

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

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ATTORNEY GENERAL FOR THE STATE OF  
MICHIGAN, ex rel, MICHIGAN DEPARTMENT  
OF ENVIRONMENTAL QUALITY,

Plaintiffs,

File No. 88-34734-CE

v

Honorable Donald E. Shelton

GELMAN SCIENCES, INC.,  
a Michigan corporation,

Defendant.

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**PLAINTIFFS' MOTION TO ENFORCE  
ORDER PROHIBITING GROUNDWATER USE**

Plaintiffs, the Attorney General of the State of Michigan and the Michigan Department of Environmental Quality ("MDEQ"), as successor to Plaintiffs Michigan Natural Resources Commission, Michigan Water Resources Commission, and Michigan Department of Natural Resources under Executive Orders 1991-31 and 1995-18, by their undersigned counsel hereby

move this Court pursuant to MCR 2.119 and 3.310, to enforce the Order Prohibiting Groundwater Use dated May 17, 2005 by ordering the Defendant Pall Life Sciences, Inc. ("PLS"), the successor to Gelman Sciences, Inc., to: (a) perform activities necessary to identify all private wells within the Prohibition Zone established by the Court; and (b) provide for the abandonment of any private wells and the replacement of private drinking water wells with connection to the municipal water supply.

### **NATURE OF THE CASE**

1. On October 26, 1992, the Plaintiffs and the Defendant (collectively, the Parties), entered into a Consent Judgment to address contamination at and emanating from Defendant's facility located at 600 S. Wagner in Scio Township, Michigan. The overall goal of the Consent Judgment was to clean up the area-wide groundwater contamination. This was to be accomplished by the development of several remediation systems.<sup>1</sup> The Consent Judgment was amended on September 23, 1996 and October 20, 1999, pursuant to the stipulation of the Parties.

2. The Court has also supplemented the Consent Judgment with several cleanup related orders, based on information about the nature and extent of contamination acquired after the Consent Judgment was entered.

3. Two such orders were the Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer ("Unit E Order") dated December 17, 2004 and the Order Prohibiting Groundwater Use dated May 17, 2005 ("PZ Order").

4. As described below and in the attachments, PLS has repeatedly failed or refused to comply with the requirements of the PZ Order, which calls into question the effectiveness of the remedy the PZ Order was designed to effectuate.

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<sup>1</sup> The systems include the Evergreen System, Core System, the Western System.

5. In this motion, Plaintiffs ask this Court to order PLS to perform specific actions needed to meet the requirements of the PZ Order. These include among other things, completing the well identification process as envisioned in the PZ Order, and submitting documentation needed to verify the adequacy of the process.

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### **PZ ORDER BACKGROUND**

6. In 2001, the Parties discovered that the groundwater contamination at the site was deeper than originally thought and had seeped into what they thought at the time was a separate aquifer, which was given the designation "Unit E".

7. The Unit E aquifer is generally believed to be located at lower depths than what had been termed the Evergreen or D2 aquifer, and Unit E is downgradient, and south of the D2 aquifer. It has subsequently been determined that these aquifers Unit E and D2 communicate hydraulically although the extent of the communication is not fully known.

8. The Court indicated in the Unit E Order that the Unit E aquifer was part of the Western System and subject to the Consent Judgment.

9. Because 1,4-dioxane would be left in groundwater above 85 ppb, the drinking water standard, MCL 324.20118(6)(d) required "other institutional controls necessary to prevent unacceptable risk from exposure to the hazardous substances."

10. MCL 324.20120b(5) provides that such institutional controls "include, but are not limited to, an ordinance that prohibits the use of groundwater or an aquifer in a manner and to a degree that protects against unacceptable exposures as defined by the cleanup criteria approved as part of a remedial plan."

11. Because, the Washtenaw County Rules and Regulations for the Protection of Groundwater adopted February 4, 2004, did not meet the requirements of an institutional control

under Part 201 of the NREPA, the Court issued the Order Prohibiting Groundwater Use on May 17, 2005 (PZ Order) to satisfy the requirements of MCL 324.20118(6)(d) and MCL 324.20120b(5) and ordered in part that:

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(1) The prohibitions imposed by this Order apply to the zone identified in the map attached hereto as Figure 1 (Prohibition Zone).

(2) The installation by any person of a new water supply well in the Prohibition Zone for drinking, irrigation, commercial, or industrial use is prohibited.

(3) The Washtenaw County Health Officer or any other entity authorized to issue well construction permits shall not issue a well construction permit for any well in the Prohibition Zone.

(4) The consumption or use by any person of groundwater from the Prohibition Zone is prohibited.

(5) The prohibitions listed in paragraphs 2, 3, and 4 do not apply to the installation and use of:

\* \* \*

(e) any existing water supply well that has been demonstrated, on a case-by-case basis and with the written approval of the MDEQ, to withdraw water from a formation that is not likely to become contaminated with 1,4-dioxane emanating from the PLS facility. Such wells shall be monitored for 1,4-dioxane by PLS at a frequency determined by the MDEQ.

\* \* \*

(6) PLS shall provide, at its expense, connection to the City of Ann Arbor municipal water supply to replace any existing *private drinking water* wells within the Prohibition Zone. Within thirty (30) days after entry of this Order, *PLS shall submit to MDEQ for review and approval a work plan for identifying, or verifying the absence of, any private wells within the Prohibition Zone, for the abandonment of any such private wells and for the replacement of private drinking water wells with connection to municipal water supply. Well abandonment and replacement shall be performed in accordance with all applicable regulations and procedures at the expense of PLS. PLS shall implement the work plan and schedule approved by MDEQ.* (emphasis added).

12. On or about June 24, 2005, PLS submitted its Work Plan for Identification, Abandonment, and Replacement of Certain Private Water Supply Wells (Work Plan).

13. On August 12, 2005, after a complete review of the Work Plan, the MDEQ provided its Response to Work Plan for Identification, Abandonment, and Replacement of Certain Water Supply Wells, dated June 24, 2005. The MDEQ conditionally approved the Work Plan informing PLS that, among other things, "it is PLS's responsibility to abandon *any* wells identified within the PZ, subject to the exception allowed for in 5e of the Order." (emphasis added). And, further stating: "The *obligation* of PLS to provide connection to the city water supply and abandon wells within the PZ *will continue for the duration of the PZ. If any vulnerable properties or wells are identified after PLS submits its final report on this Work Plan, PLS will be required to implement the tasks in this Work Plan, as modified by this letter, or according to subsequent revisions approved by the DEQ.*" (emphasis added).

14. By a letter dated November 14, 2005, PLS questioned the MDEQ's August 12, 2005 response based on its narrow interpretation of the PZ Order, and requested clarification of the intent of the MDEQ's response.

15. The MDEQ further clarified its August 12, 2005 response in a letter dated January 10, 2006, stating in part:

Wells that are still intact, regardless of their current use, could be used in the future, in violation of the Order, unless they are permanently plugged. The DEQ is charged in the Order with approving PLS Work Plan. As the agency that oversees the implementation of the remedial action, the DEQ is obligated to ensure that the remedy selected by PLS, and approved by the Court, is implemented to protect the public health, safety and welfare, and the environment. To that end, consistent with guidance from division management, the DEQ will not approve the Work Plan unless it includes a commitment by PLS to identify any water supply wells that have not been plugged, and to render any such wells incapable of providing water, unless an exception allowed for in the Order is approved. *PLS must implement this Work Plan with the purpose of using its best efforts to identify any private water wells within the PZ that have not been*

*properly plugged to ensure that groundwater from the PZ cannot be consumed or used.* (emphasis added).

\* \* \*

It has now been nearly seven months since PLS's submittal of the Work Plan and five months since the DEQ's response to the Work Plan. Section X of the Consent Judgment, Approvals of Submissions, requires PLS to submit for dispute resolution under Section XVI of the Consent Judgment if it disagrees with the DEQ's conditional approval of its submissions. PLS has not yet submitted any information to demonstrate that it has undertaken any of the tasks that are required by the Order. *PLS should immediately implement the Work Plan as conditionally approved by the DEQ in this letter and our August 12, 2005 letter. If PLS objects to any of the conditions, then PLS should immediately invoke the dispute resolution procedures of the Consent Judgment.* (emphasis added).

16. PLS never invoked dispute resolution with regard to the conditions MDEQ placed on its approval of the Work Plan as provided by the Consent Judgment.

17. After numerous written and verbal communications between MDEQ and PLS, some of the MDEQ's comments on the Work Plan and subsequent reports have been addressed and some of the information requested to document the well identification process has been gathered and submitted by PLS. However, PLS has not complied with all of the items required by the Work Plan, as conditionally approved by the MDEQ.

18. Further, the process of identifying water supply wells within the PZ, as required by the PZ Order, has been more difficult than anticipated. Neither party contemplated the possibility of not being able to find wells that were known to exist or the inability to verify the presence or absence of wells at specific locations. To address this situation DEQ has required PLS to provide owners of such properties specific notice of the PZ.

19. Although the PZ Order requires PLS to identify or verify the absence of any private wells within the PZ to meet the requirements of an institutional control and thus for the remedy to be protective while leaving 1-4, dioxane in groundwater above the cleanup standard of

85 ppb, PLS has been reluctant and in some instances refused to take additional steps to address the well identification problem described above, asserting that the requests were beyond the scope of the PZ Order or the conditionally approved Work Plan, although it is clear from the PZ Order that the Court wants any possible exposure pathway extinguished unless certain exceptions apply.

20. During this process, MDEQ performed its own investigations identified specific private wells that PLS did not locate or identify on its own although the PZ Order and the Work Plan, as conditionally approved by MDEQ, clearly places the responsibility on PLS to perform such tasks. The investigation was done to demonstrate that more work is needed to complete the well identification process.

#### **ENFORCEMENT PROVISIONS OF THE PZ ORDER**

21. Paragraph 11 of the PZ Order provides that: "Either Party or a local unit of government having jurisdiction within the Prohibition Zone may seek enforcement of this Order by the Court."<sup>2</sup>

#### **VIOLATIONS**

22. There are four general areas that not been adequately addressed by PLS as required by the PZ Order:

- (1) Private water supply well investigation.
- (2) Private water supply well identification and plugging.

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<sup>2</sup> The PZ Order also provides that in the event the boundary of the PZ is expanded, PLS shall, within thirty(30) days after entry of such an Order, submit to the MDEQ for review and approval, a work plan for identifying, or verifying the absence of any private wells within the modified PZ, for the abandonment of any such private wells, and for the connection to the municipal water supply to replace drinking water wells within the modified PZ.

- (3) Notices where unused private water supply wells cannot be located.
- (4) Final report.

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23. In its March 18, 2009 letter, MDEQ has identified the following issues/tasks that

PLS must address to be in compliance with the scope and spirit of the PZ Order:

- 1) produce a detailed figure of the PZ that shows individual parcels and identifies the boundaries of each area/subdivision that is not being surveyed;<sup>3</sup>
- 2) produce a list of addresses that are outside of the subdivision boundaries in the figure discussed in #1 above, that have not been surveyed or investigated;
- 3) review all parcels on the list in #2 above, to determine if they need to be surveyed and provide the basis for not surveying those that PLS does not propose to survey (i.e. vacant, well plugging record, documentation that they were provided with municipal water when developed);
- 4) survey the owner of each parcel on the list in #3 above, where wells were known to exist, or where the absence of wells cannot be verified;
- 5) complete the measures specified in this letter for unresolved addresses in Table 1;
- 6) provide an electronic spreadsheet of all addresses outside of the subdivision boundaries on the figure described in #1, above, including the results of the review and surveys of new addresses and updates of any information in Table 1;
- 7) provide a final report with the above figure and spreadsheet that explains which subdivisions/areas were not surveyed and why;
- 8) for any expansion of the PZ, the same process shall be followed and PLS shall provide any addendum with a revised figure and spreadsheet;
- 9) inform the DEQ of any new information it becomes aware of regarding the status of any wells in the PZ and take any required measures, including the plugging of any water supply wells that are subsequently identified (the DEQ will maintain the spreadsheet).

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<sup>3</sup> MDEQ has since completed this task.



24. MDEQ requests that this Court use its inherent powers to enforce the PZ Order.  
*See, St. Clair Commercial & Savings Bank v. Macauley*, 66 Mich App 210 (1975); *Schaeffer v Schaeffer*, 106 Mich App 452 (1981); *Cohen v Cohen*, 125 Mich App 206 (1983); and MCL 600.611.

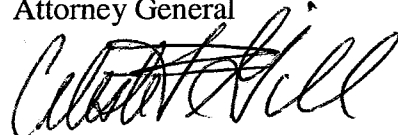
**Relief Requested**

For all the reasons stated above, the Plaintiffs request that this Court:

- A. Enter the attached proposed order:
- B. Grant Plaintiffs such further relief as the Court finds appropriate and just.

Respectfully submitted,

Michael A. Cox  
Attorney General



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Dated: June 5, 2009

LF:Gelman/Motion to Enforce Order

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF  
MICHIGAN, ex rel, MICHIGAN DEPARTMENT  
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(313) 963-3873  
Attorneys for Defendant

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At a session of said Court, held in the Courtroom thereof, in the  
City of Ann Arbor, County of Washtenaw, State of Michigan, this

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PRESENT:

HONORABLE DONALD E. SHELTON  
CIRCUIT COURT JUDGE

The Court, being fully advised in the premises, hereby orders Defendant, Pall Life Sciences, Inc.

(PLS) to:

A. Take the following actions to complete the well identification process:

- 1) produce a list of address that are outside of the subdivision boundaries in the map attached as Exhibit 1 to this Order, that have not been surveyed or investigated;
- 2) review all parcels on the list in #1 above, to determine if they need to be surveyed and provide the basis for not surveying those that PLS does not propose to survey (i.e. vacant, well plugging record, documentation that they were provided with municipal water when developed);
- 3) survey the owner of each parcel on the list in #2 above, where wells were known to exist, or where the absence of wells cannot be verified;
- 4) complete the measures specified in the Michigan Department of Environmental Quality's March 18, 2009 letter for unresolved addresses in Table 1;
- 5) provide an electronic spreadsheet of all addresses outside of the subdivision boundaries on the attached map, above, including the results of the review and surveys of new addresses and updates of any information in Table 1;
- 6) provide a final report with the above figure and spreadsheet that explains which subdivisions/areas were not surveyed and why;
- 7) for any expansion of the PZ, the same process shall be followed and PLS shall provide any addendum with a revised figure and spreadsheet; and
- 8) inform the DEQ of any new information it becomes aware of regarding the status of any wells in the PZ and take any required measures, including the plugging of any water supply wells that are subsequently identified (the DEQ will maintain the spreadsheet).

B. Take the following additional actions to meet the requirements of the Court's Order Prohibiting Groundwater Use, dated May 17, 2005:

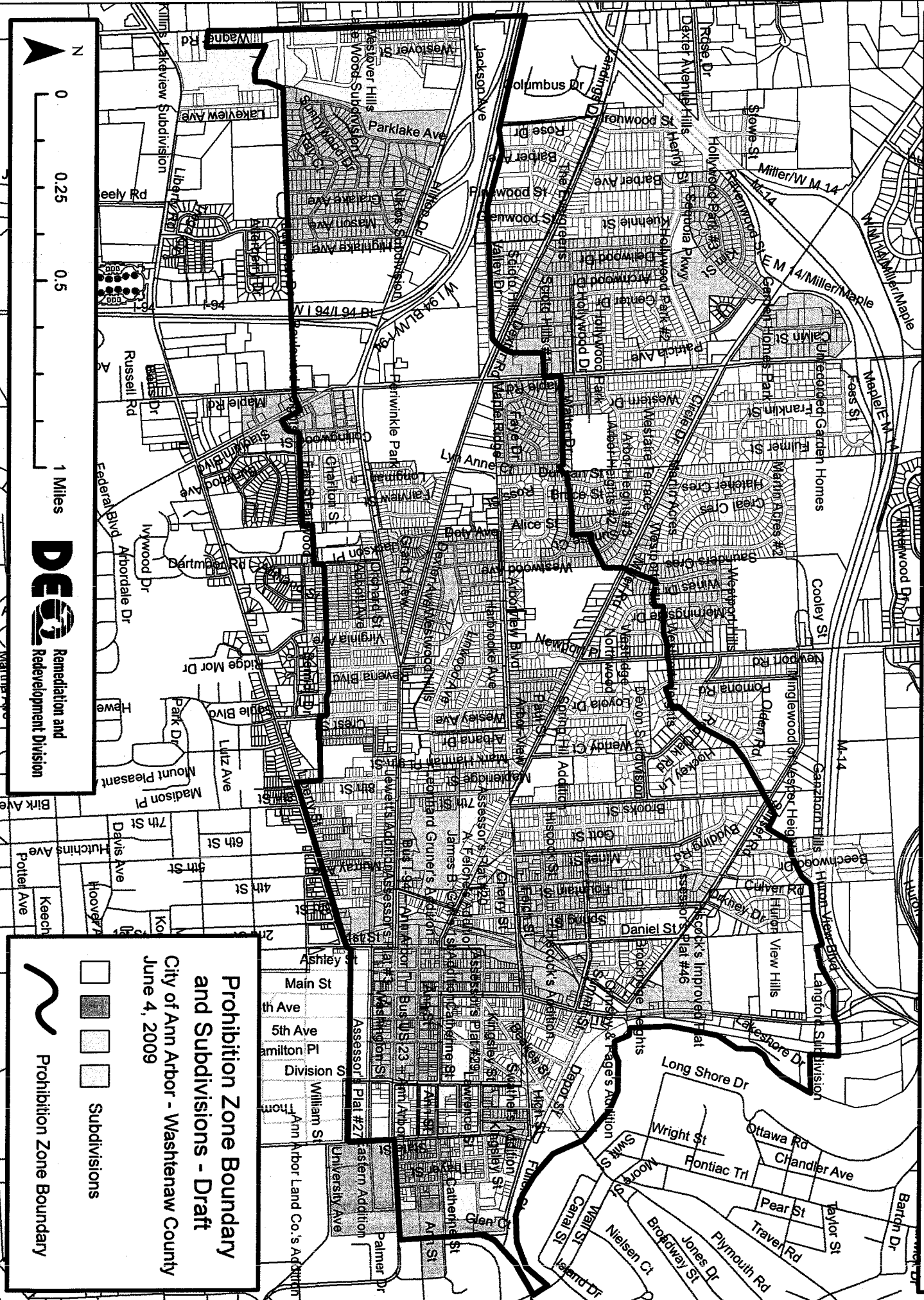
- 1) for addresses where the absence of a well cannot be verified, provide the property owner with notice of the Prohibition Zone, including a copy of the PZ Order, an offer to inspect the site, and an offer to plug any water supply well subsequently discovered on site at PLS's cost; and
- 2) plug any wells otherwise identified within the Prohibition Zone, whether currently in use or not.

Date: \_\_\_\_\_

\_\_\_\_\_  
Honorable Donald E. Shelton  
Circuit Court Judge

LF:/Gelman/Proposed Order

# Gelman Sciences, Inc. Prohibition Zone Subdivisions for Well Identification Survey



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ATTORNEY GENERAL FOR THE STATE OF  
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**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO  
ENFORCE ORDER PROHIBITING GROUNDWATER USE**

**Introduction**

Plaintiffs, the Attorney General of the State of Michigan, and the Michigan Department of Environmental Quality (MDEQ), as successor to Plaintiffs Michigan Natural Resources Commission, Michigan Water Resources Commission, and Michigan Department of Natural Resources under Executive Orders 1991-31 and 1995-18 seek to enforce the Court's Order Prohibiting Groundwater Use dated May 17, 2005. Specifically, the Plaintiffs asks that an Order

be entered requiring the Defendant, Pall Life Sciences, Inc. ("PLS"), the successor to Gelman Sciences, Inc., to: (a) perform activities necessary to identify all private wells within the Prohibition Zone established by the Court; and (b) provide for the abandonment of any private wells, and (c) Replace private drinking water wells with connection to the municipal water supply.

### **Factual and Procedural Background**

This case involves one of the more complicated sites of environmental contamination in the State of Michigan, the Gelman Sciences Site, an area of widespread groundwater contamination. It includes the PLS plant property located at 600 S. Wagner in Scio Township, Michigan and extends eastward and north-eastward into the City of Ann Arbor, and westward and north-westward in Scio Township. The primary compound of concern is 1,4-dioxane, which PLS used in the manufacture of medical filters. Toxicology testing has identified it as a probable human carcinogen (through long-term exposure to low doses.)

On October 26, 1992, the Plaintiffs and the Defendant (collectively, the Parties), entered into a Consent Judgment to address contamination at and emanating from Gelman Sciences Site. The overall goal of the Consent Judgment was to clean up the area-wide contamination through the development and use of several remediation systems.<sup>1</sup> The Consent Judgment was amended on September 23, 1996 and October 20, 1999, pursuant to the stipulation of the Parties.

The Court has also supplemented the Consent Judgment with several clean up related orders, based on information about the nature and extent of the groundwater contamination that was acquired after the Consent Judgment was entered. The Court entered its Opinion and Remediation Enforcement Order (REO) on July 17, 2000 because it did not appear that the

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<sup>1</sup> The systems include the Evergreen System, Core System, and the Western System.

groundwater clean up had progressed as fast as it should. Among other things, the REO required PLS to "submit a detailed plan, with monthly benchmarks, which will reduce the dioxane in all affected water supplies below legally acceptable levels within a maximum period of five years from the date of this Order." PLS submitted its 5-Year Plan on or about December 20, 2000 and the Court entered the "Stipulated Order Adopting Five-year Plan." Clean up continues under the 5-Year Plan.

In May 2001, as the result of a MDEQ requested investigation of the Western System, it was discovered that there was no confining layer of clay separating what was known as the Evergreen or D2 aquifer from what was thought at the time to be a separate aquifer, designated as the "Unit E" aquifer, and that 1,4-dioxane contamination had migrated into the Unit E aquifer in an area west of the PLS property. The Unit E aquifer is generally believed to be located at lower depths, downgradient, and south of the D2 aquifer.

By its December 17, 2004 Opinion and Order Regarding Remediation of the Contamination of the "Unit E" Aquifer (Unit E Order), the Court held that the Unit E aquifer was part of the Western System and it was subject to the terms of the Consent Judgment, including the overall objective of the Consent Judgment to clean up the area-wide contamination. At the time, it was believed that the Unit E plume was deep (more than 200 feet below ground level) and that ultimately the groundwater would migrate to the Huron River where it would be expected to meet criteria protective of surface water.

PLS's proposal for addressing the 1,4-dioxane contamination found in the Unit E aquifer included an element of monitored natural attenuation, that would allow contamination to be left in place above the applicable cleanup criteria. Because 1,4-dioxane would be left in groundwater above 85 ppb, the drinking water standard, MCL 324.20118(6)(d) requires that to be protective,



the remedial action must include "other institutional controls necessary to prevent unacceptable risk from exposure to the hazardous substances." MCL 324.20120b(5) provides that such institutional controls "include, but are not limited to, an ordinance that prohibits the use of groundwater or an aquifer in a manner and to a degree that protects against unacceptable exposures as defined by the cleanup criteria approved as part of a remedial plan." The Court recognized that "there must be enforceable restriction on the human use of water from the 'Unit E' aquifer during remediation" in the Unit E Order and therefore established a prohibition zone (PZ) in which the use of groundwater was restricted.

Because the Washtenaw County Rules and Regulations for the Protection of Groundwater adopted February 4, 2004, did not meet the requirements of an institutional control under Part 201 of the NREPA, the Court issued the Order Prohibiting Groundwater Use on May 17, 2005 (PZ Order) to satisfy the requirements of MCL 324.20118(6)(d) and MCL 324.20120b(5) and ordered, in part, that:

(1) The prohibitions imposed by this Order apply to the zone identified in the map attached hereto as Figure 1 (Prohibition Zone).

(2) The installation by any person of a new water supply well in the Prohibition Zone for drinking, irrigation, commercial, or industrial use is prohibited.

(3) The Washtenaw County Health Officer or any other entity authorized to issue well construction permits shall not issue a well construction permit for any well in the Prohibition Zone.

(4) The consumption or use by any person of groundwater from the Prohibition Zone is prohibited.

(5) The prohibitions listed in paragraphs 2, 3, and 4 do not apply to the installation and use of:

\* \* \*

(e) any existing water supply well that has been demonstrated, on a case-by-case basis and with the written approval of the MDEQ, to withdraw water from a formation that is not likely to become contaminated with 1,4-

dioxane emanating from the PLS facility. Such wells shall be monitored for 1,4-dioxane by PLS at a frequency determined by the MDEQ.

\* \* \*

(6) PLS shall provide, at its expense, connection to the City of Ann Arbor municipal water supply to replace any existing *private drinking water* wells within the Prohibition Zone. Within thirty (30) days after entry of this Order, *PLS shall submit to MDEQ for review and approval a work plan for identifying, or verifying the absence of, any private wells within the Prohibition Zone, for the abandonment of any such private wells* and for the replacement of *private drinking water wells* with connection to municipal water supply. Well abandonment and replacement shall be performed in accordance with all applicable regulations and procedures at the expense of PLS. *PLS shall implement the work plan and schedule approved by MDEQ.* (emphasis added).

On or about June 24, 2005, PLS submitted its Work Plan for Identification, Abandonment, and Replacement of Certain Private Water Supply Wells (Work Plan). Exhibit 1. PLS proposed the following tasks with regard to identification of existing drinking water wells within the prohibition zone:

- a. Task 1: Door-to-Door Survey of Vulnerable Neighborhoods<sup>2</sup>
- b. Task 2: Research and Preparation of Chronology Regarding the Availability of Municipal Water within the prohibition zone
- c. Task 3: Research and preparation of memorandum regarding ordinances regulating connection to municipal water.

The Proposal also included the procedures to be followed for plugging identified water supply wells and provided for the connection of properties possessing private water supply wells to the municipal water supply. By a letter dated July 11, 2005, MDEQ provided a preliminary response to the Work Plan to highlight its concerns with various schedule related items and to emphasize the need for exposure pathways to be eliminated as soon as possible. (Exhibit 2)

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<sup>2</sup> At the time of proposal, PLS had identified two areas as potentially having private wells.

On August 12, 2005, after a complete review of the Work Plan, the MDEQ provided its Response to Work Plan for Identification, Abandonment, and Replacement of Certain Water Supply Wells, dated June 24, 2005. (Attached as Exhibit 3). The MDEQ conditionally approved the Work Plan informing PLS that, among other things, "it is PLS's responsibility to abandon *any* wells identified within the PZ, subject to the exception allowed for in 5e of the Order."

(emphasis added). And, further stating: "The *obligation* of PLS to provide connection to the city water supply and abandon wells within the PZ *will continue for the duration of the PZ. If any vulnerable properties or wells are identified after PLS submits its final report on this Work Plan, PLS will be required to implement the tasks in this Work Plan, as modified by this letter, or according to subsequent revisions approved by the DEQ.*" (emphasis added).

By a letter dated November 14, 2005, PLS questioned the MDEQ's August 12, 2005 response based on its narrow interpretation of the PZ Order, and requested clarification of the intent of the MDEQ's response. Among other things, PLS asserted that it was not necessary or appropriate to locate and identify open loop heat pumps, that the Order does not require it to identify or abandon non-drinking water supply wells, or identify wells already taken out of service and that wells currently in use or temporarily out of use are already "abandoned."

(Exhibit 4) The MDEQ further clarified its August 12, 2005 response in a letter dated January 10, 2006, (Exhibit 5) stating in part:

Wells that are still intact, regardless of their current use, could be used in the future, in violation of the Order, unless they are permanently plugged. The DEQ is charged in the Order with approving PLS Work Plan. As the agency that oversees the implementation of the remedial action, the DEQ is obligated to ensure that the remedy selected by PLS, and approved by the Court, is implemented to protect the public health, safety and welfare, and the environment. To that end, consistent with guidance from division management, the DEQ will not approve the Work Plan unless it includes a commitment by PLS to identify any water supply wells that have not been plugged, and to render any such wells incapable of providing water, unless an exception allowed for in the Order is

approved. *PLS must implement this Work Plan with the purpose of using its best efforts to identify any private water wells within the PZ that have not been properly plugged to ensure that groundwater from the PZ cannot be consumed or used.* (emphasis added).

\* \* \*

It has now been nearly seven months since PLS's submittal of the Work Plan and five months since the DEQ's response to the Work Plan. Section X of the Consent Judgment, Approvals of Submissions, requires PLS to submit for dispute resolution under Section XVI of the Consent Judgment if it disagrees with the DEQ's conditional approval of its submissions. PLS has not yet submitted any information to demonstrate that it has undertaken any of the tasks that are required by the Order. *PLS should immediately implement the Work Plan as conditionally approved by the DEQ in this letter and our August 12, 2005 letter. If PLS objects to any of the conditions, then PLS should immediately invoke the dispute resolution procedures of the Consent Judgment.* (emphasis added).

\* \* \*

PLS never invoked dispute resolution with regard to the conditions MDEQ placed on its approval of the Work Plan as provided by the Consent Judgment.

Unfortunately, the process of identifying water supply wells within the PZ, as required by the PZ Order, has been more difficult than anticipated. Neither party contemplated the possibility of not being able to find wells that were known to exist or the inability to verify the presence or absence of wells at specific locations. In its October 30, 2006 letter, the MDEQ requested that PLS make a good-faith effort to verify whether wells were installed at each address in question, and to address the situation in which the status of wells could not be confirmed, DEQ has required PLS to provide owners of such properties specific notice of the PZ. See Exhibit 6 and Exhibit 7 generally.

Because PLS refused to do so, MDEQ also performed its own investigation to demonstrate that there were other areas that needed to be investigated. In some instances MDEQ actually identified specific private wells that PLS did not locate or identify on its own although

the PZ Order and the Work Plan, as conditionally approved by MDEQ, clearly places the responsibility on PLS to perform such tasks. MDEQ provided PLS with this information to assist it in identifying private wells.<sup>3</sup> See Exhibit 8 and Exhibit 9, which contains a list of close to 30 properties identified by MDEQ. The work MDEQ did was not intended to complete PLS's obligation, but was simply done to demonstrate that more work was needed to complete the well identification process.

After numerous written and verbal communications between MDEQ and PLS, some of the MDEQ's comments on the Work Plan and subsequent reports have been addressed and some of the information requested to document the well identification process has been gathered and submitted by PLS. However, PLS has not complied with all of the items required by the Work Plan, as conditionally approved by the MDEQ.

### Argument

PLS refuses to complete the well identification process as required by the PZ Order and the Work Plan as conditionally approved by the MDEQ, or take other steps to ensure the effectiveness of the PZ and thus the protection of the public health, safety, and welfare.

There are four general areas that not been adequately addressed by PLS as required by the PZ Order:

- (1) Private water supply well investigation.
- (2) Private water supply well identification and plugging.
- (3) Notices where unused private water supply wells cannot be located.
- (4) Final report.

See. Exhibit 9.

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<sup>3</sup> To MDEQ's knowledge PLS has addressed one or two of the wells identified by MDEQ.

As discussed above, the PZ Order, unambiguously requires PLS to submit to MDEQ for review and approval a plan for identifying, or verifying the absence of, *any private wells* within the PZ, for the *abandonment of any such private wells*, and for the *replacement of private drinking water wells*. PLS submitted a work plan that attempted to limit the clear requirements of the Court's order, however, the MDEQ's conditional approval (and subsequent correspondence) clearly reiterates the Court's mandate that PLS identify or verify the absence of, and if identified, abandon any private wells located in the PZ.

PLS has and to some extent continues to assert that it is not required it to identify or abandon non-drinking water supply wells, or identify wells already taken out of service and that wells not currently in use are already "abandoned," although no such exceptions exist in the PZ Order. In fact, the only specific reference to drinking supply wells is the requirement to connect to city water, because obviously you cannot leave someone without of source of drinking water.

Although the PZ Order requires PLS to identify or verify the absence of any private wells within the PZ to meet the requirements of an institutional control and, thus be protective while allowing concentrations of 1,4-dioxane, in excess of the clean up criteria to remain in place, as required by MCL 324.2118(6)(d), PLS has been reluctant and in some instances refused to take additional steps to address the well identification problem described above, asserting that the requests were beyond the scope of the PZ Order or the conditionally approved Work Plan, although it is clear from the PZ Order that the Court intended the remedy to be protective as possible and therefore any possible exposure pathway extinguished, unless certain exceptions apply.

Paragraph 11 of the PZ Order provides that: "Either Party or a local unit of government having jurisdiction within the Prohibition Zone may seek enforcement of this Order by the

Court."<sup>4</sup> Further, MCL 600.611 provides that "[c]ircuit courts have jurisdiction and power to make any order proper to fully effectuate the circuit court's jurisdiction and judgments."<sup>5</sup>

In its most recent correspondence dated March 18, 2009, MDEQ identified the following issues/tasks that PLS must address to be in compliance with the scope and spirit of the PZ Order:

- 1) produce a detailed figure of the PZ that shows individual parcels and identifies the boundaries of each area/subdivision that is not being surveyed (MDEQ has completed this map and therefore this task is no longer required, (See Exhibit 1 – to the Proposed Order);
- 2) produce a list of address that are outside of the subdivision boundaries in the figure discussed in #1 above, that have not been surveyed or investigated;
- 3) review all parcels on the list in #2 above, to determine if they need to be surveyed and provide the basis for not surveying those that PLS does not propose to survey (i.e. vacant, well plugging record, documentation that they were provided with municipal water when developed);
- 4) survey the owner of each parcel on the list in #3 above, where wells were know to exist, or where the absence of wells cannot be verified;
- 5) complete the measures specified in this letter for unresolved addresses in Table 1;

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<sup>4</sup> The PZ Order also provides that in the event the boundary of the PZ is expanded, PLS shall, within thirty(30) days after entry of such an Order, submit to the MDEQ for review and approval, a work plan for identifying, or verifying the absence of any private wells within the modified PZ, for the abandonment of any such private wells, and for the connection to the municipal water supply to replace drinking water wells within the modified PZ. However, this dispute is not related or intended to address the well identification process to be used for future expansions of the PZ, including any that may be currently contemplated by the Parties.

<sup>5</sup> See also, *Schaeffer v Schaeffer*, 106 Mich App 452 (1981); and *Cohen v Cohen*, 125 Mich App 206 (1983) regarding the inherent authority of the Court.

6) provide an electronic spreadsheet of all addresses outside of the subdivision boundaries on the figure described in #1, above, including the results of the review and surveys of new addresses and updates of any information in Table 1;

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7) provide a final report with the above figure and spreadsheet that explains which subdivisions/areas were not surveyed and why;

8) for any expansion of the PZ, the same process shall be followed and PLS shall provide any addendum with a revised figure and spreadsheet;

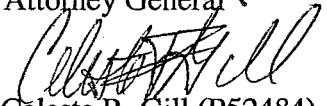
9) inform the DEQ of any new information it becomes aware of regarding the status of any wells in the PZ and take any required measures, including the plugging of any water supply wells that are subsequently identified (the DEQ will maintain the spreadsheet).

### **Conclusion**

As described herein and in the Exhibits, PLS has repeatedly failed or refused to comply with the requirements of the PZ Order, which calls into question the effectiveness of the remedy the PZ Order was designed to effectuate. For all the reasons stated above, the Plaintiffs request that this Court grant the Plaintiffs' Motion and enter the attached Proposed Order, requiring PLS to comply with the PZ Order.

Respectfully submitted,

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LF:/Gelman/Brief in Support