

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TEXARKANA DIVISION

UNITED STATES OF AMERICA,  
and the STATE OF TEXAS,

Plaintiffs,

V.

BEAZER EAST, INC.,

Defendant.

Civil Action No. 5:08-CV-00132

## ORDER ON CONSENT DECREE

Before the Court is an *Unopposed Motion for Entry of Consent Decree* [Clerk's Docket No. 9] filed September 23, 2008. Having considered the Motion, and taking into account that the Motion is unopposed, the Court is of the opinion that the Motion should be granted and the Consent Decree entered.

**IT IS THEREFORE ORDERED** that the *Unopposed Motion for Entry of Consent Decree* [Clerk's Docket No. 9] is in all things **GRANTED**.

**IT IS FURTHER ORDERED** that the Consent Decree is hereby ENTERED OF RECORD.

**IT IS FURTHER ORDERED** that the Clerk is so **DIRECTED** to close this case file.

**SO ORDERED.**

**SIGNED this 25th day of September, 2008.**

Dair Johnson

DAVID FOLSOM  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TEXARKANA DIVISION

UNITED STATES OF AMERICA,  
and the STATE OF TEXAS,

Plaintiffs,

v.

BEAZER EAST, INC.,

Defendant.

Civil Action No.

**CONSENT DECREE ADDRESSING NATURAL RESOURCE DAMAGES**

This Consent Decree is made and entered into by and between the United States of America (United States), on behalf of the Secretary of the United States Department of the Interior ("DOI"); the State of Texas, on behalf of the Texas Commission on Environmental Quality ("TCEQ"), the Texas Parks and Wildlife Department ("TPWD"), and the Texas General Land Office ("TGLO") (collectively, the Trustees); and Beazer East, Inc. (Beazer).

**BACKGROUND**

A. The Koppers Site ("Site"), consists of 62 acres located approximately one mile west of downtown Texarkana, Bowie County, Texas. A former wood treatment facility which began operation in 1910, the operation area of the Site consisted of a drip track, treated and untreated

wood storage areas, wood treating cylinders, chemical storage tanks, and a waste water lagoon. Beazer and/or a predecessor to Beazer owned and operated the Site from approximately 1940 to 1962.

B. In 1998, Beazer entered into a Memorandum of Agreement with the Trustees to perform a cooperative, restoration-based assessment to address potential natural resource injuries at the Site. As a result of this assessment, the Trustees determined that hazardous substances released at or from the Site injured or potentially injured benthic sediment habitat and organisms, aquatic habitats and organisms, terrestrial wildlife, and other resources.

C. Contemporaneously with the lodging of this Consent Decree, the United States, on behalf of DOI, and the State of Texas, on behalf of TCEQ, TPWD, and TGLO, filed a Complaint in this matter against Beazer pursuant to Sections 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, and Section 311 of the Clean Water Act ("CWA"), 33 U.S.C. § 1321. In the Complaint, the United States and the State of Texas seek (1) Natural Resource Damages for the injury, loss or destruction of natural resources, including the interim loss of the services or use of such resources, resulting from the release of hazardous substances at or from the Site, (2) past costs incurred by the Trustees in assessing these Natural Resource Damages based on the release of hazardous substances at or from the Site, and (3) future restoration costs to be incurred by the Trustees in overseeing and monitoring the Restoration Project to be undertaken by Beazer.

D. Pursuant to this Consent Decree, Beazer shall ensure that a Trustee-approved Conservation Easement is filed and recorded on the Acquisition Property in accordance with the requirements of Paragraph 10. When timely and successfully completed, the Conservation

Easement will provide for the replacement with the equivalent of natural resources or natural resource services, allegedly injured, destroyed, or lost as a result of releases of hazardous substances at or from the Site.

E. This Consent Decree is a settlement of a contested matter, and neither payment nor the acceptance of any consideration represents an admission of liability or responsibility by any Party.

F. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated in good faith and implementation of this Consent Decree will expedite the restoration of natural resources, and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, it is ORDERED, ADJUDGED AND DECREED as follows:

### **I. JURISDICTION AND VENUE**

1. The Court has personal jurisdiction over the Parties and has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and Sections 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9607 and 9613(b). Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). Solely for the purposes of this Consent Decree, the Parties waive all objections and defenses that they may have to the personal jurisdiction of the Court, to venue in this District, and to service of process.

### **II. DEFENDANT**

2. Beazer is a Delaware corporation which conducts, or formerly conducted, business in the State of Texas.

### **III. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA, 42 U.S.C. § 9601 et seq., or in regulations promulgated under CERCLA, 43 C.F.R. Part 11 and 40 C.F.R. Part 300, shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the attachments attached hereto and incorporated hereunder, the following definitions shall apply:

A. "Acquisition Property" means a 76.708 acre portion of land located in Red River County, Texas which is part of the Lennox Woods Preserve owned by The Nature Conservancy and which is more fully described in Attachment A to this Agreement.

B. "Consent Decree" means this document entitled "Consent Decree," all attachments thereto, and all items approved by the Trustees pursuant to Section V (Natural Resource Damage Restoration Requirements).

C. "Conservation Easement" means the legal document attached hereto as Attachment B, after it is signed by the grantor, the Holder, and TCEQ, TPWD, and GLO as third parties with the right to enforce the terms of the Conservation Easement.

D. "Date of Entry" means the date which either this Consent Decree or an order entering this Consent Decree is filed with the Clerk of Court after the United States and State of Texas have moved for entry and the District Judge has signed the Consent Decree.

E. "Date of Lodging" means the date which this Consent Decree is lodged with the Clerk of Court.

F. "Federal Trustee" means DOI.

G. "Future Costs" means the costs which the United States and the State of Texas incur from February 1, 2005, through one year after the date that the Conservation Easement is properly recorded, in connection with overseeing completion of the Restoration Project contemplated by this Consent Decree. Such costs include administrative costs and other costs or expenses which are incurred to provide for, carry out, or support the activities or responsibilities of the United States and the State of Texas in overseeing completion of the Restoration Project.

H. "Holder" means a person or entity qualified under Chapter 183 of the Texas Natural Resources Code ("TNRC") that is proposed by Beazer and approved by the Trustees to hold the Conservation Easement.

I. "Natural Resource Damages" means civil compensatory relief, including the reasonable costs of assessing such damages, which is recoverable pursuant to Section 107 (a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), and Section 311(f) of the CWA, 33 U.S.C. § 1321(f), by the Trustees on behalf of the public for injury to, destruction of, loss of, or loss of use of the natural resources or resource services resulting from the release of hazardous substances at or from the Site, including due to response actions.

J. "Parties" means the United States of America, the State of Texas, and Beazer.

K. "Past Costs" means the costs incurred by the United States and the State of Texas through January 31, 2005, in assessing the natural resources actually or potentially injured, destroyed, or lost as a result of releases of hazardous substances at or from the Site; in identifying and planning for restoration actions to compensate for such injuries and losses. Such costs include administrative costs and other costs or expenses associated with providing for public

participation which are incurred incident to or in support of the assessment and restoration planning process.

L. "Restoration Plan" means the plan entitled Restoration Plan and Environmental Assessment and attached as Attachment C to this Consent Decree.

M. "Restoration Project" means the restoration actions described in Attachment C which consist generally of the recording of a Conservation Easement on the Acquisition Property in accordance with the terms set forth herein and in Attachment C and in the form set forth in Attachment B.

N. "Site" means the Koppers Site consisting of 62 acres located approximately one mile west of downtown Texarkana, Bowie County, Texas.

O. "State" means the State of Texas, and its departments and agencies.

P. "State Trustees" means TCEQ, TPWD, and TGLO.

Q. "Trustees" means the Federal Trustee and State Trustees.

#### **IV. APPLICABILITY OF CONSENT DECREE**

4. This Consent Decree applies to and is binding upon the United States and the State and upon Beazer and its successors and assigns. Any change in ownership or corporate status of Beazer including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Beazer's responsibilities under this Consent Decree.

5. Beazer shall provide a copy of this Consent Decree to the proposed Holder and any other private enforcers of the Conservation Easement of which Beazer is, or may become, aware.

Beazer shall be responsible for ensuring that a Trustee - approved Conservation Easement is filed and recorded on the Acquisition Property in accordance with this Consent Decree.

6. Consent Decree Not a Permit. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any Federal or State statute or regulation. The United States and the State of Texas do not, by their consent to this Consent Decree, warrant or aver in any manner that Beazer's compliance with this Consent Decree will constitute or result in compliance with the requirements of any Federal, State, and local laws and regulations which may be applicable to the implementation of any Restoration Project or other activities required by the terms of this Consent Decree.

7. Responsibility for Compliance. Notwithstanding any action by the United States and the State of Texas, including, without limitation, their issuance of the Restoration Plan or the review and approval of any design, plan, report, and other information or action formulated by Beazer under this Consent Decree, Beazer is and shall remain solely responsible for compliance with all terms and requirements of this Consent Decree, including those related to performance criteria.

8. The United States and the State of Texas may take any and all legal or administrative actions necessary to enforce the terms of this Consent Decree. In the event that the United States and the State of Texas take legal or administrative actions to enforce this Consent Decree and such action is successful, Beazer shall pay all reasonable costs incurred by the United States and the State of Texas related to this action including, but not limited to, enforcement costs, attorneys fees and interest accruing on any unpaid balance.



**V. NATURAL RESOURCE DAMAGE RESTORATION REQUIREMENTS**

9. This Consent Decree provides the terms upon which the United States, the State of Texas, and Beazer agree to settle the claims of the United States and the State of Texas under CERCLA and the CWA for Natural Resource Damages which resulted from releases of hazardous substances into the environment at or from the Site. The objectives of the Parties in entering into this Consent Decree are to compensate the Trustees, on behalf of the public, for alleged Natural Resource Damages and to provide for the restoration, replacement, or acquisition of the equivalent of the allegedly injured, destroyed, or lost natural resources.

**10. Conservation Easement on Acquisition Property**

In accordance with the terms of this Consent Decree, Beazer shall ensure that a Conservation Easement is prepared and recorded on the Acquisition Property to preserve the Acquisition Property in perpetuity for protection of the natural resources on the property. The Conservation Easement shall be in the form of, and contain the terms set forth in, Attachment B to this Decree. Except as otherwise provided in Attachment B or as approved by the Trustees, the Conservation Easement shall be granted with warranty covenants, free and clear of all prior liens and encumbrances.

A. In accordance with the terms of this Consent Decree and within sixty (60) days after the Date of Entry of this Consent Decree, or thirty (30) days after the Trustees approve the designated "Holder," the terms of the proposed Conservation Easement, and the title commitment and certification, whichever deadline is later, Beazer shall ensure that a Conservation Easement, as defined in Chapter 183 of the Texas Natural Resources Code (TNRC)

and in the form provided in Attachment B, is granted and properly executed and recorded in the deed records of Red River County over the Acquisition Property in favor of a Holder, qualified under Chapter 183 of the TNRC and approved by the Trustees. The Conservation Easement shall comply with the legal requirements of Chapter 183 of the TNRC and be enforceable under the laws of the State of Texas. The Conservation Easement shall preserve the Acquisition Property in perpetuity for protection of the natural resources thereon and the ecological services they provide.

B. Within fifteen (15) days after the Date of Lodging of this Consent Decree and in accordance with the terms of this Consent Decree, Beazer shall ensure that the identity of the entity proposed to serve as the "Holder" of the Conservation Easement, as defined in Chapter 183 of the TNRC, together with a written explanation by the proposed "Holder" of its willingness, financial and technical ability, and qualification under Chapter 183 of the TNRC, to serve as "Holder" of the Conservation Easement, is submitted in writing to the Trustees. In Beazer's submission, the Holder must commit in writing, in a form acceptable to the Trustees, that it will (a) monitor the Acquisition Property and enforce the Conservation Easement through available legal and judicial means, and (b) inform the Trustees and Beazer that it will no longer be able to meet its obligations at least thirty (30) days before it ceases to do business or ceases to exist as a legal entity, whichever is sooner. Within twenty-one (21) days of receipt of the proposed Holder submission, The United States and the State shall notify Beazer whether the proposed Holder is acceptable. If the proposed Holder is rejected by the Trustees, declines to serve in that capacity or declines to sign the Conservation Easement, then Beazer shall ensure

that an alternate proposed Holder is submitted to the Trustees for approval within ninety (90) days of the notice of rejection.

C. On February 18, 2007, the Trustees received a written commitment from Natural Area Preservation Association, Inc. (NAPA) to serve as the Holder of the Conservation Easement in accordance with Paragraph 10 (B). Thereafter, the Trustees promptly approved NAPA as the Holder and so informed Beazer also in accordance with Paragraph 10 (B). Provided that NAPA remains the Holder and signs the Conservation Easement, the Holder submission and approval requirements in Paragraph 10 (B) have been satisfied.

D. Within thirty (30) days after the Date of Lodging of the Decree and in accordance with the terms of this Consent Decree, Beazer shall ensure that the final form of the Conservation Easement is provided to the Trustees for review and approval (with or without the identity of the approved Holder). Any changes to the terms and form of Attachment B must be approved in writing by the Trustees prior to execution and recordation in the County real property records.

E. Consistent with the terms set forth in Attachment B, it is intended by the parties that the United States, on behalf of the Federal Trustee, and the State shall have access to the Acquisition Property and third party rights of enforcement of the Conservation Easement to prevent any activity on or use of the Acquisition Property that is inconsistent with the Conservation Easement and to ensure that the intended purpose of this Consent Decree is satisfied.

F. Prior to the Date of Lodging of this Consent Decree and in accordance with the terms of this Consent Decree, Beazer shall ensure that a current title commitment and title certification,

which shows title to the Acquisition Property to be free and clear of all prior liens and encumbrances (except those liens or encumbrances approved by the Trustees), is submitted to the Trustees for review and approval. The commitment and certification shall be provided by an insured title examiner in good standing in the State of Texas and must show that the Acquisition Property is free from all other encumbrances that would undermine or conflict with the purposes of the Conservation Easement. The certification shall list any encumbrances of record, with a copy of such encumbrances to be provided to the Trustees, along with associated release(s) and subordination agreement(s). If the title insurance commitment or title certification reveals a defect in title or an encumbrance that would undermine or conflict with the purposes of the Conservation Easement, Beazer shall ensure such defect is corrected and such encumbrance is removed (except as otherwise proposed by Beazer and approved in writing by the Trustees) within thirty (30) days after receipt of notice from the Trustees that such defect or encumbrance must be resolved.

G. Immediately prior to recording the Conservation Easement, Beazer shall ensure that the title search is updated and that a determination has been made on whether there has been an occurrence that impairs the title since the effective date of the original title commitment or certification. Beazer shall (except as otherwise requested by Beazer and approved by the Trustees) ensure that any such defect or impairment to the title is removed within thirty (30) days from receipt of the title update.

H. Within sixty (60) days after recording the Conservation Easement and in accordance with the terms of this Consent Decree, Beazer shall ensure that the Trustees are provided with a

final title insurance policy and a certified copy of the original recorded Conservation Easement, showing the clerk's recording stamps.

11. Until the Conservation Easement is properly filed and recorded, Beazer shall ensure that if the owner of the Acquisition Property seeks to transfer title or ownership (or any portion thereof) of the Acquisition Property, the owner of the Acquisition Property may only do so to a person or entity approved by the Trustees.

12. Beazer shall ensure, subject to the force majeure provisions of this Decree, that the natural and ecological integrity of the Acquisition Property is maintained in the condition described in the baseline documentation attached hereto as Attachment D and included herein by reference until the Acquisition Property is formally preserved through proper recording of the Conservation Easement.

## **VI. COSTS REIMBURSEMENT**

13. The United States and the State of Texas have expended time, funds and resources in assessing damages for the alleged natural resource injuries and losses that resulted from the releases of hazardous substances at or from the Site. Beazer has reimbursed each Trustee for its Past Costs. The United States and the State of Texas have incurred and will continue to incur Future Costs in connection with the activities pursuant to this Consent Decree.

14. Beazer shall reimburse each Trustee for its Future Costs within thirty (30) days after receiving a bill from a Trustee. The Trustees may submit bills periodically for payment.

Payment for these Future Costs shall be made in the manner described below.

A. Reimbursement of Future Costs shall be made by certified check referencing the Koppers Settlement” as follows:

i. Payment of DOI’s Future Costs shall be in the form of a certified check with the annotation “USAO File Number \_\_\_\_\_, DOJ case number 90-11-3-07668, Koppers Site-DOI” payable to the United States Department of Justice and sent to:

Matthew Orwig  
United States Attorney  
Attn: Randi Russell  
350 Magnolia Avenue  
Suite 150  
Beaumont, TX 77701-2237  
409-839-2538

With a copy of the check sent to:

Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044  
DOJ # 90-11-3-07668

Jennifer Bagdovitz  
Division of Environmental Quality  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Dr., Room 330  
Arlington, VA 22203; and

Martin Steinmetz, Esq.  
Office of the Field Solicitor  
U.S. Department of the Interior  
7906 E. 33rd St., Suite 100  
Tulsa, OK 74145

ii. Payment of the State of Texas' Future Costs shall be in the form of a certified check made payable and mailed to each individual Trustee Agency as follows:

a. TCEQ: a certified check in the amount billed made payable to: "Texas Commission on Environmental Quality" with the annotation "PCA # 46225, Project #462200."

Payment should be mailed to:

Texas Commission on Environmental Quality  
ATTN: John Racanelli, MC-214  
P.O. Box 13088  
Austin, Texas 78711-3088

b. GLO: A certified check in the amount billed made payable to: "Texas General Land Office" with the notation "Trustee cost reimbursement for Koppers Site, Bowie County."

Payment should be mailed to:

The Texas General Land Office  
ATTN: Sharon Mooney, Coastal Resources, MC-151  
P.O. Box 12873  
Austin, Texas 78711-2873

c. TPWD: A certified check in the amount billed made payable to: "Texas Treasury Safekeeping Trust Company" with the notation "Natural Resource Trustees- Natural Resource Damage Restoration- Texas Parks and Wildlife Damage Assessment." Payment should be made to:

Texas Treasury, Safekeeping Trust Company  
P.O. Box 12608  
ATTN: Settlement & Custody Services Department  
Austin, Texas 78711-2608

B. In the event that any payments required by this Section are not made within

thirty (30) days of receipt of the bill, Beazer shall pay interest on the unpaid balance. Interest shall begin to accrue commencing on the thirty-first (31st) day after receipt of a bill and continue to accrue through the date of payment. In accordance with 42 U.S.C. § 9607(a), interest shall accrue at the rate specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26 of the U.S. Code, compounded on October 1 of each year.

#### **VII. TRUSTEE AND BEAZER CONTACT PERSONS**

15. Each Trustee agency hereby respectively designates the following person(s) as its representative for receipt of information and notices required or occasioned under this Consent Decree, including, but not limited to, notices pertaining to the payment or contest of Future Costs, and notices invoking force majeure or dispute resolution:

A. For DOI:

Karen Cathey  
U. S. Fish and Wildlife Service  
Region 2 Ecological Services  
P. O. Box 1306  
Albuquerque, NM 87103  
Tel: 505-248-6648  
Fax: 505-248-6922  
Email: karen\_cathey@fws.gov

Martin Steinmetz, Esq.  
Office of the Field Solicitor  
U.S. Department of the Interior  
7906 E. 33rd St., Suite 100  
Tulsa, OK 74145

B. For the State Trustees:

Richard Seiler, MC-225



Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087  
Tel: (512) 239-2523  
Fax: (512) 239-4814  
Email: [rseiler@tceq.state.tx.us](mailto:rseiler@tceq.state.tx.us)

Sarah Utley  
Assistant Attorney General  
Texas Office of the Attorney General  
P.O. Box 12548, Capitol Station  
Austin, TX 78711-2548

16. Beazer hereby respectively designates the following person(s) as its representative for receipt of information and notices required or occasioned under this Consent Decree:

Michael W. Bollinger  
Three Rivers Management  
One Oxford Centre, Suite 3000  
Pittsburgh, PA 15219  
412-208-8864  
Email: [bollinge@hansonle.com](mailto:bollinge@hansonle.com)

Jill M. Blundon  
Vice President & General Counsel  
Beazer East, Inc.  
c/o Three Rivers Management, Inc.  
One Oxford Centre, Suite 3000  
Pittsburgh, PA 15219  
412-208-8831  
Email: [Jill.Blundon@hanson.biz](mailto:Jill.Blundon@hanson.biz)

17. Any Party may change its designated person or address as set forth in this Section by communicating such changes in writing to the other Parties.

18. All notices and submissions shall be considered effective upon receipt by mail, unless otherwise provided. All notices shall be sent by first class United States mail.

Submission of written notice by mail as specified in this Section shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the Parties.

#### **VIII. INDEMNIFICATION**

19. The United States and the State of Texas do not assume any liability by entering into this agreement. Beazer shall indemnify, save and hold harmless the United States and the State of Texas and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Beazer, its officers, directors, employees, agents, contractors, subcontractors, and any person acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. Further, Beazer agrees to pay the United States and the State of Texas all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State of Texas based on negligent or other wrongful acts or omissions of Beazer, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. Neither the United States nor the State of Texas shall be held out as a party to any contract entered into by or on behalf of Beazer in carrying out activities pursuant to this Consent Decree. Neither Beazer nor any such contractor shall be considered an agent of the United States or the State of Texas.

20. The United States and the State of Texas shall give Beazer notice of any claim for which the United States or the State of Texas plans to seek indemnification pursuant to

Paragraph 19 and shall consult with Beazer prior to settling such claim.

21. Beazer waives all claims against the United States and the State of Texas for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State of Texas, arising from or on account of any contract, agreement, or arrangement between Beazer and any person for performance of the Restoration Project, including, but not limited to, claims on account of delays. In addition, Beazer shall indemnify and hold harmless the United States and the State of Texas with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Beazer and any person for performance of the Restoration Project including, but not limited to, claims on account of delays.

#### **IX. FORCE MAJEURE**

22. "Force majeure," for the purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Beazer, of any entity controlled by Beazer, or of Beazer's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Beazer's best efforts to fulfill the obligation except the obligations to make payments described in Sections VI and VII of this Consent Decree. The requirement that Beazer exercise "best efforts to fulfill the obligation" includes using the best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (1) as it is occurring and (2) following the potential force majeure, such that the delay is minimized to the greatest extent possible. "Force majeure," does not include changes in the cost of the Restoration Project or financial hardship on the part of Beazer.

23. If any circumstance occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by force majeure, Beazer shall orally notify the Trustees within 48 hours of the time that Beazer first knew or should have known that the circumstances might cause a delay. Within five (5) days thereafter, Beazer shall provide in writing to the persons identified in Paragraph 15 a detailed description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay; Beazer's rationale for attributing such a delay to a force majeure if it intends to assert such a claim; and a statement as to whether, in the opinion of Beazer, such circumstances may cause or contribute to an endangerment to public health or the environment and, if so, the basis for that opinion. Beazer shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Beazer from asserting any claim of force majeure for that circumstance for the period of time of such failure to comply, and for any additional delay caused by such failure. Beazer shall be deemed to know of any circumstances of which Beazer, any entity controlled by Beazer, or Beazer's contractors knew or should have known.

24. If the United States and the State of Texas agree that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Consent Decree that are affected by the force majeure will be extended by the United States and the State of Texas for such time as necessary to complete the obligations. An extension of the time for

performance of the obligations affected by the force majeure shall not, of itself, extend the time for performance of any other obligation. If the United States and the State of Texas do not agree that the delay or anticipated delay has been or will be caused by a force majeure, the United States and the State of Texas shall notify Beazer in writing of their decision. If the United States and the State of Texas agree that the delay is attributable to a force majeure, the United States and the State of Texas shall notify Beazer in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

25. If Beazer elects to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution) regarding the United States' and the State of Texas' notice under Paragraph 24, it shall do so no later than fifteen (15) days after receipt of the United States' and the State of Texas' notice. In any such proceeding, Beazer shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Beazer complied with the requirements of Paragraphs 22 and 23, above. If Beazer carries this burden, the delay at issue shall not be deemed to be a violation by Beazer of the affected obligation of this Consent Decree identified to the United States and the State of Texas and the Court.

#### **X. DISPUTE RESOLUTION**

26. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedure of this Section shall be the exclusive mechanism to resolve disputes arising

under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States or the State of Texas to enforce obligations of Beazer that have not been disputed in accordance with this Section.

27. **Informal Dispute Resolution.** Beazer may initiate dispute resolution under this Section by sending a written notice to the United States and the State of Texas. The notice shall identify the issue in dispute and Beazer's position on the issue. The Parties shall attempt to resolve the dispute by engaging in good faith informal negotiations. The period for informal negotiations shall not exceed thirty (30) days from the date the notice is sent, unless this time period is modified by written agreement of the Parties.

28. **Formal Dispute Resolution.**

A. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the United States and/or the State of Texas (as applicable depending on the nature of the dispute) shall be considered binding on Beazer unless, within thirty (30) days after the conclusion of the informal negotiation period, Beazer invokes the formal dispute resolution procedures of this Section by serving the United States and the State of Texas with a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by Beazer.

B. Within sixty (60) days after receipt of Beazer's Statement of Position, the United States and/or the State of Texas shall serve on Beazer Statement(s) of Position, including, but not limited to, any factual data, analysis, or opinion supporting each position and all supporting

documentation relied upon by the United States and/or the State of Texas. Within fifteen (15) days after receipt of the Statement(s) of Position, Beazer may submit a Reply.

C. An administrative record of the dispute shall be maintained by the United States and/or the State of Texas and shall contain all Statements of Position, including supporting documentation, submitted pursuant to this Section. Where appropriate, the United States and the State of Texas may allow submission of supplemental Statements of Position by the Parties to the dispute.

D. The United States and/or the State of Texas shall issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 28(C). This decision shall be binding on Beazer, subject only to the right to seek judicial review pursuant to Paragraph 28(E).

E. Any administrative decision made by the United States and/or the State of Texas pursuant to this Paragraph shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Beazer with the Court and served on all Parties within ten (10) days of receipt of the United States' and/or the State of Texas' decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States and/or the State of Texas may file a response to Beazer's motion.

F. In proceedings on any dispute governed by this Paragraph, Beazer shall have the burden of demonstrating that the decision of the United States and/or the State of Texas is

arbitrary and capricious or otherwise not in accordance with law or the requirements of this Consent Decree. Judicial review of the decision of the United States and/or the State of Texas shall be on the administrative record compiled pursuant to Paragraph 28(C).

29. The invocation of informal or formal dispute resolution procedures pursuant to prior Paragraphs shall not extend, postpone or affect in any way any obligation of Beazer under this Consent Decree that is not directly in dispute, unless the United States and the State of Texas or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that Beazer does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XI (Stipulated Penalties).

#### **XI. STIPULATED PENALTIES**

30. Beazer shall be liable for stipulated penalties in the amounts set forth in Paragraph 31 to the United States and the State of Texas for failure to comply with the requirements of this Consent Decree. "Compliance" by Beazer shall include completion of the activities identified in Paragraph 31 within the schedules established in the Consent Decree.

31. The following stipulated penalties shall accrue per violation per day for Beazer's failure to comply with the time schedules established for the following implementation requirements:

- A. Failure to timely comply with the requirements under Paragraphs 10 - 12: \$250 per day per violation.



- B. Failure to make the payments required by Paragraph 14 in a timely manner: \$250 per day, in addition to the interest required by Paragraph 14.

32. All penalties shall begin to accrue on the day after Beazer should have performed an obligation specified in Paragraph 31 and shall continue to accrue through the day Beazer complies with the obligation. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree. Notwithstanding any other provision of this Section, the United States and the State, in their unreviewable discretion, may waive any portion of stipulated penalties owed to them that have accrued pursuant to this Consent Decree.

33. Following the determination by the Plaintiffs, individually or jointly, that Beazer failed to comply with one of the requirements of this Consent Decree listed above, the Plaintiff(s) may give Beazer written notification of the same and describe the noncompliance. The Plaintiffs may send Beazer a written demand for the payment of penalties. Penalties shall accrue and are due as provided in this Section regardless of whether the Plaintiffs have notified Beazer of a violation. All stipulated penalties due under this Section shall be due and payable within thirty (30) days of Beazer's receipt of a demand for payment from the United States and/or the State of Texas, unless Beazer invokes dispute resolution under Section X of this Consent Decree. If Beazer invokes dispute resolution under Section X, then stipulated penalties shall be due at the time specified in Paragraphs 29 and 34. Stipulated penalties shall be paid 50% to the United States and 50% to the State of Texas. Interest shall accrue on unpaid stipulated penalties at the rates set forth in Paragraph 14 beginning on the thirty-first (31) day after Beazer's receipt of the demand for stipulated penalties.

A. All payments to the United States under this Section shall be paid by certified check made payable to "U.S. Department of Justice." This payment shall be mailed to the U.S. Attorney's Office, Eastern District of Texas, 350 Magnolia Avenue, Suite 150, Beaumont, TX 77701-2237, referencing "United States and the State of Texas v. Beazer East Inc., USAO File Number: \_\_\_\_\_, DOJ Case Number 90-11-3-07668" and the name and address of the party making payment. Copies of the check and notice shall be sent to the Parties as specified in Section VIII (Trustee and Beazer Contact Persons).

B. All payments made to the State of Texas under this Section shall be paid by certified check make payable to the "State of Texas." This payment should be mailed to the Chief, Natural Resources Division, Texas Attorney General's Office, P.O. Box 12548, Austin, TX 78711. The check shall bear the identifying number "AG# 01-1465903."

34. In the event Beazer fails to pay stipulated penalties when due, the United States and/or the State of Texas may institute a legal proceeding to collect such penalties, as well as interest accruing on any unpaid balance, as provided by law. Pursuant to Paragraph 29, however, stipulated penalties continue to accrue during dispute resolution but are not due and payable until resolution of the dispute.

A. If the dispute is resolved by agreement, accrued penalties agreed to be owed shall be paid to the United States and the State within twenty-five (25) days of the agreement;

B. If the dispute is appealed to this Court and the Plaintiff(s) prevail in whole or in part, Beazer shall pay all accrued penalties determined by the Court to be owed to the United States

and the State within sixty (60) days of receipt of the Court's decision or order, except as provided by Paragraph 34(C) below;

C. If the District Court's decision is appealed by any Party, Beazer shall pay all accrued penalties determined by the District Court to be owed to the United States and the State into an interest-bearing escrow account within sixty (60) days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every sixty (60) days. Within fifteen (15) days of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States and the State, or Beazer to the extent that it prevails.

## **XII. COVENANTS NOT TO SUE BY THE UNITED STATES AND THE STATE OF TEXAS**

35. In consideration of the satisfactory performance by Beazer of all of its obligations under this Consent Decree, and except as specifically provided in Paragraphs 36 and 37, the United States and the State of Texas each hereby covenant not to sue or to take administrative action against Beazer for Natural Resource Damages that resulted or allegedly resulted from the release of hazardous substances at and/from the Site. With respect to all obligations under this Consent Decree, these covenants not to sue shall take effect upon Beazer's successful completion of the obligations in Section V (Natural Resource Damage Restoration Requirements) of this Consent Decree and the receipt by the Trustees of all payments due pursuant to both Sections VI (Costs Reimbursement) and Section XI (Stipulated Penalties), whichever occurs last. These covenants not to sue are conditioned upon the satisfactory performance by Beazer of its

obligations under this Consent Decree. These covenants not to sue extend only to Beazer and do not extend to any other person.

**XIII. RESERVATION OF RIGHTS BY THE UNITED STATES  
AND THE STATE OF TEXAS**

36. Notwithstanding any other provision of this Consent Decree, the United States and the State of Texas reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Beazer to reimburse the United States and the State for additional Natural Resource Damages if:

- (i) conditions, including the release of hazardous substances at or from the Site, that previously were unknown to the Trustees are discovered after the Date of Lodging of this Consent Decree and these conditions cause or contribute to new or additional injuries to, losses of, or destruction of natural resources, or new or additional service losses;
- (ii) information about the release of hazardous substances at or from the Site that previously was unknown to the Trustees is received, in whole or in part, after the Date of Lodging of this Consent Decree, and this information together with any other relevant information indicates that there are new or additional injuries to, losses of, or destruction of natural resources, or new or additional service losses;

For purposes of this provision, the information and conditions known to the Trustees shall include only the information and the conditions set forth in the administrative record supporting the Restoration Plan. It is assumed that Beazer's groundwater dense non-aqueous phase liquid recovery systems will halt unacceptable releases at or from the Site to Waggoner Creek by July

14, 2006. If such releases are not halted by that date, any releases occurring after July 14, 2006, shall be considered unknown information or conditions under this Paragraph.

37. Nothing in the Consent Decree is intended to be, nor shall be construed as, a release from liability or a covenant not to sue for any claim or cause of action, administrative or judicial for the following:

A. Beazer's failure to pay the Trustees' Future Costs, to complete the Restoration Project and related obligations described in Section V (Natural Resource Damage Restoration Requirements), or to comply with any other obligation or requirement of this Consent Decree;

B. claims brought on behalf of the United States and the State of Texas, including State and Federal agencies, for costs, damages, and expenses of any sort, including response costs recoverable under Sections 107(a) or 113 of CERCLA, 42 U.S.C. §§ 9607(a) and 9613, other than for Natural Resource Damages that are the subject of this Consent Decree;

C. liability arising from any past, present, or future releases of hazardous substances other than the releases at or from the Site that are the subject of this Consent Decree;

D. liability arising from any releases of hazardous substances from any site or location that is not the subject of this Consent Decree, including, but not limited to, any hazardous substance taken from the Site and disposed of at another site or location;

E. liability for violations of federal and state law which occur during or incident to the implementation and/or monitoring of the Restoration Project;

F. criminal liability; and

G. any matter not expressly included in the covenant not to sue for Natural Resource Damages set forth in Section XII (Covenants Not to Sue by the United States and the State of Texas) of this Consent Decree.

38. With regard to State property interests, the State of Texas reserves full rights, title, and interest in state-owned land.

39. The failure of the Trustees to insist upon strict and prompt performance of any provision of this Consent Decree shall not operate as a waiver of any requirement of this Consent Decree or of the United States and the State of Texas' right to insist on prompt compliance in the future with such provision, and shall not prevent a subsequent action by the United States and the State of Texas to enforce such a provision.

40. In any subsequent administrative or judicial proceeding initiated by the United States or the State of Texas for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Beazer shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claim raised by the United States or the State of Texas in subsequent proceedings was or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XIII (Covenants Not to Sue by the United States and the State of Texas).

41. Notwithstanding any other provision of this Consent Decree, the United States and the State of Texas retain all authority and reserve all rights to take any and all action authorized

by law.

#### **XIV. COVENANTS BY SETTLING DEFENDANT**

42. Beazer hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States or the State of Texas for any claims arising from or relating to the Restoration Project or any claims arising from or relating to Natural Resource Damages resulting or allegedly resulting from the release of hazardous substances at or from the Site, pursuant to any Federal, State, or common law, including, but not limited to the following:

A. Any direct or indirect claim for reimbursement for Natural Resource Damages from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through Sections 107, 111, 112, and 113 of CERCLA, 42 U.S.C. §§ 9607, 9611, 9612, and 9613, or any other provision of State or Federal law; or

B. Any claims arising out of activities related to the Restoration Project, including without limitation, claims based on the Trustees' selection of the Restoration Project, oversight of the Restoration Project, and/or approval of plans for such activities.

43. Beazer hereby covenants not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States or the State of Texas notifies it in writing that it no longer supports entry of the Consent Decree.

44. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

45. Notwithstanding any other provision of this Consent Decree, this Consent Decree is without prejudice to all rights of Beazer with respect to all matters other than those expressly specified in the covenants set forth in Paragraphs 40, 42 and 43.

#### **XV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

46. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Except as otherwise provided herein, each of the Parties expressly reserves any and all rights (including, but not limited to, any right of contribution against third parties), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to Natural Resource Damages resulting from the releases of hazardous substances at or from the Site against any person not a Party hereto.

47. The Parties agree, and by entering into this Consent Decree this Court finds, that Beazer is entitled, as of the Date of Entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for the Natural Resource Damages related to the Site.

#### **XVI. CERTIFICATION**

48. Beazer certifies that, to the best of its knowledge and belief, it has fully and accurately disclosed to the Trustees all information requested by the Trustees regarding potential Natural Resource Damages at the Site which is currently in the possession of Beazer's officers,



employees, contractors and agents, that relates in any way to the releases of hazardous substances at or from the Site.

49. Each undersigned representative of a Party to this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

#### **XVII. VOIDABILITY**

50. If for any reason the District Court should decline to approve entry of this Consent Decree in the form presented, this Consent Decree and the settlement embodied herein shall be voidable by written notice to the other Parties at the sole discretion of any Party to this Consent Decree, and the terms hereof may not be used as evidence in any litigation.

#### **XVIII. COMPLIANCE WITH OTHER LAWS**

51. This Consent Decree shall not be construed in any way to relieve Beazer or any other person or entity from the obligation to comply with any Federal, State, or local law.

#### **XIX. RETENTION OF JURISDICTION**

52. The Court shall retain jurisdiction of this matter for the purpose of entering such further order, direction, or relief as may be necessary or appropriate for the construction, implementation, resolution of disputes, or enforcement of this Consent Decree.

#### **XX. MODIFICATION**

53. Any modification to the Consent Decree, including the attachments thereto, that does not materially alter the Restoration Project may be made by written agreement between the

United States, the State of Texas, and Beazer. Any modification that materially alters the Restoration Project shall take effect only upon filing with the Court.

#### **XXI. TERMINATION**

54. Any Party may apply to the Court to terminate this Consent Decree twelve months after (a) Beazer has paid all costs as provided in Section VI, and all penalties due pursuant to Section XI, and (b) the Trustees-approved Conservation Easement has been properly filed and recorded and a Holder is in place. Termination of this Consent Decree under this Paragraph shall not affect the covenants, reservations, and effects of settlement set forth in Sections XII (Covenants Not to Sue By The United States and State of Texas); Section XIII (Reservation of Rights by the United States and State of Texas); Section XIV (Covenants by Settling Defendant); and Section XV (Effect of Settlement; Contribution Protection).

#### **XXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

55. The Parties agree and acknowledge that final approval by the United States and the State of Texas and entry of this Consent Decree is subject to a thirty-day (30) period for public notice and comment in accordance with Section 122 of CERCLA, 42 U.S.C. § 9622 (d) (2) (B), U.S. Department of Justice policy and Texas Water Code Section 7.110. The United States and the State of Texas reserve the right to withdraw or withhold their consent if comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Beazer consents to the entry of this Consent Decree without the need for further approval.

### **XXIII. SIGNATORIES/SERVICE**

56. Beazer shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Beazer hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable rules of this Court, including, but not limited to, service of a summons.

57. This Consent Decree may be executed in any number of counterparts and, as executed, shall constitute one agreement, binding on all of the Parties hereto, even though all of the Parties do not sign the original or the same counterpart.

### **XXIV. APPENDIX**

58. The following appendices are attached to and incorporated into this Consent Decree:

“**Attachment A**” is the description of the Acquisition Property;

“**Attachment B**” is the Conservation Easement;

“**Attachment C**” is the Restoration Plan; and

“**Attachment D**” is the baseline documentation.

### **XXV. FINAL JUDGMENT**

59. This Consent Decree and its Attachments constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations,

agreements or understandings relating to the settlement other than those contained expressly in this Consent Decree.

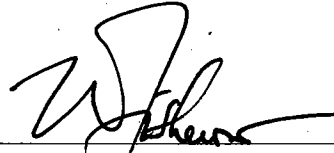
60. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States, the State of Texas, and Beazer.

**SIGNED this 25th day of September, 2008.**

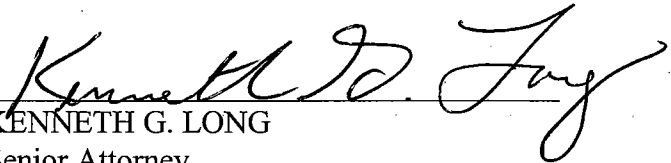
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DAVID FOLSOM  
UNITED STATES DISTRICT JUDGE

FOR THE UNITED STATES OF AMERICA:



W. BENJAMIN FISHEROW  
Deputy Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, DC 20530



KENNETH G. LONG  
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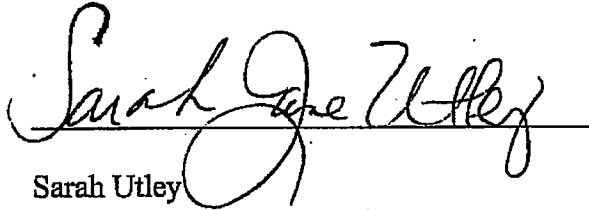
FOR THE PLAINTIFF STATE OF TEXAS:

GREG ABBOTT  
Attorney General of Texas

KENT SULLIVAN  
First Assistant Attorney General

JEFF L. ROSE  
Deputy First Assistant Attorney General

DAVID PREISTER  
Assistant Attorney General  
Acting Chief, Natural Resources Division

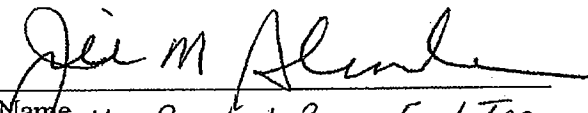
A handwritten signature in cursive script, appearing to read "Sarah Utley", written over a horizontal line.

Sarah Utley  
Assistant Attorney General  
Texas State Bar No. 24042075  
Natural Resources Division  
Texas Office of the Attorney General  
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Austin, TX 78711-2548  
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**ATTORNEYS FOR THE STATE OF TEXAS**

FOR BEAZER EAST, INC.:

Designated Agent for Beazer per Section XXIII:

  
Name Vice President, Beazer East, Inc.  
c/o Three Rivers Management, Inc.  
One Oxford Centre, Suite 3000, Pittsburgh PA 15219  
Address

(412) 208-8831  
Telephone Number