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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BRIEF REGARDING ISSUES IN DISPUTE

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INTRODUCTION

This Court has asked the parties to identify any disputes arising from the proposed modifications to the cleanup program described in PLS' May 4, 2009 Comprehensive Proposal to Modify Cleanup Program ("Comprehensive Proposal"). Defendant, Gelman Sciences, Inc., d/b/a Pall Life Sciences ("PLS") has moved separately for approval of its proposed modifications to both the Eastern and Western Areas. This document identifies the disputes between the parties that need to be resolved in order to determine how best to modify the cleanup program. Disputes that affect both sets of proposed modifications are discussed first, followed by those directly related to the Eastern and Western Areas.

AREAS OF DISPUTE

Although it is somewhat difficult to determine from the Michigan Department of Environmental Quality's ("MDEQ") June 15, 2009 correspondence denying approval of PLS Comprehensive Proposal ("MDEQ Denial") what is a real concern and what is merely grumbling, it appears that the following issues are in dispute:

Disputes Affecting Entire Comprehensive Proposal

1. Legally Enforceable Agreement (Discussed below)

   Whether, as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to enter into a "legally enforceable agreement" with the MDEQ in addition to the Consent Judgment that would require PLS, among other things, to pay the Plaintiffs' future oversight costs and provide a financial assurance mechanism to fund future response actions where neither of these is required by the Consent Judgment.

2. Contingency Plans (Discussed below and in PLS' Evergreen/Maple Road Brief)

   Whether, as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to prepare and obtain approval of detailed contingency plans to address the remote risks identified in the MDEQ Denial.

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3. Contaminant/Source Delineation (Discussed below)

Whether, as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to conduct the extensive remedial investigation of the entire site as described in the MDEQ's Denial and the attached memorandum authored by James Coger to address the MDEQ's concerns about the "uncertainty" allegedly created by PLS' proposed modifications.

4. Performance Monitoring Plan (Discussed below and in PLS' Comprehensive Proposal Brief)

Whether, as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to supplement its proposed performance monitoring plan, beyond the compliance monitoring points PLS has agreed to add.

Disputes Affecting Western Area

1. Feasibility of Containment Objective (Discussed in Comprehensive Proposal Brief)

Whether PLS' proposed cleanup objective to prevent expansion of the plume in the Western Area in directions other than toward the Prohibition Zone is feasible.

2. Mass Removal Estimate/Milestones (Discussed below)

Whether as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to undertake the investigation specified by the MDEQ and calculate/estimate the contaminant mass remaining in the aquifer system for the purpose of establishing mass removal milestones where making mass removal an enforceable cleanup objective serves no purpose.

3. Ann Arbor Cleaning Supply Well (Discussed below)

Whether as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to agree to continue "batch purging" from the only location in what has historically been called the Western "System" when contaminant levels are already declining and barely above the cleanup criterion, and there is no indication that continuation of batch purging will help.

4. Restrictive Covenants (Discussed in Comprehensive Proposal Brief)

Whether as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to obtain consent from the property owners currently affected by the groundwater contamination to restrict their properties even though such restrictions will not need to be recorded for many years.

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Disputes Affecting Eastern Area

1. Groundwater Flow In Evergreen Area Under Reduced Extraction (Discussed in Evergreen/Maple Road Brief)

   Whether as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to continue to investigate the effect, if any, that the proposed reduction in Evergreen groundwater extraction may have on groundwater flow directions.

2. Veterans Park Performance Monitoring Well (Discussed below)

   Whether as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to install a performance monitoring well immediately downgradient from the Maple Road extraction well when the presence of subterranean boulders has twice prevented PLS from doing so and when there is an existing monitoring well that is well suited for use as a performance monitoring well?

3. Northern Boundary of Prohibition Zone (Discussed below)

   Whether as a prerequisite to approval of its Comprehensive Proposal, PLS should be required to agree never to seek to modify the northern border of the proposed expanded Prohibition Zone when such expansion might be prudent in the future?

I. DISPUTES ARISING FROM COMPREHENSIVE PROPOSAL

A. PLS Need Not Enter Into a "Legally Enforceable Agreement" That Is Inconsistent with the Consent Judgment in Order to Have its Modifications Approved.

In its Denial, the MDEQ asserts that in order to obtain the MDEQ's approval of its proposed modifications, PLS must abandon the October 26, 1992 Consent Judgment ("Consent Judgment") and enter into a new enforceable agreement that is consistent with the form document the MDEQ has developed. (Appendix 15, pp. 1-2, 13-14).[1] This form document contains requirements that are utterly inconsistent with the terms the parties negotiated, including those specifically requested by the MDEQ regarding financial assurance and payment of

[1] The MDEQ's form implementation agreement can be found at: http://www.michigan.gov/deq/0%2c1607%2c7-135-3311_4109_4214-58107--%2c00.html (Agreement to Implement a Limited Remedial Action). One can only imagine how long PLS' proposed modifications would be delayed while the parties negotiated the language of a new agreement of this magnitude.

oversight costs. Once again, the MDEQ is holding PLS' attempt to improve the cleanup program hostage in order to gain some advantage on a completely unrelated issue. Such an attempt to unilaterally and drastically alter the basic terms of the Consent Judgment is not permitted, nor does anything in Part 201 suggest that such a result is required.[2]

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 if 'changed circumstances' subvert its intended purpose." *Id.*

Most relevant to the issue raised by the MDEQ: "A modification will be upheld if it furthers the original purpose of the decree in a more efficient way, without upsetting the basic agreement between the parties." *Heath v DeCourcy*, 888 F.2d 1105, 1110 (CA6 1989). PLS is seeking appropriate modifications to the Consent Judgment for precisely this purpose – to allow the parties to address the groundwater contamination in a "more efficient way." The MDEQ, on the other hand, is attempting leverage PLS' desire to improve the cleanup program to "upset[] the basic agreement between the parties." Specifically with respect to the MDEQ's demand that PLS pay its oversight costs, the "basic agreement" was that in exchange for PLS' agreement to reimburse the State's past costs and cleanup the groundwater contamination, PLS would not be

[2] Nor is such an attempt necessary to ensure that PLS' proposals are in compliance with Part 201. PLS' proposals do comply with the substantive Part 201 provisions (e.g., PLS' Western Area containment objective is specifically intended to comply with R 299.5705(5) (Comprehensive Proposal, p. 10). The only statutory provisions PLS makes no attempt to comply with are those like MCL 324.20120b(3) that could be interpreted to require additional approvals from the MDEQ. The MDEQ argues that that Part 201 applies precisely so that it will have a pretext for making other demands presumably as a quid pro quo for exercising its authority. While this may not be "arbitrary," it is capricious and an abuse of statutory authority.

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required to pay the MDEQ's future oversight costs. (Consent Judgment, Section XVIII.B.5, p. 51). Nor does the Consent Judgment contain any requirement that PLS post a bond or provide some other form of financial assurance now being demanded by the MDEQ.[3]

The MDEQ attempts to argue that changed circumstances brought about by PLS' proposal make rewriting the Consent Judgment appropriate. The MDEQ claims that PLS' Comprehensive Proposal would:

> 1) increase the uncertainty about the fate of contamination; 2) increase the potential for additional response actions to be necessary in the future to address unintended consequences; and 3) increase in the length of long-term monitoring required.

(Appendix 15, p. 14). Nothing that has occurred since the MDEQ agreed to enter into the Consent Judgment justifies this demand. In fact, changes that have occurred since 1992 make it even more inappropriate to eviscerate the Consent Judgment in the manner suggested by the MDEQ.

While the parties can argue about the effect of PLS' proposal using today as the baseline, there can be no dispute that the MDEQ is and will be in a much better position than it could have foreseen in 1992 when it agreed to forego claims for future oversight costs/financial assurance with regard to each of these categories. The parties' original agreement only required PLS to conduct modest onsite remediation and to capture the leading edge of the offsite plumes. There was no timeframe for completing the cleanup. PLS' efforts since then, particularly since this Court issued its REO, have greatly reduced the level of uncertainty going forward and the MDEQ's likely future oversight cost expenditures. Therefore, there are no changed circumstances that justify "upsetting the basic agreement between the parties." *Heath,* 888 F2d at 1110. If the MDEQ was really concerned about reducing costs, it would stand up to the political

[3] Considering the amount of money and resources PLS has poured into this project since purchasing Gelman, this request is particularly galling.

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pressure it gets from a few fringe activists and stop treating PLS like a recalcitrant polluter and work with PLS as a partner in moving this cleanup forward.

The MDEQ also relies on Section 20102a of Part 201, MCL 324.20102a, in support of its argument that if PLS wants to improve the cleanup program it must enter into an entirely new agreement with the MDEQ and ensure that its modifications comply with Part 201. The actual intent of this Section of Part 201 is to permit a party implementing a response activity to have the choice of whether to proceed under the previous authorities in effect prior to May 1, 1995 or under the sometimes more flexible Part 201 standards adopted on that date. Section 20102a provides, in pertinent part:

> (1) Notwithstanding any other provision of this part, the following actions shall be governed by the provisions of this part that were in effect on May 1, 1995:
>
> a. Any judicial action. . . that was initiated by any person on or before May 1, 1995 under this part.
>
> * * *
>
> c. An enforceable agreement with the State entered into on or before May 1, 1995 by any person under this part.
>
> * * *
>
> (3) Notwithstanding subsections 1 and 3, upon request of a person implementing response activity, the department **shall** approve changes in a plan for response activity to be consistent with Sections 20118 and 20120a.

MCL 324.20102a (emphasis added). The intent behind this Section was to allow a responsible party to take advantage of the flexibility offered by Sections 20118 and 20120a if desired. In such a case, the MDEQ is required to approve the modification.[4] The converse, however, is not

[4] Section 20118 sets forth various options for achieving an acceptable cleanup (including the waiver provisions this Court relied upon to authorize the Prohibition Zone in its Unit E Order). Section 20120a requires the MDEQ to promulgate cleanup criteria for various property use assumptions (e.g., residential, commercial, industrial) and mandates that a less restrictive cancer risk tolerance be used to generate those criteria. MCL 324.20120a(1) and (4).

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true: Modifications to pre-1995 agreements do not have to conform to Part 201 or its rules. There is nothing in the language of Subsection 20102a(3) that requires that result. Such an interpretation would fly in the face of the flexibility granted to the responsible party ("upon request of . . .") by Subsection 20102a(3) and clear the protections granted to pre-1995 agreements granted by Subsection 20102a(1). Certainly, there is nothing in this provision that would require PLS to enter into a completely new agreement with the MDEQ. Thus, the MDEQ's suggestion that the previously agreed upon structure set forth in the Consent Judgment must be jettisoned in favor of standards adopted well after the date of that agreement is without basis.[5]

By overstating its statutory authority, the MDEQ has again created a pretext for denying approval of improvements to the cleanup program in the interest of furthering a financial agenda. This Court may recall a similar situation in 2000 when the MDEQ refused to allow PLS to operate the Horizontal Well even though objective observers, including the geologist previously assigned to this site, thought its operation would benefit the cleanup. Unfortunately, the MDEQ could not approve its operation without undermining its claim for millions of dollars of stipulated penalties. Now the MDEQ is again willing to sacrifice system improvements for financial gain. PLS is again compelled to seek this Court's intervention and to focus the parties on what is important for the cleanup program.

B. Neither Part 201 Nor Common Sense Requires PLS to Develop Contingency Plans for Future Risks Not Likely to Occur.

In its Denial, the MDEQ demands from PLS numerous contingency plans it says are needed as a predicate for even considering approving a change in the Eastern or Western Areas.

[5] Section 20102(a) does not apply to PLS' proposed modifications for another reason. The MDEQ has already denied PLS' request for MDEQ approval. (*See* Appendix 15). Thus PLS is no longer seeking the MDEQ's approval, but rather is once again forced to impose on this Court to obtain the common sense approvals necessary to move this cleanup program forward.

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Specifically, the MDEQ makes mention of a contingency or the need for a plan no fewer than nine times covering the following various topics: a) to address unanticipated expansion of the plume west of Wagner Road (Appendix 15, pp. 6-7); b) to address the potential need for additional pipeline capacity to transport both treated and untreated groundwater from the Eastern Area (Appendix 15, p. 10); c) to address the potential need for increased purging at Maple Village and associated treatment and discharge capacity that might be needed (Appendix 15, p. 10); d) to prevent migration of the plume in the Evergreen area north of the proposed expansion of the PZ boundary (Appendix 15, p. 12); and e) and to prevent the migration of 1,4-dioxane into the Huron River proximate to the City of Ann Arbor water intake (Appendix 15, p. 13).

Even an observer unfamiliar with the MDEQ's approval process would quickly conclude from this list that PLS would have to spend the next several years debating the details and the merits of plans to address remote and inflammatory contingencies. One can readily guess, for example, that even discussing a plan for interdicting a plume proximate to the Barton Pond municipal water intake would inevitably lead to the perception that such migration is realistic, when it is not, a public uproar over this eventuality, and a insoluble debate over what should be done to address a risk that does not realistically exist.[6] Similarly, as discussed in PLS' Western Brief, the area affected by the plumes west of Wagner Road has not changed since groundwater extraction was initiated even though concentrations have declined precipitously. It is very unlikely that the changes in objectives proposed by PLS will lead to migration that is contrary to the natural flow patters observed before PLS began extracting groundwater.

The Part 201 rules cited in the MDEQ Denial say nothing about the necessity for the type of contingency planning the MDEQ is demanding here. Only two MDEQ cleanup rules address

[6] As PLS has demonstrated in its Evergreen Brief, the risk that contamination will extend beyond the proposed Prohibition Zone northern boundary, let alone migrate the 11,000 feet to the Barton Pond water intake is "non-existent."

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contingencies: Rule 538(2)(g) provides for a contingency plan as part of an operation and maintenance plan to address a failure in a system component (i.e., a mechanical failure) and Rule 540(2)(k) provides for a contingency plan to address "ineffective monitoring." These rules do not require any planning beyond the narrow scope of the subjects covered, and certainly do not touch on planning for unanticipated changes in the environment. To suggest that such planning is a necessity now that PLS wants to amend some of its existing systems, when such planning was not previously necessary, strains credulity. There is no reason that it is necessary to resolve now any possible unanticipated future change in circumstances as a pretext for not approving the PLS proposal.

Finally, PLS has a long history of addressing operational issues in a proactive manner, before they affect the protectiveness of the cleanup program. PLS has not needed a shelf full of contingency plans in order to keep its cleanup program in compliance. For instance, PLS installed the Horizontal Well/Transmission pipeline (despite the MDEQ's objections) before the limited capacity of its original Evergreen remedial system threatened PLS' ability to achieve that Consent Judgment objective. Whenever PLS' remedial systems have become outdated or inadequate due to changing conditions, PLS has proposed and implemented improved systems and/or appropriate repairs or substitutions without the need to identify the such solutions in advance.[7] Ironically, it is PLS' attempt to take such responsible steps with regard to the Evergreen and Maple Road systems that the MDEQ is now thwarting by its demand for unnecessary contingency plans.

[7] As a side note, true contingency plans are generally reserved for situations where a public health emergency could occur in the event of an unanticipated breakdown or event, such as a spill out of containment, an explosion, an act of terrorism in vulnerable areas, or a nuclear meltdown. Although not demanded here by MDEQ, PLS has spill response plans and homeland security contingency plans in place, for example.

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C. Further Delineation Should Not Be a Prerequisite to Approval of PLS' Comprehensive Proposal

The MDEQ's demands for further delineation and its expressed concerns regarding the alleged uncertainty as to the fate of the contamination after it migrates into the Prohibition Zone are not valid technical objections, but rather excuses not to make a decision. This tiresome habit of demanding more data as a means of avoiding the need to make a decision should be rejected out of hand.

To read the MDEQ Denial and the level of investigation being demanded, one would think that PLS had yet to install its first monitoring well. Nothing could be further from the truth. The PLS site is one of the most thoroughly investigated sites in the State of Michigan. PLS has been investigating the site for over 20 years – *with the MDEQ's involvement at every step of the way.*

As Mr. Brode testifies in his affidavit, PLS has installed over 200 monitoring wells and borings to define the extent of contamination throughout the entire aquifer system. (Brode Aff., ¶ 3). Although PLS and the MDEQ have from time to time agreed to supplement the monitoring well network by adding certain monitor wells, the current monitoring well network has been deemed to be sufficient to define the extent of groundwater contamination west of Wagner Road for at least the last ten years. The last time the parties agreed to supplement the approved monitoring well network west of Wagner Road to refine the plume delineation was in 2007 (soil boring MW-109). (Brode Aff., ¶ 18). The MDEQ's sudden demand for numerous new monitoring well clusters (i.e., two or more wells at different depths at each location) flies in the face of its previous satisfaction with the plume delineation and approval of PLS' existing monitoring well network.

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If anything, the Eastern Area has been even more thoroughly investigated than the Western Area. The Evergreen area has been the subject of numerous investigations and technical review over the years. The MDEQ, however, asserts that additional monitoring wells are needed to "define the western extent of contamination and to establish that the source of contamination in DuPont Circle is not from an area west of, or outside of the proposed expanded PZ." (Appendix 15, 06/15/09 Coger Memo, p. 8). As Mr. Brode explains, PLS has repeatedly installed monitoring wells in locations approved by the MDEQ to debunk the MDEQ's unsupported hypothesis that groundwater contamination is flowing into the Evergreen area from the west. The data from all of these wells has shown that the plume enters the Evergreen area from the southwest as PLS has depicted. (Brode Aff., ¶¶ 46-51). PLS should not be required to undertake additional investigations to disprove an already disproved theory that had no data to support it in the first place.

The MDEQ also mischaracterizes the parties' previous source area investigation as inadequate, claiming that there is only a limited understanding of the sources of the remaining groundwater contamination. To the contrary, PLS, the MDEQ, and even the USEPA have all thoroughly investigated and characterized the "source areas." (Brode Aff., ¶¶ 12-16). Although there are small pockets of relatively high contaminant concentrations (e.g., MW-5d) in the shallower zones, they contain very little mass because these areas are very low-producing water-bearing zones in thin, discontinuous seems. (Brode Aff., ¶ 11).

Nor should the Unit E – the deeper aquifer to which 1,4-dioxane has migrated <u>from</u> the source areas – be characterized as "source area." This characterization is contradicted by the fact that all available data indicate that it is a receiving aquifer with steadily declining 1,4-dioxane concentrations. This dramatic decrease in observed concentrations indicates there is no

significant area within the Unit E that could be considered a source area. For example, 1,4-dioxane concentrations at TW-11 and TW-17 (and all surrounding monitoring wells) would not be declining if there were a significant mass/source of 1,4-dioxane hydraulically upgradient (west) of these wells. Similarly, it is clear that there is no ongoing *source* of 1,4-dioxane upgradient of TW-12. This Unit E extraction well near Wagner Road was turned off after concentrations being extracted fell below 85 micrograms per liter (µg/L). Since the well was turned off a few years ago, concentrations in this area have stayed below the DWC and have not rebounded, which is what would have happened if there was an ongoing source within the Unit E. Data from MW-65s/i/d, nearby monitoring wells, indicate this is not the case. (Brode Aff., ¶ 15).

Finally, PLS' proposal to set cleanup objectives for the entire aquifer system, rather than on an aquifer by aquifer basis reduces rather than increases the need to further characterize the Unit E. Consequently, there is no technical reason to, or benefit from, further characterizing the Unit E. (Brode Aff., 16).

D. PLS' Performance Monitoring Plan is Adequate

As Mr. Fotouhi explains, a lot of thought went into PLS' performance monitoring plan so that it will provide the data the parties will need to evaluate the performance of PLS' remedial systems. (*See* Fotouhi Aff.). PLS supplemented the proposed monitoring plan included with its Comprehensive Proposal, which the MDEQ acknowledges improved PLS' monitoring plan.

As described in Mr. Fotouhi's Affidavit, PLS has again committed to augment its monitoring plan to include specified "compliance monitoring wells" that the MDEQ can monitor to determine if any of the cleanup objectives have violated. (*See* Fotouhi Aff.). Although PLS does not find the data from these wells to be useful, it understands that the MDEQ wants to have

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a "line in the sand" beyond with unacceptable levels of contamination cannot pass so that it can seek stipulated penalties or take other enforcement action.

Hopefully, this latest supplementation will move the parties closer to resolution of these issues. PLS will continue to attempt to reach resolution or at least narrow any remaining disputes in this regard.

I. Disputes Affecting Western Area

A. PLS Should Not be Required to Provide Mass Removal Milestones

To date, PLS' groundwater extraction system has successfully reduced contaminant concentrations across the site. One measure of that success is the concentration of the influent water from the extraction wells that goes to PLS' treatment system. These concentrations have fallen from over 20,000 ppb in 1997 when PLS began groundwater extraction to approximately 550 ppb currently. With the relatively low levels in the Western Area, it no longer makes sense from a technical standpoint to operate wells that are extracting low concentrations of 1,4-dioxane, so long as any residual contamination above the Drinking Water Criterion (DWC) flows into the Prohibition Zone where use of the groundwater is illegal.

Consequently, as discussed in Mr. Fotouhi's Affidavit, PLS is proposing to focus its efforts in the Western Area on removing mass from the areas where relatively high mass remains. PLS is not, however, proposing mass removal as an enforceable cleanup objective in and of itself. PLS has proposed to operate on-site purge wells until concentrations in the individual purge wells fall below 500 ppb in order to:

a. reduce the MDEQ's concerns regarding any uncertainty associated with the possibility that the plume contamination could expand outside of the Prohibition Zone boundaries; and

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b. reduce mass loading to the Huron River when the plume ultimately vent to that surface water body.

This rationale for conducting mass removal does not require monthly or annual mass removal benchmarks, as suggested by the MDEQ, to measure progress. Progress will be measured by the efficiency of the groundwater extraction wells, i.e., by the 1,4-dioxane concentrations in the water being extracted. (*See* Fotouhi Aff.).

Previous attempts by both parties to estimate the amount of mass in the aquifer systems was, frankly, a time-consuming and ultimately futile exercise. Moreover, the MDEQ has demanded that PLS install numerous additional groundwater monitoring wells that it feels will be necessary before this calculation can be performed. It is not logical to further delay implementation of the proposed modifications in order to conduct an investigation designed to allow the parties to make a calculation that is not necessary or relevant.

B. Further Batch Purging of the Ann Arbor Cleaning Supply Well Is Not Necessary

The Ann Arbor Supply extraction well is the only monitoring point in what has historically been referred to as the "Western System" where contaminant levels are above the DWC. The data from the extraction well have been trending down since it was first sampled, and with latest sampling data from the extraction well showing 1,4-dioxane at 93 ppb, just above the 85 ppb DWC. The monitoring well immediate adjacent to the extraction well and all surrounding wells have been below the DWC for some time.

Because this location is remote from the other extraction wells located west of Wagner Road, the MDEQ has required PLS to actively remediate this area.[8] There is no method of

[8] The other option would be to obtain restrictive covenants from the several property owners affected by this small plume. Unfortunately, one of the potentially affected properties is owned by the Sunward Co-Housing organization. PLS has previously been required to petition this Court just to obtain access to install a monitoring well and it is unlikely that PLS would be able to obtain the owner's permission to record a restrictive covenant.

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disposing purged water so PLS has used a tanker truck to collect the water and bring it back to the Wagner Road facility for treatment. The volume of water that PLS can manage in this manner is too small to meaningfully affect the rate of decline in contaminant levels.

PLS is proposing to discontinue active remediation of this isolated pocket of contamination above the DWC because it will naturally attenuate. PLS will continue to monitor the area monitoring wells to confirm that the small area of contamination above the DWC does not migrate. This methodology is not only logical, it is consistent with Part 201's requirement that active remediation continue until either the cleanup criterion is achieved or restrictive covenants are in place. The parties have agreed to simplify the cleanup program by dividing the site into two areas. This location will be within the Western Area. Active remediation of this isolated "warm spot" will no longer be necessary because other extraction wells within the Western Area will continue to operate well after this small area of contamination attenuates below the DWC.

III. Disputes Affecting Eastern Area Modifications

A. The Veterans Park Performance Well in Unnecessary

There is a long history regarding the MDEQ's attempt to force PLS to install yet another performance monitoring well immediately downgradient of its Maple Road response system. This dispute is actually premature because levels above 2,800 ppb have not reached and may never reach Maple Road. Nevertheless, the DEQ has required PLS to have a performance monitoring network in place.

PLS has acceded to the MDEQ's demands and installed the requested network of wells, save one, which the MDEQ wanted PLS to install immediately downgradient of TW-18, the Maple Road extraction well. PLS initially protested this requirement because an existing well –

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MW-84s-d – was perfectly suited to serve as a performance monitoring well. The MDEQ, however, claimed that although this well is at the correct depth, it is a few hundred feet further downgradient (east) of Maple Road than the MDEQ's preferred location. In other words, the MDEQ does not want to miss any violations based on elevated contaminant levels that might dilute to below acceptable levels while the groundwater migrates that few hundred additional feet to MW-84. Incredibly, the MDEQ took this position even though the next receptor – the Huron River – is about 15,000 feet further downgradient.

In a valiant attempt to avoid burdening this Court with yet another dispute, Mr. Fotouhi agreed to install the well at the requested location in Veterans Park, immediately east of Maple Road. Proving that no good deed goes unpunished, subterranean boulders twice prevented the installation of this well and caused costly drilling augers to be ruined.

The MDEQ continues to demand that PLS employ extraordinary efforts to drill through these obstacles to install a well whose only purpose is to catch PLS in a "paper violation" that could not harm any potential receptor. PLS respectfully asks this Court to put a halt to this nonsense.

B. PLS' Proposed Northern Boundary is Appropriate and Protective

The MDEQ has demanded that PLS expand the Prohibition Zone to include the triangle shaped parcel adjacent to M-14 in the Evergreen area that is currently excluded. (Appendix 15, p. 7) There is absolutely no basis for this requirement.

PLS installed MW-121(s-d) immediately between this property and the nearest edge of the Evergreen Plume. Groundwater flows east from this location toward the Evergreen Plume (i.e., this property is upgradient of the groundwater contamination). (Brode Aff., ¶¶ 46-51).

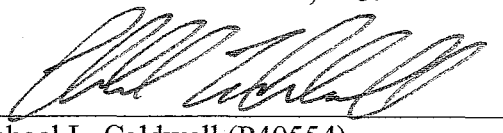
The MDEQ has never considered this private well supply to be threatened by the Evergreen plume. As set forth in PLS' Evergreen/Maple Road Brief, nothing PLS is proposing to do that will increase the risk to this homeowner. Connecting this property to municipal water would be especially burdensome on the homeowner and unnecessarily expensive for PLS because, as the MDEQ notes, there is no water main that currently services this large parcel (which would have to be annexed into the City). Absent any increased risk, there is no reason to undertake the steps that would be necessary in order to include the property in the expanded Prohibition Zone.

CONCLUSION

For the above stated reasons, PLS asks that this Court resolve these disputes in the manner discussed above and to approve PLS' Comprehensive Proposal.

Respectfully submitted,

ZAUSMER, KAUFMAN, AUGUST
CALDWELL & TAYLER, P.C.



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