

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.

STEVEN E. CHESTER (P32984)  
Attorney for Plaintiffs  
525 W. Allegan St.  
P.O. Box 30473  
Lansing, MI 48909  
(517) 373-7917

MICHAEL L. CALDWELL (P40554)  
KARYN A. THWAITES (P66985)  
Zausmer, Kaufman, August, Caldwell  
& Tayler, P.C.  
Co-Counsel for PLS  
31700 Middlebelt Road, Suite 150  
Farmington Hills, MI 48334  
(248) 851-4111

CELESTE R. GILL (P52484)  
Assistant Attorney General  
Attorney for Plaintiffs  
525 W. Ottawa Street, Floor 6  
Lansing, MI 48909  
(517) 373-7540

ALAN D. WASSERMAN (P39509)  
Williams Acosta, PLLC  
Co-Counsel for PLS  
535 Griswold Street, Suite 1000  
Detroit, MI 48226  
(313) 963-3873

**PETITION FOR DISPUTE RESOLUTION**

Defendant, Gelman Sciences Inc., d/b/a Pall Life Sciences ("PLS"), by and  
through its attorneys, Zausmer, Kaufman, August, Caldwell & Tayler, P.C., and Williams  
Acosta, PLLC, and for its Petition for Dispute Resolution, states as follows:

## INTRODUCTION

1. PLS submits this Petition and asks that the Court provide a resolution to a dispute currently existing between PLS and the Michigan Department of Environmental Quality ("DEQ") regarding whether certain circumstances, as described in detail below, constitute Force Majeure under the Consent Judgment between the parties. Specifically, this dispute arises from PLS' inability to maintain the minimum purge rate the DEQ has assigned to a purge well located on Allison Street in the Evergreen Subdivision. The well currently in operation, AE-3, is the third purge well PLS has installed at this location. Because of the poor aquifer conditions at this location and declining water levels in the area, each of these wells has, over increasingly short periods of time, failed to produce the required volume of water. Although PLS continues to purge as much water as AE-3 will produce, it is impossible to maintain the previously approved purge rate for reasons that are not in PLS' control. AE-3's reduced flow rate does not, however, prevent PLS from capturing the leading edge of the Evergreen plume.

2. Prior to AE-3's failure, PLS presented to the DEQ its analysis of the aquifer conditions in this area and its conclusion that operation of the Evergreen System purge wells (including AE-3) at the currently required rates is not necessary to capture the groundwater contamination the system was designed to contain. Indeed, as explained below and in the Motion to Amend Consent Judgment filed with this Petition, operating the Evergreen System at the currently required rates is actually counterproductive because groundwater contamination from the Unit E plume located to the south is being drawn into the Evergreen Subdivision by the overly aggressive pumping of the Evergreen System purge wells. Indeed, the Unit E plume is the primary, if not the sole, source of

the 1,4-dioxane now being purged by AE-3. The DEQ has so far failed to respond to that report, indicating that it has not completed its review of PLS' analysis and is not prepared to engage in a constructive discussion of these issues. Instead, the DEQ has disputed PLS' claim of force majeure and sought to assess stipulated penalties for each day PLS is unable to maintain the required purge rate, even though it cannot offer a credible alternative course of action. Thus, PLS is compelled to bring this matter to this Court for resolution.

### FACTUAL BACKGROUND

3. The parties to this action entered a Consent Judgment in this matter on October 26, 1992. (Exhibit 1). The Consent Judgment has been amended on two occasions since that time.

4. The Consent Judgment requires PLS to implement various remedial actions to address environmental contamination in the vicinity of PLS' property.

5. The Consent Judgment, among other things, requires PLS to submit work plans for meeting the identified objectives to the DEQ for approval.

6. Section V.A.1(a) of the Consent Judgment requires PLS "to intercept and contain the leading edge of the plume of groundwater contamination detected in the vicinity of the Evergreen Subdivision area." (Exhibit 1, pp. 6-7). As understood at that time, groundwater contamination migrated to the Evergreen Subdivision area from the southwest through the aquifer designated the "D<sub>2</sub> aquifer." (Affidavit of James W. Brode ("Brode Aff."), Exhibit 2, ¶ 17).

7. Gelman originally accomplished this objective through the installation and operation of a single purge well denominated LB-1 pursuant to DEQ-approved work

plans. The original Evergreen System successfully contained the leading edge until the injection well Gelman used to dispose of the treated groundwater became clogged and had to be abandoned in November 1996. Without anywhere to put the treated water, Gelman was forced to shut down LB-1 while it negotiated with the City of Ann Arbor for permission to temporarily discharge treated water into the City sanitary sewer system. PLS promptly re-engaged purge well LB-1 after obtaining such approval. PLS subsequently installed an additional purge well at this location, LB-2, which is screened to draw from a different depth, in order to maximize the system's efficiency. Eventually LB-2 was replaced with LB-3.

8. The parties' interpretation of the available data at the time indicated that a small portion of the plume escaped beyond the capture zone of LB-1 during the hiatus from purging caused by the clogged injection well and the delay in obtaining City permission to use the sanitary sewer. Gelman began implementing the required corrective action by installing a downgradient purge well on Allison Street to capture the small portion of the plume that had migrated past the LB-1 location. After Pall Corporation purchased Gelman in 1997, PLS completed installation of the original Allison Street purge well, called AE-1, and the related pipeline infrastructure. PLS began operating AE-1 in July, 1998, and successfully captured and began removing 1,4-dioxane located east of the LB well location. At that time, the Unit D<sub>2</sub> levels as measured in nearby monitoring wells at that time were approximately at elevation 872 feet below ground surface ("bgs"). (See Brode Aff., Exhibit 2, ¶ 7). Because of the high water levels in the aquifer present at that time, AE-1 could support purge rates in the range of 50 gallons per minute ("gpm").

9. Nevertheless, as part of its February 2000 Motion to Enforce Consent Judgment, the State sought additional stipulated penalties with regard to the portion of the plume that had migrated past the LB wells, taking the position that installation of AE-1 did not relieve PLS from its responsibility of preventing groundwater contamination from migrating past the LB purge wells. Under the DEQ's interpretation of the Consent Judgment, "the DEQ-approved function of AE-1 is simply to intercept and remove groundwater contamination that was discovered to have migrated beyond LB-1 in November 1996." (Exhibit 3, pp. 15-16). Under the DEQ's interpretation, AE-1 could be shut down as soon as it intercepted and removed the remnant portion of the plume.

10. The State subsequently amended the relief sought by its motion to include injunctive relief in form of an order requiring PLS to increase the combined purge rate of the LB-1 and LB-2 wells by 50 gpm (to 150 gpm total) in order to insure that these wells continued to capture the entire width of the plume at this location in the future. (June 21, 2000 Joint Pretrial Statement, Exhibit 3, pp. 5-6).

11. Although PLS did not agree that the Consent Judgment required PLS to capture the plume at both locations, it argued that, in any event, the existing LB purge rate was sufficient to capture the entire width of the plume. PLS, however, agreed that it made sense from an overall plume management perspective to increase the purge rate of the LB wells as the DEQ requested and informed the Court at the subsequent hearing that it intended to increase the combined purge rate of the Evergreen System wells, including AE-1, to 200 gpm. (Exhibit 3, p. 7).

12. Following the hearing on the DEQ's motion, this Court entered its July 17, 2000 Remediation Enforcement Order ("REO") in this matter. (Exhibit 4). Among other

things, the REO requires PLS to purge a total of 200 gpm from the Evergreen System purge wells and to submit a plan to remediate the affected groundwater to acceptable levels within five years (the "Five-Year Plan").

13. The Five-Year Plan developed by PLS and subsequently adopted by the Court similarly requires that PLS maintain a combined pumping rate of 200 gpm for the Evergreen System. (Exhibit 5). The Five-Year Plan also contains other minimum purge rates for other purge wells that have been deemed to be "containment" wells, i.e., wells that prevent expansion of the various plumes of contamination. Maintaining these minimum purge rates has become problematic site-wide because of declining water levels in the aquifers.

#### **EFFECT OF DECLINING WATER LEVELS SITE-WIDE**

14. As a result of the drastic increase in PLS' groundwater extraction program after entry of the REO and perhaps longer term natural trends in precipitation, water levels in the aquifers, including the D<sub>2</sub> aquifer in the Evergreen Subdivision area, have declined significantly. (Brode Aff., Exhibit 2, ¶ 7). This decrease in water levels, six to seven feet in the Evergreen Subdivision area, has had a negative effect on PLS' ability to maintain the minimum purge rates set by the DEQ for certain extraction wells. (*Id.*)

15. On February 13, 2006, PLS asked the DEQ to eliminate these minimum purge rate requirements, including the 200 gpm combined purge rate requirement for the Evergreen System, in part so that the purge rates of other wells in more highly contaminated areas could be increased to maximize mass removal. (Exhibit 6). In that letter, Mr. Fotouhi notes that dropping water tables have made it difficult to maintain the minimum purge rates.

16. In its initial March 27, 2006 e-mail response and later in a April 11, 2006 letter, the DEQ acknowledged the wisdom of eliminating the minimum purge rates from the Five-Year Plan, but conditioned deletion of this requirement on PLS' agreement to supply the DEQ with detailed information and analysis regarding the effects of any such changes on PLS groundwater purge program (collectively referred to as a "Well Optimization Plan"). (Exhibit 7). In subsequent technical meetings, Mr. Fotouhi and Mr. Brode explained that it was not possible to provide the requested studies and data.

17. PLS' attempt to eliminate the inefficient minimum purge rates on a site-wide basis floundered as the parties were unable to agree on the scope of information to be included in the Well Optimization Plan.

18. PLS eventually concluded that it was necessary to separately address the Evergreen System minimum purge rate requirement issue because of acute problems caused by the excessive purging from the Evergreen System purge wells and the imminent failure of AE-3.

#### **EFFECT OF EXCESSIVE EVERGREEN PURGING AND UNFORSEEABLE CONTRIBUTION OF UNIT E**

19. PLS increased the purge rate of the LB wells (LB-2 was subsequently replaced with LB-3) to a minimum of 150 gpm in September 2000. Since that time, PLS has maintained and usually significantly exceeded this purge rate. PLS is currently purging approximately 170 gpm from the LB wells.

20. PLS has demonstrated with various DEQ-approved capture zone analyses ("CZA") that it has been capturing the entire width of the D<sub>2</sub> plume at the LB location since the LB extraction well was restarted in 1996. Operation of the LB wells since that time has prevented any additional groundwater contamination above 85 ppb from

migrating past the LB capture zone toward the AE location. (Brode Aff., Exhibit 2, ¶18). Thus, the intended function of the Allison Street purge wells has been limited to intercepting and removing the small amount of groundwater contamination that may have migrated past the Evergreen Street location prior to that time, and there should be no continuing source of contamination reaching the Allison Street location.

21. As explained by Mr. Brode, however, PLS' purging from the Evergreen Subdivision in general, and from the LB purge wells in particular, has created a huge hydrogeologic depression that has extended well beyond the boundaries of the D<sub>2</sub> aquifer – the only known source of contamination in the area when the Consent Judgment and REO were entered. PLS' purging of these wells has drawn contaminated groundwater from the Unit E aquifer located to the south into the Evergreen Subdivision area. (Brode Aff., Exhibit 2, ¶ 19).

22. This phenomenon explains why PLS continues to observe relatively high concentrations of contamination in the water being drawn from the LB wells despite falling concentrations in the D<sub>2</sub> aquifer upgradient of these wells. It also explains why such a large mass of contamination has been removed from the AE wells. PLS estimates that approximately 60 pounds of 1,4-dioxane was present east of LB-1 when capture was regained (if it was ever lost) in 1996. Restarting LB-1, the subsequent installation of LB-2 and the increase in the combined purge rate of these wells cut off the upgradient source of contamination reaching the Allison Street extraction wells. Nevertheless, PLS has removed approximately 100 pounds from the AE wells to date. Moreover, concentrations in the immediate area of the AE wells have remained slightly above the cleanup criterion even though the upgradient source of contamination was cut off in 1996. (Brode Aff.,



Exhibit 2, ¶ 19). The only plausible explanation for these data is the contribution from the Unit E aquifer.

23. This Court's December 17, 2004 Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer (the "Unit E Order") and related orders established a "Prohibition Zone" which prohibited certain uses of the groundwater within the zone in order to protect against unacceptable exposures to that area of groundwater contamination. (Exhibit 8). The excessive purging in the Evergreen Subdivision area has distorted the Unit E plume and drawn the northern edge of that plume beyond the original boundary of the Prohibition Zone. (Brode Aff., Exhibit 2, ¶ 19). PLS and the DEQ have already begun the process of revising the Prohibition Zone boundary, and further amendment may be necessary unless the excessive Evergreen purging is reduced.

24. Consistent with that realization and previous technical discussions of this issue with DEQ staff, PLS submitted its Evergreen System Review on May 10, 2007 (the "ESR"). The ESR sets forth PLS' conceptual plan for systematically determining the appropriate purge rate for the LB wells; that is, the purge rate that will still safely intercept the contamination migrating through the D<sub>2</sub> aquifer, but at the same time minimize or eliminate the distortion of the Unit E plume to the south and avoid pulling this water into the Evergreen Subdivision area. Under this proposal, purging at the AE location would cease, since that well is primarily (if not entirely) purging contamination from the Unit E at this point. (Exhibit 9).

25. Although the parties discussed this report at a subsequent technical meeting, the DEQ has not formally responded to it, nor has the DEQ been prepared to

discuss this issue in the context of the current AE dispute. PLS recently submitted its work plan for implementing the ESR to the DEQ. (Exhibit 10.) The June 29, 2007 Work Plan sets for the specific steps that will be implemented to determine the appropriate purge rate for the LB wells. PLS will implement the Work Plan following DEQ approval or Court order granting PLS authorization to do so.

#### **REQUIRED PURGE RATES FOR THE ALLISON STREET WELLS AND PRIOR DISPUTE RESOLUTION**

26. At the insistence of the DEQ, PLS revised the Five-Year Plan originally submitted to the Court to include the initial minimum purge rates for AE-1. The rate designated for AE-1 was 35 gpm.

27. Even before the 5-Year Plan was formally adopted, PLS dramatically increased its groundwater purging operation. Under the authority of the REO, PLS began operating the Horizontal Well and increased the combined purge rates of the Evergreen wells to 200 gpm.

28. One unforeseen, and unforeseeable, consequence of this dramatic increase in purging is that the water table in the area of AE-1 was significantly lowered. As a result, PLS began having difficulty maintaining AE-1's 35 gpm purge rate shortly after this Court approved PLS' Five-Year Plan in January 2001. In April of 2001, for example, the water levels in the unit D<sub>2</sub> monitoring wells had fallen approximately 2-3 feet from the time AE-1 began operation.

29. Because of the reduced water level and difficult aquifer conditions, AE-1 would pull air into the pump instead of water if operated at 35 gpm.

30. Although PLS had brought the falling water table issue to the DEQ's attention during several conversations with the DEQ's project manager and had notified

the DEQ in numerous reports beginning in January that AE-1's purge rate was fluctuating between 31 and 33 gpm, the DEQ first notified PLS that it considered PLS' inability to maintain the AE-1 purge rate to be a violation of the 5-Year Plan that would subject PLS to stipulated penalties by correspondence dated April 10, 2001.

31. PLS responded to this letter in correspondence dated April 17, 2001, and advised the DEQ that PLS was invoking the dispute resolution procedures of the Consent Judgment.

32. Consistent with its April 17, 2001 letter, PLS also submitted a Capture Zone Analysis to the DEQ on May 4, 2001. This Capture Zone Analysis demonstrated that even with conservative assumptions regarding the aquifer characteristics, a purge rate of 28 gpm at the AE-1 location would be sufficient to capture the leading edge of the plume. (Exhibit 11). The DEQ subsequently agreed that this purge rate was sufficient and approved PLS' CZA.

33. This Court held that PLS had a "substantial basis" for its position, and that it had the discretion to refrain from assessing penalties under the Consent Judgment. (See August 1, 2001 Stipulated Order Regarding Status Review and Dispute Resolution, Exhibit 12). This Court then demonstrated its focus on whether there had been any actual environmental harm by tabling the matter until the data from sampling the downgradient monitoring wells would indicate whether the reduced purge rate had allowed the plume to migrate beyond AE-1. The parties subsequently submitted these data to the Court and agreed that the data showed that the reduced purge rate was sufficient to capture the plume. (See August 2003 Stipulation Regarding AE-1 Dispute Resolution, Exhibit 13). The penalties sought by the DEQ have never been assessed by this Court.

34. On August 21, 2002, PLS submitted to the DEQ a revised CZA seeking approval of a reduced extraction rate of 25 gpm for AE-1. (Exhibit 14). PLS subsequently submitted a further revision to the CZA on November 18, 2002. (Exhibit 15).

35. On May 19, 2004, in response to PLS' submission, the DEQ approved the operation of AE-1 at a minimum purge rate of 25 gpm. (Exhibit 16). At that time, the water elevations in the area monitoring wells for the D<sub>2</sub> unit were down approximately 5 feet from the original elevations in 1998. This is the currently approved rate for AE-3, which was placed into operation on or about June 8, 2004.

#### **PAST PROBLEMS WITH ALLISON STREET WELLS**

36. As detailed in the affidavits of Farsad Fotouhi and Mr. Brode, the aquifer conditions in the Allison Street area have made it extremely difficult to continue to operate a usable purge well in this area for any length of time. (Fotouhi Aff., Exh. 17, ¶¶ 13-30; Brode Aff., Exh. 2, ¶¶ 4 -7). These conditions when combined with the drastically reduced water levels observed in the area make it impossible to operate a purge well in this area at the DEQ-required purge rates.

37. As this history shows, as the water levels have declined, the useful life of the Allison Street purge wells has declined as well, and these wells have required increasingly frequent rehabilitation.

38. Rehabilitating an extraction well involves the use and storage of powerful acids and other reactive chemicals that are injected into the well to remove the biofouling and mineral deposits that accumulate on or around the well screen. As explained by Mr. Brode, this process presents risks to both the workers involved and residents of the

Evergreen Subdivision and is not a procedure that should be undertaken unless substantial benefits are likely to result. (Brode Aff., Exhibit 2, ¶ 11). Moreover, rehabilitating a well does not recover 100% of the original capacity and repeated rehabilitation events have diminishing returns. (Brode Aff., Exhibit 2, ¶ 8).

### RECENT FAILURE OF AE-3

39. As indicated chronology described in Mr. Fotouhi's Affidavit, PLS has experienced problems with AE-3 from almost the moment it was installed. These problems have culminated in the recent failure of the well.

40. On January 18, 2007, PLS shut down AE-3 and rehabilitated the well. (Affidavit of Farsad Fotouhi ("Fotouhi Aff."), Exhibit 17, ¶ 22). At the time of the shut-down, water elevations in the area monitoring wells for the D<sub>2</sub> unit had fallen approximately six to seven feet from their original elevations at the time AE-1 had first been commissioned.

41. On January 22, 2007, PLS resumed pumping the well and continued to pump the well at or above the minimum purge rate until March 4, 2007. (Fotouhi Aff., Exhibit 17, ¶ 22).

42. On March 4, 2007, PLS noted fluctuations in the purge rate of AE-3, and Mr. Fotouhi instructed staff to replace the pump. (Fotouhi Aff., Exhibit 17, ¶ 22). Pumping of the well resumed that day.

43. PLS continued to pump the well at or above the minimum purge rate until March 14, 2007. (Fotouhi Aff., Exhibit 17, ¶ 24).

44. As of March 14, 2007, AE-3 was being pumped at a rate of approximately 32 gpm. However, on that date, the pumping water level in AE-3 decreased to a depth

equal to the pump intake. Accordingly, it was necessary for PLS to reduce the groundwater extraction flow rate from approximately 32 gpm to 25 gpm and then to 20 gpm. However, even at 20 gpm, the well continued to draw air into the pump and piping, so it was necessary for PLS to shut down AE-3. (Fotouhi Aff., Exhibit 17, ¶ 24).

45. On March 15, 2007, Mr. Fotouhi sent two emails to Ms. Kolon informing the DEQ (i) that PLS was turning the well off until March 19, 2007, and (ii) attaching water level data showing that water levels were low at the location of AE-3. (Exhibit 18).

46. On March 19, 2007, PLS turned the well back on, but the well continued to draw in air. (Fotouhi Aff., Exhibit 17, ¶ 26). Accordingly, PLS turned the well off to allow the water table time to rebound from pumping to normal conditions.

47. On April 3, 2007, Mr. Fotouhi informed Ms. Kolon that on March 19, 2007, PLS had turned the well back on but was forced to shut it back off because the well continued to draw in air. Mr. Fotouhi informed DEQ that the well would remain shut off while PLS considered its options. (Fotouhi Aff., Exhibit 17, ¶ 27).

48. On April 20, 2007, Mr. Fotouhi informed Ms. Kolon that PLS would rehabilitate the well but opined that most likely this would not fix the situation. (Exhibit 19).

49. AE-3 was rehabilitated between April 23, 2007, and April 26, 2007.

50. AE-3 was restarted on April 27, 2007, with a flow rate of 10 gpm, which was then raised to 15 gpm. The well drew in air at both the 10 gpm and 15 gpm flow rates.

51. PLS continued to operate AE-3 at a 15 gpm flow rate until April 30, 2007. The well continued to draw in air. Accordingly, at this point, PLS formed the belief that

it would be unable to maintain the minimum purge rate for any reasonable length of time without damaging the well and that circumstances existed constituting force majeure under the Consent Judgment. (Fotouhi Aff., Exhibit 17, ¶¶ 29, 30).

### **EXISTENCE OF FORCE MAJEURE AND INITIATION OF DISPUTE RESOLUTION**

52. The Consent Judgment defines “Force Majeure” as “an occurrence or nonoccurrence arising from causes beyond the control of Defendants or of any entity controlled by the Defendant performing Remedial Action, such as Defendant’s employees, contractors, and subcontractors.” (Exhibit 1, § XIV.A).

53. The Consent Judgment further provides:

- (a) When circumstances occur that Defendant believes constitute Force Majeure, Defendant shall notify the [DEQ] by telephone of the circumstances *within 48 hours after Defendant first believes those circumstances to apply*. Within 14 working days after Defendant first believes those circumstances to apply, Defendant shall supply to the [DEQ] in writing, an explanation of the cause(s) of any actual or expected delay, the anticipated duration of the delay, the measures taken and the measures to be taken by Defendant to avoid, minimize, or overcome the delay, and the timetable for implementation of such measures. (Exhibit 1, § XIV.B (emphasis added)).
- (b) A determination by the [DEQ] that an event does not constitute Majeure, that a delay was not caused by Force, or that the period of delay was not necessary to compensate for Force Majeure may be subject to Dispute Resolution under Section XVI of this Judgment. (Exhibit 1, § XIV.C).

54. Under the Consent Judgment, “[a]ny delay attributable to a Force Majeure shall not be deemed a violation of Defendant’s obligations under this Consent Judgment.” (Exhibit 1, § XIV).

55. As discussed above, on April 30, 2007, PLS concluded that circumstances existed constituting force majeure. Accordingly, that day – well within 48 hours after PLS first believed circumstances constituting force majeure applied – PLS notified the

DEQ that circumstances existed related to AE-3 that constitute a force majeure event under the Consent Judgment. (Exhibit 20).

56. On May 17, 2007, within 14 business days of providing notice of the force majeure event to the DEQ, PLS submitted written documentation to the DEQ in support of its force majeure claim as required by the Consent Judgment. (Exhibit 21).

57. On May 29, 2007, the DEQ informed PLS that it had determined that the circumstances described by PLS did not constitute force majeure under the Consent Judgment. (Exhibit 22).

58. Accordingly, on June 1, 2007, PLS invoked the Dispute Resolution provisions of the Consent Judgment in accordance with the provisions of § XIV.C. (Exhibit 23).

59. Section XVI of the Consent Judgment, "Dispute Resolution," provides that the dispute resolution procedures set forth therein "shall be the exclusive mechanism to resolve disputes under this Consent Judgment." (Exhibit 1, § XVI.A).

60. Section XVI.A further provides: "Any dispute that arises under this Consent Judgment initially shall be the subject of informal negotiations between the Parties. The period of negotiations shall not exceed ten working days from the date of written notice by any Party that a dispute has arisen. This period may be extended or shortened by agreement of the Parties." (Exhibit 1, § XVI.A).

61. The parties did engage in such informal negotiations. The parties participated in a conference call on June 11, 2007, and Mr. Fotouhi provided information to the DEQ that Ms. Kolon requested with regard to the circumstances at issue. (Exhibit 24).



62. Section XVI.B of the Consent Judgment provides that “immediately upon expiration of the informal negotiation period, the DEQ shall provide to Defendant a written statement setting forth the DEQ’s proposed resolution of the dispute.” (Exhibit 1, § XVI.B).

63. By correspondence dated June 15, 2007, the DEQ provided PLS with a written statement setting forth its proposed resolution. (Exhibit 25).

64. The DEQ’s proposed resolution calls for PLS to pay \$50,500.00 in stipulated penalties for the days between March 15, 2007, and May 31, 2007, in which AE-3 was not operating or was operating below the minimum approved purge rate. It is clear from the DEQ’s correspondence that it will seek additional stipulated penalties for each day PLS is below the required rate on a going forward basis.

65. Pursuant to Section XVI.B of the Consent Judgment, as amended, PLS is required to petition this Court for resolution of the dispute no later than 15 working days after receipt of the DEQ’s proposed resolution, and set forth “the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Judgment.” (Exhibit 1, § XVI.B).

#### **MATTER IN DISPUTE**

66. The issues in dispute are whether the circumstances causing PLS’ inability to operate AE-3 at a minimum purge rate of 25 gpm constitute force majeure under the Consent Judgment and whether PLS timely gave notice of the event constituting force majeure.

67. PLS contends (i) that it was unable to operate AE-3 at the minimum purge rate because of circumstances that were, in retrospect, beyond its control from March 15, 2007, to May 3, 2007, and from May 31, 2007 to the present; and (ii) that it notified DEQ of the circumstances constituting force majeure within 48 hours after PLS first believed circumstances constituting force majeure applied.

68. Specifically, PLS has been unable to operate AE-3 at the minimum purge rate because of the poor quality of the aquifer at the location and because PLS' purging from upgradient locations (i.e., LB-1 and LB-3) has lowered the water table by approximately six to seven feet. As a result of these conditions, pumping AE-3 even at a rate lower than 25 gpm results in drawing in a significant amount of air, causing bio-fouling and further reductions in purging capacity.

69. Additionally, PLS first concluded that circumstances constituting force majeure existed on April 30, 2007, and that it informed DEQ of these circumstances on that same day, *i.e.* well within 48 hours of its conclusion that circumstances constituting force majeure existed.

70. The DEQ contends that the force majeure provisions of the Consent Judgment do not apply because (i) PLS failed to claim force majeure within 48 hours of the event constituting force majeure; and (ii) the circumstances at issue were not outside PLS' control. (Exhibits 22, 25).

71. Specifically, the DEQ claims that force majeure should have been declared in March 2007 and that PLS should have anticipated the reduction in the extraction rate at AE-3 and taken measures to capture the leading edge at that location such as the installation of a multi-well purge system. (Exhibits 22, 25).

72. PLS disagrees that it should, or even could, have properly claimed a force majeure defense prior to April 30, 2007. PLS could only claim the defense after it concluded that there was nothing else it could do to meet the minimum required purge rate. The fact that PLS and Mr. Fotouhi explored other options before it asserted the defense is laudable, not a basis for claiming that PLS waived an otherwise valid defense. Indeed, it is hard to square the DEQ's assertion that PLS should have claimed the defense in March (i.e., PLS should have concluded that circumstances beyond its control prevented it from satisfying the purge rate requirement) with the DEQ's simultaneous assertion that meeting this requirement is still within PLS' control. It should also be pointed out that, in the face of the DEQ's threats of stipulated penalties, Mr. Fotouhi raised the purge rate of the well back up to 25 gpm on May 1, 2007 – the day after PLS claimed the force majeure defense – even though the well was pulling air into the well. He was able to maintain this level despite increasingly large air bubbles until May 30, 2007. (Fotouhi Aff., Exhibit 17, ¶ 31). Consequently, PLS arguably provided the DEQ with formal notification of its force majeure defense too early, not too late.

73. The DEQ's conclusion that maintaining the minimum purge rate is not beyond PLS' control is similarly flawed. As detailed in the affidavits of Mr. Fotouhi and Mr. Brode, the DEQ's proposed multi-well extraction system along Allison Street is unworkable and only multiplies the problems caused by the poor aquifer conditions and low water levels present at this location. (Fotouhi Aff., Exhibit 17, ¶¶ 32-33; Brode Aff., Exhibit 2, ¶¶ 9-11).

74. Moreover, it is clear that PLS should be purging less water from the Evergreen System purge wells, not more. The data demonstrate that the current capture

zone of the Evergreen System extends to the "Unit E" plume and that continued operation of the Evergreen System at a combined purge rate of 200 gpm would continue to "pull" the Unit E plume toward the Evergreen System. Further distortion of the Unit E plume undermines the protectiveness of this Court's Unit E Order. Concurrent with this Petition, PLS has filed a Motion to Amend Consent Judgment seeking to redefine the Consent Judgment objective for the Evergreen System to address this concern.

75. Out of respect for this Court's authority, PLS is already attempting to obtain access and the necessary permits for installing a single extraction well along Allison Street so that a new well could be quickly installed should the Court rule against PLS. This area, including the underground right-of-way, is extremely congested and may not support another well and related pipelines, let alone a multi-well system. Moreover, although installation of such a well might temporarily allow PLS to obtain a 25 gpm purge rate, it would only be a stopgap remedy and would only put off resolution of this issue. (Fotouhi Aff., Exhibit 17, ¶ 35).

#### **EFFECT, IF ANY, OF AE-3'S REDUCED PURGE RATE**

76. Only one monitoring well in the area of AE-3 still reflects contaminant levels above 85 ppb. The contaminant levels in the groundwater purged from AE-3 have consistently been below 85 ppb since July 2005. (Brode Aff., Exhibit 2, ¶ 13). Therefore, there is only a small amount of contaminant mass above 85 ppb present in the Allison Street area that could potentially migrate to the east because of the currently reduced operation of AE-3.

77. Moreover, because of the increasingly broad capture zone created by the operation of the LB wells, the groundwater gradient in the area of Allison Street is nearly

flat. Consequently, to the extent groundwater in this area is flowing east at all, it is at an extremely slow flow rate. Mr. Brode estimates that it would take over *eight years* for contamination to migrate from the one small area near AE-3 that is contaminated above 85 ppb to the downgradient monitoring wells. (Brode Aff., Exhibit 2, ¶ 14). Thus, there is no immediate danger that the reduced operation of AE-3 will result in any measurable environmental harm while this petition and the issues raised herein are being resolved.

#### **EFFORTS MADE BY THE PARTIES TO RESOLVE THE DISPUTE**

78. In an attempt to resolve this dispute, representatives of the parties participated in a conference call on Monday, June 11, 2007. Additionally, PLS has exchanged emails with the DEQ and has provided information requested by the DEQ with regard to the circumstances at issue. (Exhibit 24). Prior to this call, the DEQ informed PLS that it would not be prepared to address the effect of the Unit E on this issue because it had not completed its review of the ESR.

#### **SCHEDULE**

79. As discussed both above and in PLS' Motion to Amend the Consent Judgment, future operation of AE-3 or a replacement well or wells at a purge rate of 25 gpm is not feasible and would not effectuate the Consent Judgment's objective of containing the leading edge of the D<sub>2</sub> plume, which is already being intercepted by the LB wells. Moreover, continued operation of the Evergreen System at a combined purge rate of 200 gpm will continue to result in portions of the Unit E plume being pulled into the Evergreen System, frustrating the objectives of this Court's December 14, 2004 Unit E Order and the Consent Judgment. Accordingly, PLS asks this Court to authorize PLS to implement its June 29, 2007 Work Plan in accordance with the schedule set forth in

that plan. Implementation of this work and a timely determination of an appropriate purge rate for the LB wells are necessary "in order to ensure orderly implementation of the Consent Judgment."

### RELIEF REQUESTED

80. PLS requests that this Court resolve the pending dispute between the parties pursuant to Section XVI of the Consent Judgment, as amended, and find that circumstances identified by PLS constitute a force majeure event under the Consent Judgment and that PLS will not be subject to stipulated penalties in connection with its inability to operate AE-3 at a minimum purge rate of 25 gpm. PLS also asks this Court to authorize PLS to: (a) cease operating an extraction well at the Allison Street area; (b) proceed with the work identified in PLS' June 29, 2007 Work Plan; and (c) allow PLS to reduce the combined purge rate for the Evergreen System to a lower rate, if it is determined that a lower rate will prevent groundwater contamination from migrating east of the LB location on Evergreen Street. PLS also asks this Court to grant the related Motion to Amend Consent Judgment filed contemporaneous with this Petition.

Respectfully submitted,

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



Michael L. Caldwell (P40554)  
Karyn A. Thwaites (P66985)  
Co-Counsel for Pall Life Sciences, Inc.  
31700 Middlebelt Road, Ste. 150  
Farmington Hills, MI 48334  
(248) 851-4111

WILLIAMS ACOSTA, PLC  
Alan D. Wasserman (P39509)  
Co-Counsel for Pall Life Sciences, Inc.  
535 Griswold Street, Suite 1000  
Detroit, MI 48226  
(313) 963-3873

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31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334-2374 • 721 N. Capitol, Suite 2, Lansing, MI 48906-5163  
Zausmer, Kaufman, August, Caldwell & Taylor, P.C.,