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Erik Booth, P.E.
Power Supply Manager
Grand Haven Board of Light & Power
1700 Eaton Drive
Grand Haven, Michigan 49417

Dear Mr. Booth:

Re: *Construction in area of former JB Sims Generating Station Property*

The Sims Site is comprised of different types of property:

1. Regulated coal ash impoundments – Unit 3A, Unit 3B and Unit 1/2, which have different conditions discussed below.
2. Areas that were filled with ash as part of the making of Harbor Island
3. Areas that, more than 50 years ago had solid waste disposed there and until more comprehensive sampling is completed, it is assumed that the majority of the Sims Site was filled with both ash and some amounts of solid waste as this has been observed in a number of areas where excavation or sampling work was conducted. This letter makes this assumption as well.

As discussed below, these areas likely have different regulatory statuses which likely impact how the BLP may utilize them.

1. Regulated Coal Ash Impoundments

As noted above, there are effectively two different Impoundments – the 3A/3B Impoundment are clay lined, built in the 1980's and have been emptied and are in the process of pursuing closure. There are two options relating to this Impoundment – either EGLE will require the clay be removed or the clay will be allowed to remain in place. Until that is resolved, the Impoundment is regulated under the Federal Rules found at 40 CFR Part 257 and Michigan Part 115 of the State's environmental code. At the point at which the closure is approved, the footprint of the former Impoundment will be treated as the remainder of the Sims Site discussed below.

We understand that the BLP's current plans call for the footprint of Unit 3 Impoundment to be used for a solar "farm." The issues relating to this are discussed below.

The Unit 1/2 Impoundment is something of a regulatory oddity. Because of differences between the Federal and State regulatory regimes, its regulatory status is inconsistent. It is regulated as an inactive impoundment under the Federal rules but is largely unregulated under the recently enacted amendments to the State law. EGLE has taken the position that if the ash is not removed from the Impoundment, it is subject to a closure in-place rule dating from 1979 but is not subject to the other requirements of the Part 115 statute. It appears that the present thinking is to close the 1/2 Impoundment in place as removal appears to be impracticable if not actively risky. This evaluation continues and a final determination may not be made and agreed-upon with the regulators for some time. If closed in place, it is likely that regulatory requirements will be imposed which require maintenance and monitoring for an extended period – likely at least 30 years and perhaps longer.

While materials from the Impoundment may legally be removed and disposed of off-site in a landfill, we believe that EGLE and EPA will permit ash materials to be "consolidated" within the footprint of the Impoundment (i.e., provided that there are sound reasons for doing so, the Impoundment may be made smaller but not bigger by relocating and consolidating materials). If desirable (for various reasons) this will need to be confirmed with the agencies.

We understand that the BLP's current plans call for the footprint of Unit 1/ 2 Impoundment to be used for a battery facility. If closed in place, it is possible that a cap may be designed and negotiated with the regulators that can support such a system and may even protect the Impoundment more than a "standard" cap as part of a rule-prescribed closure. There are certainly issues with placing anything on top of a cap which may penetrate the cap. This may mean specialized footings and regulatory approvals of engineering.

2. Areas without regulated impoundments

As discussed above, the Unit 3 Impoundment is likely to be considered unregulated by Part 115 and the Federal CCR rules following its closure. The same is true for the coal ash pile, and the area of the former Unit 3 generating station.

As has been explained to me, following GHBLP's recent demolition of the former generating station, it was discovered that the foundational materials included some suspect materials which appear to include some ash. The generating station was constructed in the mid 1980's and the detection of ash used as foundational fill is consistent with the past practice of beneficial use of ash materials at the Sims Site. These materials were removed and properly disposed of off-site in a licensed landfill. Following the advice of BLP's environmental engineering firm, to avoid exacerbating any existing conditions and consistent with landfill specifications, removal stopped at the groundwater table or on encountering waste inconsistent with coal ash based on visual observation. The remainder was covered with clean foundation

materials, providing a clean layer between the *in situ* materials and the planned foundations. Our office reviewed this advice and concurs that it was proper and consistent with encountering this unexpected material during the demolition and construction project.

With respect to the footprint of the former Unit 3 Generating Station, we understand that the Board intends to construct a proposed power facility and other structures at this location. As noted by the BLP's consultants, some ash and apparently benign debris were identified under the footprint of the Generating Station following its demolition. This was not expected based on the information available from the 1980's vintage construction of that Station. A significant quantity of ash was removed and properly disposed of and you have asked if this is legally permissible. While not a formal opinion of the Jaffe law firm, our conclusion is yes, this approach is legally permitted.

As we have previously discussed, we believe, and EPA and EGLE have confirmed, that areas outside the footprints of the Impoundments (1/2 and 3A and 3B) are not regulated by either the federal CCR regulations or Part 115 of the Michigan environmental code. This location definitely qualifies.

There is the possibility that some residuals remaining in place may be contaminated and may pose a risk of impacting surrounding soils or groundwater.

Pursuant to MCL 324.20107a(1), a person who owns or operates property that he has knowledge is a contaminated "facility" shall do the following with respect to hazardous substances at the facility:

(a) Undertake measures necessary to prevent exacerbation.
(b) Exercise due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards and allow for the property's intended use that protects public health and safety.
(c) Take reasonable precautions against reasonably foreseeable acts or omissions of a third party and consequences that foreseeably could result from those acts or omissions.
(d) Cooperate and provide assistance and access to persons authorized to conduct response activities at the property.
(e) Comply with any land use or resource use restrictions.
(f) Not impede the effectiveness or integrity of any land use or resource use restriction.

In short, don't make matters worse. In this case, assuming that the BLP, as an "operator" of the Sims Site, is aware of some contamination, it would be obligated to exercise "due care" as defined above. We will turn to (a) in a moment, but as to the rest, we are not aware of unacceptable exposure to hazardous substances, or fire or explosive hazards here and BLP's exercise of control over access to its facilities likely satisfies this requirement as well as (c). To our knowledge, no one is seeking access to conduct response actions and, at the moment, there are no land use restrictions currently in place. There is a possibility that, to achieve closure of one or both of the

Impoundments, BLP may pursue one or more such restrictive covenants, limiting the use of parts of the Sims Site to non-residential purposes. The legal and geographic scope of such a restriction (let alone the acceptance of same by EGLE) is yet to be determined. In such a case, the BLP would have to maintain compliance with that restriction.

With respect to (a) and (b), the BLP may require its contractors to undertake certain work practices such as equipment to minimize contact with soils to protect employees during construction. The fact of construction itself should not constitute exacerbation. The rules adopted under Part 201 provide that an owner or operator's activity is not exacerbation if the activity satisfies both of the following:

> (a) Any increase in response activity cost is small relative to the total cost of response activity that would be required to satisfy the relevant land use-based cleanup criteria and other requirements, at the time the activities are undertaken. Examples include the placement of pavement or landscaping cover that constitutes a barrier to direct contact; and (b) The activity undertaken provides environmental or public health benefits.

Michigan Administrative Code R 299.51007. Therefore, the placement of buildings over the residual ash and any debris which were previously covered by the Generating Station would restore the status quo ante, and while it would arguably increase the cost to address the remaining ash and mixed waste, any arguable increase in cost would be small relative to the cost to meet relevant cleanup criteria and of course, the capping of the site would provide environmental benefits (a direct contact barrier and prevention of mobilization of any residual contaminants from surface infiltration as well as the public benefits provided by the BLP's planned replacement structures).

This same analysis applies to any non-Impoundment areas where ash and/or waste may have been placed historically as part of Harbor Island and structures or improvements would have to be evaluated on a case by case basis. For example, the construction of wetlands, rain gardens or stormwater infiltration basins using typical practices over an impacted area should be approached with some care, as it is possible that the introduction of significant volumes of water might result in the mobilization of previously stable contaminants. Developing information and engineering on such issues will be important to consider for the City's plans for the expansion of Linear Park.

While outside the scope of your question regarding the Unit 3 Generating Site and other BLP plans, as we have previously discussed, in addition to the due care requirements discussed above, Part 201 of the environmental code imposes liability to remediate or otherwise bring to closure sources of contamination that are not regulated by Part 115 of the environmental code. That Part 201 liability could drive such a liable party to investigation, delineation and removal of some contaminated materials and/or in situ control and management of remaining materials via engineering solutions such site covering as well as long-term monitoring. This may be a topic of future discussions as discussions with the EPA and EGLE regarding the closure and monitoring of the Impoundments proceeds.

Conclusion

You identified four concepts for future development: (a) a new generating plant and other structures for the footprint of the former Unit 3 generating plant; (b) a solar garden for the footprint of the former Unit 3 Impoundment; (c) a battery storage facility for the footprint of the inactive Unit 1/ 2 Impoundment; and (d) expansion of Linear Park in the area of the coal pile once that is removed. Your question was, given the current physical and status of the Impoundments and the likely presence of ash and some debris below the surface of these footprints, may these plans legally proceed? The answer is yes, assuming steps are taken to: (1) avoid exacerbating the existing conditions; (2) prevent foreseeable exposures and mitigate imminent hazards; and (3) comply with covenants and restrictions. In all of these cases work plans should consider measures to avoid exacerbation.

With respect to the Impoundments, until they have been officially confirmed as closed, closure requirements (which may include long term monitoring) will need to be taken into account as part of any design or construction in those areas. With respect to the work in the area of the former Unit 3 generating plant, your description of the work done and planned appears to meet the due care standard and, therefore, would be permitted and would not give rise to any new liabilities under Michigan's environmental laws. With respect to the Linear Park area, more information is likely needed and plans for work in that area need to consider measures to avoid exacerbation.

Sincerely,

Jaffe Raitt Heuer & Weiss
Professional Corporation

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