

June 24, 2020

VIA EMAIL
WILLIAM.NELSON@WISCONSIN.GOV
AND VIA U.S. MAIL

Mr. William Nelson
Wisconsin Department of
Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

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

Dear Bill:

As you know, our firm represents Continental VI Fund Limited Partnership (“Continental”) on this matter. This letter follows our discussion earlier this month, wherein you affirmed the Wisconsin Department of Natural Resources’s (“DNR”) position that the City of West Bend (“City”) has no responsibility for the leak of PCE from a sewer it owns and operates.

I understood from our call that DNR’s legal position is based on the definitions of “discharge” and “site.” With respect to the definition of “site,” you referenced Wis. Admin. Code NR § 700.03(56)(b), which provides that a “site” is “[a]ny waste site as defined in s. 292.01(21), Stats.;¹ or ...[a]ny area where a hazardous substance has been discharged.” “Discharged” means, “but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping.” Wis. Stat. § 292.11.01(3).

Importantly, the statutory provision that attributes liability for “discharging” “hazardous waste” in Wisconsin, Wis. Stat. § 292.11(3) (“Spill Statute”), further qualifies the words “discharged” and “discharge,” as follows:

¹ A “waste site” means “any site, other than an approved facility, an approved mining facility or a nonapproved facility, where waste is disposed of regardless of when disposal occurred or where a hazardous substance is discharged before May 21, 1978.”

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 practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state.

While the Spill Statute does not explicitly say hazardous substance “which is **discharged into the environment**” or “a **discharge** of the hazardous substance **into the environment**,” it is implied; in order to “restore the environment,” the discharge must reach the environment. It is a well-recognized maxim of legislative construction that words and phrases used in a statute must not be read in isolation to determine meaning. Rather, the proper interpretation of language of a particular statute must be determined by considering the relevant language in the entire statute. *See Landis vs. Physicians Ins. Co.*, 245 Wis. 2d 1 (2001); *State ex rel. Kalal. vs. Circuit Court for Dane Cty.*, 271 Wis. 2d 633 (2004).

For example, if a substance is “discharged” onto a facility floor, but it does not make its way into the “environment” (i.e., air, lands, or waters of the state), then there are no “actions necessary” to take to “restore the environment,” because the environment has not been impacted. (Of course, the facility operator will want to clean up the spill so that the material does not eventually make its way into the environment via drain pipes or other pathways.) Neither Continental nor its tenants “discharged” the hazardous wastes that make up the Off-site Plume (as defined in our letter to Mr. John Feeney dated April 30, 2020 (“April Letter”). Wastewater that was discharged to a municipal sewer was not “discharged” within the meaning of the Spill Statute, as it was not released into the environment. In particular, when the tenant placed its wastewater into the City’s sewer, that placement was in accordance with applicable law and no release to the environment occurred anywhere on the property owned by Continental.

This reading of the Spill Statute is consistent with its federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), which defines “release” as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing *into the environment*.” 42 U.S.C. § 9601(22) (emphasis added). Furthermore, “release” explicitly excludes “any release which results in exposure to persons solely within a workplace,” which further underscores the fact that the parameters of the definition of “release” are limited to those releases that actually reach the environment. *Id.*

Looking further at federal law for guidance on the issue of responsibility for contamination arising from leaking sewer pipelines, it is clear that owners or operators of municipal sewer pipelines are responsible for contamination emanating from their pipes. Under CERCLA, parties that are liable for the release of hazardous substances include “the owner and operator of a...facility” and “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.” 42 U.S.C. § 9607(a). Congress specifically contemplated groundwater contamination from sanitary sewer systems when it drafted the definition of “facility” in 1980. In a report to Congress prepared by the United States

Environmental Protection Agency (“EPA”) dated January 1977, EPA reported its finding that “[t]he major cause of ground-water contamination from sanitary sewer systems (if above the water table) is through outflow leakage (exfiltration) from gravity sewers.” Report to Congress: Waste Disposal Practices and Their Effects on Ground Water, U.S. Environmental Protection Agency, January 1977, at 208. EPA cited common factors that cause such leakage include “poor workmanship,” “[c]racked or defective pipe sections,” and “poorly constructed manholes, or shearing of pipe at man-holes due to differential settlement.” *Id.* at 208-09.

When Congress subsequently enacted CERCLA in December 1980, the definition of “facility” included a “pipe or pipeline (including any pipe into a sewer or publicly owned treatment works).” 42 U.S.C. § 9601(9). Thus, a plain reading of CERCLA ascribes liability to, among other parties, publicly owned treatment works (“POTW”) that own or operate sewer pipes.

The Fourth Circuit Court of Appeals agrees with this plain reading of CERCLA. In *Westfarm Assocs. Ltd. P’ship v. Wash. Suburban Sanitary Comm’n*, 66 F.3d 669 (1995), the Fourth Circuit Court of Appeals held that POTWs are not excluded from “facilities” subject to CERCLA liability and the movement of PCE from cracks in a POTW’s sewer pipe into land was within CERCLA’s definition of “release.” See also *Adobe Lumber, Inc. v. Hellman*, 658 F.Supp.2d 1188 (2009) (holding a city sewer, into which a dry cleaning business dumped wastewater containing a hazardous substance, was a “facility” within the meaning of CERCLA).

While Continental acknowledges its legal responsibility to undertake further investigation and remediation, if any, with respect to the On-site Work (as defined in the April Letter), Continental is not responsible for the release which has resulted in the Off-site Plume. Indeed, as we described during our last phone call with DNR, the City has known about these concerns relating to a release from its sanitary sewer line since the Off-site Plume was first discovered in 2002 and Continental questioned whether it should be responsible for the likely source of this plume, to wit: a leak from the City’s sewer system. See April Letter. Also, as you know, Continental filed a notice of claim and claim against the City detailing its responsibility for this leak. See enclosed copy. Accordingly, DNR must look to the City as a responsible party (“RP”) for any investigation and remediation it believes is necessary with respect to the Off-site Plume.

During our last call with DNR, DNR expressed concern about the precedent that would be set for all cases in the future for city liability for sewer releases if the agency were to identify the City as an RP for the release in this case. However, there are unique circumstances associated with this case that justify the DNR exercising its enforcement discretion to issue an RP letter to the City. These circumstances include the following: (1) the City knew about the allegations of a leak from the sewer for almost two decades and took no action to investigate and correct the leak; (2) Continental, as the party investigating the shopping center site, was requested by DNR to expand its investigation offsite and in doing so, discovered the independent plume emanating from the City’s sewer for which it has now expended considerable time and expense to remediate; (3) there is no evidence of discharge to the environment on the up-gradient source property causing or contributing to the Off-site Plume; (4) a formal claim was filed against the City by the up-gradient

entity; and (5) there is no evidence of any response from the City after the filing of the formal claim.

Notwithstanding the foregoing legal discussion, Continental has used its best efforts to fashion a proposal which attempts to utilize the monies remaining in the Dry Cleaners Fund to assess the most immediate vapor risks that may be associated with the groundwater plume. In particular, Continental agrees to voluntarily undertake the work necessary to assess what vapor risk, if any, exists at the four homes located immediately down gradient from the source of this Off-site Plume, as more particularly described in the scope of work attached to this letter (the "Vapor Assessment"). However, Continental's offer to undertake the Vapor Assessment is expressly conditioned upon the following:

1. The City makes the sewer where the discharge occurred available for inspection and testing by Continental as described in the attached Scope of Work and, in the absence of such voluntary access granted by the City, the DNR orders the City to make such access available to Continental ("Sewer Access"). The Sewer Access must be made available before Continental is willing to conduct the Vapor Assessment;
2. The DNR approves the attached Work Plan for the Vapor Assessment proposed to be conducted; and
3. The DNR agrees, that Continental's offer to conduct the Vapor Assessment, (assuming Sewer Access) will not constitute a waiver of Continental's legal position that it is not legally responsible for the Off-site Plume.

Please contact the undersigned if you would like to discuss any aspects of the contents of this letter.

Thank you.

Very truly yours,

GODFREY & KAHN, S.C.



ARTHUR J. HARRINGTON

Mr. John Feeney
June 24, 2020
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ATTACHMENT A

April Letter

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.

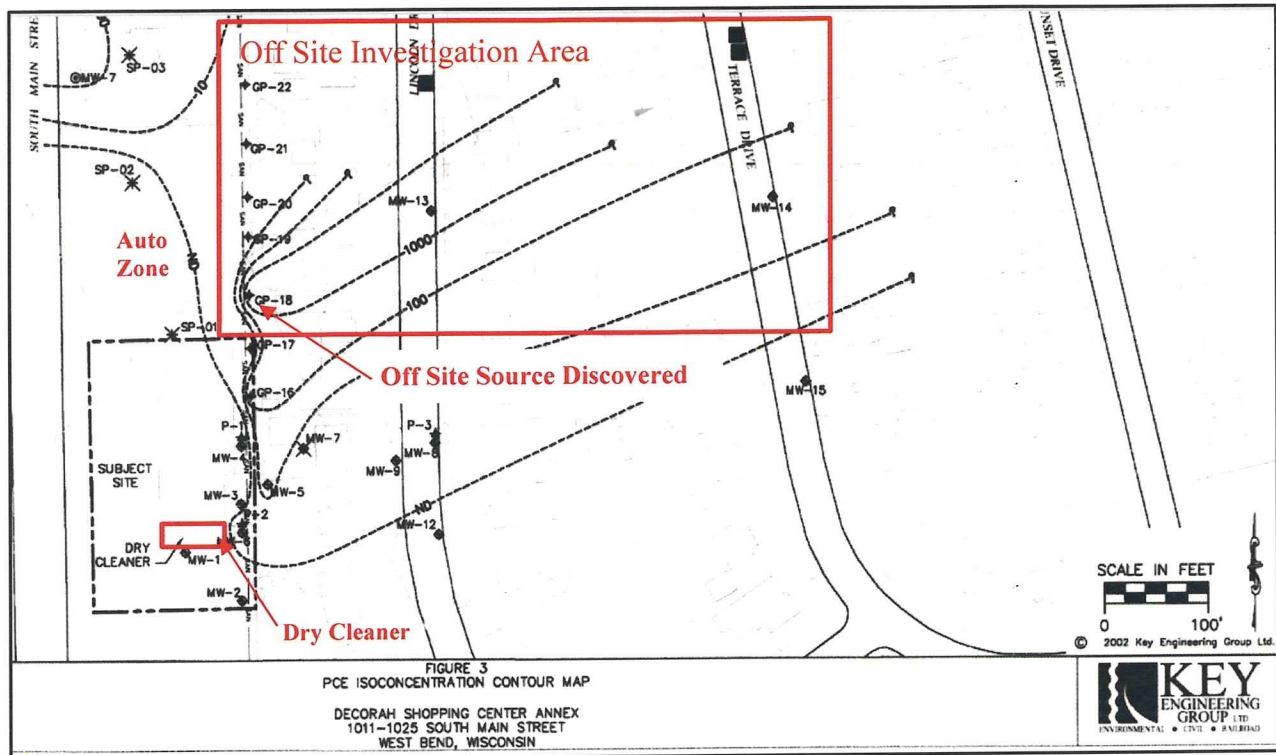
After review, DNR requested additional investigation to improved definition of the extent of impacts in groundwater, even though the highest level of detection was 10 micrograms per liter ($\mu\text{g}/\text{l}$). As a result, Continental voluntarily extended its investigation to the north and northeast 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.

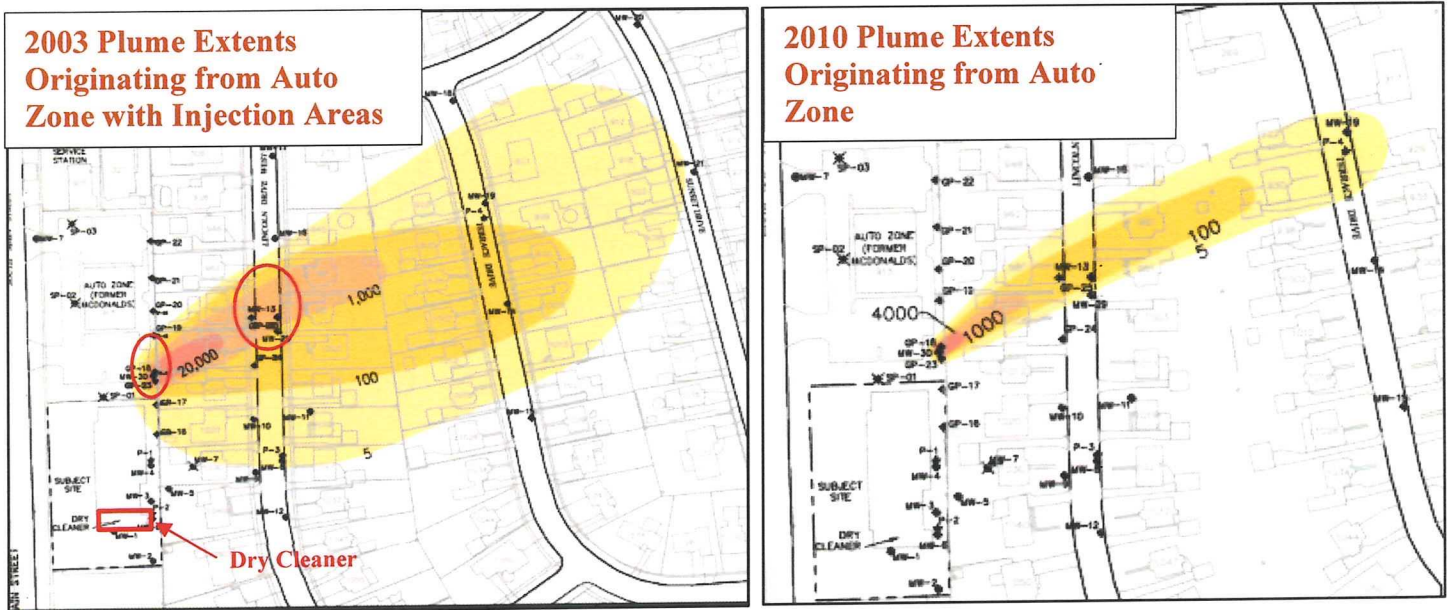
In 2003, Continental was asked to undergo an evaluation of vapor intrusion potential by the DNR focusing on the immediate area downgradient of the dry cleaner tenant space. The approach taken by Key was to install three vapor sampling points and collect soil gas samples overlying the plume in areas believed 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.



Arthur J. Harrington
Attorney Shareholder

AJH:smr
22227613.3

cc: Eric Thom, Continental
Alyssa Flandermeyer, Continental
John Osborne, GZA

Mr. John Feeney
June 24, 2020
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ATTACHMENT B
Notice of Claim and Claim

October 24, 2019

VIA PROCESS SERVER AND CERTIFIED MAIL

City of West Bend
Attn: Stephanie Justmann, City Clerk
1115 S. Main Street
West Bend, WI 53095

RE: Notice of Circumstances Giving Rise to Claim Pursuant to Wis. Stat.
§ 893.80(1d)(a) and Notice of Claim Pursuant to Wis. Stat. § 893.80(1d)(b)

Dear Ms. Justmann:

Please take notice that Continental VI Fund Limited Partnership (“Continental”), with an address of W134 N8675 Executive Parkway, Menomonee Falls, Wisconsin 53051, by its attorneys, Godfrey & Kahn, S.C., hereby provides the following Notice of Circumstances of Claim and Claim to the City of West Bend (“City”), pursuant to Wis. Stat. § 893.80.

The claim concerns environmental contamination within the City. Continental is the former owner of Decorah Shopping Center Annex (“Decorah”) located at 1011-1025 South Main Street, West Bend, WI. Decorah was once the site of a dry cleaning business that may have contributed to concentrations of trichloroethylene (“TCE”) found in and around Decorah.

The Wisconsin Department of Natural Resources (“WDNR”), which has designated Decorah as BRRTS #02-67-151266, has directed Continental to investigate and remediate TCE and other contamination allegedly arising from the operation of the dry cleaning business at Decorah. In particular, on June 27, 2019, WDNR directed Continental to perform certain activities in connection with groundwater monitoring and vapor intrusion sampling (“Additional Investigation”) associated with a plume emanating from a location off site of Decorah.

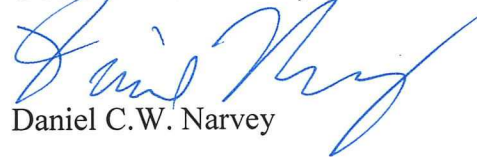
Continental has reason to believe that the recent request for Additional Investigation is associated with a leak in the sanitary sewer system owned and operated by the City (the “Sanitary Sewer Leak”). As such, Continental believes that all costs associated with the Additional Investigation as well as any future investigation or mediation costs associated with the Sanitary Sewer Leak are proximately caused by the City. We anticipate that the Additional Investigation will result in future costs to Continental of \$300,000 and therefore provide notice of claim for this amount. Continental further requests that the City agree to participate as a responsible party in future environmental response costs associated with the Sanitary Sewer Leak.

City of West Bend City Clerk
October 24, 2019
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Please contact me to discuss if you have any questions.

Very truly yours,

GODFREY & KAHN, S.C.

A handwritten signature in blue ink, appearing to read "Daniel Narvey", written over the printed name.

Daniel C.W. Narvey

21365386.2

Mr. John Feeney
June 24, 2020
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ATTACHMENT C

GZA Work Plan



Known for excellence.
Built on trust.

GEOTECHNICAL

ENVIRONMENTAL

ECOLOGICAL

WATER

CONSTRUCTION
MANAGEMENT

17975 West Sarah Lane
Suite 100
Brookfield, WI 53045
T: 262.754.2560
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www.gza.com

June 24, 2020
File No. 20.P000167.20

Mr. John Feeney
Continental VI Fund Limited Partnership
c/o Godfrey & Kahn, S.C.
833 East Michigan Street, Suite 1800
Milwaukee, Wisconsin 53202-5615

Re: Proposed Source-Area Sewer Line Investigation and Vapor Intrusion Evaluation
Decorah Shopping Center Annex
West Bend, Wisconsin

Dear John:

GZA GeoEnvironmental, Inc. (GZA) is presenting this scope of work, on behalf of Continental VI Fund Limited Partnership (Continental/"Client") to conduct a focused evaluation of the off-site sanitary sewer system and implement vapor intrusion sampling at four residences located downgradient of the historical release area on the property abutting the former Decorah Shopping Center Annex at 1011-1025 South Main Street in West Bend, Wisconsin ("Site"). This work is being proposed for reimbursement under the Dry Cleaner Environmental Response Fund (DERF) program and we seek your approval of the scope and estimated budget.

BACKGROUND

Continental has undertaken the investigation and remediation of tetrachloroethene (PCE) impacts in communications with the Wisconsin Department of Natural Resources (WDNR) for over an approximate 20-year period. Investigative work in the early 2000s identified a predominant off-Site source area of PCE impact along a municipal sanitary sewer line located off-Site to the north on the abutting Auto Zone property.

In October 2003, following the review of four remediation proposals under the DERF program, the WDNR approved ARCADIS to carry forward its proposed remedial strategy of in situ oxidation along the PCE plume that originated at the sanitary sewer alignment on the AutoZone property. Although a portion of the in situ oxidation remedy was implemented on the Auto Zone property near the sanitary sewer line, no evidence was found in the files that the City of West Bend or others evaluated the condition of the municipal sewer piping. Given the critical nature of understanding the dry-cleaner solvent release area, this work element is now proposed as a foundational element to moving this project forward.

Additionally, while levels of impact in groundwater have reduced through time downgradient of the release area, the WDNR has requested an evaluation of the vapor intrusion pathway at four nearby residential properties. The following scope of work was developed based on these considerations.



SCOPE OF WORK

GZA will propose the following sequence of activities to advance the ultimate remedy and closure of the Site.

Task 1 - Sanitary Sewer Line Evaluation

Continental and GZA believe understanding and confirming the nature of the release area at the sanitary sewer line is an important step that was not conducted in the past. On behalf of Continental, GZA proposes to coordinate access to the sanitary sewer line with the City of West Bend. A video inspection survey will be conducted by accessing the sanitary sewer through a nearby manhole and inserting a mobile camera system that records distance and collects video footage along the interior sewer pipe. Depth of the invert elevation of the sewer pipe and other field observations made during the video survey recording will be documented for reference and incorporated into a subsequent report. The cost to conduct the sewer video survey assumes that the sewer run to be videoed is unobstructed for the camera system. Excess debris, a water-filled pipe, pipe breaks, and/or other blockage in the sewer that obstructs the video survey may result in a higher sewer video survey cost.

Task 2 - Vapor Intrusion Sampling

As discussed with WDNR representatives, GZA will conduct vapor intrusion testing on behalf of Continental at four residences located on Lincoln Drive, which appear downgradient of the source area identified on the Auto Zone property. These properties include:

- 1006 Lincoln Avenue;
- 980 Lincoln Avenue;
- 981 Lincoln Avenue; and
- 961 Lincoln Avenue.

The vapor intrusion sampling activities are described in the three following subtasks.

Task 2A - Outreach and Communication

GZA will prepare an initial outreach packet for each of these residences that will include an informational letter describing the purpose and scope of the proposed vapor intrusion testing, the parties involved, describing items in the home that could affect the accuracy of the testing, requesting whether a radon system is operating and whether the home has a basement sump crock, and a written access agreement. The outreach packet will be sent via certified mail to each resident and will be followed by attempted phone contact by GZA to answer questions and gain verbal consent. Once the access agreements are received, the sampling work, as described below, will be scheduled.

Task 2B - Indoor Air Quality Testing

During GZA's first visit to the resident and prior to conducting vapor intrusion sampling, GZA will review the purpose and scope of the testing, verify that items potentially affecting the accuracy of the testing have been removed, and conduct an inspection of the basement area, especially noting the following:

1. The layout of the basement area, presence of crawl spaces, earthen floors, and the general condition of the concrete slab and walls;
2. The presence of an existing radon mitigation system;
3. The location and visible condition of sumps;



4. Visible evidence of stored chemicals; and
5. Other features that could affect interpretation of the testing results.

Although paired indoor and sub-slab sampling will be conducted, the process begins with collecting indoor air samples prior to penetrating the floor to conduct the sub-slab testing. Indoor air samples will be collected over 24 hours in 6-liter SUMMA[®] canisters from indoor locations on each floor of the residence, including the basement. An upwind background sample will be collected over the same period as the indoor air samples.

Each canister intake will be set several feet above floor level, checked after approximately one hour for appropriate vacuum decline, and picked up after approximately 24 hours of sampling with residual vacuum remaining in the canisters. Indoor air samples will be submitted to a laboratory under chain-of-custody for analysis of PCE, trichloroethene (TCE), cis- and trans-1,2-dichloroethene (DCE), and vinyl chloride in accordance with United States Environmental Protection Agency (USEPA) Method TO-15.

Task 2C - Sub-Slab Vapor Testing

Typically, at the time the indoor sampling canisters are removed, GZA will install and sample two sub-slab vapor probes in the basement or lowest level of each of the four residences. GZA will conduct sub-slab sampling as follows:

- The probes will be installed in holes drilled through the concrete floor of the house using a rotary hammer drill. Probe installation will include drilling an approximately 1.5-inch hole through the floor slab followed by the installation of a Vapor Pin[™] probe flush to the floor.
- Prior to sampling, at least five sample train volumes of air will be purged to ensure that the exiting vapor concentration is representative of the entering concentration. A helium-filled shroud will be placed over each sub-slab probe while purging with a helium meter to ensure no or minimal leakage of air through the floor and a shut-in test will be performed to ensure no or minimal leakage through the sample train. The shut-in test will be conducted by using a vacuum pump to exert a vacuum of at least 5 pounds per square inch (psi) on the sample train and make sure the vacuum holds for at least 1 minute.
- Following purging and system leak testing, sub-slab vapor samples will be collected over a period of approximately 10 minutes using 1-liter SUMMA[®] canisters at a rate of less than 200 milliliters per minute.

Sub-slab air samples will be analyzed for PCE, TCE, cis-and trans-1,2-DCE, and vinyl chloride in accordance with USEPA Method TO-15.

Also note that if a basement sump crock is found to contain water likely coinciding with the estimated groundwater elevation, GZA may recommend collecting a sump water sample for volatile organic compound (VOC) analysis.

Task 3 - Reporting

GZA will prepare a written report describing the sanitary sewer video survey findings and the results of the indoor and sub-slab vapor intrusion testing. The vapor intrusion results will be compared to current WDNR vapor risk and indoor air screening levels, noting observations in the home or in collected background samples that may have affected the interpretation of analytical results. Conclusions and recommendations will be presented regarding the need for additional evaluation or testing, or the possible installation of VI mitigation systems in response to the findings.



BASIS OF BILLINGS

Billings for GZA’s professional services for the above scope of work will be on a time and materials basis in accordance with the attached Schedule of Fees. The estimated cost to conduct the work is as follows:

Task 1 - Sanitary Sewer Video Survey	\$ 3,500
Task 2 - Vapor Intrusion Testing (Four Residences)	
Task 2A - Outreach and Communications	\$ 2,500
Task 2B - Indoor Air Sampling	\$ 6,800
Task 2C - Sub-slab Vapor Sampling	<u>\$ 8,900</u>
Total Estimated Budget	\$21,700

This estimate is based on the anticipated scope of work outlined above, which represents our present judgment as to the level of effort required. The actual charges may vary, either upward or downward, depending on the execution of the work.


CONDITIONS OF ENGAGEMENT

The conditions of engagement will be in accordance with the attached Environmental Terms and Conditions as amended by GZA. GZA’s report will be prepared on behalf of and for the exclusive use of G&K and Client. G&K and Client acknowledge and agree that the report and the findings in the report shall not, in whole or in part, be disseminated or conveyed to any other party, or used or relied upon by any other party, in whole or in part, except for the specific purpose and to the specific parties alluded to above, except as stated in the request for proposal, without the written consent of GZA. GZA would be pleased to discuss the conditions associated with any such additional dissemination, use, or reliance by other parties.

If you have any questions or comments, please feel free to contact the undersigned at (262) 754-2560.

Very truly yours,

GZA GeoEnvironmental, Inc.


 John C. Osborne, P.G.
 Principal Hydrogeologist
 Senior Vice President


 Bernard G. Fenelon, P.G.
 Hydrogeologist
 Senior Consultant

Attachment: Schedule of Fees
 Environmental Terms and Conditions



This Proposal for Services, Schedule of Fees, and Environmental Terms and Conditions are hereby accepted and executed by a duly authorized signatory, who by execution hereof, warrants that he/she has full authority to act for, in the name, and on behalf of Continental VI Fund Limited Partnership.

CONTINENTAL VI FUND LIMITED PARTNERSHIP

By: _____ Title: _____

Typed Name: _____ Date: _____

This Proposal for Services, Schedule of Fees, and Environmental Terms and Conditions may be executed in two or more counterparts, each of which together shall be deemed an original, but all of which together shall constitute one and the same instrument. In the event that any signature is delivered by facsimile transmission or by an e-mail delivery of a document in “.pdf” format, each such signature shall create a valid and binding obligation of the party executing the document, or on whose behalf each document is executed, with the same force and effect as if each such facsimile or “.pdf” signature was an original thereof.