



April 19, 2024

Mr. Edward Witte
Godfrey & Kahn, SC
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Milwaukee, WI 53202

Mr. Ferdinand Alido
Navistar, Inc.
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Lisle, IL 60532

Mr. Adam Templer
Bear Development
White Rock MF, LLC
4011 80th St
Kenosha, WI 53142

Mr. Bruce Keyes
Foley & Lardner LLP
777 E Wisconsin Ave
Milwaukee, WI 53202

Also sent electronically to all addressees

Subject: Liability Clarification Request regarding responsibility for actions at off-site affected properties at 1420 and 1421 White Rock Avenue, Waukesha, WI.
BRRTS #: 07-68-586162, 07-68-586161, and 02-68-098404

Dear Messrs. Witte, Alido, Templer and Keyes:

The Wisconsin Department of Natural Resources (DNR) received a request for liability clarification with the applicable review fee on October 16, 2023, which included an “Addendum” prepared by Edward Witte of Godfrey & Kahn law firm, representing Navistar, Inc (Navistar). Navistar is a responsible party for one or more hazardous substance discharges that originated at 1401 Perkins Avenue, in Waukesha (Source Property). The request asks whether Bear Development, LLC is responsible for vapor-related response actions, including operation and maintenance of vapor mitigation systems, at properties located at 1420 and 1421 White Rock Avenue (Off-site Properties). As the DNR understands, the Off-site Properties are owned by White Rock MF, LLC, which is owned by business entities including Bear Development, LLC. For purposes of this letter, “Bear” means Bear Development, LLC and/or White Rock MF, LLC, as applicable.

Request

The Addendum provides background information and specifically asks for:

“...an Environmental Liability Clarification Letter interpreting the provisions of §292, and specifically §292.13(1)(f), that Navistar, Inc. is not legally responsible for actions to investigate and mitigate, including operation and maintenance of necessary mitigation systems, the vapor phase of the Navistar

Groundwater Discharge where a property owner, Bear, knowingly altered conditions over the Navistar Groundwater Discharge after Bear received a §292.13 Off Site Liability Exemption letter by creating human receptors to the potential vapor phase pathway. Navistar, Inc. maintains that these facts reflect conditions or actions on the part of the otherwise exempt property owner that have worsened the vapor phase discharge of a groundwater discharge.”

The DNR also received correspondence on September 22, 2023, from attorney Bruce Keyes, of Foley & Lardner, on behalf of Bear, requesting that the DNR require Navistar to complete the activities in a work plan developed by Ramboll, the consulting firm for Bear, for commissioning the vapor mitigation system at the 1421 White Rock Avenue property.

Background Information

The DNR has reviewed applicable law, the information submitted on behalf of Navistar and Bear, and file information applicable to this request and provides the following background information:

- There is documented groundwater and vapor phase contamination impacting the Off-site Properties.
 - Information to date indicates that the groundwater contamination originated from the Source Property.
 - Navistar continues to conduct site investigation and remedial activities, including treatment for the groundwater contamination in the northwest part of the Source Property. To date, Navistar has not submitted a request for final remedial action approval to the DNR.
 - The DNR issued off-site exemption determination letters to Bear for each of the Off-site Properties on September 21, 2020. In the exemption determination letters, the DNR concluded that Bear met the requirements for the off-site liability exemption under Wis. Stat. § 292.13 and must meet specified conditions in Wis. Stat. §§ 292.13(1) and (1m). As a condition of the exemption Bear must agree to “avoid actions that worsen the discharge,” as required under Wis. Stat. §§ 292.13(1)(f) and (1m)(f). The exemption determination letters also included the following statement:

“Since development of the Property is currently planned, the Property owner should work with an environmental consultant to evaluate whether vapors from the groundwater contamination may pose a risk and provide an acceptable vapor mitigation system.”
- Bear conducted vapor investigation at both Off-site Properties. Based on that investigation, Bear installed and is operating an active vapor mitigation system under the building at 1421 White Rock Avenue. In addition, Bear installed a passive vapor mitigation system under the building at 1420 White Rock Avenue. To date, the DNR has not received a request for approval of the investigation or mitigation actions performed by Bear.
- Under Wis. Admin. Code § NR 724.13(1)(c), “[r]esponsible parties and property owners shall operate vapor mitigation systems for which they are responsible until no longer required by the [DNR].”

Determinations

Based on the information available, the DNR determines:

For Bear:

- Based on the information available to date, Bear’s development activities have included assessment and mitigation actions in order to avoid worsening the discharge. The development activities taken by Bear do not appear to have caused any interruption of, or changes to, the groundwater flow system nor to have caused any documented increase in infiltration or additional hazardous substance discharges. Bear has taken actions to test for and, as applicable, mitigate the potential vapor intrusion risk for the buildings that were constructed on the Off-site Properties.
- While Bear has taken steps to avoid worsening the discharge, Bear must take additional steps to verify that it has provided acceptable vapor mitigation systems and to continue to avoid action that may worsen

the discharge. These steps include conducting additional testing and potentially mitigation to verify the conditions at each of the Off-site Properties are protective of public health:

- For the 1421 White Rock Avenue property, performance testing, commonly referred to as “commissioning,” is needed to demonstrate that the active vapor mitigation system is acceptable and preventing vapor intrusion and that indoor air levels will remain below vapor action levels (VALs) as defined in Wis. Admin. Code § NR 700.03(66p).
- For the 1420 White Rock Avenue property, additional sub-slab and indoor air testing is needed to determine whether the passive vapor mitigation system is acceptable and is preventing vapor migration into the building. Installation and commissioning of an active vapor mitigation system may be needed, based on the results of the additional testing.
- Commissioning activities should include three successful testing events, to include pressure field extension testing and indoor air testing. The DNR recommends use of passive samplers for indoor air testing. It is recommended that Bear submit a commissioning plan with the applicable fee under Wis. Admin. Code ch. NR 749, for DNR review.
- For both Off-site Properties, submittal, and DNR approval, of documentation of the above actions is needed, and the final documentation should be provided to the DNR as soon as practicable upon completion of actions. Submittal of results for each commissioning event with any recommendations for system or testing adjustments is recommended. The documentation should include as-built diagrams for the systems.
- Pursuant to Wis. Stat. § 292.13(1m)(f), Bear must not interfere with the operation of the vapor mitigation systems and should notify Navistar if the systems malfunction or otherwise do not appear to be operating effectively.
- Pursuant to Wis. Stat. § 292.13(1m)(d), Bear must provide access to Navistar for inspection and maintenance of the vapor mitigation system(s) at the Off-site Properties until case closure, at which time the responsibility for maintaining and monitoring the systems will be transferred to Bear or the current owners of the Off-site Properties at that time.
- Bear must continue to comply with all applicable conditions of the off-site liability exemption under Wis. Stat. §§ 292.13(1) and (1m).

For Navistar:

- Navistar, as the responsible party for open DNR BRRTS case # 02-68-098404, is required to comply with the Spill Law and the applicable requirements of Wis. Admin. Code chs. NR 700-799, for the discharge(s) on the Source Property and impacts to off-site affected properties. Navistar is required to take actions to investigate soil, groundwater, and vapor pathways under Wis. Admin. Code ch. NR 716 and to select and conduct interim and/or remedial actions in accordance with applicable requirements, including under Wis. Admin. Code chs. NR 708, 722, and 724.
- To comply with the requirements of Wis. Stat. ch. 292 and Wis. Admin. Code chs. NR 700 -799, including Wis. Admin. Code §NR 724.13(1)(c), Navistar is responsible to maintain, monitor and inspect the vapor mitigation systems at the Off-site Properties until case closure is approved by the DNR. Navistar must develop and submit operation, maintenance and monitoring (OM&M) plans for the systems at the Off-site Properties that comply with the requirements in Wis. Admin. Code § NR 724.13(2). The OM&M plans should be based on the construction and commissioning information provided to the DNR by Bear.
- Navistar must also include all applicable closure documentation information for the Off-site Properties in its final case closure submittal and provide notifications required under Wis. Admin. Code ch. NR 725 for the Off-site Properties.

The determinations set forth in this letter are subject to change if any of the requirements for or conditions of the off-site liability exemption under Wis. Stat. § 292.13 cease to be met, any of the facts upon which the DNR based its determinations are inaccurate, or new information is presented.

We hope this letter addresses your requests for liability clarification. If you have additional questions, please contact me at (414) 374-2423, or pamela.mylotta@wisconsin.gov.

Sincerely,



Pamela A. Mylotta
Southeast Region Team Supervisor
Remediation & Redevelopment Program