WISCONSIN
DEPT. OF NATURAL RESOURCES

State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Scott McCallum, Governor
Darrell Bazzell, Secretary

101 S. Webster St.
Box 7921
Madison, Wisconsin 53707-7921
Telephone 608-266-2621
FAX 608-267-3579
TTY 608-267-6897

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Thomas R. Fahl
Whyte Hirshboeck & Dudek, S.C.
Attorney for Donald M. Fritzke, Sr. (Colony Dry Cleaners)
200 Woodland Prime Suite 210
Menomonee Falls, WI 53051

Richard A. Rechlicz
Ladewig & Rechlicz
Attorney for Suburban Car Wash North
N88 W15125 Main Street
Menomonee Falls, WI 53051

RE: Access Agreement between Colony Dry Cleaners & Suburban Car Wash North

Dear Mr. Fahl & Mr. Rechlicz:

I am an attorney for the Wisconsin Department of Natural Resources ("WDNR"). I have been asked to review a series of correspondence dating back to January 2002 regarding the efforts of Colony Dry Cleaners ("Colony") to gain access to the Suburban Car Wash North ("Suburban") property in order to install two soil test borings and two groundwater monitoring wells. The request to gain access is necessary in order to continue an investigation of contamination, as required by WNDR, that originates on the Colony property and has likely migrated onto the Suburban property.

After reviewing the documentation, I conclude that Colony and its consultant, Sigma Environmental Services, Inc. ("Sigma"), have been very accommodating of Suburban's concerns in attempting to negotiate an access agreement. Colony sent the first written right of entry request on December 16, 2001. However, before the first request was sent, Colony apparently discussed with Suburban its concerns about ensuring that Suburban's customers would have adequate access to the car wash during installation and monitoring of the wells and borings, since the letter addresses this issue. When Paul Binzak, an attorney for Suburban, signed the letter denying the access request, Sigma met with representatives of Suburban to specifically identify the proposed boring and well locations. Two mutually agreeable locations were selected. The right of entry request was then modified (second request, in draft form) and sent simultaneously by Sigma to the attorneys for Colony & Suburban (on February 13, 2002). The second request for entry included information about the specified locations of the two soil borings and two groundwater monitoring wells, as identified and agreed to during the field meeting on February 12, 2002.

The second request also included several additional modifications requested by Mr. Binzak at the field meeting. These included:

1.) An estimate that it would take approximately 1 day to complete the work (4 hours per soil boring/monitoring well).

2.) A site map depicting the proposed soil boring/monitoring well locations was attached.

3.) A statement indicating the type of analysis that would be completed and that a copy of the results would be forwarded to Suburban was included.

4.) Measurements for the proposed soil boring/monitoring well locations was included.

5.) An indemnification for the cleanup, if required, of contamination identified on the Suburban property and associated with the Colony release was included in the draft.

In response to the second request for entry, Attorney Richard Rechlicz (on behalf of Paul Binzak) sent a letter to Donald Fritzke (dated March 1, 2002), with five additional requests for additions to the access agreement, as follows:

1.) Reimbursement of Suburban for any lost income as a result of "business interruption," to be determined by Suburban "on a monthly basis."

2.) Evidence of insurance naming Suburban as a loss payee.

3.) Notice to Suburban of any entrance onto the Suburban property at least 24 hours in advance.

4.) Colony shall keep the Suburban property free and clear of any lien claims.

5.) Colony shall pay for and be responsible for any identified required cleanup at the Suburban property (this goes beyond the previous request, which was that Colony would indemnify Suburban for any required cleanup of contamination on the Suburban property that is associated with the release documented on the Colony property).

It appears to me that Colony has made reasonable efforts to accommodate Suburban's requests. However, the most recent requests, notably the request for indemnification for any cleanup costs (before an investigation is even conducted) and the request for reimbursement of any lost income (especially when Colony and Sigma have documented how they will make every effort not to interrupt Suburban's business) do not seem reasonable. The request to give 24 hours notice before entry does seem reasonable. As for the requests related to insurance coverage and lien claims, I would hope the attorneys for Colony and Suburban could work out these issues.

Section 292.11(3), Wis. Stats., imposes liability on persons who cause a discharge of a hazardous substance and persons who are in possession or control of a hazardous substance that is discharged. The Wisconsin Supreme Court held in State v. Mauthe, 123 Wis.2d 288 (1985), that the owner of property with contamination that is continuing to discharge to the environment is "in possession or control" of those contaminants. The WDNR interprets the Supreme Court's decision to mean that where the current property owner did not cause or contribute to the contamination that has migrated onto his or her property from an off-site source, that property owner does not have "possession" or "control" of the contamination. WDNR will expect the party or parties that caused the contamination to clean up the contamination as far as it goes, even if it migrates beyond the property boundaries. In this case, WDNR has requested Colony to investigate the degree and extent of the contamination that has likely migrated onto the Suburban property. Suburban should allow Colony to have reasonable access to Suburban's property in order to complete the necessary investigation. If Suburban does not allow reasonable access, WDNR will have to conclude that Suburban has asserted "possession and control" of the likely discharge of hazardous

substances located on the Suburban property and will require Suburban to investigate the potential contamination.

WDNR's interpretation of Mauthe pre-dates, but is consistent with, the off-site liability exemption provided for in s. 292.13, Wis. Stats. That statute provides that a person is exempt from s. 292.11(3), (4) and (7)(b) and (c) (certain provisions of the Hazardous Substance Discharge Law) with respect to hazardous substances on property possessed or controlled by the person if the discharge of the hazardous substance originated from a source on property that is not possessed or controlled by the person and if certain other conditions are met. One of these conditions is that the person agrees to allow DNR, its authorized representatives and any party that is responsible for the discharge, including the party's consultants or contractors, to enter the property to take action to respond to the discharge.

It is important for Colony and Suburban to work out a reasonable access agreement as soon as possible, so that Colony can complete the investigation of the degree and extent of contamination that originates from Colony's property. If a reasonable access agreement cannot be reached, Suburban is not eligible for the off-site liability exemption under s. 292.13, Stats., and WDNR may require Suburban to conduct an investigation of its own property and may require Suburban to clean up any contamination that is discovered on its property.

Sincerely,

Judy Mills Ohm

Judy Mills Ohm, Attorney
Bureau of Legal Services
(608)266-9972

c: Paul Binzak
Attorney at Law
N88 W15125 Main Street
Menomonee Falls, WI 53051

Gina Keenan—SER