



27777 FRANKLIN ROAD, SUITE 2500 • SOUTHFIELD, MICHIGAN 48034-8214
PHONE 248.351.3000 • FAX 248.351.3082
www.jaffelaw.com

Arthur H. Siegal
asiegal@jaffelaw.com
248.351.3000

October 27, 2021

Via Email

Mr. Kent Walters, Geologist
Department of Environment, Great Lakes, and Energy
Materials Management Division
350 Ottawa Avenue, NW Unit 10
Grand Rapids, MI 49503-2341

Re: Grand Haven Board of Light and Power/Unit 3 Clay

Dear Kent:

This letter is sent in response to your email of October 19, 2021. Thanks to you and to EGLE's Technical and Program Support (TAPS) team for confirming that the analysis done for BLP regarding the clay content is permitted to use more than just one set of criteria from the Part 201 definition of background. Therefore, your email confirmed a reduction in the number of constituents that are still outstanding. Our understanding, based on this determination, is that four of the eight constituents of concern previously identified by EGLE in its April 8, 2021, letter have now been fully resolved (Barium, Chromium, Cobalt, and Nickel) and are no longer of environmental concern based on Golder's evaluation of those constituents against the Michigan Lobe data.

We would like to respond to the remainder of your email. In particular, you state that:

“it is not appropriate to use the site-specific background concentrations that were developed from the naturally occurring clay at the Bass River State Recreation Area (BRSRA). The use of site-specific background concentrations only applies to the source location of the soil that was sampled to determine the site-specific background concentration. In this situation, the site-specific background concentrations were inappropriately being utilized at an offsite location at the JB Sims Generating Station.”

You did not provide a document prepared by the TAPS team. We would appreciate that as it is apparently their conclusions you are reporting and not yours. The BLP wants to be sure that the record here is clear. As we understand the mandate of the TAPS teams, it is to provide guidance and recommendations relating to the Part 201 program – its conclusions are not rules, nor are they law. Further, the assertion that “site-specific background concentrations only applies to the source

Mr. Kent Walters

October 27, 2021

Page 2

location of the soil” and “the site-specific background concentrations were inappropriately being utilized at an offsite location” stands as a bald assertion without any explanation or legal or regulatory support. As described below, this does not make sense in this context.

Importantly, the BLP did not ask EGLE to opine on this second question. Its request related to whether more than one Part 201 background criteria option could be used simultaneously for varying constituents. That question has been answered in the affirmative. For the TAPS team to address a question that was not before it was inappropriate, particularly as it was not the understood topic of discussion and, therefore, was not as fully discussed by all parties as would have been appropriate in that context.

In this case, the question arose pursuant to MCL 324.11519b(9) which says that closure by removal of coal ash is complete when certain requirements are met including testing confirming that constituent concentrations remaining in a coal ash impoundment do not exceed the applicable EGLE standards under section 20120a. That is how the issue of Part 201 comes into play – it was incorporated by reference through Section 19b.

The definition of background is found in 324.20101(e) is: "Background concentration" means the concentration or level of a hazardous substance that exists in the environment at or regionally proximate to a facility that is not attributable to any release at or regionally proximate to the facility. A person may demonstrate that a hazardous substance is not present at a level that exceeds background concentration by any of the following methods:....”

There is no question that the Bass River site is regionally proximate to the Sims Site. We are not certain the use of site-specific background concentrations only applies to the source location of the soil that was sampled to determine the site-specific background concentration.

The discussion of a location regionally proximate to a facility, makes clear that one can evaluate a facility against *in situ* materials that are regionally proximate. Here, the TAPS team appears to conclude (without any support) that if soils are moved from one location to another, they can no longer be evaluated against concentrations at a regionally proximate location. While we may disagree that that is correct under Part 201, in this Part 115 context, it is simply wrong. The point of the Part 115 statute is that one has to evaluate that CCR material has been completely removed from the unit (i.e., impoundment). In this case, that the clay remaining at the site of an impoundment post-CCR removal was evaluated using multiple lines of evidence including comparing the results to screening levels based on standards provided under Part 201. Reading the law the way the TAPS team reportedly did means that one could never build an impoundment out of clay other than *in situ* native clay and expect to use the Part 115/Part 201 process to demonstrate satisfactory closure. That simply cannot be what the law intends as it leads to an impossible result. Effectively, that makes it impossible for this Impoundment to EVER achieve closure by removal through this process. This is NOT what the 115 statutory language intended. It appears that the TAPS team was viewing this through the 201 lens (which makes sense given its 201 mandate) and missed the 11519b framework. Perhaps that is the result of discussing this issue after representatives of the BLP were dismissed from the virtual meeting. The goal of this Impoundment closure was to demonstrate that CCR material had been properly removed and documented in accordance with Part 115. It was not intended to demonstrate a Part 201 closure.

Further, it was EGLE's suggestion in its April 8, 2021, letter to locate the source location of the Unit 3 clay liner and if found, using the Part 201 processes to demonstrate compliance. Note the excerpt from that letter:

BLP: While EGLE has taken a position that the 2015 soil survey should not be used here, that is not consistent with MCL 324.20101(1)(e) which provides that a person may demonstrate that a hazardous substance does not exceed background concentration including by using two standard deviations of that mean for the soil type and glacial lobe area in which the hazardous substance is located.

EGLE: If BLP would be able to *provide the source location-of the Unit 3 clay liner*, using the glacial lobe specific data would be appropriate. Because BLP has stated they do not know the source of the clay, the first option in MCL 324.20101(1)(e) is, "The hazardous substance complies with the statewide default background levels under table 2 as referenced in R 299.46 of the Michigan Administrative Code." EGLE has advised BLP to use the statewide default background levels in its December 11, 2020 email.

Given that Part 201 provides 4 options to determine background including a "site specific demonstration," MCL 324.20101(e)(iv), we see no reason why using data from the actual native source of the clay is less accurate than using the lobe data or the statewide data. That data should be *more* accurate to demonstrate whether the clay was still impacted by CCR residue. Part 201 says that EGLE shall approve numeric or nonnumeric site-specific criteria if such criteria, in comparison to generic criteria, better reflects the best available information. MCL 324.202120b(1). This seems to be the case here. The Bass River data is better focused than the lobe data which is better focused than the State-wide data. Also, it is significant and cannot be overlooked, that multiple other lines of evidence were used to demonstrate and document that the CCR material had been removed.

It seems odd that EGLE's State-wide soil background survey report lists data for lithium in clay in the Michigan lobe when EGLE apparently did not take a sufficient number of samples to satisfy its own criteria. That said, as to the four remaining constituents (Arsenic, Iron, Lithium, and Selenium), Golder's December 2020 submittal as supplemented classified these as more likely being at levels that are naturally occurring than from the CCR remaining. Here is how they compare to the Michigan Lobe numbers:

Arsenic: at 2 locations (Michigan Lobe standard is 8.7 ppm and readings in the two outstanding locations are 8.8 ppm).

Iron: at 6 locations (Michigan Lobe standard is 30,082 ppm and readings in the six outstanding locations range from 31,000-35,000 ppm).

Lithium at 16 locations (Michigan Lobe standard is 16.9 ppm and readings in the sixteen outstanding locations range from 17-28 ppm).¹

Selenium at all locations (Michigan Lobe standard is 1.5 ppm and readings in all outstanding locations range from 2.5-3.4 ppm).

¹ Although only 4 samples were collected by EGLE for the Michigan Lobe, for the purposes of this evaluation, that data, with the 9 samples that BLP gathered from the Bass River site seems more appropriate to demonstrate the completion of CCR removal, particularly when one considers the other lines of evidence previously presented that reach the same conclusion.

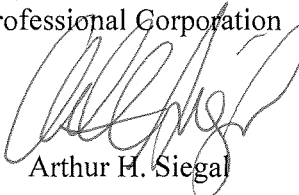
Using the Bass River site data, the Unit 3 Lithium concentrations fall below the site specific source clay lithium concentrations, leaving only arsenic, iron and selenium to work through. BLP has demonstrated through a leaching analysis that the levels of arsenic, iron and selenium do not pose a risk to human health and the environment and that removing the clay provides virtually no public health benefit. However, such removal certainly poses significant risks to the environment by exposing the subsurface wastes and materials to the environment. Would it not be better to arrive at a resolution by bringing in additional clean fill, adding a top layer of clay, and topsoil and getting this area to sheet rainfall runoff toward the Grand River, with continued site monitoring? In other words, investing time and resources to a full sitewide and wholistic approach to be environmentally protective of the environment.

BLP believes that the CCR removal has been fully completed, and is continuing with site monitoring and remedial activities for the groundwater impacts under the Part 115 rules. Therefore, Golder has suggested to the BLP that they develop a final grading plan which includes bringing in clean fill to raise this portion of the site, adding a top layer of clay followed by topsoil to sheet stormwater runoff from the area to minimize subsurface infiltration, avoiding ash and historical fill to further protect the environment.

Please confirm if the Department preliminarily agrees with this approach and the BLP will have Golder submit their plan to the Department for review and approval. Additionally, as stated in the past, the BLP is also willing to impose a restrictive covenant for this portion of the site, if the Department believes it to be necessary. The BLP intends to reach out to Elizabeth Browne with this recommendation to see if we can collaboratively reach a conclusion for this portion of the site which will allow all of us to focus our efforts on the much more difficult and significant unlined Inactive Units 1/2 impoundment.

Sincerely,

Jaffe, Raitt, Heuer & Weiss
Professional Corporation



Arthur H. Siegal

AHS

Cc: Megen Miller, Esq. AG
Elizabeth Browne
Aaron Keatley
Ronald Bultje, Esq.