

**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY  
REMEDATION AND REDEVELOPMENT DIVISION**

In the Matter of:

MDEQ Reference No. AOC-RRD-06-003

BorgWarner, Inc.  
On Behalf of the Kysor Industrial Corporation  
1100 Wright Street  
Wexford County  
Cadillac, Michigan 49601

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**CONSENT ORDER FOR PAYMENT  
OF PAST RESPONSE ACTIVITY COSTS**

A. This Consent Order for Payment of Past Response Activity Costs (Order) is entered into voluntarily by the Michigan Department of Environmental Quality (MDEQ), Michael A. Cox, Attorney General for the State of Michigan (collectively, the "State"), BorgWarner, Inc. (BorgWarner), and Kysor Industrial Corporation (Kysor), pursuant to the authority vested in the State by Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20132(1), and the Part 201 Administrative Rules, 1990 AACS, R 299.5101 *et seq*, as amended at 2002 Mich Reg 24, effective December 21, 2002 (Part 201 Rules). All terms used in this Order, which are defined in Part 201 or the Part 201 Administrative Rules, shall have the same meaning in this Order as in Part 201 and the Part 201 Rules. This Order concerns the settlement by BorgWarner, on Kysor's behalf, of the State's claim for Past Response Activity Costs for response activities it performed to address releases of hazardous substances that occurred at the Property prior to the December 27, 1994 entry of the Consent Decree between the State and the Former Kysor in *Kelley v Kysor Industrial Corporation, et al*, United States District Court, Western District File No. 5:91-CV-45 (Consent Decree). The Property includes the Former Kysor's property located

at 1100 Wright Street, Cadillac, Michigan. The parties to this Order desire to resolve the State's claim for Past Response Activity Costs, as further defined in this Order's Paragraph H, incurred between May 1, 1994 and this Order's effective date, associated with negotiating and entering the Consent Decree and in negotiating and executing this Order. Settlement of this claim is in the public interest and will minimize litigation.

B. This Order concerns the settlement between the State, BorgWarner, and Kysor of the State's Past Response Activity Costs that were incurred, between May 1, 1994 and this Order's effective date, in responding to the release or threat of release of hazardous substances at and emanating from the Property. The Property and any associated area, place, or other property where concentrations of hazardous substances exceed the residential cleanup criteria of NREPA Sections 324.20120a(1)(a) and (17) is a "facility" as defined by Section 20101(1)(o) and is subject to regulation under Part 201. This Order does not, in any manner, modify any existing obligation, under the law or under a prior agreement or a prior settlement that any party has to perform response activities at the Facility (as defined below).

C. Pursuant to Part 201, the State incurred response activity costs in responding to releases or threat of releases of hazardous substances at the Facility. Pursuant to Section 20126a(1)(a) of the NREPA, MCL 324.20126a(1)(a), a person who is liable under Section 20126 is liable for all response activity costs lawfully incurred by the State.

D. "BorgWarner" means BorgWarner, Inc.

E. "Defendants" means BorgWarner, Kysor, and their successors and assigns.

F. "Facility" for this Order's purposes shall mean any area of the Property (as defined in Paragraph J) where a hazardous substance, in concentrations that exceed the requirements of Section 20120a(1)(a) or (17) of the NREPA, MCL 324.20120a(1)(a) or (17), or

the cleanup criteria for unrestricted residential use under Part 213, Leaking Underground Storage Tanks, of the NREPA, has been released, deposited, or disposed of, or otherwise comes to be located; and any other area, place, or property where a hazardous substance, in concentrations that exceed these requirements or criteria, has come to be located as a result of the migration of the hazardous substance from the Property.

G. "Former Kysor" means the Kysor Industrial Corporation as it existed as of December 27, 1994.

H. "Kysor" means the Kysor Industrial Corporation as it exists on the effective date of this Order.

I. "Past Response Activity Costs" means those costs associated with releases and threats of releases at the Property that occurred prior to December 27, 1994 and were related to releases from the Former Kysor, including MDEQ staff, oversight, and laboratory costs, Michigan Department of Attorney General fees, and interest, that the State incurred between May 1, 1994 and this Order's effective date in the course of negotiating and entering the Consent Decree between the State and the Former Kysor and negotiating this Order between the State and BorgWarner and Kysor.

J. "Property" for this Order's purposes shall mean the approximate one-half mile square area along the northern boundary of the City of Cadillac, Wexford County, Michigan, and includes the North Park and Pine View Subdivisions to the north of the Cadillac Industrial Park, portions of the Vanderjack Industrial Park west of Leeson Avenue, and is bounded by Sixth Avenue to the east and Wright Street to the south (also known as the "Cadillac Industrial Park Site").

K. "State" means the Michigan Department of Environmental Quality and the Michigan Department of Attorney General.

L. The execution of this Order by BorgWarner and Kysor is neither an admission of liability with respect to any issue dealt with in this Order nor an admission or denial of any findings of fact or legal determinations stated or implied herein.

M. This Order shall apply to and bind Kysor and BorgWarner and their successors and assigns. However, only BorgWarner is responsible for the payment obligations pursuant to Paragraphs 1 and 2 of this Order. No change or changes in BorgWarner's ownership or corporate status shall in any way alter its obligations under this Order. The signatories to this Order certify that they are authorized to execute this Order and legally bind the parties they represent.

**BASED UPON THE FOREGOING FACTS, THE STATE AND BORGWARNER AND KYSOR AGREE, AND IT IS ORDERED THAT:**

1. Within 30 days of this Order's effective date, BorgWarner shall, on Kysor's behalf, pay to the MDEQ the sum of \$75,000.00 to resolve all claims for Past Response Activity Costs. Payment is to be made by certified check payable to the "State of Michigan – Environmental Response Fund" and sent to:

Revenue Control Unit  
Financial and Business Services Division  
Michigan Department of Environmental Quality  
P.O. Box 30657  
Lansing, MI 48909-8157

Via Courier:  
Revenue Control Unit  
Financial and Business Services Division  
Michigan Department of Environmental Quality  
5<sup>th</sup> Floor, South Tower, Constitution Hall  
525 West Allegan Street  
Lansing, MI 48933-2125

To ensure proper credit, the payments made under this Order must be made by check referencing the "Former Kysor Industrial Corporation Property/Cadillac Area Ground Water Contamination Site Facility," the MDEQ Reference No. AOC-RRD-06-003, and the Remediation and Redevelopment Division Account No. RRD 2111. A copy of the transmittal letter and the check shall be provided simultaneously to:

Stephen Cunningham  
MDEQ Project Coordinator  
Remediation and Redevelopment Division  
Michigan Department of Environmental Quality  
120 West Chapin Street  
Cadillac, MI 49601-2158

S. Peter Manning  
Division Chief  
Michigan Department of Attorney General  
Environment, Natural Resources, and Agriculture Division  
P.O. Box 30755  
Lansing, MI 48909

Costs recovered under this Order shall be deposited in the Environmental Response Fund in accordance with NREPA Section 20108(3), MCL 324.20108(3).

2. If BorgWarner fails to pay the amount indicated in Paragraph 1 within 30 days of this Order's effective date, BorgWarner shall also pay the State interest on any unreimbursed costs at the rate provided in NREPA Section 20126a(3), MCL 324.20126a(3). For payments more than 30 days past due, BorgWarner shall additionally pay the State stipulated penalties of \$500.00 per day for every day of noncompliance with Paragraph 1. If the MDEQ does not

receive full payment from BorgWarner, including any accrued interest and penalties, within 60 days after the date specified in Paragraph 1, and the MDEQ has notified BorgWarner of its failure to make such payment, the State, at its complete and unilateral discretion, may void this Order by sending written notification of such to BorgWarner and Kysor.

3. In consideration of the payment that BorgWarner will make on Kysor's behalf under this Order, and except as provided in Paragraph 6, the State covenants not to sue or to take further administrative action against BorgWarner and Kysor for Past Response Activity Costs. With respect to BorgWarner's and Kysor's liability for Past Response Activity Costs, this covenant not to sue shall take effect when the MDEQ receives full payment of the amount specified in Paragraph 1 along with any associated interest and penalties that may have accrued pursuant Paragraph 2. This covenant not to sue applies only to those Past Response Activity Costs defined in Paragraph I of this Order and shall not be construed as a covenant not to sue for any other liability that Kysor, or BorgWarner on Kysor's behalf, may have to the State for this or any other facility. The covenant not to sue shall extend only to Defendants.

4. Nothing in this Order shall be construed as releasing or discharging any liability that any person may have to Borg Warner or Kysor, and BorgWarner and Kysor specifically reserves their rights against such persons.

5. Defendants agree that all applicable statutes of limitation are tolled until BorgWarner has fully complied with this Order.

6. The State reserves all of its rights under state and federal law to perform response activities and to take enforcement action, including action to seek injunctive relief, the recovery of response activity costs not addressed in this Order, the recovery of natural resource damages and costs incurred to assess natural resource damages, monetary penalties, punitive damages for

any violation of the law or this Order, and liability for criminal acts. The State expressly reserves all rights and defenses under any applicable legal authority to enforce this Order.

7. Pursuant to Section 20129(5) of the NREPA, MCL 324.20129(5), and Section 113(f)(2) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC. § 9613(f)(2), BorgWarner and Kysor shall not be liable for claims for contribution for Past Response Activity Costs. Entering this Order does not discharge the liability of any other person that may be liable under Section 20126 of the NREPA, MCL 324.20126, or Sections 107 and 113 of the CERCLA, 42 USC § 9607 and § 9613, to the extent allowable by law. Pursuant to Section 20129(9) of the NREPA, MCL 324.20129(9), any action by BorgWarner or Kysor for contribution from any person not a party to this Order shall be subordinate to the rights of the State if the State files an action under NREPA Part 201 or other applicable federal or state laws.

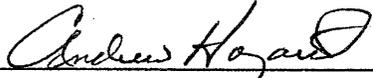
8. Nothing in this Order shall limit the power and authority of the MDEQ or the State of Michigan, pursuant to Section 20132(8) of the NREPA, MCL 324.20132(8), to direct or order all appropriate action to protect the public health, safety, welfare, or the environment; or to prevent, abate, or minimize a release or threatened release of hazardous substances, pollutants, or contaminants on, at, or from the Facility.

9. This Order shall become effective upon the date that the State signs this Order. All dates for the performance of obligations under this Order shall be calculated from the effective date of this Order. For the purposes of this Order, the term "day" shall mean a calendar day unless otherwise noted.

**SIGNATORIES**

The undersigned CERTIFY they are fully authorized by the party they represent to enter into this Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it.

IT IS AGREED AND ORDERED BY:

  
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Andrew Hogarth, Chief  
Remediation and Redevelopment Division  
Michigan Department of Environmental Quality

8/26/06  
\_\_\_\_\_  
Date

Jonathan C. Pierce  
Jonathan C. Pierce (P47339)  
Assistant Attorney General  
Michigan Department of Attorney General  
Environment, Natural Resources, and Agriculture Division  
6<sup>th</sup> Floor, G. Mennen Williams Building  
525 West Ottawa Street  
P.O. Box 30755  
Lansing, MI 48909  
(517) 373-7540

9.20.06  
Date

IT IS AGREED BY:

BorgWarner Inc.

L. H. Horiszny  
By: Laurene H. Horiszny  
Vice President, Secretary and  
General Counsel  
BorgWarner Inc.  
3850 Hamlin Rd.  
Auburn Hills, Michigan 48326

9/15/06  
Date

Kysor Industrial Corporation

Charles M. Denton  
By: Charles M. Denton (P33269)  
Varnum, Riddering, Schmidt & Howlett, LLP  
333 Bridge Street, N.W.  
P.O. Box 352  
Grand Rapids, MI 49502  
(616) 336-6538

9-8-2006  
Date

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