



BEAZER EAST, INC.

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

September 30, 2021

Christine Haag, Program Director
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: Review of Revised Interim Work Plan and Revised Remedial Action Options Report
Notice of Noncompliance – Wis. Admin. Code chs. NR 708 and 716 Interim Action
Requirements

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

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

Dear Ms. Haag,

We received by email your August 31, 2021 letter titled “Notice of Noncompliance” (the Notice) regarding the Wisconsin Department of Natural Resources’ (DNR) review of the *Revised Interim Action Work Plan* (IAWP) dated May 3, 2021 and the *Revised Remedial Action Options Report* (RAOR) dated July 1, 2021, both prepared by Tetra Tech, Inc. (Tetra Tech) on behalf of Beazer East, Inc. (Beazer) for the above-referenced properties in Oak Creek, WI (the Site). In this response, Beazer: a) identifies where in its original and/or revised IAWP and RAOR Beazer addressed each of the fourteen specifically enumerated items DNR incorrectly contends were missing; b) identifies where in its IAWP and RAOR Beazer addressed several additional items DNR incorrectly contends were missing; and c) explains why it is DNR’s dilatory and inexcusable failure to act – not any Beazer noncompliance – that has led to any perceived “inaction” at the Site.

A. Beazer’s Response to DNR’s Fourteen Specifically Enumerated Requests

In the Notice, DNR states:

“In the March 3, 2021 letter, the DNR directed Beazer to complete and incorporate the following actions outlined below, however, Beazer has not followed the DNR’s direction, despite many of these requests being included in this and earlier technical response letters:”

DNR thereafter enumerated fourteen (14) specific items it requested be addressed and contended were not addressed. The assertion that Beazer failed to address these items is simply incorrect. Each and every one of the items was included in the plans and reports submitted by Beazer. Put simply, Beazer did follow DNR’s direction and did incorporate each of the fourteen specific requests into its document submissions.

On the possibility that DNR did not carefully read the IAWP or the RAOR, Beazer identifies below where DNR may locate within those documents the details responsive to each specific request (with each DNR request enumerated below in ***bold italic font*** and Beazer’s response provided immediately thereafter).

1. Revise your interim action Work Plan to include free product removal which may be achieved through excavation at areas where there is no dispute to impacted soil and groundwater.

No revision to the documents is necessary, as the IAWP includes free product removal. Beazer proposed free product removal from monitoring wells as a component of the original IAWP dated December 21, 2020 (12/21/20 IAWP) and the revised 5/3/21 IAWP. See, e.g., 12/21/20 IAWP and 5/3/21 IAWP Section 2.2.

Additionally, absence of a dispute concerning potential impacts to soil or groundwater is not among the evaluation criteria provided in NR 722.07(4), so Beazer does not understand why DNR made reference to “areas where there is no dispute” in this item.

2. (Conduct) immediate DNAPL free product removal.

No revision to the documents is necessary, as Beazer already proposed DNAPL removal. Beazer proposed free product removal from monitoring wells as a component of both the 12/21/20 IAWP and 5/3/21 IAWP, and remains prepared to conduct free product removal as part of the comprehensive remedial action DNR has requested. See, e.g., 12/21/20 IAWP and 5/3/21 IAWP Section 2.2.

3. (Perform) quarterly groundwater monitoring.

No revision to the documents is necessary, as Beazer proposed to perform quarterly groundwater monitoring. Beazer proposed groundwater monitoring as a component of both the 12/21/20 IAWP and 5/3/21 IAWP and remains prepared to begin groundwater monitoring as part of the comprehensive remedial action DNR has requested. Beazer considered quarterly groundwater monitoring as a component of its 5/3/21 IAWP; see

Section 2.1. Beazer also considered and proposed quarterly groundwater monitoring as a component of the 7/1/21 RAOR; see Sections 3.8.1, 3.9.2, 4.3.9.1, and 6.6.

4. The DNR does not approve the abandonment of piezometer (P-110). The DNR directs this monitoring well to (should) remain as a sampling point within the former lagoon source area where there is known contamination.

No revision to the documents is necessary, as Beazer did not propose abandonment of P-110. In its 5/3/21 IAWP, Beazer proposed the retention of monitoring piezometer P-110 until such time as implementation of ISS commenced. Note that ISS, with its soil mixing apparatus, is proposed at the location of P-110, and the IAWP thus requires abandonment and then replacement of that piezometer. See, e.g., 5/3/21 IAWP Section 2.1.

5. Monitoring wells must be installed on the upstream and downstream sides of the utility plugs.

No revision to the documents is necessary, as Beazer proposed installation of upstream and downstream monitoring wells. In its 12/21/20 IAWP and 5/3/21 IAWP, Beazer proposed installation of monitoring wells upstream and downstream of the utility trench plugs. See, e.g., 12/21/20 IAWP and 5/3/21 IAWP Section 1.2.2.

6. Wells installed adjacent to the utility plugs must be included in the groundwater sampling plan.

No revision to the documents is necessary, as Beazer included such wells in the sampling plan. In its 5/3/21 IAWP, Beazer proposed that groundwater monitoring wells would be installed adjacent to the utility trench plugs and would be included in the groundwater sampling plan. See, e.g., 5/3/21 IAWP Section 1.2.2.

7. In the design, provide justification to support the proposed locations of the utility plugs and confirm whether additional plugs along the utility line would be beneficial.

No revision to the documents is necessary, as Beazer addressed these items. As noted in Section 1.2.2 of the 5/3/21 IAWP, the design phase of the proposed Interim Action included a proposed design analysis evaluating such factors as grout selection for suitability and chemical compatibility, inspection of the storm sewer interior, and ideal placement locations for utility trench plugs. Because DNR failed to approve the 5/3/21 IAWP, the design phase was not initiated, and a design analysis is yet to be conducted, but Beazer remains committed to performing such an analysis upon DNR approval of the work plan.

8. Provide an assessment of how the utility plugs will prevent the migration of contaminated groundwater along the utility backfill.

No revision to the documents is necessary, as Beazer addressed the request for such an assessment. As noted in Section 1.2.2 of the 5/3/21 IAWP, the design phase of the proposed Interim Action included a proposed design analysis evaluating such factors as grout selection for suitability and chemical compatibility, inspection of the storm sewer interior, and ideal placement locations for utility trench plugs; these factors would influence the design analysis evaluating the effectiveness of the utility trench plugs in preventing potential migration of groundwater along the utility backfill. Because DNR failed to approve the 5/3/21 IAWP, the design phase was not initiated, and a design analysis has not yet been conducted, but Beazer remains committed to performing such analysis upon DNR approval the work plan.

9. The DNR directs Beazer to consider a remedy that addresses the DNAPL tar source material on the site, rather than engineering structures to merely alter off site migration. The DNR directs Beazer to conduct an interim source control action that permanently addresses the contamination and is a significant component of an overall remedial action plan for the site.

No revision to the documents is necessary, as Beazer did address DNAPL source material and did propose an interim action that permanently addresses Site contamination and is a significant component of an overall Site remedy. In each of its 5/3/21 IAWP and 7/1/21 RAOR, Beazer considered and, indeed, proposed interim and remedial actions that addressed DNAPL tar source material on the Site using a combination of alternatives including removal, containment, and monitoring. See, e.g. 5/3/21 IAWP Sections 1.2.2, 2.0 and 2.2; and 7/1/21 RAOR Sections 4.3.1 through 4.3.16 (considering remedial alternatives) and Section 6.2 (summarizing the selected remedial alternatives).

DNR does not have the authority to require that Beazer perform only one enumerated NR 708.11(2) Specific Interim Action to the exclusion of other possibly more effective, more practicable, or more economically feasible actions. Moreover, DNR's direction that Beazer not consider engineering structures is contrary to applicable law. First, NR 708.11(2)(d) expressly allows for temporary engineering controls such as low-permeability covers, while NR 708.11(4) expressly allows for DNR-approved engineering controls to be implemented as an interim action pursuant to the NR 724 approval process. Second, under NR 700.03(17), "Engineering control" has the meaning specified in s. 292.01 (3m): an "action designed and implemented to contain contamination or to minimize the spread of contamination, including a cap, soil cover, or **in-place stabilization**, but not including a sediment cover." (emphasis added) Beazer's proposed use of ISS as **in-place stabilization** would be effective – designed and implemented to contain or minimize the spread of contamination – and statutorily compliant with NR chs. 700-799.

Separately, DNR's demand for a "permanent" action as part of an interim action is also contrary to applicable law. The NR 708.11(3) selection criteria for interim action does not require that the interim action selected by the responsible party be "permanent;" but instead requires that the interim action be "...protective of public health, safety, and welfare and

the environment for the exposure pathways being addressed and any solid or hazardous waste or the hazardous substances and contaminated environmental media being generated,” and be “consistent with the final remedial action that is likely to be selected for that pathway of exposure or contaminated environmental media that is being addressed by the interim action”.

10. In the area of the former tar lagoons adjacent to the utility trench, where the DNAPL is migrating off-site, excavation combined with in-situ stabilization (ISS) or an equally effective permanent remedy must be implemented to prevent further migration.

No revision to the documents is necessary because they already contain the requested remedial components.

As an initial response, Beazer disagrees with DNR’s assertion that DNAPL is migrating off-site. The former tar lagoons adjacent to and within the City Parcel¹ are within the bounds of the former Koppers tar plant. Redistribution of DNAPL from the former lagoons has occurred as a result of various construction activities, not migration. Further, the redistribution of DNAPL within the Site bounds into the void created by installation of a monitoring well within the former tar plant property bounds is also not “off-site” DNAPL migration.

In the 5/3/21 IAWP and 7/1/21 RAOR, Beazer proposed as components of a comprehensive remedy: ISS, a soil cover, and a barrier wall in the area of the former tar lagoons adjacent to the utility trench. This approach is as equally effective a remedy as excavation combined with ISS at preventing DNAPL tar from migrating, just as was requested by DNR in the above-quoted item. Further, and as noted above in Beazer’s response to enumerated item 9 above, in-situ stabilization (i.e., ISS) is an accepted engineering control under NR 708 to contain or minimize the spread of contamination. The use of ISS, a soil cover and a barrier wall to cap, stabilize, and contain DNAPL tar is a practicable, effective, and cost-effective approach to prevent further migration, and as proposed in the 5/3/21 IAWP and 7/1/21 RAOR, would be equally effective as excavation combined with ISS.

Separately, Beazer also notes that the NR 722.07(4) evaluation criteria for a remedial action option, which are categorized into NR 722.07(4)(a) Technical Feasibility requirements and NR 722.07(4)(b) Economic Feasibility Requirements, do not require that a remedy be “permanent.” but instead require that the remedial action option be evaluated to assess its Long-Term Effectiveness: “effectively and efficiently [address] the sources of contamination” and taking into account “the degree to which [the] remedial action option ... will protect public health, safety, and welfare and the environment over time.”

¹ 2-acre portion (Lot 1) of the Utility Corridor Property owned by the City of Oak Creek where the Koppers plant historically operated.

11. Make reasonable progress toward completion of an environmental investigation and environmental restoration of the property.

No revision to the documents is necessary, as Beazer has timely responded and timely submitted documents as requested in every DNR request since the time Beazer entered the VPLE Program in 2014. Beazer again refers the DNR to, and incorporates by reference herein, the timeline of events described in the March 6, 2020 letter from Michael R. Noel of Tetra Tech to Eric Amadi at DNR. This timeline highlights (a) Beazer's proactive efforts to seek a resolution of this matter as part of the VPLE Program; and (b) DNR's untimely and misguided refusal to approve any documents submitted by Beazer. Additional information responsive to the DNR allegation that Beazer has not made reasonable progress toward completion of an environmental investigation and environmental restoration of the property is provided within Beazer's September 29, 2021 letter to DNR withdrawing from the VPLE program. Beazer has always timely and reasonably responded to DNR timelines, responses, comments, and demands and, where necessary and appropriate, to proposals to gather more data, to implement sampling activities, or provide the analysis and evaluation of technical questions requested by DNR. Beazer has consistently been forthcoming and proactive in its approach toward seeking a permanent, environmentally protective, resolution at this Site. Any lack of progress is the result of DNR inaction, reversals of position, or delays.

12. The DNR directs Beazer to select remedial activities from the array of options previously provided in the remedial option matrix or an alternate remedy that is as effective as the remedial options included in the matrix.

No revision to the documents is necessary, as Beazer incorporated and evaluated the remedial action options presented by DNR in its submissions. Beazer interprets DNR's reference to "the array of options previously provided in the remedial options matrix" to mean the DNR-prepared matrix of remedial options DNR shared with Beazer during the meeting held May 15, 2018 (the 2018 DNR Matrix). Beazer's 7/1/21 RAOR included each of the remedial options identified in the 2018 DNR Matrix. See, e.g., Section 4.0 generally and Sections 4.3.1 through 4.3.16 specifically. In accordance with statutory requirements provided in NR 722.07(3) governing evaluation of remedial action options, Beazer selected an alternate remedy that is as effective in reducing exposure and risk as the remedial options included in the 2018 DNR Matrix. NR 722 requires the selected remedial options to meet specific evaluation criteria for technical and economic feasibility, and Beazer evaluated the remedial activities presented in the 2018 DNR Matrix against these criteria.

13. Submit a Revised Interim Action Work Plan that results in immediate action by conducting free product removal to abate free product migration. This includes an active removal action on site.

No revision to the documents is necessary, as Beazer already included free product removal in its submitted work plan. Beazer proposed free product removal from monitoring wells as a component of the 12/21/20 IAWP and the 5/3/21 IAWP. See, e.g. 12/21/20 IAWP and 5/3/21 IAWP Sections 1.2.2 and 2.2.

14. Submit a Revised RAOR that presents an overall remedial strategy to address the known contamination at the site. The evaluation must include the remedial actions proposed by the DNR in the matrix of remedial options for each area of the property.

No revision to the documents is necessary, as Beazer's RAOR already presents an overall Site remedial action and evaluates the remedial options proposed in the 2018 DNR Matrix. Beazer's 7/1/21 RAOR presents an overall remedial strategy to address the known contamination at the Site, and includes evaluation of the array of options previously provided in the 2018 DNR Matrix of remedial options for each area of the property. The 7/1/21 RAOR evaluated and recommended remedial alternatives from the array of options contained in the 2018 DNR Matrix. See, e.g., Section 4.0 generally and Sections 4.3.1 through 4.3.16 specifically (presenting the array of alternatives), Section 5.0 generally (providing the comparative analysis of alternatives), and Section 6.0 generally and Section 6.2 specifically (summarizing the selected remedial alternatives). Beazer selected an alternate remedy that is as effective in reducing exposure and risk as the remedial options included in the 2018 DNR Matrix. NR 722 requires the selected remedial options to meet specific evaluation criteria for technical and economic feasibility, and Beazer evaluated the remedial activities presented in the 2018 DNR Matrix against these criteria.

B. Beazer's Response to Several Unenumerated DNR Requests

Following the fourteen enumerated requests as listed and responded to above, DNR's Notice continues with several unenumerated requests as follows (with each DNR request restated below in ***bold italic font*** with Beazer's response provided immediately thereafter):

The DNR is directing and has directed you to complete an action that addresses the DNAPL tar source material. This free product removal may be achieved through excavation at areas with impacted soil and groundwater. ISS, as proposed, is not adequate. A removal action is necessary.

No revision to the documents is necessary, as each of Beazer's 5/3/21 IAWP and 7/1/21 RAOR did consider and indeed proposed interim and remedial actions that addressed DNAPL tar source material on the Site using a combination of alternatives including removal, containment, and monitoring. In the 7/1/21 RAOR, see, e.g., Section 4.0 generally and Sections 4.3.1 through 4.3.16 specifically (presenting the array of alternatives), Section 5.0 generally (providing the comparative analysis of alternatives), and Section 6.0 generally and Section 6.2 specifically (summarizing the selected remedial alternatives).

Beazer notes that – contrary to the position stated in this request – DNR does not have the authority under Wisconsin law to require that Beazer perform only one enumerated NR 708.11(2) Specific Interim Action to the exclusion of other effective, practicable, or economically feasible actions. Beazer has followed the process described in NR 722. In Beazer’s view, DNR has not provided any meaningful review or comment to the technical merits of Beazer’s evaluation process, but has instead merely offered opinions or made declarations unsupported by the facts, evidence, or wealth of Site investigation data generated over the last decade. To that end, DNR’s statement that ISS is inadequate is wholly unsupported and contrary to what Beazer has proposed. Beazer has not proposed to use ISS alone, but instead offers ISS as one alternative incorporated into a comprehensive remedial approach utilizing removal, containment, and monitoring actions; all of these components are in compliance with NR 722, which requires that the selected remedial options meet specific evaluation criteria for technical and economic feasibility.

Beazer further notes that since at least August 2017², the DNR has eschewed a remedial approach that would require excavation and removal of all Site media. Indeed, DNR specifically stated as much in an August 14, 2017 letter to Beazer: “*The department does not expect Beazer to remove all contaminated soil and waste materials across the entire site. That type of remedial action is neither practical nor feasible to be completed.*” The DNR statements from the Notice quoted above reflect a completely contradictory stance, variously directing Beazer to perform “*excavation at areas where there is no dispute to impacted soil and groundwater*”, directing Beazer not to consider engineering structures, and directing Beazer to perform “*...free product removal... achieved through excavation at areas with impacted soil and groundwater...*”, and that “[a] removal action is necessary.” These directions are unsupported by the facts and circumstances at the Site, and appear to reflect an arbitrary and capricious decision to preference removal over other remedial options in a manner that goes beyond DNR’s authority under NR chs. 700-799.

The Work Plan does not include a remedy that adequately addresses the DNAPL tar source material. ISS from 0-6 feet below ground surface (bgs) is proposed in specific areas across the site. The 6-foot-depth will not address the majority of the DNAPL tar source, nor the highest concentrations of contamination, as 4-8 feet of fill material exists above the DNAPL tar source material. A majority of the planned ISS will not be installed deep enough to encounter the DNAPL tar source material. Therefore, the majority of DNAPL tar source material will remain unaddressed. In essence, Beazer’s proposal is to use ISS to install a 6-foot cap in limited areas across the site. If Beazer completes the proposed action, the DNAPL tar source material would still be expected to continue to 1) migrate, 2) contaminate the groundwater, and 3) off-gas to create a risk of vapor intrusion for any future redevelopment of the property. The proposed actions are inadequate and not protective of human health and the environment now or in the future.

² August 14, 2017 DNR letter to Michael Slenska, *Enforcement Conference Summary Letter*

No revision to the documents is necessary, as the remedial approach presented in the 5/3/21 IAWP and 7/1/21 RAOR reflect a comprehensive remedial approach that addresses all potential pathways of exposure and protects human health and the environment in a manner fully compliant with Wisconsin law. First, ISS from 0-6 feet bgs is intended to eliminate the potential tar seep migration pathway. ISS would be applied to areas where tar was observed within the 0-6-foot depth interval. No tar was observed in the 0-6-foot interval outside of the proposed ISS footprint. ISS will consist of mixing binding agents into the soil with potentially mobile tar to transform the material into a durable, low-hydraulic conductivity material that reduces the tar mobility, provides a barrier to potential surface seeps and reduces potential infiltration and the potential for dissolved phase transport in ground water.

Second, the final remedy includes an additional 2-foot soil cover resulting in at least 8 feet of separation from potentially mobile tar across the entire Site. Migration of DNAPL tar source material to the ground surface has only been observed at the Site in one location, but with the completion of the proposed action, the DNAPL tar source material would no longer be expected to migrate to the ground surface.

Third, control of potential horizontal tar migration would be addressed by Beazer's proposed ISS wall on the north side of the utility trench and trench plugs around the 78" storm sewer in the utility corridor. Despite the release of tar 60 to 100 years ago, the resultant contaminated groundwater plume is substantially the same size as the observed tar footprint. The only potential groundwater migration pathway is through the more permeable fill within the utility corridor, which would be addressed by this proposed ISS wall and trench plugs. Currently, monitoring wells MW-1, MW-136, MW-112 and MW-132 at the downgradient portion of the utility corridor demonstrate that the groundwater plume is stable, so while there is no active migration, the ISS wall and trench plugs eliminate any potential for active migration in the future.

Fourth, DNR's stated concern regarding vapor intrusion is also addressed in Beazer's documents. The January 18, 2019 Supplemental Site Investigation included soil gas sampling results showing no levels above the WDNR Vapor Risk Screening Levels. These initial results suggest that the residual DNAPL materials at the Site may not pose a significant potential soil vapor risk. Nevertheless, the final remedy proposed by Beazer included Site wide institutional controls to be applied in conjunction with other remedial alternatives that include requirements to install vapor mitigation systems for any potential future occupied structures constructed at the Site and over other areas of impacted residual soil and groundwater that have the potential for volatilization. Therefore, Beazer's proposed remedy addressed even the hypothetical future risk of vapor intrusion (a risk that would already be substantially reduced upon implementation of the proposed 0-6ft bgs ISS and 2ft cover of clean fill).

In sum, all of the proposed actions described above and included within Beazer’s 5/3/21 IAWP and 7/1/21 RAOR are, in fact, adequate and protective of human health and the environment now and in the future, and are in compliance with NR 722 requiring that the selected remedial options meet specific evaluation criteria for technical and economic feasibility.

On the north side of the utility trench, an ISS wall is proposed to a deeper depth, from 0-15 feet bgs, as shown in the Work Plan’s Figure 4. The ISS wall is approximately 325 feet in length. The vertical depth of the DNAPL tar source material remains undefined in this area. Although deeper ISS is planned in a limited area, no removal of the DNAPL tar source material is proposed.

No revision to the documents is necessary. The vertical depth of DNAPL tar does not “remain undefined” in this area. Borings along the southern Site boundary and within the utility corridor, highlighted in the below table, show the depth of DNAPL tar does not extend below an elevation of 652 ft. msl. The bottom of the 15-foot deep ISS wall corresponds to an elevation of 650 ft msl – two feet below the DNAPL tar depth in this area. In addition, 6 pre-design soil borings were proposed in the 5/3/21 IAWP to confirm the depth of DNAPL, and the IAWP proposed that the depth of the ISS wall would be adjusted if needed. Therefore, even if it could be argued that the depth of DNAPL tar were “undefined” in this area, Beazer’s proposed remedy approach made provision for (a) additional sampling; and (b) a deeper ISS wall if that sampling showed DNAPL tar at lower depths.

Borehole ID	B-18	B-88	B-17	B-89	B-126	B-125
Surface Elevation (ft. msl)	669	666	665	664.5	667	665
Depth of Tar (ft)	14	13	12.5	11.5	14	13
Elevation of Tar (ft msl)	655	653	652.5	653	653	652

The attached figures illustrate the depth of the proposed ISS in relation to the known depth of the DNAPL tar source material. The base maps were provided by Beazer in June 2020. The DNR incorporated Beazer’s proposed action to illustrate the proposed completion of ISS from 0-6 feet bgs in relation to the reported DNAPL tar source material.

No revision to the documents is necessary, as the base maps enclosed with the Notice misrepresent what ISS from 0-6 feet is intended to accomplish. ISS will consist of mixing binding agents into the soil with potentially mobile tar to transform the material into a durable, low-hydraulic conductivity material that reduces the tar mobility, provides a barrier to potential surface seeps and reduces potential infiltration and ground water dissolved phase transport. It is neither practicable, nor cost-effective, nor necessary to be protective of human health and the environment for ISS to be applied below 6 feet bgs at this Site.

C. Beazer's Response to DNR's Demands for Additional Action

The DNR directs Beazer to conduct an interim action to completely remove the DNAPL tar source material or complete a combination of removal with ISS. This interim action must include free product removal, as an immediate action, to abate free product migration. Per Wis. Admin. Code §§ NR 708.13 and 716.17(3), submit a Revised Interim Action Work Plan that details the planned immediate action. Submittal of this Revised Interim Action Work Plan is required within 30 days, by September 30, 2021.

As Sections A and B above indicate, Beazer believes that no revisions to the May 3, 2021 IAWP are necessary. However, as a measure of good faith and in an ongoing effort to advance remedial activities, and because DNR has ordered Beazer to do so, Beazer will submit a further Revised Interim Action Work Plan which includes an excavation component on or before the requested date of September 30, 2021, but Beazer does not believe an excavation component is necessary to protect human health and the environment or otherwise comply with Wisconsin law.

Additionally, the DNR further directs Beazer to submit a Revised RAOR that incorporates the above Revised Interim Action Work Plan. The Revised RAOR must present an overall remedial strategy to address the known contamination at the site. The evaluation must include the remedial actions proposed by the DNR in the matrix of remedial options for each area of the property. Additional remedial actions may be evaluated that result in a similar restoration of the environment. Proposing ISS alone is not appropriate for the multitude of reasons shared above. The RAOR must include a selected remedial action for each area of the property. The DNR directs this Revised RAOR be submitted within 60 days, by October 30, 2021.

As Sections A and B above indicate, Beazer believes that no revisions to the 7/1/21 RAOR are necessary. However, as a measure of good faith and in an ongoing effort to advance remedial activities, and because DNR has ordered Beazer to do so, Beazer will submit a further Revised RAOR which incorporates the further Revised Interim Action Work Plan on or before the requested date of October 30, 2021, but Beazer does not believe that a revised RAOR is necessary to protect human health and the environment or otherwise comply with Wisconsin law.

D. Beazer Is in Compliance with Applicable Law

The Notice states the following:

To clarify, Beazer is in noncompliance and will remain in noncompliance until Beazer fulfills applicable remedial action requirements at this site.

This statement is incorrect. Beazer is now and has been in full compliance with the statutory requirements of NR chs. 700-799. Beazer conducted a fulsome and complete Site Investigation, Beazer produced a fulsome and complete RAOR, and Beazer has remained willing, ready and able to implement remedial action at this Site. But for DNR's dilatory conduct, arbitrary and capricious disapproval of the 2014 Site Investigation three years after approving it, unwillingness or inability to provide substantive answers to Beazer's technical questions and refusal to approve work plans, Beazer would have already taken steps to implement (or might have already completed) remedial action at this Site.

The repeated assertion by DNR that Beazer's alleged noncompliance arises from a failure to implement immediate action is belied by the fact that immediate action as proposed by the DNR is not regulatorily required at this Site. First, NR 708.05(1) requires immediate action to "halt a hazardous substance discharge," but at this Site the discharges from former tar operations occurred between 60 and 100 years ago. It is impossible to "halt" discharges that happened and ceased happening so long ago. Second, NR 708.05 authorizes only two forms of immediate action, and neither is applicable at this Site. An "emergency" immediate action, as authorized by NR 708.05(2) can only be undertaken when there are "discharges that pose an imminent threat to public health, safety or welfare or the environment." Putting aside that there are no ongoing discharges to halt, this Site poses no "imminent threat" and no direct exposure of contaminants to humans or the environment. A "non-emergency" immediate action is likewise not authorized because the Site fails to satisfy at least two of the four required criteria listed in NR 708.05(3)(b): specifically, to be a non-emergency immediate action, a response action must be undertaken "immediately" after discovery of the discharge (NR 708.05(3)(b)(3)) and must generate less than 100 cubic yards of remediation media (NR 708.05(3)(b)(2)). At this Site, the discharges at issue were "discovered" decades ago and any remedial action will generate in excess of 100 cubic yards of remediation media.

Similarly, DNR's assertion that Beazer should implement an interim action at this Site is also not supported by applicable law. NR 708.11(1)(a) requires that the need for an interim action be evaluated during and after completion of the site investigation. Beazer submitted its Site Investigation Report on January 14, 2014 and no interim action was warranted at that time. DNR approved that Report, but three years later reversed course and retracted its approval. Beazer submitted a Supplemental Site Investigation Report on January 18, 2019, again concluding that no interim action was warranted. An interim action is no more warranted today than it was in 2019 or in 2014.

Notwithstanding that no immediate or interim action is authorized under Wisconsin law, Beazer submitted its IAWPs because DNR ordered Beazer to do so. To the extent DNR considers Beazer to be in noncompliance for its purported failure to implement the IAWPs, Beazer reminds DNR that as a participant in the VPLE Program, Beazer was required by law to seek and obtain DNR approval before implementing any work plans. In sum, any allegation that Beazer failed to "fulfill applicable remedial action requirements" is simply incorrect where, as here, the law does not require immediate or interim action and, even if it did, Beazer was prevented from implementing its work plans due to DNR's failure and/or refusal to approve those work plans.

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As Beazer noted in its September 29, 2021 letter, Beazer has formally withdrawn from the VPLE Program. Beazer intends to address those issues at the Site that are Beazer's responsibility under Wisconsin Administrative Code NR chapters 700-799 in a manner that will restore the environment to the extent practicable and minimize harmful effects at the Site.

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

Sincerely,


Mike Bollinger

Sr. Environmental Manager
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