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*Via Email*  
[RBultje@dickinsonwright.com](mailto:RBultje@dickinsonwright.com)

Re: Grand Haven Board of Power and Light/JB Sims site

Dear Mr. Bultje:

This letter is sent to you as counsel for the City of Grand Haven. There are a number of issues that face the Grand Haven Board of Power and Light (BLP) and the City of Grand Haven relating to the JB Sims Site. These issues present the likelihood of potential litigation and liability and, as such, a full joint briefing of both governing bodies on the facts and law is advisable. This letter is to provide factual information on which strategic decisions can be based.

There are three different acknowledged coal ash impoundments at the Sims Site: (a) Impoundment 3A; (b) Impoundment 3B; (c) Impoundment 1/2 (the "Impoundments"). A map of those locations is provided below. The remainder of the Sims Site is known to have been filled to grade with ash. Also, historical photographs and reports document that the Sims Site was used for waste disposal by the City before ash from the coal fired power plant was ever generated or disposed at the Sims Site.

There are two sets of regulatory regimes that govern the management of coal ash impoundments – State regulation found at Part 115 of the Michigan Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.11501 *et seq.* (2018 PA 640) and Federal regulation found at 40 CFR Part 257. These regulatory regimes are relatively new, with some requirements largely complimentary and parallel but there are certain differences between the two and, at the moment, as the State of Michigan has not received approval from EPA of its legislation both regimes govern this situation.

The BLP has been working with the Michigan Department of Environment, Great Lakes and Energy (EGLE) over the last 18+ months to bring the Impoundments into compliance with the law and to an environmentally safe and compliant closure.

### **Impoundments 3A and B**

Impoundments 3A and 3B were constructed above grade in the early 1980s. They were engineered and their construction was contemporaneously documented. BLP emptied and cleaned

these Impoundments of their contents and a report certifying closure was submitted to EGLE on December 11, 2020. Closure certification or licensure of the 3A and 3B Impoundments by December 28, 2020 was required by the law. *See, e.g.*, MCL 324.11502. This requirement of licensure is a focus for EGLE. Although the BLP isn't generating coal ash and has modified the Impoundments (e.g., opening the perimeter berm) so that they can no longer function, EGLE continues to insist that BLP pursue an operating license.

The BLP also submitted to EGLE on December 28<sup>th</sup> a report of Alternative Source Demonstration (ASD) relating to groundwater contaminants detected near the former Impoundments 3A and 3B. It concluded that construction of Unit 3 Impoundments and that the Unit 3 impoundments' clay liner had not leaked and was not a source of groundwater contamination detected in the area based on: (1) the closure work; (2) that geochemical fingerprinting of site groundwater, porewater from Unit 3, background groundwater and Grand River samples indicate that the detected contaminants are from a source other than the CCR materials placed within the Unit 3 Impoundments; and (3) statistical trend analysis of the groundwater samples show stable groundwater quality over time which would not happen if the Unit 3 impoundments (which were active until closure in August 2020) were leaking. In short, the ASD concluded that the Unit 3 impoundments were not the source of the groundwater contamination detected. As discussed below, EGLE disagrees.

In response to the closure certification, EGLE sent the BLP a letter on January 21<sup>st</sup> taking the position that BLP is in violation of Part 115 because the impoundments have not achieved an acceptable closure and that additional work is needed to investigate and respond to groundwater contamination which EGLE erroneously attributes to Impoundments 3A and 3B. EGLE has stated that they are willing to continue the dialogue regarding these matters but BLP has not applied for nor received a license to operate these impoundments which now have been emptied, cleaned, assessed and are not in use and, due to changes made to them, cannot be returned to operation. BLP responded to EGLE by a letter from Golder dated February 17, 2021, explaining where EGLE has misunderstood or misinterpreted some of the data provided in the closure certification. Golder did also commit, on BLP's behalf, to prepare a work plan to demonstrate that coal ash materials noted on the road and berm around the Unit 3 Impoundments had been removed or to remove any residuals and confirm that removal.

EGLE responded to the Alternative Source Demonstration in a letter dated January 28, 2021. EGLE refused to approve the ASD, taking a number of positions including that: (a) they wanted more monitoring wells, (b) there isn't enough data yet to reach a conclusion; (c) EGLE was not persuaded by Golder's chemical analyses and comparisons because chemistry may have changed over time; (d) EGLE would have preferred a broader suite of chemicals to be analyzed; (e) EGLE wanted Golder to identify a specific alternative source and provide irrefutable proof that the Unit 3 clay liner had not leaked; (f) EGLE made comments asserting that the impoundments may have potentially leaked and that they were obligated to assume leakage, given that the 1983 construction did not meet the standards adopted in the last 6 years.

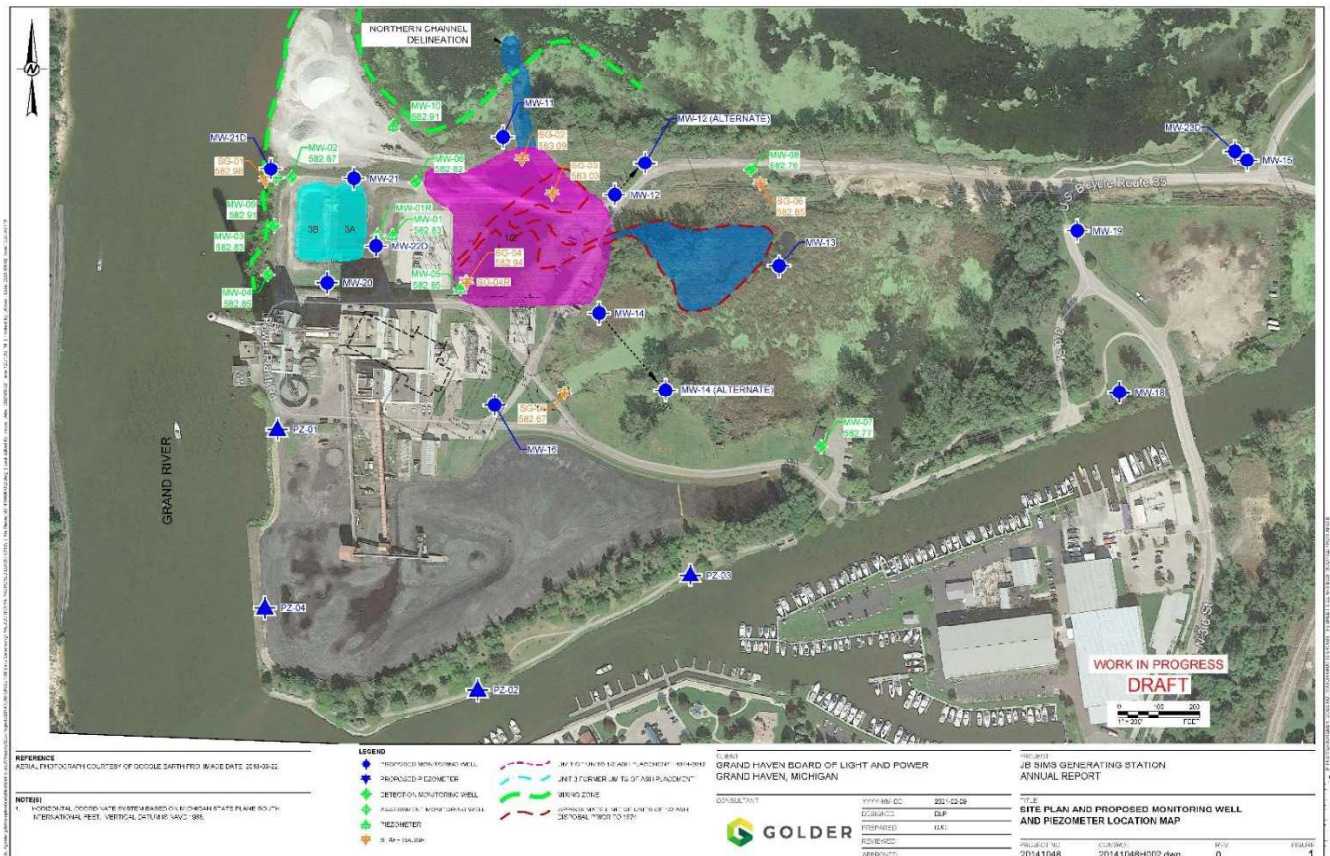
Golder answered EGLE's comments in a letter dated February 12, 2021. Golder responded that: (a) it was developing a plan for more monitoring wells but the existing data was adequate to confirm that an alternate source of contamination exists, (b) there is enough data but more can be gathered – doing so will further document that contamination remains while the Unit 3A and 3B Impoundments as a potential source has been removed; (c) Golder's chemical analyses and comparisons follow accepted analytical procedures; (d) the suite of chemicals analyzed was consistent with the federal rule and Part 115 requirements; (e) there is no requirement to identify a specific

alternative source – only that the facts support that a source other than impoundment was the source of the contaminants; (f) EGLE’s comments were wrong for the reasons stated in the February 17<sup>th</sup> letter.

Based on recent technical discussions between EGLE and Golder, it is believed EGLE wants the clay layer remaining in the footprint of these two Impoundments removed. This poses its own concerns. A lengthy dialogue was held on March 15, 2021, between Golder, the BLP staff and EGLE regarding these issues. We will update the BLP Board and the City Council regarding the upshot of that discussion at their planned joint meeting. No substantive agreements were reached but previously taken positions were clarified.

### Impoundment 1/2

This situation is more complex as this is an older impoundment and was not designed, engineered, or constructed but rather was historic filling of a low area in the island with ash. EGLE has taken the position that this Impoundment is regulated under Part 115 (although no operating license is required) and is subject to the closure requirements in Part 115 for Type III landfills. There is no question that EPA does have regulatory authority here. EPA had previously taken the position that its definition of the Impoundment did not match the delineation that BLP submitted to EGLE on October 14, 2019. On January 14, 2021, EPA and EGLE confirmed during a conference call that they agree that the Impoundment’s footprint is shown below – including only the blue and maroon areas:



Complicating matters further, portions of the Unit 1/2 Impoundment have been left alone and have been inundated with water for so long that regulated wetlands have developed over those areas, requiring permitting to work in those areas, which is complicated. Dewatering in this area would

require a permit to discharge that water. Golder is preparing a groundwater monitoring plan based on EPA and EGLE's January 14<sup>th</sup> delineation determination. The proposed well locations are shown on the image above – the green monitoring points are already installed; the blue are proposed. At the March 15<sup>th</sup> meeting, EGLE offered no initial objections to the conceptual monitoring plan but deferred the discussion to EPA for its approval, which Golder is now pursuing.

Concerns remain regarding this delineation including that sampling near the delineated area will detect ash constituents from the area around the Impoundment that received ash as beneficial fill to make land outside Impoundment 1/2 was created – which would lead to false positive results, leading to another ASD.

As noted above, waste was disposed at the Sims Site by the City and all the types of waste so disposed are not known. It is further not known what sorts of contamination is present from such waste or the exact depths or horizontal locations of such waste. At present, EPA and EGLE are offering only two options for the closure of this Impoundment – either removing it and disposing of it off-site or dewatering it and closing it in place. Based, in part, on groundwater observations during the demolition of the former power plant, Golder has concerns that either such path may result in exposing, disturbing and possibly releasing to the environment contaminants from both ash and deeper and mixed waste, raising multiple concerns including risking a release to the Grand River.

Given the multiple historical uses of the site, the BLP has been urging a holistic approach that would include the use of a mechanism allowed by both Part 201 (cleanup) and Part 31 (water) of NREPA, MCL 324.20101 *et seq.* and 324.3101 *et seq.* On October 28, 2020, BLP asked for a confirmation of Mixing Zone Criteria to apply to the Sims Site. On November 13, 2020, EGLE responded but failed to act on the request, asserting that that the request was premature and asking for more monitoring wells. BLP responded on December 16, 2020 clarifying that the request was made under Part 201 and was part of a holistic approach. Golder also responded to EGLE's substantive comments on December 30, 2020. EGLE responded on February 3, 2021, basically continuing to assert that the request was premature and asking that more monitoring wells be added. On March 2, 2021, Golder responded on behalf of BLP that the request for a mixing zone should have been made as part of a Remedial Action Plan for the entire Sims Site to be considered by a different EGLE division and asked to defer the issue until that discussion can be held. With respect to EGLE's request for more monitoring, Golder offered that it had developed a more robust draft monitoring program which it wanted to discuss with EGLE before submitting it officially for review – a common practice to make sure that draft is on track.

Copies of all of the documents described herein are included in the BLP's website.

Sincerely,

**Jaffe, Raitt, Heuer & Weiss**  
Professional Corporation



Arthur H. Siegal

AHS  
cc: Mr. David Walters  
Mr. Erik Booth