing the "leading edge" of the groundwater contamination "in the vicinity of" the Evergreen Subdivision, has unintentionally distorted the Unit E plume and drawn additional groundwater contamination from the Unit E aquifer into the Evergreen Subdivision. Continued adherence to the original Consent Judgment objectives will negatively affect both the Evergreen Subdivision cleanup and the institutional control established by this Court's "Unit E Order" to protect the public from the Unit E plume. In particular, continued operation of the Evergreen System will continue to pull the Unit E plume north, beyond the current boundary of the Prohibition Zone.[1]

[1] As set forth in PLS' Motion to Amend Consent Judgment, PLS is also proposing to modify the cleanup criteria set forth in the Consent Judgment to make them consistent with the current DEQ regulations. This type of amendment is specifically required by State law, and the parties have previously stipulated to a much more significant modification of the cleanup criteria based on earlier revisions to the State-wide cleanup criteria. PLS does not expect the State to oppose these modifications. Consequently, PLS will not address these changes in this brief, but reserves the right to do so if they are, in fact, opposed.

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FACTUAL AND PROCEDURAL BACKGROUND

A. Consent Judgment Objectives for the Evergreen System.

The parties to this action entered a Consent Judgment in this matter on October 26, 1992. The Consent Judgment has been amended on two occasions since that time. (Relevant portions of the Consent Judgment are attached as Exhibit 1.) The Consent Judgment requires PLS to implement various remedial actions to address environmental contamination in the vicinity of PLS' property.

The Consent Judgment addresses each of the known areas of groundwater contamination, including the plume of contamination that migrated into the "Evergreen Subdivision Area."[2] The plume of contamination located in the Evergreen Subdivision has generally been referred to as the D_2 plume, so named after the aquifer within which the plume has migrated to the subdivision.

At the time the parties entered into the Consent Judgment, the parties were unaware of any contamination in what is now known as the "Unit E" aquifer. Accordingly, the parties drafted the Consent Judgment objectives for the Evergreen System broadly, based on the assumption that the only contamination "in the vicinity of the" Evergreen Subdivision was contamination known to be present in the D_2 aquifer:

> (a) to intercept and contain *the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area*; (b) to remove the contaminated groundwater from the affected aquifer; and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that is not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section VI.

(Exhibit 1, § V.A.1 (emphasis added).) In 2001, the parties discovered that the assumption underlying this provision was inaccurate.

[2] The Consent Judgment defines the "Evergreen Subdivision Area" as the "residential subdivision generally located north of I-94 and between Wagner and Maple Roads, bounded on the west by Rose Street, on the north by Dexter Road, and on the south and east by Valley Drive." (Exhibit 1, § III.D.)

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B. Interaction of Unit E and D_2 Plumes.

Contamination in the Unit E aquifer was discovered for the first time in 2001. (Unit E Order, Exhibit 2, p. 3.) After extensive briefing and public debate, the Court issued its Unit E Order. The Unit E Order sets forth how PLS will be required to address the groundwater plume present in the Unit E aquifer. Among other protections, the Unit E Order establishes a "Prohibition Zone" within which the use of, and exposure to, the groundwater is generally prohibited. PLS is also required to prevent groundwater contamination in excess of 2800 parts per billion ("ppb") from migrating east of Maple Road. Less contaminated portions of the Unit E plume are allowed to migrate safely to the Huron River, subject to the protections of the Prohibition Zone. Although concentrations in the Maple Road area have not approached 2800 ppb, PLS has been operating its Maple Road groundwater extraction/treatment/reinjection system since March of last year.

Historically, the parties understood that Unit E plume and the D_2 plume were two distinct plumes of contamination. However, based on newly collected data, it is now clear that there is no geologic separation between the two aquifers in certain areas and that they can hydraulically communicate in the areas where they are not physically separated. (Affidavit of James W. Brode ("Brode Aff."), Exhibit 3, ¶ 19.) It is also clear that, as a result of this connection, operation of the Evergreen System has unintentionally pulled in a portion of the Unit E plume into the Evergreen Subdivision from the south and into the capture zone of the Evergreen System extraction wells. (Brode Aff., Exhibit 3, ¶¶ 18, 19.)

Pumping the Evergreen System at the current rates has caused a significant hydraulic depression in the area of LB-1 and LB-3 as well as a steep hydraulic gradient from south to north along the southern flank of the Evergreen System area. (Brode Aff., Exhibit 3, ¶ 19.) This has

caused the plume at that location to be drawn into the Evergreen Subdivision Area and beyond the northern boundary of the Prohibition Zone. (Brode Aff., Exhibit 3, ¶ 20.) The evidence that this is occurring is overwhelming. Among other things, recent data show that the concentration of 1,4-dioxane in groundwater samples from wells LB-1, LB-2 and LB-3 (which has replaced LB-2) has remained stable. (Brode Aff., Exhibit 3, ¶ 19.) On the other hand, concentrations of 1,4-dioxane in the upgradient portion of the D_2 plume – the Evergreen System's only known source of contamination other than contribution from the Unit E plume – *have been declining since 2001.* (Brode Aff., Exhibit 3, ¶ 19.) Similarly, the concentration of 1,4-dioxane has steadily increased in samples from wells located southeast of the LB extraction wells (see, e.g., 440 Clarendon and 456 Clarendon), even though the LB wells have prevented groundwater contamination from migrating east of Evergreen Street since 1996. (Brode Aff., Exhibit 3, ¶ 19.) These data, and the other evidence described in Mr. Brode's affidavit, indicate that the capture zone for LB-1, LB-3 and AE-1 includes a portion of the "Unit E" plume and that operation of those wells at the current rates (LB-1 at 90 gpm and LB-3 at 80 gpm) has pulled the northern portion of the Unit E plume toward those wells and into the Evergreen Subdivision. (Brode Aff., Exhibit 3, ¶¶ 18, 19.)

C. The Allison Street Extraction Well Is No Longer Necessary to Satisfy the Consent Judgment.

Moreover, data gathered by PLS indicate that further operation of the Allison Street extraction well (currently AE-3) is not necessary to satisfy the original intent of the parties with regard to the objectives of the Evergreen System remediation, *i.e.*, capture and containment of the D_2 plume. As this Court will recall, PLS installed an extraction well along Allison Street (after extensive litigation) in order to capture a small portion of the plume that may have escaped beyond the LB extraction location on Evergreen Street in 1996, during the period PLS was

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forced to stop extraction because the injection well used to dispose of the treated water became inoperable. PLS restarted the LB extraction and reestablished capture at the Evergreen Street location within a few months, after PLS obtained permission to dispose of its treated water via the City's sanitary sewer. PLS has captured the entire width of the D_2 plume at the Evergreen Street location since that time. (Brode Aff., Exhibit 3, ¶ 18.)

Because the upgradient source of contamination was quickly cut off, the escaped portion of the plume the Allison Street extraction well was intended to capture was quite small – PLS estimates the mass of this plume fragment to be approximately 60 pounds. (Brode Aff., Exhibit 3, ¶ 19.) Despite the fact that PLS' Evergreen Street extraction has cut off the upgradient source of contamination reaching the Allison Street extraction wells, PLS has removed approximately 100 pounds of 1,4-dioxane from the AE wells to date. In addition, concentrations in a small area in the immediate vicinity of the AE wells have also remained slightly above the cleanup criterion, even though the upgradient contaminant source was cut off in 1996. (Brode Aff., Exhibit 3, ¶ 19.) The only plausible explanation for these data is contribution from the Unit E aquifer. Accordingly, and contrary to the original purpose of the Allison Street extraction, the small amount of contaminant mass currently being captured by AE-3 (concentrations in AE-3 have been below 85 ppb since July, 2005) is primarily, if not entirely, Unit E contamination, not the leading edge of the D_2 plume. (Brode Aff., Exhibit 3, ¶ 19.) Therefore, continued operation of an extraction well at Allison Street is no longer necessary to achieve the Consent Judgment objectives for the Evergreen System, as the parties originally envisioned them. Indeed, operation of the Allison Street extraction well only exacerbates the distortion of the Unit E plume and the extent to which that plume is being pulled beyond the Prohibition Zone boundary.

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D. Proposed Amendment to Consent Judgment.

Accordingly, PLS seeks to amend the Consent Judgment to clarify that it obligations with regard to the Evergreen System do not unintentionally require it to operate the Evergreen System in such a way that it draws contamination from the Unit E aquifer into the Evergreen Subdivision. PLS proposes to amend the Consent Judgment as follows:

> A. Evergreen Subdivision Area System
> (hereinafter "Evergreen System")
>
> 1. Objectives. The objectives of this system shall be: (a) to prevent groundwater contamination that is present north of Valley Street and west of Evergreen Street within the Evergreen Subdivision area from migrating east of Evergreen Street, except to the extent such groundwater contamination may migrate east of Evergreen Street, but remains within the capture zone of the extraction well or wells located in the immediate vicinity of Evergreen Street; (b) to remove the contaminated groundwater from the affected aquifer; and (c) to remove all groundwater contaminants from the affected aquifer or upgradient aquifers within the Site that is not otherwise removed by the Core System provided in Section V.B. or the GSI Property Remediation Systems provided in Section VI. The objectives of the Evergreen System shall not apply to groundwater contamination that is addressed by this Court's December 17, 2004 Order and Opinion Regarding Remediation of the Contamination of the "Unit E" Aquifer.

(Proposed changes highlighted.)

By removing the reference to intercepting the "leading edge" of groundwater contamination in the "vicinity of" the Evergreen Subdivision area, the proposed modification eliminates the ambiguity caused by the intrusion of Unit E contamination and the confusion between what constitutes the leading edge of the D_2 plume versus the northern edge of the Unit E plume. The proposed amendment unequivocally requires PLS to capture the entire width of the D_2 plume at the LB extraction well location on Evergreen Street, consistent with the DEQ's past interpretation of the Consent Judgment. These modifications will allow PLS to design the Evergreen System in a way that minimizes if not eliminates the unintended distortion of the Unit E plume, allowing that plume to resume its natural migration pathway within the Prohibition

Zone. Amending the Consent Judgment objectives to allow PLS to terminate the Allison Street extraction will not cause any significant environmental harm or danger to the public. If AE-3 were to be permanently shut off, any such contamination beyond the capture zone of LB-1 and LB-3 would migrate a short distance (about 500 feet), then enter the existing boundaries of the Prohibition Zone. The contamination would then merge with the existing Unit E plume in the area of Maple Road. (Brode Aff., Exhibit 3, ¶ 16.)

LEGAL STANDARDS FOR AMENDING THE CONSENT JUDGMENT

A consent decree is a judicial "hybrid," with characteristics of both a voluntary settlement agreement and a final judicial order. *Vanguards of Cleveland v City of Cleveland*, 23 F3d 1013, 1017 (CA6 1994). "[J]udicial approval of a consent decree places the power and prestige of the court behind the agreement reached by the parties." *Id.* at 1018. Accordingly, "[t]he injunctive quality of a consent decree compels the approving court to: (1) retain jurisdiction over the decree during the term of its existence, (2) protect the integrity of the decree with its contempt powers, and (3) modify the decree is 'changed circumstances' subvert its intended purpose." *Id.*

Modification of a consent decree is appropriate "(1) 'when changed factual conditions make compliance with the decree substantially more onerous,' (2) 'when a decree proves to be unworkable because of unforeseen obstacles,' or (3) 'when enforcement of the decree without modification would be detrimental to the public interest.'" *Vanguards,* 23 F3d at 1018; *Rufo v Inmates of Suffolk County Jail*, 502 US 367, 384 (1992). The moving party has the burden of establishing a "significant change in circumstances." *Vanguards,* 23 F3d at 1018; *Rufo,* 502 US 367 at 383. A party satisfies this burden "'by showing either a significant change in factual conditions or in law.'" *Vanguards*, 23 F3d at 1018, *quoting Rufo*, 502 US at 384.

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A. Amendment is Necessary Because of Changed Circumstances.

Here, a significant change in factual circumstances has occurred with regard to the Evergreen System that was unknown to the parties at the time they entered into the Consent Judgment. At time of Consent Judgment, the parties were not aware that the Unit E plume existed. PLS' continued investigation of the Unit E plume and its relationship to the D_2 plume only recently revealed that a portion of the Unit E plume was being drawn into the Evergreen Subdivision area by the unnecessarily high purge rates of the extraction wells.

When the Consent Judgment was drafted, there was no reason to distinguish between the known contamination migrating to this area in the D_2 aquifer and contamination from some other location because the D_2 aquifer was the only known source of contamination in the area. In light of the existence of the Unit E plume and the recent discovery that it is being artificially drawn into the Evergreen Subdivision area, the existing requirement to generally "intercept and contain the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area" no longer makes sense. This is particularly true with regard to the operation of AE-3. That purge well is not capturing the "leading edge" of the D_2 plume any longer – it is distorting the "side edge" of the Unit E plume. This is not what the parties intended when the Consent Judgment was drafted. The Consent Judgment needs to be amended so that its requirements for the Evergreen System are consistent with both the parties' original intent and the current factual circumstances.

B. Amendment of the Consent Judgment is Necessary to Effectuate this Court's Unit E Order and to Protect the Public Interest.

PLS' current obligation under the current Consent Judgment to capture and remove any contamination "in the vicinity of the Evergreen Subdivision area" is endangering the effectiveness of this Court's Unit E Order and the protections put in place to protect the public

from that area of contamination. The excessive purging required to meet this objective has already distorted the Unit E plume and drawn the northern edge of that plume beyond the original boundary of the Prohibition Zone. PLS and the DEQ have already begun the process of revising the Prohibition Zone boundary, and further amendment will likely be necessary unless the excessive Evergreen purging is reduced. Continued distortion of the Unit E plume could potentially cause the plume to flow in an unanticipated direction, which would further endanger the ability of the Unit E Order to protect the public.

Finally, as set forth in Mr. Fotouhi's affidavit, the currently required level of groundwater extraction is having, and will continue to have, a detrimental effect on the groundwater cleanup as a whole. (Affidavit of Farsad Fotouhi, Exhibit 4, ¶ 33.)

CONCLUSION

For the reasons stated above, and for the reasons set for in the Petition for Dispute Resolution filed contemporaneously with this motion, PLS asks this Court to enter the Third Amendment to Consent Judgment attached to PLS' motion in order to clarify PLS' obligations under the Consent Judgment with regard to the Evergreen Subdivision area.

Respectfully submitted,

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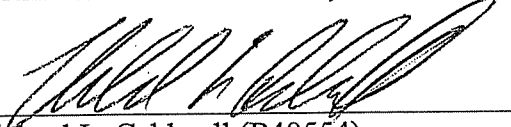

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