



GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND ENERGY
GRAND RAPIDS DISTRICT OFFICE



LIESL EICHLER CLARK
DIRECTOR

December 9, 2021

VIA EMAIL

Arthur Siegal
Jaffe Raitt Heuer & Weiss, P.C.
27777 Franklin Rd., Suite 2500
Southfield, MI 48034

Dave Walters
Grand Haven Board of Light and Power, General Manager
1700 Eaton Drive
Grand Haven, MI 49417

Subject: JB Sims Unit 3 Closure Discussions

Dear Mr. Siegal and Mr. Walters

The Michigan Department of Environment, Great Lakes, and Energy (EGLE) received the October 27, 2021 letter from Arthur Siegal and the November 5, 2021 letter from Dave Walters regarding the closure of the Unit 3 coal ash impoundments at the Grand Haven Board of Power and Light's (GHBLP) JB Sims site, which is regulated under state and federal environmental laws, including Part 115, Solid Waste, of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.11501 *et seq.*

Both of these letters claim that the Unit 3 impoundments at the site have met the requirements for clean closure, referred to in Part 115 as "closure by removal." MCL 324.11519b. As EGLE has stated in the past, the Unit 3 impoundments have not met the requirements for closure by removal under Part 115 or federal law. The information that EGLE received in both these letters does not alter EGLE's position that Unit 3 has not achieved proper closure. Under Part 115,

Closure by removal of coal ash under subsection (7) is complete when either of the following requirements are met:

- (a) The owner or operator certifies compliance with the requirements of 40 CFR 257.102(c).
- (b) The owner or operator certifies that testing confirms that constituent concentrations remaining in the coal ash impoundment or landfill unit and any concentrations of soil or groundwater affected by releases therefrom do not exceed the lesser of the applicable standards adopted by the department pursuant to section 20120a or the groundwater protection standards

established pursuant to 40 CFR 257.95(h) and the department accepts the certification or, if the constituent concentrations do exceed those standards, the department has approved a remedy consistent with R 299.4444 and R 299.4445 of the part 115 rules. [MCL 324.11519b(9).]

Pursuant to 40 CFR 257.102(c), closure by removal requires the following:

An owner or operator may elect to close a CCR unit by removing and decontaminating all areas affected by releases from the CCR unit. CCR removal and decontamination of the CCR unit are complete when constituent concentrations throughout the CCR unit and any areas affected by releases from the CCR unit have been removed and groundwater monitoring concentrations do not exceed the groundwater protection standard established pursuant to § 257.95(h) for constituents listed in appendix IV to this part.

GHBLP has not certified closure under 40 CFR 257.102(c) and GHBLP has not met the conditions necessary for EGLE to approve its certification of closure under Section 11519b(9)(b).

GHBLP's Consultant's Proposed Closure Plan

In GHBLP's November 5, 2021 letter, it requests to meet with EGLE regarding its consultant's proposal to "dewater the stormwater that has collected within the former impoundment boundary, provide a grading plan with imported clean soil, add topsoil and seed and grade the surface to drain future rainwater to the river and not collect it in this area."

As stated above, Unit 3 is not certified closed with the required approval from EGLE or certified closure under 40 CFR 257.102(c). In GHBLP's February 22, 2021 letter to EGLE, GHBLP recognized that coal ash removal was not fully complete. GHBLP stated that a workplan would be developed and submitted to EGLE to document removal of coal ash that was not outlined in the Unit 3 Closure Documentation. To date, EGLE has not received a workplan.

If GHBLP were to cover Unit 3 with soil it would be considered closure in place and GHBLP would need to follow requirements in Part 115 and federal CCR regulations to meet closure in place standards.

If GHBLP is proposing to alter its proposed plan for closure of Unit 3 to closure in place, EGLE requests GHBLP clarify its intention.

EGLE Has Not Approved Narrowing Constituents of Concern for Unit 3

Both of GHBLP's letters incorrectly suggest that EGLE has approved or confirmed that some of the 22 constituents of concern for Unit 3 have been "satisfied." This is not accurate. EGLE has agreed to allow GHBLP utilize Part 201 soil background levels to demonstrate that the liner has not be affected by releases from Unit 3. To date GHBLP has not demonstrated that the elevated levels of coal ash constituents is from something other than releases from Unit 3. Please note that EGLE allowing the use of Part 201 soil background levels in no way obligates US Environmental Protection Agency to agree to this approach to demonstrate compliance with their regulations. GHBLP has a legal duty to follow both Part 115 and the federal CCR regulations found at 40 CFR 257.

Appropriate Comparisons to Background Concentrations under Part 201, Environmental Remediation, of the NREPA

Under Part 115, a party must demonstrate either that it meets 40 CFR 257.102(c) closure standards or "that constituent concentrations remaining in the coal ash impoundment or landfill unit and any concentrations of soil or groundwater affected by releases therefrom do not exceed the lesser of the applicable standards adopted by the department pursuant to section 20120a or the groundwater protection standards established pursuant to 40 CFR 257.95(h)." MCL 324.11519b(9)(b). Section 20120a is in Part 201, Environmental Remediation, of the NREPA, and allows a party to use the background concentration for hazardous substance as the cleanup criterion if the background concentration is higher than the generic criterion developed by EGLE. MCL 324.20120a(10). "Background concentration" is defined in Section 20101(e). Under 40 CFR 257.95(h), an owner or operate must certify that "constituent concentrations throughout the CCR unit and any areas affected by releases from the CCR unit have been removed."

Under both scenarios, an owner or operator must address both constituent concentrations throughout the unit itself and any areas impacted by releases from the unit. GHBLP and EGLE have compared concentrations in the clay liner to background concentrations as a way to screen whether the unit has constituent concentrations that must be addressed. As part of this analysis, GHBLP has looked to the different methods of establishing background concentrations set forth in Section 20101(e). GHBLP sought to establish site-specific background concentrations for the JB Sims' Unit 3 by analyzing the source for the clay from which it indicates it created its liner, the Bass River State Recreation Area.

As stated, in EGLE's October 19, 2021 email it is not appropriate for GHBLP to use concentrations developed from clay at the Bass River State Recreation Area to establish site-specific concentrations for Unit 3's closure. In GHBLP's

October 27, 2021, it claims it was inappropriate for EGLE to consider this question without GHBLP asking that it be answered. Further, GHBLP claims EGLE did not sufficiently support its position on this subject.

As you are aware, government agencies regularly internally deliberate, develop positions, and reach conclusions about the innerworkings and application of their regulatory programs. EGLE is fulfilling its obligations as a regulatory agency by ensuring that all issues at this site are addressed – and it does not need GHBLP's permission to do so.

Regarding support for its position that use of off-site clay to develop a site-specific or regionally proximate background concentration is inappropriate, EGLE points GHBLP to the definition of "background concentration" in Section 20101(e). The definition of Background Concentration in Section 20101(1)(e) allows a person to demonstrate that a hazardous substance is not present at a level that exceeds background concentration by four specific methods. GHBLP's October 27, 2021 letter states that the definition of Background Concentration in Section 20101(1)(e) allows for the use of a background concentration that is regionally proximate to a facility and that the Bass River site is regionally proximate to the JB Sims facility. However, method (ii) of these four methods is the use of the 2005 Michigan Background Soil Survey, which are regionally proximate concentrations as soil samples from all over the state were used and grouped into regions based on glacial lobe boundaries. Unlike the 2005 Michigan Background Soil Survey, what GHBLP has labeled "site-specific" background concentrations for JB Sims Unit 3 were developed at a single property (Bass River site) and are not regionally proximate background concentrations.

A site-specific concentration means "the concentration or level of a hazardous substance that exists in the environment at . . . a facility that is not attributable to any release at or regionally proximate to the facility." MCL 324.20101(1)(e). A "release" means any "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment." MCL 324.20101(1)(pp). While soil relocation in compliance with section 20120c and use of by-products or inert materials under Part 115 do not constitute a release under Part 201, MCL 324.20101(1)(pp)(vi) and (vii), GHBLP's use of clay was not done in compliance with these provisions. A background concentration must represent the conditions in the environment not attributable to any releases, and the relocation of contaminated soils from one location to another constitutes a release. Therefore, the analytical data from the Bass River site cannot be used to demonstrate onsite conditions and to develop a site-specific background concentration. If bringing in soil from another location to be used as site specific clay were allowable, natural fill from areas with elevated concentrations of naturally occurring metals such as arsenic could be moved to another location and the site-specific background established at the

source area would be applicable to the new location, allowing soil exceeding criteria to remain in an area where potentially the naturally occurring concentrations do not exceed criteria. To prevent this situation, the applicable Michigan Background Soil Survey background concentration for natural fill moved from one location to another is based on the current location of the natural fill, not the source area of the natural fill.

Therefore, the numbers GHBLP is presenting as site-specific background concentrations do not fit into any of the options available under Section 20101(1)(e) to establish background concentrations.

Finally, while EGLE staff did suggest GHBLP provide the source location of the Unit 3 clay liner to establish the regionally proximate glacial lobe Michigan Background values, staff did not direct GHBLP to sample clay from the source location or to develop a site-specific demonstration based on that data.

Specific Constituents of Concern –

EGLE also wishes to address assertions made in GHBLP's letters regarding specific constituents of concern. EGLE will provide follow up in additional technical meetings regarding these constituents, but believes it is important to note the following:

- Lithium – The Michigan Background Soil Survey cannot be used to establish a background concentration for lithium because it used less than nine samples in the survey. MCL 324.20101(1)(e)(ii)(A) (allowing use of the Soil Survey to establish background concentrations only if there are at least nine samples). The State Default Background level for lithium is 9,800 ppb and all of GHBLP's soil samples for its clay liner exceed this concentration for lithium.
- Selenium – GHBLP's October letter indicates the 2015 Michigan Background Soil Survey standard is 1,500 ppb for selenium. For the 2015 MBSS, the selenium background is 1,300 ppb (lesser of table 1 or lobe/soil value).

Conclusion

EGLE continues to be eager to move this site toward proper closure; however, GHBLP continues to propose strategies that do not meet its state or federal obligations. If GHBLP wishes to change course to complete a closure in place, please inform EGLE and the United States EPA of this change in plans.

EGLE is willing to set up a meeting with GHBLP to discuss next steps for either closure by removal or closure in place; however, EGLE is not willing to meet to

Arthur Siegal and Dave Walters

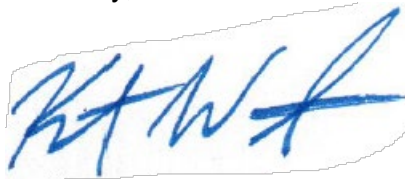
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discuss the proposal in GHBLP's November 5, 2021 letter because on its face, the proposal seeks to ignore important requirements under Part 115 and the federal CCR regulations. EGLE is not in a position to approve a proposal that does not comply with state and federal law.

Please let me know if you wish to set up a meeting to propose a strategy to comply with your obligations under Part 115.

Sincerely,

A handwritten signature in blue ink, appearing to read 'KAW', is enclosed in a white rectangular box with a slightly irregular border.

Kent A. Walters, Geologist
Materials Management Division
Grand Rapids District Office
Department of Environment, Great Lakes
and Energy

cc/via email: Erik Booth, GHBLP
Tiffany Johnson, Golder
Alexandra Clark, EGLE
Margie Ring, EGLE
Timothy Unseld, EGLE
Fred Sellers, EGLE
David Willard, EGLE