

TO: The Honorable
Statutory Legislative Committees
for Review of Administrative Rules
100 North Hamilton Street
P.O. Box 7882, Room 404
Madison, Wisconsin, 53707-7882

Case NO. 96-CF-484
Case NO. 98-CF-869

I am James Farmer, an inmate NO. 7265122, housed in the state of Oklahoma, at the North Fork Correctional Facility, 1605 East Main, Sayre, Oklahoma. Case held in Kenosha County Circuit Court

This matter is in reference to, failure to comply with legislative intent, by departure from prescribed sentence guidelines, in effect at the time offense was committed, under Wis. Stat. 161.001(2), with the imposition of a 147 days given as time served, probation for (6) six years, and stayed sentence of (4) four years, without statutory authority, being charged under Statutes 161.41(1)(c) 1, and W.S.A. 939.05 as a party to a crime for delivery of a controlled substance, whereby both instances in guidelines and charges, are a changed in circumstances since passage of the law.

Having been sentenced May 29, 1997, of charges after enactments effective date July 9, 1996, by Wisconsin legislative Assembly Bill 819, Act 448 Section 242, where this creates a disadvantage, being resented under other than the original undischarged sentence with retrospective application charging statute, due to increase in punishment, which is prohibited by the ex post facto clause.

In resentencing, June 25, 1999, the sentence guidelines where increased with (7) seven years prison time, and probation ordered (15) fifteen years, whereby an error exist for ex post facto purposes, the guidelines from the original sentence, was disregarded with a final revocation hearing, in a decision, not to be revoked, even though the original guidelines where incorrect, from retrospective use of statute, the further increase, in hidden concepts effect good time denied and parole eligibility, by (3) three years.

with circumstances changed in the law, it is also prohibited to increase, or submit less evidence, modify, and alter the ingredients, whereby statutory charges, where not set forth from W.S.A 939.05 in the Complaint, and information, thus is an ex post facto law, whereas the prosecutor did not provide the court with subject matter jurisdiction to render a verdict, or to even hear the case, with only a portion of statutory charging elements set forth, it also effect involuntariness of plea agreement, in notice as to prepare a defense. Whereas statutes enacted together, should used together, for fair notice.

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JAMES A. FARMER #7265122
North Fork Correctional Facility
1605 East Main CS-159-B
Sayre, Oklahoma, 73662



[Handwritten signature]

State of Wisconsin
Statutory Legislative Committee
Joint Committee for Rules of Administrative Rules
100 North Hamilton Street Room 404
PO. Box 7882
Madison, Wisconsin
53707-7882

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Judith B. Robson

Wisconsin State Senator

April 6, 2001

Mrs. Ann Bender
Viola Quik Stop
P.O. Box 215
Viola, WI 54664

Dear Mrs. Bender:

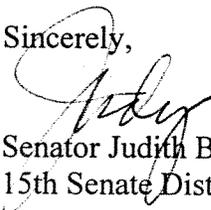
Thank you for your recent letter regarding problems you are experiencing with the PECFA program. I am sorry that you are having such a difficult time working with the Department of Natural Resources and the Department of Commerce on this issue.

I do not think I will be able to help you in this matter. The best course of action for you to follow is to work with your own legislators to resolve this problem. I see that you sent copies of your letter to Senator Rude and Representative Johnsrud. Please note that Senator Rude retired last fall and Senator Mark Meyer now represents your district. You should hear from Senator Meyer and Representative Johnsrud in the near future and they should work with you to resolve this problem.

If you do not hear from your representatives, you can reach Senator Meyer by phone at 608-266-5490 and Representative Johnsrud at 608-266-3534.

I hope this information is helpful to you.

Sincerely,


Senator Judith B. Robson
15th Senate District

JBR:da

APR 05 2001

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VIOLA QUIK STOP
P.O. BOX 215
VIOLA, WI 54664

The Honorable Judy Robson, Senate Chair
Joint Committee for the Review of Administrative Rules
15 South, State Capitol
Madison, WI 53702

Dear Senator Robson:

I am writing this letter in hopes that someone can help Bill and I resolve the enormous problems we are having with the DNR, Department of Commerce and yes, even the consultants we hired, Ayres & Associates regarding our PECFA claim for Bud's Mobil and the Viola Quik Stop.

As you can see, after going over the enclosures, this has been a comedy of errors resulting in over 13 years of tremendous pressure and stress on our lives. The most alarming of all, there seems to be no end in sight, jeopardizing Bill and I's financial future and retirement. This seems to be so unfair considering that we have spent thousands of dollars of out-of-pocket expenses trying to comply with state agencies' requirements.

In 11/89 the DNR put the squeeze on us, even though they admitted they had lost the file for five years and just happened to find it again shortly after we bought the property. We and Dave Brandemuehl met with the DNR to plead our case and they basically told us to either proceed with clean up or contact a lawyer. They said it would only cost us the \$5,000 deductible and everything else would be taken care of through PECFA. NOT SO.

We contacted Ayres & Associates to act as our consultants. They came highly recommended so we put our confidence in them. At the time remediation started the DNR had very high standards before they would allow closure. Almost impossible standards. This resulted in spending much more money to comply. Since then they have relaxed their standards, but the bulk of expense had already incurred resulting in Ayres spending almost \$1,000,000 to clean these sites.

At the time we installed a new UST system at our place of business - "Viola Quik Stop", Ayre's consultant Gail Zaucha (who no longer works for Ayres) and I decided it would be best for us to pay another \$7,500 deductible for the Quik Stop site so we could be assured of funding over the \$1,000,000 cap for the Mobil site if needed. DOC accepted the \$7,500. Now they are stating that this is one contiguous plume, hence we only have \$1,000,000 to work on to clean up **both** sites. However, they have not returned our \$7,500. If it has been two separate owners of these properties, there would have been no problem. However, since we are unfortunate enough to own both we're being

BEFORE THE STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

DRAFT

PETITION FOR A CONTESTED CASE HEARING REGARDING THE DEPARTMENT'S
DECISION TO DENY CLAIMANT REIMBURSEMENT FROM THE PECFA FUND

Ann and Bill Bender ("Claimant") hereby request that a contested case hearing be held pursuant to Wis. Stat. §§ 101.02(6)(e), 227.42, and Wis. Admin. Code § Comm 47.53. Wisconsin Admin. Code § 47.53 regarding the Wisconsin Department of Commerce's ("Department") decision to deny the Claimant reimbursement of remedial costs from the Petroleum Environmental Cleanup Fund ("PECFA"). Claimant is appealing the denial of \$141,823.87 plus PECFA loan interest [is the number correct?]. The site is located at 116 South Main Street, Viola, WI 54664 ("Site") and the PECFA Claim number is 54664-9999-42. The basis for such denial, made by Darin K Powers, PECFA Program Specialist, is set forth in the Breakdown of PECFA costs dated February 21, 2000, which is attached to this petition as **Exhibit 1** and incorporated herein. This is an appeal from the February 21, 2000 decision.

RIGHT TO A HEARING

Claimant, as owners of the site, has a right to appeal the Department's decision pursuant to Wis. Stat. §§ 101.02(6)(e), 227.42, and Wis. Admin. Code § Comm 47.53. Wis. Admin. Code § 47.53 requires that appeals from Department decisions under the scope of Wis. Admin. Code ch. Comm 47 be brought within thirty (30) days of the decision being challenged. However, on February 15th the Department published the following as part of an emergency rule:

"Comm 47.53 (1) (b)(b) *Appeal Requirements*. All appeals pursuant to this chapter shall be filed no later than 30 calendar days from the date of the decision being appealed, except that appeals from decisions issued between February 15, 2000, and June 30, 2000, shall be filed no later than 90 calendar days from the date of the decision being appealed."

This appeal has been filed within the ninety-day period allowed under Wis. Admin. Code § Comm 47.53 amended under the Departments' February 15th emergency rule.

BASIS FOR APPEAL

At issue in this appeal are costs associated with design, construction, and operation of an engineered remedial system that operated at the Bud's Mobil site commencing on August 1996 for the ground water extraction system ("GWE") and on May 1997 for the soil vapor extraction

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At issue in this appeal are costs associated with design, construction, and operation of an engineered remedial system that operated at the Bud's Mobil site commencing on August 1996 for the ground water extraction system ("GWE") and on May 1997 for the soil vapor extraction

system ("SVE"). The claim at issue is the Claimant's third PECFA claim for the site. On this claim, the Department denied a total of \$226,917.80 including interest. This denial was based upon the Department's impression that the installed SVE system was not operational or was not effective if operational. Moreover, the Department claimed that only one of the two GWE wells was effective. The claim reviewer noted that "until it can be proven that the installed systems have been used effectively (or modified to work effectively), the following commodity costs are considered ineligible at this time: all SVE costs, 50% of the GWE costs, and 75% of utility costs. In addition, the Dept. estimates that 40% of consultant costs are ineligible at this time (i.e., costs related to system design, construction, and O&M)".

For reasons set forth in this appeal, namely that the SVE and GWE systems were operational and effective, the denied project costs and accumulated PECFA loan interest are eligible for PECFA reimbursement. Not being appealed is \$40.00 for flushmount replacement, \$225.00 for clean soil disposal, and \$250.00 for VOC testing, despite the Claimant being requested to perform such testing by the Wisconsin Department of Natural Resources ("DNR").

The claimant implemented the least costly remediation system for the site in accordance with acceptable engineering and scientific principles. The consultant of record will show that the SVE and GWE remediation systems were in fact operational and successful in removal and treatment of significant volumes of contaminated ground water and were successful in reducing migration of the plume and preventing petroleum vapors from migrating into sewers and adjacent buildings.

SUMMARY OF ARGUMENT

The SVE System was Effective for its Intended Purpose

The cover letter to the claim review stated that "the Department believes that the installed SVE system has not been operational or has been ineffective if operational." As presented in more detail below, the SVE system was primarily installed to reduce vapor transport into off-site vectors (see Exhibit 11 - June 1993 RAP) and was not designed to be the primary contaminant mass remover. In fact, the SVE system was very effective at reducing vapor migration and was also achieving a significant level of contaminant removal as described below.

Ayres assumes that the Department concluded that the system was not operational because Ayres was initially unable to provide SVE laboratory data to support its operation until recently. The reason Ayres was unable to provide such data was because the Ayres project engineer assigned to this project resigned from Ayres in the fall of 1998. Due to pressing space needs, the project engineer's files were placed into banker's boxes and stored in Ayres' archive room. After the project engineer left Ayres, Ayres mistakenly assumed that all of the original reports, laboratory analysis reports, etc. were located in Ayres main project file. Consequently, Ayres was not able

to substantiate the SVE sampling program from the system until the project engineer's files were recently recovered from the archives.

Having now located the original SVE data, Ayres has been able to determine the cumulative PVOC discharge rate during system operation since its start-up on May 1, 1997 through 1998 when Ayres ceased collection of samples. During this operational period, Ayres extracted over 17 pounds of PVOCs from the SVE system. **[As demonstrated how? Can we show the calculation?]** Although the PVOC removal efficiency of the SVE system did decline as the ground water recovery system became increasingly plugged, thus insufficiently depressing the ground water table, contaminant mass removal was still being accomplished throughout system operation. It is understood that soil vapor concentrations generally peak relatively soon after SVE system start-up and reach asymptotic levels fairly quickly during the life of an SVE system.

In addition, the mass removal rate is undoubtedly considerably greater since Ayres only sampled the system at a collection point located immediately upstream from the vent stack. **[Why would removal rate be greater if sampled elsewhere?]** The reason it is sampled in this location is for evaluating discharge contaminant levels for meeting discharge limits (air samples are generally collected to document compliance with air discharges not to calculate mass removal). When Ayres conducted a SVE pilot test prior to installation of the system, consistent total PVOC levels of 135 ppm were achieved throughout the 5.5-hour test. Based on this result and using the test flow rate of 405 scfm, a PVOC discharge rate of 0.74 lbs./hr or 60.48 lbs./year was estimated. Therefore, it is assumed that actual PVOC removal from the operational SVE system was in fact significantly higher than the 17 pounds estimated above.

A tabulation of the SVE discharge monitoring data is included at **Exhibit 17** and included with this appeal.

The SVE system was clearly also very effective in preventing vapor transport into contaminant vectors as evidenced by no additional reports of gasoline vapors in neighboring basements and sewer utilities.

Finally, although the SVE system was temporarily shut off **[When? Date?]** as a cost savings measure and to allow reconfiguration of the system, Ayres intention was to re-start the system after the reconfiguration of the proposed ground water remediation system was complete. In fact, the SVE system was restarted in December of 1999 and has operated continuously since that time. **[Can we document additional VOC removal since re-start up?]**

The Ground Water Extraction System was Effective

The Department's October 20, 1999 letter states that "only one of the two ground water extraction wells has been effective." In fact both recovery wells have been effective in both mass reduction and for plume control. Ayres' ground water extraction system performance data indicates that

over 14,600,000 gallons of ground water were removed and treated between system start-up on July 23, 1996 and December 30, 1999. Using influent data collected over this period, the Bud's Mobil ground water remediation system removed over 182 pounds of volatile organic hydrocarbons through the end of 1999. Thus, the ground water recovery system has been effective as the performance data demonstrates.

Historical ground water monitoring reports routinely forwarded to the DNR documented the effectiveness of the system through 1998. One only need to review Ayres quarterly ground water monitoring report dated November 5, 1998 to see that significant reductions in concentrations were occurring since system start-up in 1996. Figure 2 – Water Table Contour (8-12-98) contained in this quarterly report demonstrates the sizable capture area achieved by the ground water remediation system.

A series of bar graphs and charts outlining the performance of the ground water extraction system is included with this appeal as **Exhibit 19**.

The Remediation Systems Were not Designed to Address the Additional Plume from the Viola Quick Stop Site

After the design and construction of the GWE and SVE system, a significant petroleum ground water plume was discovered at the Viola Quick Stop site ("the Quick Stop Plume"), located directly across the street from Bud's Mobil. Subsequent investigations indicated that a portion of the Quick Stop Plume might be impacting the Bud's Mobil Plume. Thereafter, in the course of a system performance evaluation, Claimant's consultant determined that the performance of the GWE system was not sufficient to remediate the both the Bud's Mobile Plume and the Quick Stop Plume beneath the Bud's Mobil site. Claimant has not stated that the remediation system was ineffective in remediating the Bud's Mobile Plume, only that the system was not designed to address the additional contamination from an off-site source discovered after construction of the system.

[Moreover, during construction of the Bud's Mobil remediation system, three badly leaking underground gasoline storage tanks were discovered on the Bud's Mobil property. These tanks were not known to exist by the owner (Claimant), the previous owner, the Wisconsin Department of Natural Resources ("DNR") who previously performed investigation and remedial activities on the property, nor by the consultant or the Bureau of Petroleum Inspection.] [How is this relevant? Was there additional contamination from these tanks that the GWE system could not handle?]

PROJECT BACKGROUND

On February 22, 1984, the Department of Natural Resources ("DNR") was notified of gasoline fumes in the basement of a residence and in portions of the sanitary sewer line in the Village of

Viola, Richland County, WI. The DNR retained Fuel Recovery Company ("FRC") of St. Paul, Minnesota on February 24, 1984 to investigate the gasoline contamination. On February 27, 1984, FRC performed an investigation, which included 16 soil borings. Gasoline contamination was found in 7 of the 16 borings and free product was discovered in the boring closest to the previously known underground storage tanks ("USTs") at the Bud's Mobil gasoline station site ("Bud's Mobil"). With the extent of contamination determined, the DNR and FRC fitted 11 of the borings with two-inch PVC well screens and casings to serve as temporary observation wells. See, DNR "Findings of Fact," copy attached as **Exhibit 2**. During this time, Mr. Ed Hill Jr., d/b/a Bud's Mobil Oil, owned and operated Bud's Mobil.

On March 1, 1984, Mr. Hill, the DNR, the Village of Viola, and FRC held a meeting to discuss the site. Mr. Hill was informed of the investigation results and was asked to follow through with a remediation of the site. Mr. Hill was apparently financially unable to pay for the cleanup. Subsequently, the DNR contracted FRC to install and operate a ground water recovery system. Mr. Hill filed for bankruptcy in late 1984.

A ground water recovery system was put into operation by the DNR on March 12, 1984. The system operated continuously until June 19, 1984 when the DNR authorized termination. However, the DNR did not require the removal or abandonment of the ground water recovery wells. As a result of the DNR's failure to properly remove and abandon the recovery wells, open and uncontrolled pathways to the groundwater were created. Thus, as discussed in greater detail below, it is likely that these unabandoned wells further exacerbated the contamination at the site.

During operation of the DNR's ground water recovery system, approximately 1,411 gallons of free product were removed over a 70-day period and a total of 4,233,600 gallons of impacted ground water were removed and treated. The ground water extraction system was discontinued on June 19, 1984 after free product recovery rates decreased substantially.

While operational, the DNR's ground water recovery system removed ground water at a rate of nearly 42 gallons per minute. With such a high pumping rate, free product was most certainly drawn deep below the normal water table surface. Thus, the DNR's actions caused free product to be drawn down into the subsoil, significantly below the static water table surface. This "smearing" of product deeper into the aquifer created a much more difficult environment in which to remediate ground water in the vicinity of the Bud's Mobil Site. This conclusion is supported by Ayres well construction log for MW-1 on the Bud's Mobil property where significant contamination existed over 9 feet below the static water level and in MW-12, where benzene concentrations exceeded 22 ppb, 25 feet below grade, despite the existence of a strong, upward groundwater gradient.

The DNR spent a total of \$12,843.44 "to identify, locate, monitor, contain and remove the gasoline contamination in the Village of Viola." See, Findings of Fact, Exhibit 2 (underline added).

In 1985, the Bud's Mobil property was purchased by Mr. Michael Skildun and operated as a full service gasoline station. In January 1986, the Benders' purchased the station from Mr. Skildun. **[What information were the Benders provided at or before purchase regarding environmental conditions and the remediation of the site? Did they see the Findings of Fact?]** *No* In reliance upon the DNR's 1984 "Findings of Fact" document, the Benders reasonable believed that any contamination issues associated with the site had been fully addressed by the DNR. Obviously, the Benders would not have purchased the property if they had known that the DNR's investigation and remediation was inadequate and incomplete.

[When did the Benders discontinue use of the site as a service station?] The Benders discontinued use of the property as a service station and had the two known remaining tanks removed and disposed in _____. Neither of these tanks was found to have leaked. A third tank believed to have been leaking was previously removed Mr. Hill. **[When? Could this third tank have leaked into one of the unabandoned wells?]** *No - the wells were not in place at that time*

5 years later
On March 13, 1989, Ms. Laurie Egge, DNR hydrogeologist, visited the site to determine if the monitoring wells were still in place. Wells #1 and #2 were in place, with steel protective casings. Well #3 on the Bud's Mobil property had been snapped off at ground level. Ms. Egge noted that Well #3 needed to be repaired or abandoned as soon as possible. Ms. Egge also noted that 7 to 8 inches of gasoline product was floating on the ground water surface in Well #1. New locks were placed on Wells #1 and #2. In her memo, she notes that the Bud's Mobil station is now owned by the Benders', whom also own the Viola Quick Stop north of the Bud's Mobil station. She reports that Mr. Bender "said there are not tanks remaining at the old Mobil station, which is now leased out as a repair shop. Mr. Bender said he has photos of the tank excavation; he does not believe soil was excavated." Her memo concludes by noting that the Village Clerk's office has no additional reports of recurring gasoline odors in basements of sewer lines. A copy of Ms. Egge's memo is included with this appeal as **Exhibit 3**.

Because the Village of Viola municipal well is located one block away from the Bud's Mobil site, the site was of great concern to DNR staff. The DNR reopened the site in 1989 after free product was noted in one of the existing on-site monitoring wells. In an internal memo to Joe Brusca (SD) from Dave Lundberg (WD), the DNR indicates that they were responsible for initiating the free product recovery and authorized the abandonment of the recovery system in 1984. Dave Lundberg suggests that "perhaps ERF can be used to supplement the DILHR clean-up fund. With a municipal well 1 block away (and a proposal to expand the capacity of the well), this would seem to be an emergency justifying the use of public funds." Although the Benders' inquired about supplemental funding to assist in the clean up, no official confirmation of funding was made available to the Benders. A copy of this memo is included as **Exhibit 4**.

On May 15, 1989, Ms. Egge forwarded a letter to the Benders' notifying them of her findings on her March 13, 1989 visit to the Bud's Mobil site (copy attached as **Exhibit 5**). The intent of her

letter was to advise the site owner of their responsibility under s. 144.76 Wis. Admin. Code to "address this situation by defining the extent of contamination and conducting any necessary cleanup." The letter also notifies the Benders of the PECFA program. Although Ms. Egge's letter states that it is the responsibility of the owner to investigate the extent of contamination and conduct the necessary cleanup, the letter contradicts the DNR's 1984 "Findings of Fact" document (see Exhibit 2). In the "Findings of Fact," the DNR states that the extent of contamination was known after investigation by the DNR consultant and that the gasoline contamination had been identified, located, monitored, contained and removed. Thus, as mentioned above, it was reasonable for the Benders to believe that any contamination had already been investigated and cleaned up by the DNR in 1984.

On October 6, 1989, Mr. Ted Amman, hydrogeologist with the DNR, visited the site to check monitoring wells installed in 1984. Mr. Amman noted that free product still remained in MW #3 and stated that this well was providing an open and uncontrolled conduit to groundwater. Thus, the DNR's failure to properly abandon this well in 1984 when operation of the recovery system was discontinued was acknowledged by the DNR to be contributing to the contamination at the site. Mr. Amman also noted that "[i]t was his [Mr. Benders'] understanding that the Department had investigated and cleaned up this site. (When he had purchased this property, he said he checked with the Department and they were unable to find any records for this site." A copy of Mr. Amman's memo is attached as **Exhibit 6**.

In an internal memo from Mr. Ted Amman to Ms. Laurie Egge on August 23, 1990, both of the DNR (copy attached as **Exhibit 7**), Mr. Amman states that the Benders' "understood that the state (i.e. the Department) had cleaned up the site back in 1984." The Benders' also asked "if we (the Dept.) hadn't cleaned it up in 1984, how come we walked away and ignored it for five years?" Mr. Amman noted that he was "unable to provide satisfactory answers to their questions." As it turns out, the DNR lost (misplaced) the project file and therefore lost track of the site and was not able to look after a free product plume within 200 feet of the only municipal well in the Village of Viola.

In an October 9, 1990 memo to Ms. Laurie Egge, Mr. Ted Amman describes a phone call from State Assemblyman Dave Brandemuehl who called the DNR on behalf of the Benders. Mr. Brandemuehl was making inquiries as to why the site was not completely cleaned up and closed by the DNR, considering the magnitude of the release and its proximity to the municipal well. Mr. Amman noted that "when we shut down the cleanup in spring of 1984, we had no groundwater standard to go by. When we could no longer recover pure product, it was normal procedure to close the case out. I could not give Brandemuehl a good explanation as to why we did not officially close this case in 84 (including removing monitoring wells) except to say that we didn't have any dedicated (LUST) program staff and whoever was assigned moved on to the next crisis." A copy of this memo is included as **Exhibit 9**.

The Benders' retained Ayres in May 1991 to investigate the extent of contamination at the site. Ayres advanced 10 borings on and around the Bud's Mobil property and conducted other investigatory activities throughout much of 1991. The results of the investigation indicated significant dissolved concentrations of petroleum hydrocarbons in ground water and determined there was a chlorinated hydrocarbon plume emanating from a bank property northwest of Bud's Mobil. In April 1992, Ayres generated a "Contamination Assessment Report for the Former Bud's Mobil Service Station." The recommendations of this report include conducting a soil-gas survey to determine the southernmost extent of the contaminant plume, abandonment and replacement of MW-B, formerly installed by the DNR consultant (well contained excessive sediment and was previously noted by the DNR to contain free product), and advancement of hydropunch borings to better define the extent of contamination. Additional recommendations included installation of additional monitoring wells. A copy of this report is included as **Exhibit 10**.

Ayres subsequently conducted the soil-gas survey, advanced 14 hydropunches, and installed nine additional ground water monitoring wells. In June 1993, Ayres produced an addendum to the April, 1992 Contamination Assessment Report. The addendum outlined the findings from the additional site evaluation and investigation. The results of this phase of work concluded that the relationship between the Kickapoo River system and the groundwater at the site is quite dynamic, with significant changes in groundwater elevation concurrent with river flooding events. This is complicated by substantial variability of soil conditions and paucity of lateral continuity of soil layers. For example, during an April, 1993 flooding event, a large increase in the potentiometric surface elevation occurred which indicated that the aquifer is being recharged in the nearby wetlands where the aquifer is unconfined. The water table elevation rose over four feet during this period.

The addendum report also concluded that significant soil-absorbed contamination existed below the water table in the vicinity of groundwater monitoring wells MW-1, MW-6, and MW-12. The report further concluded that operation of the recovery wells during the response activities conducted by the DNR in 1984 caused significant downward spread of the contamination. Based upon chemical and field analysis, the maximum depths of contamination in the three monitoring wells (MW-1, MW-6, and MW-12) closest to the former recovery well, roughly correspond to the depth of drawdown estimated for the pumping rate (38 gpm) utilized by FRC for free product removal. A copy of this report is included as **Exhibit 11**.

In June 1993, Ayres submitted a remedial action plan ("RAP") to the DNR, which outlined Ayres recommended approach to address soil, soil vapor, and ground water remediation at the Bud's Mobil site. [Was the RAP approved by DNR?] Data presented in the RAP indicated that the previous pumping conducted by the DNR depressed the water table by as much as 16 feet. This resulted in smearing of the gasoline through the soil beneath the water table. Soil contamination was documented to a depth of 23 feet below grade in the area of the former leaking UST at Bud's Mobil. The estimated area of soil contamination was 3500 cubic yards,

with approximately 50 percent of this area underlain by Wisconsin Highways 56 (Main Street) and 131 (Commercial Avenue). Prior to submittal of the RAP, Ayres conducted aquifer permeability tests. These tests indicated that the hydraulic conductivity in the unconsolidated material ranged between 4.32×10^{-04} to 8.97×10^{-03} cm/sec.

Ayres also performed a vapor extraction pilot test in early 1993. The purpose of this pilot test was to determine the applicability of *in-situ* soil vapor extraction for removing explosive vapors along Main Street in Viola. The pilot test indicated that vapor extraction from a series of vertical extraction points would be capable of affecting the impacted soil beneath the roadways. The RAP determined that the concentration of petroleum hydrocarbons in the soil was fairly low, however, it was spread over a very large area. The most immediate concern at the site was the high levels of explosive vapors in the vadoze zone, which were accumulating in the basement of a nearby store and inside the sanitary sewers.

The primary limitation of the *in-situ* soil vapor extraction ("SVE") technology is outlined in the discussion of SVE as a remedy for vapor control at the Bud's Mobil site. Large and rapid fluctuations of the Kickapoo River cause ground water to rise near the ground surface. Under these conditions, the well screens for the soil vapor venting system would be submerged and no air could be evacuated from the subsurface. Because of these conditions, it was necessary to install a ventilation fan in the basement of the corner store and another one inside the sanitary sewer. The fans were designed to start automatically whenever an increase in the soil venting system vacuum occurred. The SVE system was installed primarily as a means of mitigating against vapor transport of explosive vapors however, even though the SVE system was not intended to be a primary means of contaminant removal at the site, significant contaminant removal was achieved by operation of the SVE system.

As indicated in the RAP [as approved by the DNR], the SVE monitoring would follow requirements directed by the DNR Bureau of Air Management permit issued for the Bud's Mobil site. The permit emission limits are based only upon calculations of project benzene and total VOC off-gas emissions from the entire remediation site. As such, Ayres proposed sampling the SVE emissions immediately prior to being emitted from the vent stack inside the remediation building. **[Was this location approved by DNR? Does it matter? Would system performance been better if sampled somewhere else?]**

The RAP also recommended installation of a ground water pump and treatment system for the Bud's Mobil site. Based upon preliminary pumping tests conducted by Ayres, the anticipated pumping rate from two extraction wells was between 15-25 gallons per minute. The RAP outlined the proposed removal of petroleum-impacted water and treatment through a diffused air stripper, tray aeration system. Treated water would be discharged to the storm sewer. The RAP was prepared prior to any knowledge of contaminant conditions, either real or perceived, at the Viola Quick Stop. A copy of Ayres June 1993 RAP is included as **Exhibit 12**.

For the remaining portion of 1993, Ayres performed a variety of activities, including but not limited to: 1) conducting emergency ventilation of petroleum vapors for area sewers and basements, 2) drafting engineering plans, specifications, and bidding documents for a combined soil and ground water treatment system, 3) obtaining approval from DNR project manager to commence with the remediation, 4) preparing and obtaining a WPDES permit to discharge treated ground water, 5) and preparing a PECFA application for activities conducted through April 1993.

In 1994, Ayres continued to prepare and finalize engineering drawings and specifications for the remediation system and the claimants sought funding from lending institutions to conduct the remediation. Bid documents were also prepared and sent out for construction of the remediation system. A separate bid document was prepared for the installation of the recovery wells.

A soil and ground water remediation system was installed at the site in July 1996, based on the results of the DNR and Ayres investigation at the Bud's Mobil site. The remediation system consisted of a ground water and soil vapor extraction system. The ground water extraction system commenced operation on July 23, 1996. The soil vapor extraction system was started in May 1997. Both systems were operated continuously until it was determined in late 1998 that the production rate from the recovery wells was below desirable treatment levels. The SVE system continued operation until it was shut off for reconfiguration of the GWE and SVE systems in the autumn of 1999. **[Earlier we say the system was shut down in 1998 when low pumping rates due to clogging did not depress the GW table sufficiently. When and why was the SVE shut down? When and why was it restarted?]**

CONTAMINATION ASSOCIATED WITH THE VIOLA QUICK STOP

In [] the owners of the Viola Quick Stop (who also own the Buds Mobil site) retained Ayres to perform contaminant assessment activities at their facility located at 102 East Commercial Street, Viola, Wisconsin. This site is located directly north and upgradient of the Former Buds Mobil site (across the street). The assessment was performed prior to upgrading their underground storage tank system. Ayres advanced six Geoprobes™ in the vicinity of underground storage tanks (USTs) on February 11, 1998. The probes were advanced to a total depth of 15 ft below ground surface (bgs). Ground water was encountered at a depth of 10 feet bgs. Contamination assessment activities performed in February 1998 confirmed that soil and ground water contamination requiring remedial action exists at the Viola Quick Stop site.

Ayres was subsequently retained by the owners to conduct a tank closure assessment at the Quick Stop site based on the results of preliminary environmental assessment conducted in February 1998. Two 10,000-gallon gasoline USTs were removed from the site on August 3, 1998. Approximately 300 tons of petroleum-impacted soil were removed and disposed as an interim action during the tank system removal. A new UST system was installed following the soil remediation activities.

Ayres installed a single water table observation well (MW-13) in the southwest corner of the Viola Quick Stop property at the request of the DNR. The well was installed in January, 1999 to assess potential ground water impacts from the former UST system at the site. Laboratory analytical results for a ground water sample collected from the well indicate significant concentrations of PVOCs. Total PVOC concentrations in ground water exceeded 107,000 µg/L in a sample collected from well MW-13. The ground water contamination plume originating at the Viola Quick Stop appears to be migrating onto the former Buds Mobil site. Although significant ground water contamination exists at the Viola Quick Stop, only a limited portion of the plume was being captured by the existing Bud's Mobil ground water remediation system. The groundwater contamination at Viola Quick Stop is hydraulically 50 feet upgradient and 90 feet sidegradient of the former tank bed at Bud's Mobil, indicating that the contamination at the Quick Stop site is from a separate source than that from Bud's Mobil. Ayres Site Investigation Report, dated June 1998, is included as **Exhibit 13** in this appeal and describes the relationship of the two plumes and the effectiveness of the Bud's Mobil remediation system.

The discovery of the ground water contamination plume at the Viola Quick Stop prompted Ayres to request that remediation at the two sites be bundled. The site bundling request was submitted to the Department on September 24, 1998 (copy attached as **Exhibit 14**). Ayres Associates spoke with Eric Scott from the Department on December 12, 1998 regarding modifying existing systems to enhance contaminant removal. It is understood that the Department had experienced similar problems with a decrease in recovery efficiency with other remediation systems at other sites and had reevaluated a number of other systems to determine if modifications were warranted. In fact, Mr. Scott stated that the legislature had inserted a provision into the Statutes that specifically allows for remediation systems modifications to help remedy the discharge. See, §101.143(4)(a)(8) Wis. Stat.

The Department responded to the bundling request in a letter to the Claimant by asking for an evaluation of the existing remediation system operating at Buds Mobil. A remediation system evaluation report was submitted to Ms. Denise Nettesheim, on May 20, 1999. Ayres system evaluation report showed a decrease in contaminant mass removal efficiency commencing in late 1998 due to clogging of the system, and the resulting need for system modifications to enhance system performance. It was also determined that system modifications would be necessary to be able to use the system to remove contamination originating from the Viola Quick Mart. Ayres recommended that the current ground water extraction system be retrofit to increase concentrations of petroleum hydrocarbons extracted from the surficial ground water. The preferred option was to convert the existing ground water extraction system to a suction lift system utilizing existing engineering appurtenances. **[Unclogging of the GWE system was determined to be technically infeasible and prohibitively expensive.]** It was also recommended to utilize the SVE system to reduce vapor transport in the vadose zone. A copy of this evaluation report is appended to this appeal as **Exhibit 15**.