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*Submitted Via Electronic Mail*

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**Re: In the Matter of Koppers Co., Inc, (Newport, Delaware Plant)  
Administrative Order  
EPA Docket No. CERC-03-2023-0064DC**

Dear Mr. Goldman:

The purposes of this letter are threefold: (1) to advise the United States Environmental Protection Agency, Region III (“EPA”), pursuant to Section IX of Administrative Order for Remedial Design/Remedial Action; Revocation of Administrative Order No. CERC-03-2006-0266-DC (“2023 Order”), of Beazer East, Inc.’s (“Beazer” or “Respondent”) intention to comply with the terms of the 2023 Order to the extent such compliance is required under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§9601, *et seq.*, and its implementing regulations, namely the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), 40 C.F.R. Part 300; (2) to outline Beazer’s several objections and defenses to the 2023 Order as issued that constitute, or may constitute sufficient cause defenses for purposes of Sections 106(b) and 107(c)(3) of CERCLA, 42 U.S.C. §§ 9606(b) and 9607(c)(3), respectively; and (3) to provide Beazer’s comments regarding the 2023 Order and Statement of Work (“SOW”) appended to the 2023 Order.

By way of background, on or about September 25, 2006, the EPA issued an Administrative Order for Remedial Design/Remedial Action (Docket No. CERC-03-2006-0266 DC) (the “2006 Order”) to Beazer directing Beazer to implement remedial design and remedial action for the Koppers (Newport Plant) Superfund Site in Newport, New Castle County, Delaware (the “Site”) consistent with the requirements established in EPA’s September 30, 2005 Record of Decision (the “2005 ROD”). The selected remedy described in the 2005 ROD was modified by a May 28, 2010 Explanation of Significant Differences (the “2010 ESD”). On or about August 19, 2014, EPA issued Modification No. 2 to the 2006 Order, suspending certain requirements of the 2006 Order and directing Beazer to complete a focused feasibility study “to provide EPA with information from which it may modify the selected remedial action.” On or about May 2, 2019, EPA issued Modification No. 3 to the 2006 Order (the “2019 Order”), revoking the requirement to conduct a focused feasibility study and directing Beazer to submit a Request for ROD Amendment that would identify and propose an alternative to the 2005 ROD’s selected remedy

as modified by the 2010 ESD. The 2005 ROD’s selected remedy was superseded and replaced by an August 4, 2022 ROD Amendment (the “2022 ROD Amendment”). On or about August 21, 2023, EPA issued the 2023 Order directing Beazer to implement both the 2022 ROD Amendment and the July 6, 2023 Programmatic Agreement Between [EPA]; the Delaware State Historical Preservation Office; and the Advisory Council on Historic Preservation Regarding Cleanup of the Koppers Newport Superfund Site, Newport, New Castle County, Delaware (“Programmatic Agreement”).

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## **I. General Objections and Reservation of Rights**

As an initial matter, by setting forth any objections or defenses in this letter, or by submitting this letter at all, Beazer does not waive, and hereby specifically reserves, all of its rights to raise additional or different objections and defenses to the 2023 Order at some later time, or to provide additional information and evidence in support of any position that it may take in the future.

Without in any way limiting the generality of the foregoing reservation, Beazer specifically reserves and does not, by providing notice at this time, waive its right to assert any arguments, defenses, objections, positions, or claims that would demonstrate sufficient cause for noncompliance with all or portions of the 2023 Order pursuant to Sections 106 and/or 107 of CERCLA, 42 U.S.C. §§ 9606 and/or 9607, or that would support its belief that all or portions of

the 2023 Order are arbitrary and capricious, not supported by the Administrative Record or otherwise not in accordance with law. Moreover, neither this notice nor any information contained herein shall constitute an admission by Beazer with respect to the Site for any purpose, including third party claims or future enforcement proceedings, and Beazer incorporates by reference as if restated herein all prior objections and defenses raised in this matter with respect to the Remedial Investigation/Feasibility Study (“RI/FS”), ROD and its subsequent amendments/modifications, and Proposed Remedial Action Plan (“PRAP”), including, but not limited to, Beazer’s Letter dated January 30, 2006 to Matthew Mellon of EPA from Robert S. Markwell of Beazer entitled “Good Faith Offer for the Koppers (Newport Plant) Superfund Site in Newport, New Castle County, Delaware” and Beazer’s Sufficient Cause Letter dated October 26, 2006 to Matthew Mellon of EPA, Beazer’s Sufficient Cause Letter dated September 23, 2014 to William Geiger, Beazer’s Sufficient Cause Letter dated June 4, 2019 to Christopher Corbett, and Beazer’s January 25, 2023 Letter to Dan Taylor entitled, “Comments to Draft Programmatic Agreement, Koppers (Newport) Superfund Site, Newport, New Castle County, Delaware.” Beazer reserves all rights, claims, and defenses it has, has had, or will have in the future regarding the matters addressed under the 2023 Order or related to the Site, whether under CERCLA or any other law.

Beazer also specifically reserves any affirmative rights and claims it may have to seek for reimbursement from EPA pursuant to Section 106(b) of CERCLA, 42 U.S.C. §9606(b), the right to file claims against the Superfund under Section 112 of CERCLA, 42 U.S.C. §9612, and to pursue any other claims it may have under CERCLA, the United States Constitution, the Administrative Procedure Act, the Federal Tort Claims Act, or any other law. Finally, Beazer does not admit or concede any of the findings and determinations contained in the 2023 Order, Beazer objects to each and every one of such findings and determinations, and Beazer specifically reserves the right to challenge each of such findings and determinations in any future proceeding, regardless of whether or not Beazer herein specifically objected to any of such findings and determinations.

## **II. Notice of Intent to Comply**

Subject to the reservations set forth above, and the objections, defenses, and other qualifications identified herein, Beazer hereby provides timely notification to EPA of its intention to comply with the terms of the 2023 Order to the extent required under CERCLA and the NCP.

## **III. Specific Objections, Defenses, and Requests for Amendment**

### **A. Introduction**

No provision of CERCLA requires a Section 106 Order Respondent to outline its “sufficient cause” defenses at the time an order is issued. Paragraph 26 of the 2023 Order provides that Beazer may provide comments to the 2023 Order, but then attempts to limit the scope of any “sufficient cause” defense asserted by Beazer to “facts that exist on or prior to the Effective Date [of the 2023 Order].” As set forth in greater detail in Section II above, by setting forth

certain objections to the 2023 Order and “sufficient cause” defenses under Sections 106 and 107 of CERCLA herein, Beazer does not waive, and expressly reserves its right to raise additional or different defenses to the 2023 Order at some later time, and hereby preserves all defenses and objections to the 2023 Order and to liability under CERCLA and other applicable laws, whether or not they are specifically set forth in this document, or whether they did or did not exist upon the Effective Date of the 2023 Order.

## **B. Certain of the Findings of Fact are Erroneous**

As an initial matter, the Findings of Fact presented in Appendix D to the 2023 Order reproduce the Findings of Fact from the 2006 Order which refer to certain attachments and the 2005 ROD. However, the 2023 Order omits Attachments 1 and 2 to the 2006 Order and the 2005 ROD was superseded and replaced by the 2022 ROD Amendment. In addition, Paragraph No. 7 of the Findings of Fact contains statements regarding Site structures and/or other physical features which are no longer accurate.

Further, 2023 Order Section IV, Paragraph 12, states:

*EPA [required Beazer to perform an FFS] because it determined that the information supplied by Respondent in the 2007-2010 Investigation called into question the appropriateness of the 2005 Selected Remedy and that additional information was necessary in order to evaluate an alternative remedial action and select such action...*

Beazer previously addressed this statement in its Sufficient Cause Letter dated September 23, 2014, which is incorporated by reference as stated in Section II above, and in which Beazer did not agree that the appropriateness of the remedial designs submitted by Beazer and approved by EPA had been “called into question” or that EPA had acted appropriately in issuing Modification No. 2 to the 2006 Order.

Beazer hereby requests that EPA make the following changes to the 2023 Order in order to correct these erroneous findings of fact:

- a) that 2023 Order Section IV, Paragraph 12 be revised to delete the following sentence: “EPA took this action because it determined that the information supplied by Respondent in the 2007-2010 Investigation called into question the appropriateness of the 2005 Selected Remedy and that additional information was necessary in order to evaluate an alternative remedial action and select such action in a manner not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), 40 C.F.R. Part 300.”
- b) that Appendix D be removed/struck from the 2023 Order; and
- c) instead of Appendix D, that 2023 Order Section IV be supplemented by whatever

additional paragraphs EPA believes are necessary to make Section IV complete.

### **C. Certain Requirements of the 2023 Order are Arbitrary and Capricious, Not Supported by the Administrative Record and Not in Accordance with CERCLA and Other Laws.**

In reviewing the 2023 Order and appended Statement of Work (“SOW”), Beazer notes several provisions that are inconsistent with CERCLA and/or its implementing regulations, or that are not covered by CERCLA at all, thereby rendering all or portions of this 2023 Order invalid and unenforceable. The following points highlight the ways in which the 2023 Order are arbitrary, capricious, not supported by the Administrative Record or are otherwise not in accordance with CERCLA or other laws and, therefore, are invalid and unenforceable.

#### **1. EPA’s Process for Review of Submissions and Project Personnel Exceeds EPA’s Statutory Authority**

The provisions of the 2023 Order that relate to EPA’s review of Beazer submissions and Beazer project personnel (*e.g.*, Section X, Paragraphs 29, 30, 33 and 50, and the referenced paragraphs of the SOW) are objectionable because they do not specify the standards that EPA will apply in reviewing and approving such submissions and project personnel. Rather, these provisions attempt to provide EPA with the absolute power and authority to approve, disapprove, or modify submissions and/or project personnel, regardless of applicable law. EPA’s decisions in reviewing submissions are subject to the standards in CERCLA, the NCP, and other relevant statutes and regulations, including without limitation the federal Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 *et seq.* Beazer reserves all rights to object to EPA’s actions with respect to any submission and/or designation of project personnel to the extent that they exceed EPA’s authority, are not adequately supported by law or fact, are not cost-effective, or are unreasonable, irrational or arbitrary or capricious. Beazer’s objections extend to all provisions of the 2023 Order that require submissions and/or designation of project personnel to EPA.

In addition, Section X, Paragraph 30 of the 2023 Order purports to grant EPA unfettered discretion to determine when the SOW required under Section X of the 2023 Order has been fully performed, and would require Beazer to unquestioningly incorporate any modifications, comments or other changes that EPA may have to Beazer’s submissions. Such a requirement has no authority under CERCLA or other applicable law, and Beazer specifically reserves its rights to object to EPA’s list of deficiencies or modifications required to correct such deficiencies. Beazer objects to any provision of the 2023 Order that suggests that failure to incorporate such changes constitutes noncompliance with the 2023 Order.

Moreover, Section XIV, Paragraph 50 of the 2023 Order provides EPA with an unqualified authority to arbitrarily designate as a violation of Paragraph 49 of the

Order any perceived delay in progress that Beazer has not “properly justified.” In addition, the stringent notification requirements of Paragraph 49 of the 2023 Order for Beazer to provide notification to EPA of any delay or anticipated delay within 48 hours and further provide a written explanation of the mitigation of the delay is overly burdensome and serves no rational purpose toward the completion of the remedial action.

Finally, Sections 4.3 and 4.6 of the SOW grants EPA unqualified ability to arbitrarily conclude whether components of the remedial action are complete, and to obligate Beazer to address “deficiencies” according to a schedule set by EPA.

## **2. The Obligations to Provide Financial Assurance and Insurance Exceed EPA’s Authority**

Section XII of the 2023 Order requires Beazer to secure financial assurance to demonstrate its ability to complete the Work required by the 2023 Order. No basis exists under Section 106 of CERCLA for requiring Beazer to provide such financial assurance. In fact, the legislative history for CERCLA clearly indicates that Congress specifically contemplated that a respondent's financial inability to comply with a Section 106 order would preclude the assessment of penalties. *See* comments of Senator Stafford (a bill sponsor) quoted in *United States v. Reilly Tar & Chemical Corp.*, 606 F. Supp. 412, 420 (D. Minn. 1985). For this reason, this requirement is arbitrary and capricious, inconsistent with CERCLA and the NCP, and beyond EPA's authority pursuant to Section 106.

Section XIII, Paragraph 48, of the 2023 Order requires Beazer to secure certain insurance. For the same reasons articulated above, this requirement exceeds the authority of EPA granted under CERCLA Section 106. Moreover, given the general difficulty of obtaining such insurance and the probable excessive cost and deductible thresholds, it would be arbitrary and capricious for EPA to require Beazer to purchase such insurance in lieu of self-insuring, especially in light of Beazer’s demonstrated financial ability to pay such claims.

In addition, Paragraph 48 requires Beazer to name the United States as an additional insured with respect to all liability arising out of the activities performed by or on behalf of Beazer with respect to the 2023 Order. No such authority for this requirement is provided under CERCLA or applicable law.

## **3. The 2023 Order Lacks Due Process Rights to Raise Objections to the 2023 Order**

EPA has not provided for a hearing or other opportunity to comment on the provisions of the 2023 Order or to raise objections to the 2023 Order as is required by the due process clause of the Constitution of the United States. Certainly, the opportunity to have the conference or to provide written materials pursuant to

Paragraphs 22 and 23 of the 2023 Order does not cure this flaw. Paragraph 23 states in pertinent part:

*This conference is not an evidentiary hearing, does not constitute a proceeding to challenge this Order or the RA, and does not give Respondent a right to seek review of this Order or the RA.*

Accordingly, EPA has provided no meaningful mechanism for Beazer to raise legitimate challenges to the provisions of the 2023 Order. EPA's failure to provide Beazer with a fair and objective forum to raise its objections violates the due process clause of the United States Constitution, the Administrative Procedures Act, and CERCLA.

**4. The National Historic Preservation Act (“NHPA”), 54 U.S.C. § 306108 et seq., is Not Applicable and Does not Impose Any Obligations on Beazer**

- a) The NHPA is not a “Relevant and Appropriate” Standard, Requirement, Criteria, or Limitation under CERCLA

EPA has improperly ordered Beazer to comply with the NHPA. Section IV, Paragraph 11 of the 2023 Order states:

*On August 16, 2010, EPA issued Modification No. 1 to the 2006 Order (Appendix C) incorporating modifications to the 2005 Selected Remedy selected by EPA in a May 28, 2010, Explanation of Significant Differences (“ESD”). The ESD made clear that certain provisions of the National Historic Preservation Act of 1966, 16 U.S.C. § 470 et. Seq., and its implementing regulations (“NHPA”) were applicable requirements with respect to the 2005 Selected Remedy within the meaning of Section 121(d) of CERCLA, 42 U.S.C. § 9621(d).*

Further, the Programmatic Agreement states on Page 1:

*WHEREAS, EPA has identified the procedural requirements of Section 106 of the National Historic Preservation Act of 1966 (“NHPA”), 54 U.S.C. 300101 et seq. as amended, and its implementing regulations at 36 C.F.R. Part 800 as “relevant and appropriate” to the Project within*

*the meaning of Section 121(d) of CERCLA, 42  
U.S.C. 9621(d)...*

EPA has exceeded its authority under CERCLA in designating the NHPA and its implementing regulations (36 C.F.R. § 800 *et seq.*) as a “relevant and appropriate” federal *environmental* requirement, standard, criteria, or limitation (“ARAR”) applicable to the “Project.” Specifically, section 121(d) of CERCLA (42 U.S.C. § 9621(d)) concerns the degree of cleanup to be achieved by remedial actions and directs EPA to select ARARs that apply to hazardous substances or pollutants or contaminants under relevant federal or state *environmental* laws. *See also* 40 C.F.R. § 300.5 (requiring both “applicable requirements” and “relevant and appropriate requirements” to be “promulgated under federal environmental or state environmental or facility siting laws”); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 671 (5th Cir. 1989) (“ARARs include ‘any standard, requirement, criteria, or limitation under any Federal environmental law’ or any more stringent ‘State environmental or facility siting law.’ ”). Quite simply, the NHPA is no more an example of a federal environmental law than the federal Copyright Act or Bankruptcy Code and does not come within the scope of permissible ARARs that Congress authorized under the CERCLA statute.

In sum, the NHPA is not a federal environmental law and, therefore, is not among the permissible categories of laws and regulations that EPA has legal authority to designate under CERCLA § 121(d) as an ARAR. For this reason alone, EPA does not have authority to direct Beazer to implement any of the provisions or requirements of the NHPA as part of the CERCLA remedial action or cleanup process.

b) The NHPA By Its Terms Does Not Apply to the CERCLA Remedial Action at the Site

Even if the NHPA was an ARAR, which it is not, the CERCLA remedial action proposed for the Site does not meet the threshold criteria for application of the NHPA. It is well-established that two basic criteria must be satisfied for the NHPA to apply: (1) there must be an “undertaking” as that term is defined in the NHPA and its implementing regulations; and (2) that undertaking must either receive federal funding, or require the federal issuance of a license. *See* 54 U.S.C. § 306108; *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 755-56 (D.C. Cir. 1995) (describing the two-step process for application of the NHPA).

Neither of the two Section 106 criteria are met with respect to the remedial action at the Site. As to the second criterion listed above, Section 106 of NHPA makes clear that the expenditure of federal funds or the issuance of a license is a prerequisite for the NHPA to apply:

*The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.*

54 U.S.C. § 306108 (emphasis added).

Case law confirms that it is not enough to simply meet the requirements of an “undertaking,” to determine that the NHPA applies. Rather, for the NHPA to apply, the undertaking must also either receive federal funding or require the federal issuance of a license. *Sheridan supra*, 49 F.3d at 755 (“Thus, however broadly the Congress or the ACHP define ‘undertaking,’ §106 applies only to: 1) ‘any Federal agency having ... jurisdiction over a proposed Federal or federally assisted undertaking’; and 2) ‘any Federal ... agency having authority to license any undertaking.’”); *Bus. & Residents All. Of E. Harlem v. Jackson*, 430 F.3d 584, 591-92 (2d Cir. 2005) (citing *Sheridan* and noting that even if a project fits under the NHPA’s definition of an undertaking, NHPA does not apply if the agency does not have authority to license the project or “the power to approve or otherwise control the expenditure of federal funds on the undertaking”); *Nat’l Min. Ass’n v. Fowler*, 324 F.3d 752, 760 (D.C. Cir. 2003) (noting NHPA confers jurisdiction over federally funded or federally licensed undertakings “only”); *Menominee Indian Tribe of Wisconsin v. U.S. Env’tl. Prot. Agency*, 360 F.Supp.3d 847, 855-56 (E.D. Wis. 2018) (holding that even if the project at issue fits under the NHPA definition of undertaking, there was no violation of NHPA because no federally funded or federally licensed project was involved).

Consequently, the NHPA does not apply in this instance because there is **no federal funding and no federal licenses to be issued at the Site**. EPA has not approved and will not approve the expenditure of federal funds because Beazer, a private party, will implement and fund the remedial action. In addition, EPA does not have authority to issue and will not issue a license or permit with respect to the Site. Indeed, CERCLA Section 121(e), 42 U.S.C. § 9621(e), clearly states that no federal permits are required for a CERCLA remedial action. And Paragraph 27 of the 2023 Order specifies that no permits are required and that the 2023 order shall not be construed to be a permit. In short, Section 106 of the NHPA does not apply to the Site because there is no federal funding and EPA will not be issuing any licenses or permits.

As to whether there is an “undertaking,” the remedial action at the Site does not fall under the definition of an “undertaking.” The definition section of the NHPA,

54 U.S.C. § 300320 (see also 36 C.F.R. § 800.16(y)), defines “undertaking” as follows:

*[T]he term “undertaking” means a project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including – (1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.*

54 U.S.C. § 300320.

The NHPA only applies if the project, activity, or program meets the NHPA definition of “undertaking” either funded by the jurisdiction of a federal agency or carried out by a federal agency. Here, where we have a remedial action (i) to be performed on private property (owned by Beazer), (ii) using wholly private funds (of Beazer), and (iii) requiring no federal permit, license, or approval, the statutory and regulatory definitions of an NHPA “undertaking” fail to be met. Beazer has located no examples, in caselaw or otherwise, where a court has held, or EPA has even asserted, that the NHPA applies to a CERCLA remedial action that is privately funded and will occur entirely on private property. Even EPA’s own guidance on NHPA applicability at CERCLA sites limits the NHPA’s applicability to CERCLA response activities “conducted by federal agencies or with federal assistance,” as opposed to CERCLA sites where a private party will implement the response action without using any federal funds. In sum, EPA is attempting to make new law at this Site. There is no “undertaking” and EPA is without legal authority to implement the NHPA or require others to comply with the NHPA at this Site.

c) The NHPA Does Not Impose Obligations on Private Parties

Even if the NHPA was applicable to the remedial action at the Site, which it is not, EPA has still exceeded its authority by issuing the 2023 Order compelling Beazer’s compliance because the NHPA only imposes obligations on federal agencies and not private parties like Beazer.

The 2023 Order requires Beazer to comply with the NHPA by stating at Paragraph 16:

*On July 6, 2023, the Programmatic Agreement (Appendix B, Exhibit 1) became effective. The*

*Programmatic Agreement obligates EPA to take certain steps to mitigate adverse effects to historic property at the Site in the course of implementing the 2022 Selected Remedy. This Order directs Respondent to implement provisions of the Programmatic Agreement as described in Section 5.0 of the SOW.*

In addition, the Programmatic Agreement states:

*WHEREAS, EPA may require Beazer and/or one or more additional persons or entities to implement the Project under EPA oversight pursuant to its CERCLA authorities and require Beazer and/or such other party or parties to implement certain requirements placed upon EPA under this PA...*

The NHPA and its implementing regulations make clear that the obligation to fulfill NHPA requirements falls squarely on the federal agency having jurisdiction over the federal undertaking (36 C.F.R. § 800.3 *et seq.*). Each relevant regulation explicitly places obligations on a “federal agency” or an “agency official.” *See, e.g.,* 36 C.F.R. § 800.5. Nowhere does the NHPA or implementing regulations allow a federal agency to delegate its responsibilities, and the associated costs, to private parties. To the contrary, the NHPA contemplates federal agencies recouping NHPA costs that the *agencies* incur in certain circumstances (see further discussion below), but does not authorize a federal agency to require a private party to incur those costs. *See* 54 U.S.C. § 306109 (regarding costs).

In sum, EPA may not order Beazer to implement the NHPA by way of its CERCLA authority; instead, EPA alone must implement the NHPA. Accordingly, every provision of the 2023 Order that directs Beazer to comply with the NHPA exceeds EPA’s authority, including but not limited to those provisions directing Beazer to implement provisions of the Programmatic Agreement, to prepare submittals or deliverables in furtherance of the NHPA, or to adjust or revise aspects of the remedial design or remedial action.

Furthermore, Section XI, Paragraph 34.b.6 of the 2023 Order requires Beazer to place prohibitions on the Site against “...such activities and uses as may be required by the EPA-approved Treatment Plan submitted under ¶ 5.2 of the SOW.” By requiring Beazer to take certain actions or make certain forbearances which have no relation to EPA’s jurisdictional authority under CERCLA on the usage of Beazer’s own private property, the requirements of Paragraph 34.b.6 amount to a governmental taking in violation of the Fifth Amendment of the U.S. Constitution.

d) The NHPA Also Does Not Permit EPA to Recoup Costs of NHPA Implementation

The NHPA limits EPA's ability to recover costs from private parties to only those parties who are licensees or permittees:

*A Federal agency may include the costs of preservation activities of the agency under this division as eligible project costs in all undertakings of the agency or assisted by the agency. The eligible project costs may include amounts paid by a Federal agency to a State to be used in carrying out the preservation responsibilities of the Federal agency under this division, and **reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of the license or permit.***

54 U.S.C. § 306109 (emphasis added).

In other words, NHPA costs may only be passed on to Federal licensees and permittees as a condition to the issuance of the license or permit. Therefore, EPA has no basis to order Beazer to incur costs that the agency itself would have no ability to recover from a private party. Accordingly, EPA may not rely on Section 107 to classify costs of NHPA implementation as eligible project costs chargeable to Beazer. To the extent that EPA believes that its implementation of the NHPA and/or the PA to date requires the expenditure of funds over and above those which would ordinarily be required to conduct CERCLA oversight of Beazer's performance of remedial design and remedial action at the Site, Beazer is not responsible for such costs.

## 5. Objections to the SOW as Related to the NHPA

Beazer objects to the sections of the SOW discussed below as being arbitrary, capricious and exceeding EPA's authority under CERCLA as they relate to the applicability and/or implementation of the NHPA, which does not apply and for which implementation is EPA's, not Beazer's, responsibility. Therefore, Beazer requests that each of the below-referenced sections of the SOW be deleted entirely or, if requested below, amended as indicated:

- a) Sections 5.2(a), 5.2(c), 5.2(e) and 5.2(f) of the SOW, which require Beazer to develop the Treatment Plan.
  - i. Beazer requests that Section 5.2(a) be revised to state solely the following: "*To mitigate adverse effects to Historic Properties at*

*Affected Sites which may arise from implementation of the 2022 Selected Remedy, Respondent shall submit a draft Treatment Plan to EPA.”*

- ii. Beazer requests that Section 5.2(c) be revised to state solely the following: *“Respondent shall submit a revised draft Treatment Plan to EPA for preliminary approval, which shall not constitute final approval of the Treatment Plan.”*
  - iii. Beazer requests that Section 5.2(e) be revised to state solely the following: *“If Respondent intends the Treatment Plan to include data recovery, Respondent shall ensure that a Data Recovery Plan is developed and included with the Treatment Plan drafts submitted to EPA.”*
  - iv. Beazer requests that Section 5.2(f) be revised to state solely the following: *“If Respondent intends the Treatment Plan to include preservation in place of all or part of a Historic Property, Respondent shall include recommendations for use of legal instruments that would ensure preservation or protection of the Historic Property.”*
- b) Sections 5.2(d)(3), 5.2(d)(6) and 5.2(d)(7) of the SOW, which obligate Beazer to revise the Treatment Plan. EPA does not have the authority to shift NHPA obligations to Beazer, nor the authority to require Beazer to “take into account comments” which would require Beazer to divest itself of personal and/or real property interests. Moreover, EPA cannot order Beazer to comply with the Programmatic Agreement, an agreement to which Beazer is not a party.
- i. Beazer requests that Section 5.2(d)(3) be revised to state solely the following: *“Respondent shall submit a revised draft Treatment Plan to EPA.”*
  - ii. Beazer requests that Section 5.2(d)(6) be revised to state solely the following: *“Respondent shall submit a revised final draft Treatment Plan to EPA.”*
  - iii. Beazer requests that Section 5.2(d)(7) be revised to state solely the following: *“EPA, in its discretion, may (a) arrange for additional meetings/calls and/or comment periods with the DE SHPO, Consulting Tribes, and Other Consulting Parties to discuss the draft Treatment Plan to ensure that the concerns of the DE SHPO, Consulting Tribes, and Other Consulting Parties have been heard and considered.”*
- c) Section 5.2(d)(8) of the SOW which obligates Beazer to implement the Treatment Plan.

- d) Section 5.2(h) of the SOW is arbitrary and capricious insofar as it requires all schedules submitted to EPA for approval to consider that, except as may be provided in the Treatment Plan, Beazer must complete all necessary data recovery fieldwork prior to commencement of Ground Disturbing Activities associated with the 2022 Selected Remedy at any Affected Site where data recovery will be performed. Beazer does not agree that it is obligated to or that EPA has authority to compel it to comply with the Programmatic Agreement or the Treatment Plan, so Beazer is not required to submit schedules related to data recovery.
- e) Section 5.3(a)(1) of the SOW which requires Beazer to conduct archaeological surveys.
- f) Section 5.3(a)(2) of the SOW which obligates Beazer to prepare and submit reports that meet standards described in the Programmatic Agreement.
- g) Section 5.3(a)(3) of the SOW which requires Beazer to conduct surveys in compliance with NHPA statutory references.
- h) Section 5.3(a)(4) of the SOW which compels Beazer to obtain determinations of eligibility for the National Register of Historic Places (“NRHP”) or to “otherwise assist” EPA, should EPA assume responsibility for coordinating determinations of eligibility for the NRHP.
- i) Section 5.3(b) of the SOW which compels Beazer to assist EPA in implementation of the NHPA and directs Beazer to “resolve adverse effects” in a way whereby Beazer is divested of personal or real property interests.
- j) Section 5.5 of the SOW which compels Beazer to curate artifacts pursuant to the Programmatic Agreement.
- k) Section 5.6(a) of the SOW which obligates Beazer to requires its contractors and subcontractors to comply with the NHPA.
- l) Section 5.6(b) of the SOW which requires Beazer to provide a qualified archaeologist on-site during ground disturbing activities. Beazer further objects to Section 5.6(b) of the SOW to the extent that it qualifies objects as “Historic Property” or human remains as “items.”
- m) Sections 5.6(c), 5.6(d), 5.6(e) and 5.6(f) of the SOW which include required procedures related to the discovery of human remains. Beazer believes that any human remains encountered during site activities will be treated with respect and dignity, and will be addressed in accordance with Title 17 of the Delaware Code, Chapter 54, *Unmarked Human Burials and Human Skeletal Remains*.

- n) Sections 5.7(a), 5.7(b) and 5.7(c) of the SOW which obligate Beazer to assist EPA in implementation of the NHPA, participation in consultation meetings, implementation of actions approved by EPA to resolve adverse effects, and submission of reports.
- o) Sections 5.7(d), 5.8 through 5.13, and 5.15 of the SOW which compel Beazer to comply with the NHPA, Programmatic Agreement and Treatment Plan.

Over the last 30 years, Beazer has committed extensive resources to the evaluation of eligible cultural resource sites that may potentially be affected by remedial action at the Site, funding numerous, well-documented archaeological surveys and evaluations. Beazer has also engaged its own personnel and consultants to develop remedial designs that at least minimize, where complete avoidance is impossible, potential impacts to identified cultural resources at the Site. Beazer values the collaborative working relationships it has established with the various federal, state and tribal consulting parties and remains committed to both maintaining those relationships and to voluntarily implementing reasonable measures necessary to preserve and protect cultural resources at the Site.

Beazer recognizes the importance of the cultural resources at the Site and re-emphasizes its intent to continue to cooperate with EPA and the consulting parties. To that end, Beazer believes a Treatment Plan that transparently describes the ways in which potential adverse effects to cultural resources will be mitigated is essential to effectively and efficiently implementing the remedy at the Site. However, as noted herein, Beazer does not agree that the Site remedial action is a federal undertaking to which NHPA applies, or that EPA has the authority to (i) designate the NHPA as an ARAR under CERCLA; (ii) impose an obligation on Beazer pursuant to NHPA; (iii) compel Beazer to comply with the NHPA; or (iv) compel Beazer to implement requirements of the NHPA on EPA's behalf. To this end, Beazer urges EPA to remove all references and provisions in the 2023 Order and the SOW that purport to obligate Beazer to implement the NHPA or EPA's obligations under the PA.

## **6. The Obligation to Record the Notice to Successors-in-Title within 10 Days is Arbitrary, Capricious and overly Burdensome**

Paragraph 37 of the 2023 Order requires, *inter alia*, that Beazer record the above-referenced notice to successors in title within 10 days after EPA approval and to submit a certified copy of the recordation to EPA within 10 days after recordation. Imposing on Beazer deadlines that are dependent on the actions of an unrelated third party is arbitrary, capricious and overly burdensome. Beazer has no control over the amount of time in which a recorder's office will process the submittal for recordation or how long the recorder's office will take to return certified copies to Beazer.

Beazer requests that Paragraph 37.a be revised to state solely the following:  
“Respondent shall, within 15 days after the Effective Date, submit for EPA approval a

*notice to be filed regarding its Affected Property in the appropriate land records. The notice must: (1) include a proper legal description of the Affected Property; (2) provide notice to all successors-in-title: (i) that the Affected Property is part of, or related to, the Site; (ii) that EPA has selected a remedy for the Site; and (iii) that EPA has issued an order requiring implementation of such remedy; and (3) identify the EPA docket number and Effective Date of this Order. Owner Respondent shall record the notice within 10 days after EPA's approval of the notice and submit to EPA, within 10 days of receipt from the recorder's office, a certified copy of the recorded notice."*

## **7. Additional Objections to the SOW**

Notwithstanding the objections provided elsewhere in this document, Beazer provides additional objections related to the SOW as listed below.

- a) Section 3.1(a) of the SOW requires that the Remedial Design ("RD") Workplan include a "...description of updated elements of the design that have been modified since the approval of the Pre-Final Design submitted in April 2013." Beazer objects to this requirement as it is arbitrary and overly burdensome. The 2022 ROD Amendment replaced and superseded the 2005 ROD (as amended by the 2010 ESD) and in Beazer's view, producing such a description would serve no purpose. Beazer requests that Section 3.1(a) of the SOW be deleted.
- b) Section 3.1(k) of the SOW requires the RD Workplan to include "Preliminary versions of the following supporting deliverables described in ¶ 7.7 (Supporting Deliverables): Health and Safety Plan; Emergency Response Plan; Field Sampling Plan; Quality Assurance Project Plan; Community Impact Mitigation Plan; Site Wide Monitoring Plan; and other applicable supporting deliverables." It is unclear whether EPA intends the term "preliminary" to mean "pre-final." Moreover, regardless of whether EPA intends the submittals to be preliminary or pre-final, Beazer believes the requirement that such documents accompany the RDWP submittal is arbitrary and unreasonable. Beazer requests Section 3.1(k) be modified to eliminate the requirement that such documents accompany the RDWP submittal.
- c) Section 3.6 of the SOW is captioned "Reserved." In Beazer's view, EPA's concept that the first substantive submittal be a 95% Remedial Design ("95% RD") is impracticable given the significant differences between the 2005 ROD and 2022 ROD Amendment that replaced and superseded it. Beazer requests that Section 3.6 be replaced by a requirement for a Pre-Final (60%) Remedial Design ("60% RD") that would precede submittal of the 95% RD.
- d) Section 3.7(a)(1) of the SOW requires the 95% RD to "Address relevant comments received from EPA on previous designs leading to the 2014 Design

that were not addressed by Respondent, if any.” Beazer objects to this requirement as arbitrary and overly burdensome. The 2022 ROD Amendment replaced and superseded the 2005 ROD and commenting on a prior submittal would serve no purpose.

- e) Section 4.6 of the SOW requires Beazer to provide information to EPA in order to allow EPA to conduct a 1-year review to determine whether the remedy is functioning as intended. Beazer incorporates by reference item III.C.7.b) above. Beazer further objects to the requirement as being arbitrary, overly burdensome and beyond EPA’s authority under CERCLA. The stated purpose of reviewing whether the remedy is functioning as intended is achieved by the 5-Year Review cycle under CERCLA. Further, EPA provides no triggering event for which the 1-year period would begin. For these reasons, Beazer requests that Section 4.6 of the SOW be deleted.
- f) Section 7.7(b)(2) of the SOW requires Beazer to include in the Emergency Response Plan “...date(s) for meeting(s) with the local community, including local, State, and federal agencies involved in the cleanup, as well as local emergency squads and hospitals...” Beazer objects to this requirement as being vague, arbitrary and capricious as there is no reasonable method to pre-determine meeting dates with multiple parties during the preparation of the Emergency Response Plan. The scheduling of meetings should occur outside the preparation of the Emergency Response Plan.
- g) Section 7.7(e) of the SOW requires Beazer to include biota monitoring elements as part of a Sitewide Monitoring Plan. Beazer objects to these requirements as being arbitrary, capricious and overly burdensome. The biota data required to be collected have no direct relationship to EPA’s selected cleanup goals, which are de facto protective of biota. Furthermore, the requirements in Sections 7.7(e)(2)(i) and 7.7(e)(2)(ii) to conduct 14-day toxicity tests inappropriately deviates from the accepted 10-day standard EPA test method requirements.
- h) Section 7.7(e)(9) of the SOW uses the term “removal management levels.” Beazer objects to the usage of this term as vague and arbitrary. Beazer is unaware of a definition for this term under CERCLA or other remedial statutes.
- i) Section 8.2 of the SOW describes a schedule. Beazer objects to the schedule as arbitrary and capricious to the extent it is unreasonably vague and/or impracticable at this early stage of the process. Specific examples include, but are not limited to:
  - i. There is no schedule provided for the deliverables required by Section 7.7 of the SOW.

- ii. Submittal of an Institutional Controls Implementation and Assurance Plan within 70 days following the authorization to proceed in Paragraph 29(c)(1) of the UAO is unreasonable.
- iii. Submittal of the PDI Work Plan being required within 30 days of being directed by EPA is unreasonable.
- iv. Submittal of the 95% Pre-Final RD is required within 60 days of EPA's approval of the PDI Evaluation Report is unreasonable. Based on significant new design requirements provided in the 2022 ROD Amendment, including, but not limited to, designing to the 500-year flood event (formerly 100-year flood event), and performance standards that impact many of the remedial elements (requiring collection of PDIs, treatability testing, and updated groundwater modeling) the current design is closer to a 60% RD. Submittal of a 60% RD based upon information from PDI evaluations typically requires, at a minimum, 120 days following approval of the PDI Evaluation Report.
- v. The award of the of the Remedial Action contract within 60 days of EPA's approval is not practical. The procurement process typically requires, at a minimum, 120 days.

#### **IV. Additional Comments to the 2023 Order and SOW**

Without in any way limiting or waiving any rights or objections, Beazer offers the following additional comments regarding the 2023 Order and SOW. Beazer respectfully requests that EPA amend the 2023 Order and/or the SOW to provide clarity and resolution regarding the following comments and issues:

##### **A. Comments to the 2023 Order**

1. Although Paragraph 34 of the 2023 Order obligates Beazer to use "best efforts" to secure access to Non-Respondent Owners' Affected Property, it obligates Beazer to "immediately...provide EPA and its representatives, contractors, and subcontractors with access at all reasonable times to ... Affected Property [owned by Beazer]." The Beazer property is not accessible without traversing property owned by other persons and/or entities. Beazer will exercise best efforts to secure access agreements for neighboring property, and can immediately "authorize" EPA and its agents to access Affected Property owned by Beazer. However, because the Beazer property cannot be accessed from any public roadway, EPA and its agents should be aware that unless and until Beazer secures such an access agreement allowing vehicular and pedestrian traffic across and through the neighboring Sun Chemical, Inc. property, immediate and unfettered access to the Beazer property is neither available nor practicable.

B. Comments to the SOW

1. Section 2.2(a) of the SOW is internally inconsistent. Section 2.2(a) provides that EPA has developed a Community Involvement Plan (“CIP”), yet also states that EPA will develop a CIP.
2. Section 2.2(d) requires Beazer to designate and notify EPA of Beazer’s Community Involvement Coordinator “within 15 days,” yet provides no time point or event for when the 15 day period is to start. Additionally vague is the requirement that Beazer’s coordinator provide unspecified “support.”
3. Sections 3.4, Pre-Design Investigation (“PDI”), and 3.5, Treatability Study of the SOW provide EPA with unqualified and arbitrary authority to require Beazer to conduct PDI and/or Treatability Studies. Neither the 2023 Order nor the SOW provide any criteria for which EPA is to apply to make these determinations. While Beazer anticipates that some degree of PDI will be necessary and appropriate to development of the 100% Remedial Design, Beazer reserves the right to object to arbitrary determinations by EPA that Beazer must perform unnecessarily duplicative or additional PDI and/or Treatability Studies.
4. Section 5.4 of the SOW requires Beazer to take “all reasonable steps to ensure that information and documents do not endanger the archaeological or Historic Properties at the Site.” It is unclear to Beazer as to what “reasonable steps” may be required to shield sensitive information from the general public, which will make Beazer’s compliance with such a requirement difficult.
5. Section 6.2 of the SOW states:

*If the schedule for any activity described in the Progress Reports, including activities required to be described under ¶ 6.1(d), changes, Respondent shall notify EPA of such change at least 7 days before performance of the activity.*

This clause presumes that the only schedule change may be due to a delay. However, if the schedule should accelerate, a situation may be created wherein Beazer is obligated to delay an activity by up to six (6) days to comply with the requirement to provide at least seven (7) days’ advance notice of a schedule change, unnecessarily hindering remedial progress. This Section should be amended to clarify that the requirement for pre-notification of schedule changes only applies to schedule delays.

6. Section 7.4(a) of the SOW refers to the term “Settling Defendants” as opposed to “Respondents” which is used throughout the 2023 Order. Beazer is not a “Settling Defendant” nor does the 2023 Order constitute a settlement in any fashion. It is unclear if EPA intends for any requirements of the SOW imposed on a “Settling Defendant” to be applied to Beazer as the Respondent, and this language should be revised to resolve this uncertainty.

7. Sections 5, 7.6 and 9.1 of the SOW provide differing and conflicting requirements on which deliverables prepared by Beazer must be submitted to which parties. Section 5 obligates Beazer to transmit certain deliverables to EPA only.<sup>1</sup> Section 7.6 requires EPA, rather than Beazer, to transmit certain deliverables to the NHPA consulting parties. By its terms, however, Section 9.1 appears to obligate Beazer to transmit copies of each and every deliverable due under the 2023 Order and SOW to the NHPA consulting parties. Beazer requests the first sentence of SOW Section 9.1 be deleted.

## V. Conclusion

Subject to the reservations, objections, defenses, and other qualifications identified herein, Beazer currently intends to comply with the terms of the 2023 Order to the extent required under CERCLA and the NCP. Beazer is hopeful that a good working relationship will continue with EPA.

Respectfully submitted,  
BABST CALLAND CLEMENTS and ZOMNIR,  
P.C.

BY: \_\_\_\_\_



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cc: Daniel Taylor  
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<sup>1</sup> See, e.g.: Section 5.2(c), 5.2(d)(3), 5.2(d)(6), 5.2(e), 5.2(f), 5.8(a), 5.8(c).