



BEAZER EAST, INC.

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May 29, 2020

VIA ELECTRONIC MAIL ONLY

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Remediation & Redevelopment Program
SER-Milwaukee Service Center
Wisconsin Department of Natural Resources
2300 N Dr Martin Luther King, Jr. Drive
Milwaukee, WI 53212-3128

Re: Non-Listed Hazardous Waste Determination Request by Beazer East, Inc.

Former Koppers Tar Plant and Wabash Alloys Site
9100 South 5th Avenue, Oak Creek, WI 53154
FID #: 241379050; BRRTS #: 02-41-553761
VPLE BRRTS #: 06-41-561509

City of Oak Creek Utility Corridor Lot 1
9170 South 5th Avenue, Oak Creek, WI 53154
FID #: 341074470; BRRTS #: 02-41-561425
VPLE BRRTS #: 06-41-561426

Dear Attorneys Kamp and Motl and Mr. Amadi:

During various discussions between representatives of Beazer East, Inc. ("Beazer"), the Wisconsin Department of Justice ("DOJ"), and the Wisconsin Department of Natural Resources ("WDNR") concerning potential remedial action options at the Former Wabash Alloys Property in Oak Creek, WI (the "Site"), WDNR and DOJ requested, and Beazer offered to provide, certain information that would substantiate its position that any tar plant-related remediation media at the Site that may be generated during a remedial action need not be designated a "listed" hazardous waste. Beazer has now assembled the requested information and is hereby requesting a pre-remediation, non-listed hazardous waste determination for Site media that might be generated as part of any future remedial action at the Site. The purpose of this letter is twofold: first, to present applicable legal principles governing hazardous vs. non-hazardous determinations applicable to media that may be generated during remediation activities, such as materials excavated as part of future remedial actions at the Site; and second, to provide references where these principles have been successfully applied and accepted by the United States Environmental Protection Agency ("USEPA") and other state regulators where Beazer has made similar requests at other remediation sites located around the country.

Legal Principles Governing Remediation Waste Determinations:

Under the Resource Conservation and Recovery Act ("RCRA"), solid wastes generated during an environmental response action must be characterized prior to treatment, storage, or disposal. Under RCRA, contaminated media such as soils, sediments, debris, or groundwater

generated during a response action can fall into one of three categories for RCRA waste disposal purposes: (1) media that must be handled as a listed hazardous waste because it contains some fraction or portion of a listed hazardous waste and must be classified as such under the "contained-in" rule (which provides that a mixture containing a listed waste must be classified as the listed waste), regardless of whether such waste does or does not test as characteristic; (2) media that does not contain a listed waste but must be handled as a characteristic hazardous waste because, after testing, it exhibits a characteristic of a hazardous waste; or (3) media that does not require management as a hazardous waste because it neither contains a listed hazardous waste nor exhibits a characteristic of a hazardous waste.

While the determination of whether remediation media falls into category (2) or (3) is simply a measure of performing the appropriate characteristic hazardous waste tests (i.e., Toxicity Characteristic Leaching Potential ("TCLP") tests), the determination of whether media contains a listed hazardous waste and falls into category (1) must be made based upon knowledge of the process that created the impact to the media where it is found. The USEPA recommends that the Lead Agency look to available Site information such as manifests, storage records, and vouchers to ascertain the sources of contaminants found in the generated remediation media [53 Fed. Reg. 51394, 51444 (December 21, 1988)]. But, if such information is limited or unavailable, the USEPA has stated that where a facility owner/operator makes a good faith effort to determine whether a material is a listed hazardous waste but cannot make such a determination because documentation regarding a source of contamination, contaminant, or waste is unavailable, inconclusive, or contradictory, the Lead Agency may assume the contaminant or waste is not listed hazardous waste [55 Fed. Reg. 8665, 8758 (March 8, 1990)]. For your reference, much of the existing USEPA guidance on how the RCRA regulations affect remediation waste management is compiled and presented in an October 1998 memorandum issued by USEPA's Office of Solid Waste and Emergency Management titled "Management of Remediation Waste" (the "1998 OSWER Memo").¹

As applied to the Site, the first step in this analysis is to determine what potential listed hazardous waste codes might apply to any waste that was generated by the former tar plant using the listed hazardous waste sources defined in 40 CFR §261.32 (specific sources) and 40 CFR §261.31 (non-specific sources). The specific source listed waste codes associated with coal tar refining and distillation are K147 (Tar storage tank residues from coal tar refining) and K148 (Residues from coal tar distillation, including but not limited to, still bottoms). None of the listed hazardous waste codes from non-specific sources in 40 CFR §261.31 apply to coal tar refining or distillation.

Based on available documentation, coal tar distillation began at the Site in approximately 1917 and had ceased by 1968. The onset of aluminum smelting activities after 1968 coincided with removal of all remaining coal tar distillation structures. While the location of pre-1968 structures are known based on available drawings, the lack of pre-1968 operational documentation makes it virtually impossible to determine with any certainty and specificity what spills, releases, or disposals of material may have occurred during the five decades of coal-tar distillation operations. Given this lack of information, it would be entirely speculative to determine whether any spills, releases or disposals arose from the two listed hazardous waste sources (tar storage

¹ USEPA, OSWER, Management of Remediation Waste Under RCRA, (October 14, 1998), available at <https://www.epa.gov/hw/guidance-management-remediation-waste-under-resource-conservation-and-recovery-act-rcra>.

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tank residues or distillation residues) as opposed to from the innumerable potential non-listed waste sources (such as spills or releases of crude coal tar inputs during handling, loading and transferring, spillage of finished distillation products like naphthalene, pitch, or refined coal tar, releases from wastewater treatment facilities, etc.). The lack of documentation relating to operations that occurred between 52 and 103 years ago makes it virtually impossible to determine whether the tar-related constituents now present in subsurface media today came from a listed versus a non-listed source.

Therefore, in light of this lack of information, it is more appropriate to test any Site-related remediation media to determine whether it exhibits a characteristic of a hazardous waste (i.e., "fails" the TCLP test) and use that data to determine handling for transportation and disposal purposes than it would be to assume any media generated during remediation must automatically be assigned listed hazardous waste codes K147 or K148, even where the media does not test as characteristically hazardous. Moreover, such an approach is entirely consistent with the USEPA guidance cited above, especially where the USEPA guidance does not require, and even counsels against, reaching a conclusion that a waste is listed when evidence for that determination is lacking and unavailable.

With respect to the determination as to whether any Site-related remediation media exhibit a hazardous waste characteristic, Beazer performed hazardous waste characterization analysis on composite samples from five test pits as part of its Supplemental Investigation Report submitted in January 2019; results indicated none of the soils exhibited hazardous waste characteristics. This is consistent with our experience elsewhere, as Beazer has performed extensive testing of soils and sediments generated during remediation measures at many other coal-tar distillation sites throughout the country, and these tests have demonstrated similar media not to be characteristically hazardous. Regardless, Beazer is willing to, and commits to, include a reasonable TCLP testing program as part of any proposed remedial measures that might involve the generation of wastes necessitating off-site transportation or disposal, for example confirming whether certain parameters fall below the maximum allowable concentration of contaminants for a toxicity characteristic. Following such classification, any media classified as characteristically hazardous would be properly manifested and managed as characteristic hazardous waste for off-site treatment or disposal in accordance with applicable regulations.

Examples Where Agencies Have Made a Pre-Remediation Non-Listed Determination

Where remediation media are not listed hazardous wastes and not characteristically hazardous, a non-hazardous waste determination is consistent with the National Contingency Plan and USEPA guidance. In reliance on the legal principles, rationale and guidance described above, Beazer has applied for a pre-remediation non-listed hazardous waste determination at several other remediation sites across the country and received approval from both USEPA and state regulatory agencies.

A list of those sites, the type of former industrial operation, the type of remediation waste media, the dates of the approvals and the agencies that approved these non-listed waste determinations are provided in the table that follows. If WDNR or DOJ would like to see the documentation we have assembled that supports the information provided in the table, we can provide that information upon request.

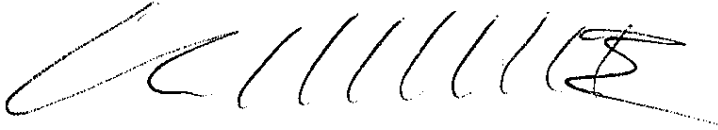
Site Name & Location	Material Type	Date of Approval	Approving Agency
Former Koppers Company, Inc. Wood Treating Site – Charleston, SC	Soil and sediment from the “South Tidal Marsh”	May 22, 2002	United States Environmental Agency (USEPA) Region 4
		August 27, 2002	South Carolina Department of Health and Environmental Control (SC DHEC)
	Soil from “Northwest Corner Area”	June 27, 2003	SC DHEC
		July 17, 2003	USEPA Region 4
Koppers Inc. Wood Treating Facility – Montgomery, AL	Soil and soil/bentonite slurry	March 3, 2004	Alabama Department of Environmental Management (ADEM)
Koppers Inc. Wood-Treating Site – Guthrie, KY	Sediments and DNAPL	May 26, 2004	Kentucky Department for Environmental Protection
Former Koppers Wood-Treating Site – Wauna, OR	Excess soil and wood debris	December 8, 2004	Oregon Department of Environmental Quality
Former Reichhold Chemical Plant Facility – Bridgeville, PA	Excavated materials from “Flood Control Levee”	May 31, 2007	USEPA Region 3
		August 1, 2007	Pennsylvania Department of Environmental Protection
Former Koppers Wood-Treating Site – Carbondale, IL	Soil from Central, Eastern, and Southern Exposure Areas	June 19, 2018	USEPA Region 5
Koppers Coal Tar Plant – Follansbee, WV	Sediment dredged from Ohio River	June 14, 2011 (conditional approval)	West Virginia Division of Natural Resources
		March 7, 2011	USEPA Region 3
Roanoke Valley Plant – Salem, VA	Soils	December 1, 2015	Virginia Department of Environmental Quality
South Cavalcade Street Superfund Site – Former Wood Treating and Tar Plant, Houston, TX	Soils	December 1, 2015	USEPA Region 6
Former Koppers Inc. Coal Tar Facility – Dolomite, AL	Soils	July 29, 2011	ADEM

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A pre-remediation non-listed hazardous waste determination increases flexibility in the number of options and the scale for cost-effective management of remediation media. We believe such flexibility would facilitate the ongoing discussions between Beazer and WDNR regarding the remediation approaches proposed for the Site. To that end, Beazer respectfully asks WDNR to give serious consideration to its request for a pre-remediation, non-listed hazardous waste determination in order to efficiently and effectively manage the handling of Site media that might be generated as part of any future remedial action at the Site.

If you should have any questions or concerns regarding this approach to the characterization and management of Site media, or would like copies of the documentation cited in the above table, please contact me at 412.208.8839.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. McChesney II', with a stylized flourish at the end.

Charles E. McChesney II
Vice President & Secretary, Beazer East, Inc.
Chief Legal Counsel, Three Rivers Management, Inc., agent for Beazer East, Inc.

cc (via email only):

Mike Bollinger, Beazer
Mike Slenska, Beazer
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Michael R. Noel, Tetra Tech
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