

Amadi, Eric A - DNR

From: Bollinger, Mike W (Pittsburgh) USA <Mike.Bollinger@TRMI.Biz>
Sent: Monday, December 14, 2020 2:56 PM
To: Amadi, Eric A - DNR; Haag, Christine T - DNR
Cc: Fassbender, Judy L - DNR; Norman, Michele R - DNR; Nelson, William J - DNR; Slenska, Mike (Pittsburgh) USA; McChesney, Charles (Pittsburgh) USA; Philpotts, Brett H (Pittsburgh) USA; Noel, Mike; Eric M. McLeod (Eric.McLeod@huschblackwell.com)
Subject: RE: Review of Site Conditions and Progress in the VPLE Program - Former Koppers Tar Plant & Wabash Alloys (BRRTS #: 02-41-553761 & 06-41-561509) and City of Oak Creek Utility Corridor Lot 1 (BRRTS #: 02-41-561425 & 06-41-561426), Oak Creek, WI.
Attachments: 2020-12-14_145638.pdf

Dear Eric

Please see the attached letter regarding the referenced sites. Please note that we are specifically requesting clarification of your request for a Work Plan. We are requesting that the department clarify whether an Interim Action Work Plan or an Immediate Action Work Plan is being requested.

Regards

Michael W. Bollinger

Sr. Environmental Manager
Beazer East, Inc.
c/o Three Rivers Management, Inc. (Agent for Beazer East, Inc.)
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Mike.Bollinger@TRMI.BIZ

From: Amadi, Eric A - DNR <Eric.Amadi@wisconsin.gov>
Sent: Thursday, November 19, 2020 12:30 PM
To: Bollinger, Mike W (Pittsburgh) USA <Mike.Bollinger@TRMI.Biz>
Cc: Fassbender, Judy L - DNR <Judy.Fassbender@wisconsin.gov>; Haag, Christine T - DNR <Christine.Haag@wisconsin.gov>; Norman, Michele R - DNR <Michele.Norman@wisconsin.gov>; Nelson, William J - DNR <William.Nelson@wisconsin.gov>
Subject: Review of Site Conditions and Progress in the VPLE Program - Former Koppers Tar Plant & Wabash Alloys (BRRTS #: 02-41-553761 & 06-41-561509) and City of Oak Creek Utility Corridor Lot 1 (BRRTS #: 02-41-561425 & 06-41-561426), Oak Creek, WI.

Hi Mike (Bollinger):

Please see attached letter regarding the referenced subject. If you have questions, please let us know.

Thanks.

Eric

We are committed to service excellence.

Visit our survey at <http://dnr.wi.gov/customersurvey> to evaluate how I did.

Eric Amadi

Cell Phone: (414) 405-0752 - **primary phone contact during the COVID-19 health crisis**

eric.amadi@wisconsin.gov



BEAZER EAST, INC.

c/o Three Rivers Management, Inc. (Agent for Beazer East, Inc.)
600 River Avenue, Suite 200, Pittsburgh, PA 15212-5994

December 14, 2020

VIA ELECTRONIC MAIL ONLY

Christine Haag, Program Director
(Christine.Haag@wisconsin.gov)
Remediation & Redevelopment Program
SER-Milwaukee Service Center
Wisconsin Department of Natural Resources
2300 N Dr Martin Luther King, Jr. Drive
Milwaukee, WI 53212-3128

Eric Amadi, Hydrologist
(Eric.Amadi@wisconsin.gov)
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: Nov. 19, 2020 Review of Site Conditions and Progress in the VPLE Program
Interim Action Work Plan Deadline December 21, 2020
Immediate Action Deadline January 28, 2021**

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 Ms. Haag and Mr. Amadi:

On November 19, 2020, Beazer East, Inc. (Beazer) received by email the above-referenced letter (November 19 Letter). In the November 19 Letter, the Department of Natural Resources (DNR) contends that Beazer has not made reasonable progress in the Voluntary Party Liability Exemption (VPLE) program towards addressing investigation and remediation at the Former Wabash Alloys Property in Oak Creek, Wisconsin (Site). The November 19 Letter also demands submission and implementation of something DNR inconsistently refers to at different points in the November 19 Letter as an "interim action" and/or an "immediate action" work plan, despite those terms having very different meaning under DNR's own regulations. As communicated by November 23, 2020 email, Beazer intends to comply with DNR's request and intends to submit a work plan. The purpose of this written response is threefold: first, to correct the record as to certain inaccurate statements regarding Beazer's conduct in the VPLE program; second, to identify core legal problems with DNR's demand and, as a result, request that DNR clarify the type of remedial action work plan requested and agree that implementation occurs only after DNR approval (as required by Wisconsin law); and third, to address the incorrect contention that Beazer has "failed to make reasonable progress" at the Site.

First, the statements about Beazer's conduct made by DNR in the "Requests for Remedial Action" section of the November 19 Letter are not factually accurate. DNR summarizes its position by stating that "Beazer has failed to provide an adequate response to repeated requests from DNR for a revised or interim remedial action made between December 2016 and June 2020." Beazer has timely and completely responded to DNR time and again. In a March 6, 2020 letter from Tetra Tech, Beazer provided a timeline of events starting with Beazer's entry into the VPLE on January 6, 2014. It is not necessary to recite that timeline again here, but that timeline belies DNR's contention that Beazer has somehow "failed" to respond. Rather, the timeline evidences a sequence of Beazer submitting work plans, implementing those workplans, submitting reports, revising reports and responding to DNR comments time and again within specified deadlines. In contrast, the timeline also details repeated delays by DNR – sometimes months- or years-long delays – where DNR simply failed to approve or comment upon documents, respond to or provide answers to questions, or to take any action.

Second, the positions taken by DNR in the November 19 Letter create several core problems that must be resolved before meaningful Site remedial action can occur. In June, as requested by DNR, Beazer sent to DNR updated Site investigation figures. These updated figures were provided to address a number of DNR comments and concerns centered on DNR's belief that the Site investigation is incomplete and/or does not fully and accurately present all available data. On August 3, 2020, DNR sent Beazer a letter stating that "a full review [by DNR] of the information [submitted by Beazer in June] has not been completed," and that, purportedly, there were "numerous instances where it appears site data has not been accurately depicted" in the figures Beazer provided. DNR concluded the August 3 letter with a demand that Beazer revise and resubmit the figures. On September 3, 2020, Beazer submitted revised figures and included detailed responses to DNR's comments and detailed narrative explanations and graphics to support the interpretation of the data. On October 16, 2020, DNR sent Beazer a letter stating, "Beazer's September 3, 2020 response did not properly address the issues identified in the DNR's August 3, 2020 letter." DNR demanded that Beazer amend and resubmit its response, but did not describe what Beazer had improperly addressed. Lacking an explanation of what revisions DNR wanted to see in any further modified figures, Beazer requested a technical meeting to get more information (emails sent on October 30, 2020 and again November 16, 2020 requesting a technical meeting). Rather than agree to a meeting, DNR instead sent the November 19 Letter demanding a work plan to implement remedial action and refusing to meet with Beazer until a work plan is submitted. DNR's actions put Beazer in one of several untenable quandaries: what remedial action is Beazer supposed to propose that will satisfy DNR if DNR is unwilling to explain to Beazer the basis of DNR's view that the existing Site investigation fails to fully delineate Site conditions and/or interpret available Site data?

To further complicate matters, the November 19 Letter at times demands that Beazer submit an "interim action work plan" with citation to the regulatory provisions applicable thereto, yet at other times demands that Beazer take "immediate action" with citation to the regulatory provisions applicable to immediate action work plans. The regulations separately define "interim action" and "immediate action" and have very different requirements for what is contained in and what can be addressed via an Interim Action Work Plan versus an Immediate Action Work Plan. Again, DNR is not being clear about what it wants at this Site. And DNR's lack of clarity creates Beazer's second quandary: Does DNR want Beazer to submit an Interim Action Work Plan or an Immediate Action Work Plan?

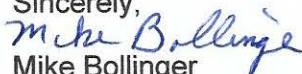
In addition, the November 19 Letter demands that Beazer "commence work" under whatever plan Beazer submits "by January 28, 2021" whether or not DNR has approved the plan. The VPLE

program and Wis. Admin Code § 708¹ obligate Beazer to secure DNR's approval of any Interim Action Work Plan before proceeding to implement it, yet the regulations would allow implementation of an Immediate Action Work Plan prior to DNR approval, but only if Beazer were not in the VPLE program. And this creates Beazer's third quandary: if applicable law and the VPLE program rules make it improper for Beazer to proceed with implementation of any Interim Action Work Plan or any Immediate Action Work Plan in the absence of DNR approval, how is it possible for Beazer to comply with DNR's demand to begin implementation on or before January 28, 2021 if no DNR approval has been received by that date? We assume DNR does not intend to order Beazer to violate Wisconsin law and implement a plan prior to DNR approval.

In light of these core problems with the approach proposed by DNR, Beazer hereby requests that DNR answer certain questions and modify the demand dates it specified in the November 19 Letter to allow a chronological sequencing that complies with the requirements of the regulations. Namely, Beazer requests that DNR take and/or agree to the following actions: (1) prior to December 16, please clarify in writing that what is being requested of Beazer is an "Interim Action Work Plan," not an "Immediate Action Work Plan"; (2) agree that Beazer will submit its plan by the later of December 21, 2020 or five (5) business days after DNR issues such clarification; (3) agree that a technical meeting between the parties will occur (currently scheduled for February 2, 2021) before DNR takes any action to approve or disapprove the submitted plan, and (4) agree that Beazer's commencement of work under the submitted plan is not required until after DNR approves the work plan. Further, rather than specifying a date certain for the start of work, Beazer suggests DNR agree that Beazer begin implementation of the work plan (which we will assume, pending DNR written clarification requested above, is an Interim Action Work Plan) within a reasonable and appropriate period (e.g., 30 days) following DNR's approval.

Finally, Beazer reiterates its belief that its actions meet the statutory requirement to make "reasonable progress" as required of it under the VPLE program. Beazer has never missed a deadline, has fully and frankly responded to the requests it has received from DNR and DOJ, has cooperated with the other Site PRPs, has conducted additional investigations when requested, has made amendments and adjustments to submittals as requested, and has continuously made good faith efforts to advance its shared interest in remediating the Site. Beazer is committed to continuing that effort: we will provide the requested work plan by December 21, 2020 (or otherwise five (5) business days after DNR issues the clarification requested above) and we look forward to a productive technical meeting on February 2, 2021. However, Beazer formally requests that DNR amend its January 28, 2021 due date for commencement of work to occur after the technical meeting and after DNR approves the plan, as requested above and in accordance with the requirements of Wisconsin law.

If you should have any questions or concerns, please contact me at 412 208 8864.

Sincerely,

Mike Bollinger
Sr. Environmental Manager
Three Rivers Management, Inc.
Agent for Beazer East, Inc.
600 River Ave, Suite 200
Pittsburgh, PA 15212

¹ See, e.g.: Wis. Admin. Code § NR 708.11(3)(d), obligating Beazer to have chosen an Interim Action consistent with the Final Remedial Action likely to be selected; (3)(e), obligating Beazer to have secured approval depending on the threshold volume of contaminated soils removed, and; (4), obligating Beazer to have secured approval if the Interim Action includes an engineered or designed control.

cc: Attorney Charles McChesney, Beazer East (via e-mail)
Attorney Brett Philpotts, Beazer East (via e-mail)
Attorney Eric McLeod, Husch Blackwell (via e-mail)
Mike Slenska, Beazer East (via e-mail)
Mike Noel, Tetra Tech (via e-mail)