

April 30, 2020

VIA EMAIL AND U.S.P.S.: JOHN.M.FEENEY@WISCONSIN.GOV

Mr. John Feeney
Remediation and Redevelopment Program
Wisconsin Department of Natural Resources
1155 Pilgrim Road
Plymouth, WI 53073

RE: BRRTS No. 02-67-151266
Site Advancement Toward Regulatory Closure Decorah Shopping Center
Annex, West Bend, Wisconsin

Dear Mr. Feeney:

As you are aware, our office represents Continental VI Fund Limited Partnership (“Continental”) in connection with the above referenced matter. We are in receipt of your email dated March 12, 2020, requesting significant additional work in relationship with the off-site plume identified in the vicinity of the City’s sewer system (the “Off-site Plume”).

As you know, Continental submitted a proposed work plan to the Department for vapor assessment on December 13, 2019. Your response detailed in your March 12, 2020 email goes well beyond the proposal made by Continental in its December 13, 2019 work plan. In particular, Continental proposed a practical approach to address the most likely potential receptors given the limited monies remaining in the Dry Cleaners Environmental Remediation Fund (“Fund”) for this site.

Given the significant expanded scope of DNR’s request for assessment of vapor risk, Continental is not willing to perform the work requested in your March 12, 2020 email response since the point of release of the hazardous substances which is the source of the Off-site Plume is not located on the Decorah Property and there are limited monies remaining in the Fund for this site.

Continental’s position is based upon the following: (1) Continental has no legal responsibility for the Off-site Plume, which is the subject of your March 12, 2020 email; (2) the legal responsibility for that Plume lies with the City of West Bend; (3) Continental will agree to voluntarily conduct limited off-site vapor assessment at the four homes located immediately down gradient from the Off-site Plume under a reservation of rights; and (4) while Continental agrees to close out any remaining contamination located on Continental’s former property (the “Decorah Property”), it will conduct no further investigative or remediation work on the Off-site Plume after the exhaustion of monies available under the Dry Cleaners Fund (the “Fund”).

The balance of this letter will be devoted to explaining, in detail, the basis for Continental's position that it has no responsibility for the Off-site Plume.

Background of Continental's Ownership of the Decorah Property.

In support of Continental's position that it has no legal liability for this Off-site Plume, it is important to understand Continental's ownership interest of the Decorah Property. The dry-cleaning operations at the Decorah Property were ongoing from 1965 until approximately the late 1990's. Continental acquired the Decorah Property in 1985 from the Decorah Corporation. At the time of acquisition, the Decorah Property included an existing dry-cleaning operation. During 1997, Contamination was discovered at the Decorah Property. This contamination was likely caused by the dry-cleaning tenant. It is important to note that Continental was not the party causing the contamination discovered on the Decorah Property.

As the owner of the Decorah Property, Continental, agreed to fulfill its legal obligation to investigate and remediate contamination located on its property. In addition, given the availability of monies in the Fund, Continental voluntarily agreed to investigate the Off-site Plume during its ownership of the Decorah Property.

History and the Results of the Investigation Conducted to Date Establish that the Source of the Off-site Plume is Not on the Decorah Property.

Given the limited amount of available Funds and DNR's recent response to the Continental proposal for vapor assessment, Continental is declining to continue its voluntary assessment of the Off-site Plume. This decision is based upon the fact that that the investigation conducted to date clearly establishes that the point of release that is the source of the Off-site Plume is not located on the Decorah Property.

A. History of the Investigation on the Decorah Property

Following the discovery of impacts near the dry-cleaning operation, the DNR was notified on June 9, 1997, and a Responsible Party letter was sent to Continental dated June 23, 1997. In response, Continental engaged Key Environmental Services, Inc. (Key), whose work and findings included the preparation of a Site Investigation Work Plan in December 1997 and proposed a scope of work to install soil borings and groundwater monitoring wells, collect soil and groundwater samples and collect other relevant subsurface information.

The investigation work found limited PCE impacts on the southern portion of the Site immediately outside the former dry-cleaner tenant space (PCE) and after multiple phases of investigation, the extents of impacts were defined.

As a result of Continental's work, the highest concentration of PCE in soil was discovered to occur 10 feet east of the dry-cleaner tenant space at a concentration of 1,500

micrograms per kilogram ($\mu\text{g}/\text{kg}$). Impacts in soil and groundwater near the east property line led the investigation to evaluate off-site impacts down gradient of the Site.

Four off-Site monitoring wells were installed in either private properties or public-rights-of way east and downgradient of the dry cleaner. Off Site groundwater impacts downgradient of the dry cleaner tenant space were limited to one low-level Chapter NR-140 ES exceedance for PCE.

Based upon limited magnitude of PCE impacts and the extent of impact being reasonably determined in both soil and groundwater, Continental's consultant prepared and submitted a Closure Review Request to the DNR in June 1999.

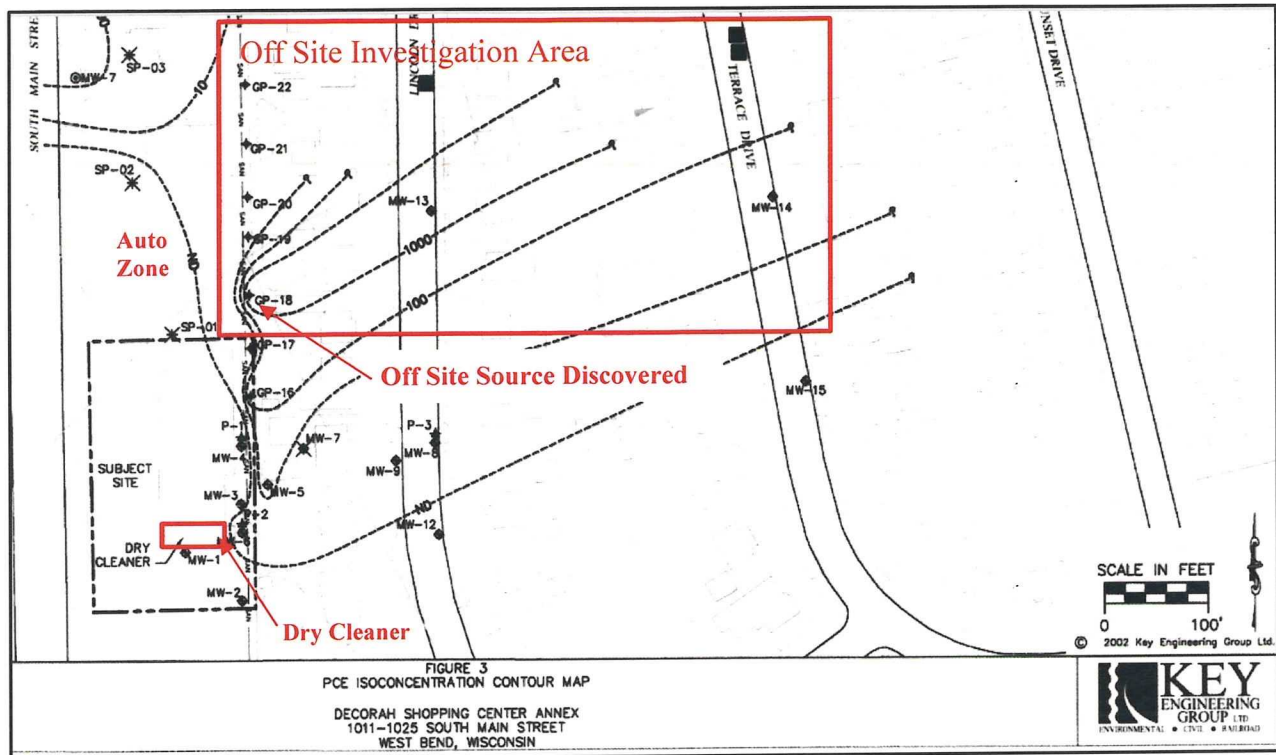
After review, DNR requested additional investigation to improved definition of the extent of impacts in groundwater, even though the highest level of detection was 10 micrograms per liter ($\mu\text{g}/\text{l}$). As a result, Continental voluntarily extended its investigation to the north and northeast of the dry cleaner tenant space. This voluntary expansion of the Site Investigation will be more fully described in the following section of this letter.

B. Continental's Voluntary Expansion of the Investigation to the North

At the time of the June 1999 request for case closure, only one Wis. Adm. Code Chapter NR 140 groundwater enforcement standard (ES) exceedance was found related to the dry cleaner. Subsequent groundwater investigation based on monitoring wells installed northeast of the Site indicated likely alternate sources of releases other in areas north of the Site. At monitoring wells installed in residential areas northeast of the dry cleaner tenant space, PCE concentrations were found exceeding the NR 140 ES for PCE by 200 times over 400 feet northeast of the dry cleaner location and six times the ES approximately 600 feet northeast of the dry cleaner location.

Based on the groundwater flow direction, it was reasonable to conclude that an alternate source of the release of contaminants was located on either the Auto Zone/former McDonalds property abutting the Site to the north or the Matanaer's Service Station or Ol' Tyme Cleaners located approximately 600 feet north and northwest of the Site, respectively.

Given that the main source of the downgradient PCE impacts in groundwater appeared to be originating from the abutting Auto Zone property, Continental's consultant, obtained access from the property owner, Tsiampas, LLC (915 South Main Street), and conducted additional soil and groundwater sampling. In 22 sampling locations on and off the Site, a temporary well (GP-18) near the southeast corner on the Auto Zone property was reported to have the highest concentration of PCE in groundwater at 1,800 $\mu\text{g}/\text{l}$.



A survey of the Site sewer system was also conducted to determine whether there was any possible linkage between the impacts on the Auto Zone property and the dry cleaner located on the Decorah Property. It was found that a 4-inch sanitary sewer lateral originated at the dry cleaner tenant space and led to an 8-inch-diameter sewer main in the north-south trending alleyway on the eastern Site boundary.

In an October 21, 2002 email, Continental questioned the assumption that the dry cleaner and Continental should be responsible if the leakage occurred from the sanitary sewer system. Despite the fundamental question of responsibility being unanswered, Continental voluntarily agreed to continue the investigation given the availability of monies in the Fund.

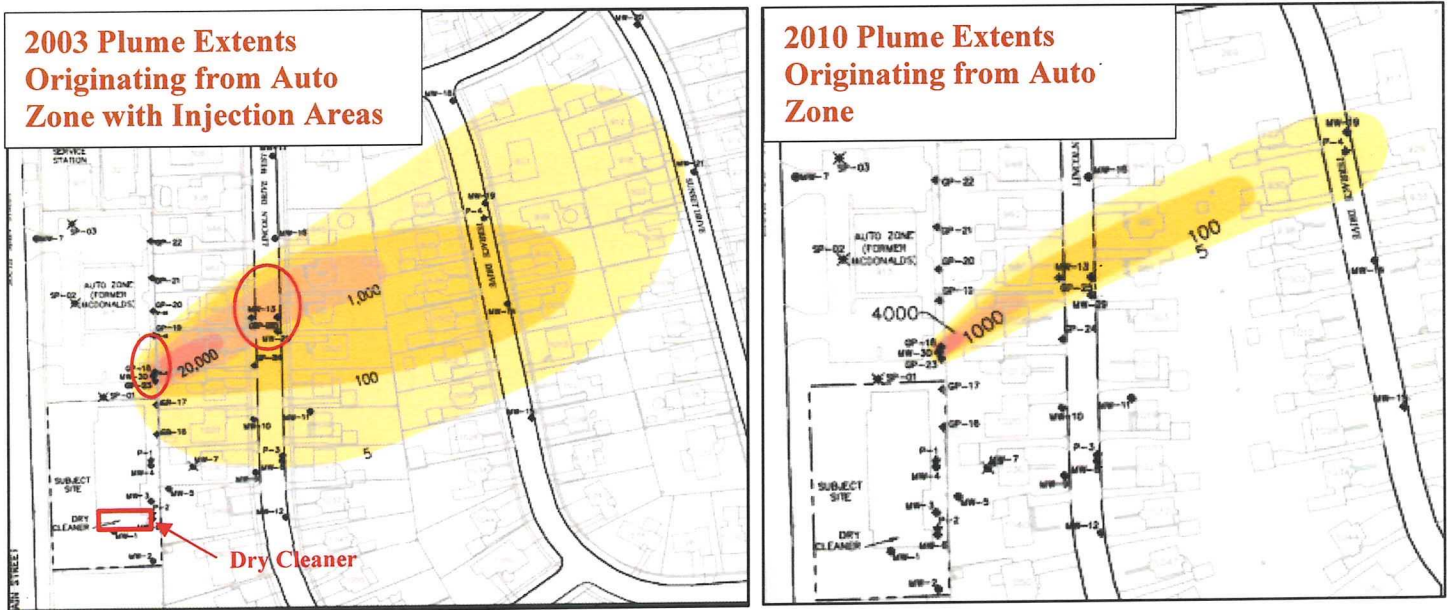
In 2003, Continental was asked to undergo an evaluation of vapor intrusion potential by the DNR focusing on the immediate area downgradient of the dry cleaner tenant space. The approach taken by Key was to install three vapor sampling points and collect soil gas samples overlying the plume in areas believed to represent the highest potential for vapor intrusion concern and calculate the exposure potential using the Johnson Ettinger model. Key stated that based on the analysis, PCE and trichloroethene (TCE) “ranged from two to four orders of magnitude below the established acceptable risk screening factor of 1×10^{-6} . Based on the results of the soil vapor evaluation, there is no complete pathway for PCE and TCE vapor intrusion and therefore no significant human health risk associated with PCE and/or TCE soil vapor present.”

In October 2003, four remediation proposals were solicited from local consultants under the Dry Cleaner Environmental Response Fund program and Continental approved ARCADIS to carry forward its proposed remedial strategy of in situ oxidation along the Off-site PCE Plume that originated at the sanitary sewer alignment on the AutoZone property.

C. Continental's Voluntary Remediation Efforts Regarding the Off-site Plume

With DNR's approval, Continental conducted further investigation included installing a monitoring well (MW-30) along the sewer alignment on the AutoZone property which resulted in the discovery of the highest concentration of PCE (23,000 µg/l) observed during the entire investigation in the same approximate location as GP-18, previously referenced.

On behalf of Continental, ARCADIS proceeded with in-situ oxidation pilot studies in February and May 2005, and then full-scale remediation in May 2007 focusing on the suspected source area at the sewer main on the Auto Zone property and in Lincoln Drive about 200 feet downgradient of the apparent off-Site source area.



Groundwater monitoring was then conducted of the well network positioned downgradient of the release area in the sewer alignment on the AutoZone property. In June 2011, four years after full-scale injection, ARCADIS observed rebounding concentrations of PCE in several monitoring wells and prepared a Supplemental Remediation Workplan to conduct a repeat of its full-scale permanganate injections followed by seven rounds of groundwater monitoring. The DNR approved this additional remediation in December 2011. The supplemental remedial injection was conducted in May 2012.

Over the next six years, ARCADIS continued to conduct intermittent monitoring noting that “some lingering rebound of CVOC concentrations has occurred in the source area (on the

AutoZone property north of the former dry cleaner) and immediately downgradient of the source area (Lincoln Drive).”

Based upon the investigation and remediation information outlined above, it is clear that the release which is the source of the Off-site Plume which forms the foundation for DNR’s request for the off-site vapor analysis occurred on Property owned by the City of West Bend, to wit: its sewer system.

An Overview of the Recent Communication between Department and Continental Supports Continental’s Decision to Refuse to Accept Legal Responsibility for the Off-site Plume.

Following over 14 years of investigative and remedial action relating to the Off-site Plume, in June 2019 you issued correspondence to Continental in which you requested a report that contain the following elements:

- A proposal to collect sub-slab samples in homes with potential VI intrusion risk in four residences on Lincoln Drive with the results submitted to the DNR and individual property owners within 10 days of receiving the results;
- Submit a groundwater monitoring and site progress report.
- Submit a revised remedial action options report to address remaining contamination.
- Submit recommendations for any other work needed such as monitoring well replacements, soil sampling, groundwater sampling or other activities,
- Submit additional and expanded utility information.

The DNR requested completion of the above requests and submission of a report by August 26, 2019.

In consideration of the new requests being made by the DNR, Continental requested GZA GeoEnvironmental, Inc. (GZA) provide an independent evaluation of the remedial status and an independent opinion on a path forward toward regulatory closure. GZA compiled historical Site data and concluded that remediation activities had reduced the VOC mass in the off-site groundwater plume originating from the sewer alignment on the AutoZone property by approximately 90% based in a comparison of pre- and post-remediation groundwater concentrations.

On October 15, 2019 Continental and its representatives met with the DNR staff to address the questions raised and requests made of Continental in its June 2019 correspondence, and reached

general agreement on the follow-on work activities that should be conducted. Based on those discussions, Continental submitted a work plan to the DNR on December 13, 2019.

Upon review of Continental's work plan, the DNR issued its response on March 12, 2020 with several requests as summarized as follows:

- Conduct VI assessments of four homes downgradient of the sewer alignment on the AutoZone property including conducting sub-slab and indoor air samples prior to any VI system installation;
- Regardless of the results or approach at the four houses mentioned above, the Department required that other occupied structures should be sampled based on the screening criteria in Section 3.4.2 of RR-800. These include houses overlying the plume above an ES, and maybe within 100 feet of contaminated soil, such as behind the strip mall and probably some retail spaces within the strip mall itself. The Department requested a proposal be submitted which systematically discusses which occupied structures/spaces are within RR-800 screening guidelines.
- Obtain complete records of the sewer systems in the area including construction, flow direction, repair, cleaning, video-logging to Hawthorne Avenue located further north of the AutoZone property.

The expansive and unreasonable response to Continental's proposed work plan for vapor assessment analysis for the Off-site Plume for which it has no legal responsibility and the limited availability of monies in the Fund have caused Continental to discontinue voluntarily accepting further investigation and remediation for the Off-site Plume. The balance of this letter will be devoted to explaining Continental's legal basis for this position.

Continental has No Legal Liability for the Off-Site Plume Since the Department has failed to provide Evidence that a Release of a Hazardous Substance Occurred on the Decorah Property during Continental's Ownership.

Continental has no legal responsibility for contamination that has migrated from the sewer system at a location off-site of the Decorah Property for two reasons: (1) there is no evidence establishing that the contamination migrated from the Decorah Property during Continental's ownership of the Decorah Property; and (2) the source of the contamination is likely a discharge from the City of West Bend's sewer system (or possibly other third party sources).

The legal responsibility of a property owner under the Spill Statute is limited to releases of contamination that that occurred on the property during its ownership and/or which release migrated off that property during that ownership. In this regard, §292.11(3) provides as follows:

RESPONSIBILITY. A person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practical and minimize the harmful effects from the discharge to the air, lands or waters of the state.

The burden to establish liability of a property owners is on the Department. The Department must establish that the contaminants which are the subject of the recent Department's request for additional investigation work actually was released to the environment on the Decorah Property and migrated off of the Decorah Property during Continental's ownership of that property. Since Continental's ownership of the Property was only for a short period of time that the dry-cleaning operation was in operation at this location, it is very likely that the source of the off-site contamination occurred before Continental's ownership of the Property. In any event, the burden is on the Department to establish this fact and not on Continental to disprove the fact under the statutory liability scheme in Wis. Stat. §292.11.

Assuming for purposes of argument only, that the Department were to establish that the dry-cleaning solvents were generated by the dry-cleaning tenant during Continental's ownership and are the source of the off-site contamination in question, there was an intervening cause of the discharge, to wit: a leak in a defective sewer system owned and operated by the City of West Bend. Under this scenario, the City of West Bend, not Continental, possessed or controlled the contaminant at the time it was discharged to the environment.

There are only two basis for liability under Wis. Stat. §292.11(3): the Department must establish either that a party caused the discharge or that party possessed or controlled the contaminant at the location where the discharge occurred.

It is undisputed in this case that Continental did not cause the release of the dry-cleaning solvents into the environment which are the subject of this investigation and remediation controversy. More likely than not, the cause of the release was a defect in the City of West Bend's sewer system at this location. In addition, the release occurred at a location "possessed or controlled" by the City of West Bend; not Continental.

For all these reasons, Continental has no liability for the contamination migrating from the release area even if the Department could establish that the dry-cleaning solvents, which are the source of the off-site plume, were generated by the tenant during Continental's ownership of the Property.

Continental's Voluntary Offer for Limited Vapor Assessment Work for the Off-site Plume.

Although the Department has failed to establish legal liability for Continental in this case regarding this Off-site Plume, Continental, nonetheless, is willing to undertake voluntary efforts to assess the impact of the contaminants, if any, on the indoor air quality of the four homes

immediately down gradient from the source area and take any such remedial effort necessary at these homes to the extent funds are available under Funds for these efforts. However, the voluntary commitment made by Continental is limited to the four homes mentioned above.

Given this recent broad request by DNR relating to vapor assessment as well as the failure to establish liability for Continental for this Off-site Plume, the Department should focus on the City of West Bend as a responsible party for any additional investigative and remediation work it believes is necessary.

**Continental Accepts Investigation/Remediation Responsibility for Contamination
the Existed on the Decorah Property During its Ownership.**

While Continental does not have any legal liability for the Off-site Plume, it acknowledges its legal responsibility to undertake further investigation and remediation, if any, associated with the dry-cleaning contamination that existed on the Decorah Property during Continental's ownership ("On-site Work"). If necessary, Continental is willing to include a limited vapor assessment of selected retail spaces within the Decorah Property as part of the On-site Work.

In addition, as outlined in this letter, Continental is willing to voluntarily conduct the vapor assessment and, if necessary, remediation in the four homes immediately down gradient from the source of the Off-site Plume. Please be advised that this offer is provided under a reservation of rights that it has no legal responsibility to conduct such a vapor assessment/remediation for the reasons outlined in this letter.

Given Continental's position as outlined in this letter, it is open to discussing this topic further with the Department in a conference call. Please let us know if you share our belief that a conference call would be valuable under the circumstances.

Best regards.

Very truly yours,

GODFREY & KAHN, S.C.



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